No. 12-15388

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,

Plaintiff - Appellee,

v.

U.S. OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants - Appellees,

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant - Appellant

On Appeal from a Final Order of the U.S. District Court
for the Northern District of California

APPELLANT BIPARTISAN LEGAL ADVISORY GROUP'S (I) RESPONSE TO EXECUTIVE BRANCH APPELLEES' MOTION TO CONSOLIDATE AND EXPEDITE APPEALS, (II) MOTION FOR STAY PENDING RULING ON EXECUTIVE BRANCH APPELLEES' PETITION FOR INITIAL HEARING EN BANC, AND (III) MOTION TO DISMISS NO. 12-15409

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Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully responds to the Motion to Consolidate and Expedite Appeals (Mar. 26, 2012) (ECF No. 19) ("Motion") filed by appellees Office of Personnel Management ("OPM") and OPM Director John Berry (collectively, "Executive Branch Appellees"). The Motion seeks various forms of relief, some of which is related to the Executive Branch Appellees' separately filed Petition for Initial Hearing En Banc (Mar. 26, 2012) (ECF No. 18) ("Petition"). As explained below, the House supports some, although not all, of the relief the Executive Branch Appellees seek. *See infra* pp. 15-19.

In addition, because (i) the House currently is obligated to file its opening panel brief on June 4, 2012, *see* Order at 2 (Feb. 29, 2012) (ECF No. 3); (ii) the pendency of the Petition creates uncertainty about whether the House should draft a panel brief or a brief for the en banc court; and (iii) the distinction between a panel brief and an en banc brief in this case is substantial, *infra* pp. 15-18, the House hereby moves for a stay of further proceedings in this case (including all briefing), until such time as the full Court rules on the Petition. Once the full Court rules, a new briefing schedule can be established, as appropriate.

Finally, the House moves for dismissal of No. 12-15409, the parallel appeal filed by the Executive Branch defendants. As explained below, that appeal is superfluous because the Executive Branch defendants fully prevailed below and,

therefore, are not aggrieved, and because that appeal is not necessary to enable the House to prosecute its appeal (No. 12-15388). *See infra* at pp. 9-15, 16.

BACKGROUND

As the Court is aware, it is the constitutional responsibility of the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of the Justice Department – in furtherance of that responsibility – to defend the constitutionality of duly-enacted federal laws when they are challenged in court. This case, brought by Karen Golinski, a staff attorney employed by this Court, concerns the constitutionality of one such duly-enacted federal statute: Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), codified at 1 U.S.C. § 7, which defines "marriage" and "spouse" for purposes of federal law. DOMA was enacted in 1996 by substantial bipartisan majorities in both houses of Congress, and signed into law by President Clinton. *See* 142 Cong. Rec. H7505-06 (July 12, 1996) (House vote 342-67 on H.R. 3396); 142 Cong. Rec. S10129 (Sept. 10, 1996) (Senate vote 85-14 on S. 1999); 32 Weekly Comp. Pres. Doc. 1891 (Sept. 21, 1996) (bill signed).

The Department Carries Out Its Constitutional Responsibility. Prior to 2004, there were no constitutional challenges to DOMA Section 3. However, from 2004-11, the Department repeatedly defended the constitutionality of Section 3 against all constitutional challenges. For example:

BUSH ADMINISTRATION – *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir.) (plaintiffs lacked standing to challenge DOMA Section 3), *cert. denied*, 549 U.S. 959 (2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (constitutional challenges to DOMA dismissed for failure to state claim); Order, *Sullivan v. Bush*, No. 1:04-cv-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting plaintiff's motion for voluntary dismissal after defendants moved to dismiss); Order, *Hunt v. Ake*, No. 8:04-cv-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35) (constitutional challenges to DOMA Section 3 dismissed for failure to state claim); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (holding that DOMA Section 3 does not violate Fifth Amendment).

OBAMA ADMINISTRATION – Corrected Br. for the U.S. Dep't of Health and Human Servs., *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir. Jan. 19, 2011) (ECF No. 5520069); Fed. Defs.' . . . Mot. to Dismiss, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-cv-01564 (N.D. Cal. July 2, 2010) (ECF No. 25); Mem. in Support of Defs.' Mot. to Dismiss Pl.'s First Am. Compl., *Golinski v. OPM*, No. 3:10-cv-0257 (N.D. Cal. May 10, 2010) (ECF No. 49); Br. in Supp. of Mot. to Dismiss . . . , *Bishop v. United States*, No. 4:04-cv-00848 (N.D. Okla. Oct 13, 2009) (ECF No. 138); Defs.' . . . Mot. to Dismiss,

Torres-Barragan v. Holder, No. 2:09-cv-08564 (C.D. Cal. Mar. 5, 2010) (ECF No. 7).

The Department Abandons Its Constitutional Responsibility. In February 2011, the Department abruptly reversed course. The Attorney General publicly notified Congress of the President's and his conclusion that DOMA Section 3, "as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment," and their decision that, as a result, the Department no longer would defend Section 3 in court against equal protection challenges. Letter from Eric H. Holder, Jr., Att'y Gen., to the Honorable John A. Boehner, Speaker, U.S. House of Representatives at 1, 5 (Feb. 23, 2011) ("Holder Letter"), attached as Ex. 1.

In so deciding, the Attorney General acknowledged, correctly, that (i) the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id*. at 5; (ii) binding precedents of *ten* U.S. circuit Courts of Appeals [actually eleven] – including this Court[1] – reject his conclusion that sexual orientation classifications

[1] *See Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir.) (even after *Lawrence v. Texas*, 539 U.S. 558 (2003), sexual orientation classifications challenged as violative of equal protection properly analyzed under rational basis standard), *reh'g en banc denied*, 548 F.3d 1264 (9th Cir. 2008); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.) ("rational basis review" proper for classifications based on sexual orientation), *reh'g and reh'g en banc* (*continued* ….)

are subject to a heightened standard of scrutiny, and instead hold that rational-basis scrutiny is appropriate for such classifications, *id*. at 3-4 nn.4-6; and (iii) "reasonable argument[s] for Section 3's constitutionality may be proffered under th[e] [rational basis] standard," *id.* at 6. In short, the Attorney General's own letter conceded that his decision to abandon the defense of DOMA Section 3 is a very sharp departure from past precedent and is not predicated primarily on constitutional or other legal considerations.[2]

In response, the House determined on March 9, 2011, to defend DOMA Section 3 in civil actions in which the statute's constitutionality has been challenged. *See* Press Release, Speaker of the House John Boehner, *House Will Ensure DOMA Constitutionality Is Determined by the Court* (Mar. 9, 2011) ("House General Counsel has been directed to initiate a legal defense of [DOMA

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denied, 909 F.2d 375 (9th Cir. 1990). The Department has acknowledged in this case that these precedents are "binding." Defs.' Br. in Opp'n to Mots. to Dismiss at 4, *Golinski v. OPM*, No. 3:10-cv-00257 (N.D. Cal. July 1, 2011) (ECF No. 145); *see also Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *17, *20 (9th Cir. Feb. 7, 2012) (applying rational basis review).

[2] In his February 2011 public announcement, the Attorney General also said that "the President has instructed Executive agencies to continue to comply with Section 3 of DOMA . . . unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Holder Letter at 5. The Executive Branch recently has begun backing away from the promise of continued enforcement, particularly in the immigration context. *See* Proposed Intervenor's Reply to Executive Branch Defs.' Opp'n to Mot. for Denial of Voluntary Dismissal of Appeal at 3-4, *Torres-Barragan v. Holder*, No. 10-55768 (9th Cir. Mar. 26, 2012) (ECF No. 54).

Section 3]"), *available at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539.

The *Golinski* Case Works Its Way Through the District Court. Ms. Golinski initially sought benefits for her same-sex spouse through non-constitutional mandamus relief, but the district court dismissed that claim shortly after the Department abandoned its defense of DOMA. *See Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2011). In so ruling, the district court said that it "would, if it could, address the constitutionality of . . . the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages," but that it was "not able to reach these constitutional issues due to the unique procedural posture of this matter." *Id.* at 975. In light of this judicial invitation, Ms. Golinski, not surprisingly, amended her complaint to challenge Section 3 on equal protection grounds. The House then sought, and was granted, leave to intervene. *See* Order Granting the Mot. of the [House] to Intervene . . . , *Golinski v. OPM*, No. 3:10-cv-0257 (N.D. Cal. June 3, 2011) (ECF No. 116).[3]

[3] At present, the House is defending DOMA Section 3 in ten cases around the country (including this case) – three in the federal Circuit Courts and seven in the federal district courts.

Notwithstanding that the Holder Letter said only that the Department would *not defend* DOMA Section 3, beginning with *Golinski*, the Department pivoted from that position to the even more extraordinary and constitutionally problematic position of aligning itself with DOMA plaintiffs to *affirmatively attack Section 3* in court. *See* Defs.' Br. in Opp'n to Mots. to Dismiss at 3-23, *Golinski v. OPM*, No. 3:10-cv-00257 (N.D. Cal. July 1, 2011) (ECF No. 145) (arguing that Section 3 is subject to heightened scrutiny and is unconstitutional under that standard).[4] While the Department, on a few occasions, affirmatively has attacked the constitutionality

[4] That would be the very same statute (i) which the Department had defended a few short months before, *see supra* pp. 2-4, and (ii) which the Department acknowledges is constitutional under the equal protection standard that applies in this Circuit (rational basis review). *See* Defs.' Br. in Opp'n to Mots. to Dismiss at 18 n.14, *Golinski v. OPM*, No. 3:10-cv-00257 (N.D. Cal. July 1, 2011) (ECF No. 145).

To date, the Department has filed substantive briefs in seven other DOMA cases making this same argument. *See, e.g.*, Superseding Br. for the U.S. Dep't of HHS, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011) (ECF No. 5582082); Fed Defs.' Br. in Partial Supp. of Pls.' Mot. for Summ. J., *Dragovich v. U.S. Dep't of the Treasury*, 4:10-cv-01564 (N.D. Cal. Jan. 19, 2012) (ECF No. 108); Br. of [Dep't] Regarding the Constitutionality of Section 3 of DOMA, *Cozen O'Connor, P.C. v. Tobits*, 2:11-cv-00045 (E.D. Pa. Dec. 30, 2011) (ECF No. 97); Resp. of Defs. [Dep't] to [House]'s Cross-Mot. for Summ. J., *Bishop v. United States*, 4:04-cv-00848 (N.D. Okla. Nov. 18, 2011) (ECF No. 225); Defs.' Mem. of Law in Resp. to Pls.' Mot. for Summ. J. & [House's] Mot. to Dismiss, *Pedersen v. OPM*, 3:10-cv-01750 (D. Conn. Sept. 14, 2011) (ECF No. 98); Defs.' Opp'n to [House]'s Mot. to Dismiss, *Lui v. Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 2, 2011) (ECF No. 28); Def. [Dep't]'s Mem. of Law in Resp. to Pl.'s Mot. for Summ. J. & [House]'s Mot. to Dismiss, *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y. Aug. 19, 2011) (ECF No. 71).

of Acts of Congress that, in its view, unconstitutionally restricted or infringed the powers of the executive branch,[5] DOMA Section 3 plainly is not such a statute, making the Department's actions here, to our knowledge, wholly unprecedented.

Ultimately, the district court – not surprisingly in light of its unmistakable earlier signal – agreed with the Department, holding that Section 3 is subject to heightened scrutiny and is unconstitutional under that standard. *Golinski v. OPM*, No. 3:10-cv-00257, 2012 WL 569685, at *20, *26 (N.D. Cal. Feb. 22, 2012). It did so notwithstanding binding Ninth Circuit precedent holding that sexual orientation classifications, like DOMA Section 3, are subject to rational basis review. *See Witt*, 527 F.3d at 821; *High Tech Gays*, 895 F.2d at 574.[6]

The House appealed that judgment on February 24, 2012, *see* [House's] Notice of Appeal, No. 3:10-cv-00257 (N.D. Cal. Feb. 24, 2012) (ECF No. 188), as it was entitled to do by virtue of its status as an intervenor-defendant. *See, e.g.*,

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[5] *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1545 (10th Cir. 1991); *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986); *Synar v. United States*, 626 F. Supp. 1374, 1378-79 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Ameron, Inc. v. U.S. Army Corp of Eng'rs*, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986); *Barnes v. Carmen*¸ 582 F. Supp. 163, 164 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21, 22 (D.C. Cir. 1985), *rev'd on mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361, 362 (1987).

[6] The Department also prevailed in its defense of a statutory claim asserted by Ms. Golinski. *See Golinski*, 2012 WL 569685, at *7 & n.3.

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); *NL Indus., Inc. v. Sec'y of Interior*, 777 F.2d 433, 436 (9th Cir. 1985) (same). The House appeal is No. 12-15388.

Since then, Ms. Golinski's spouse has been permitted to enroll in the Federal Employee Health Benefit Program – *see* Letter from Shirley Patterson, Ass't Dir., Fed. Employee Ins. Ops., OPM, to William Breskin, V.P., Gov't Programs, Blue Cross and Blue Shield Ass'n (Mar. 9, 2012), attached as Ex. 2. Thus, the Department's representation that Ms. Golinski continues to suffer harm, Motion at 5-6, is incorrect.

The Department Files a Superfluous Appeal. Four days later, despite having fully prevailed below, the Department filed a separate Notice of Appeal. *See* Notice of Appeal of Defs., No. 3:10-cv-00257 (N.D. Cal. Feb. 28, 2012) (ECF No. 192). That appeal was docketed as No. 12-15409. The Department made clear it was appealing *the very same issue the House is appealing*. *Compare* [Dep't] Mediation Questionnaire, No. 12-15409 (9th Cir. Mar. 5, 2012) (ECF No. 5), *with* [House's] Notice of Appeal, No. 3:10-cv-00257 (N.D. Cal. Feb. 24, 2012) (ECF

No. 188); *see also* Motion at 4. This necessarily renders the Department's appeal superfluous.[7]

The Department offers two justifications for its behavior. First, it says "the interim invalidation of a statute itself causes recognized injury to the interests of the United States." Motion at 6-7 (citing *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). This is a red herring for the following seven reasons: (i) none of these cases say that "interim invalidation of a statute" renders the Executive Branch aggrieved for purposes of filing an appeal where the Executive seeks to have the statute struck down; (ii) in *Bowen* and *Walters*, the Department was *defending*, rather than attacking (as it is here), the constitutionality of the statute at issue; (iii) in *New Motor Vehicle Bd.*, which did not involve federal parties at all, a state government entity was *defending* the challenged state statute; (iv) all three cases are otherwise factually and legally inapposite because each involved applications by government defendants for stays of lower court injunctions prohibiting enforcement of statutes, and in each case Justice Rehnquist said only that the

[7] Ms. Golinski has not appealed the district court's denial of her statutory claim. *See supra* p. 8 n.6.

presumption of a statute's constitutionality is a factor to be considered in determining whether to grant the stay; (v) the decisions, entered by a single justice, lack precedential value, *see, e.g.*, Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. Rev. 1020, 1046 (1985) ("In-chambers opinions on stays have no precedential effect on either the lower courts or the Supreme Court."); (vi) the Department clearly is not aggrieved here in any reasonable sense of that word, having secured everything it sought below (indeed, it acknowledges that it "intend[s] to file briefs [with this Court as an appellee] supporting plaintiff's claims," Motion at 9); and (vii) the Department, as appellee in No. 15388, has every opportunity to articulate its views on the constitutionality of DOMA Section 3.

Second, the Department patronizingly suggests that its appeal is necessary to enable the House to litigate in this Court. *See* Motion at 4 (Department appealed "in order to ensure the existence of a justiciable case or controversy for this Court to resolve on appeal."). That plainly is wrong. Where, as here, the Department abandons its constitutional responsibility to defend a federal statute, the Legislative Branch has Article III standing to intervene to defend the law at all stages of the litigation. The Supreme Court

> ha[s] long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the

> statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.

Chadha, 462 U.S. at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968); *United States v. Lovett*, 328 U.S. 303 (1946)).

In *Chadha*, a private party challenged the constitutionality of a federal statute the Department declined to defend. After this Court ruled for the plaintiff, the House, through the Speaker, and the Senate moved to intervene for the purpose of petitioning for certiorari. *Chadha*, 462 U.S. at 930 n.5. This Court granted that motion. *See* Order, *Chadha v. INS*, No. 77-1702 (9th Cir. Mar. 10, 1981), attached as Ex. 3 (granting House's motion to intervene for purpose of obtaining standing to petition for rehearing and seeking certiorari from Supreme Court).

Subsequently, the Supreme Court granted the House and Senate petitions for certiorari, holding – over the Department's suggestion otherwise, *see* Mem. for the Fed. Resp't, *U.S. House of Representatives v. INS*, Nos. 80-2170 & 80-2171, 1981 U.S. S. Ct. Briefs LEXIS 1423, at *4 (Aug. 28, 1981) – that "Congress is both a proper party to defend the constitutionality of [the statute at issue] and a proper petitioner under [the statute governing petitions for writs of certiorari]." *Chadha*, 462 U.S. at 939. In so holding, the Supreme Court made crystal clear that the House and Senate had Article III standing: "[A]n appeal must present a justiciable case or controversy under Art. III. Such a controversy clearly exists . . . *because of the presence of the two Houses of Congress as adverse parties*." *Id*. at 931 n.6

(emphasis added). Therefore, when the Department defaults on its constitutional responsibilities to defend the constitutionality of a statute, as it has here, the House may intervene and, when it does, it has Article III standing, regardless of what the Department does or does not do.[8]

In light of *Chadha*, the two cases the Department cites – *Diamond v. Charles*, 476 U.S. 54 (1986), and *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002) – are inapposite. *Diamond*, which held only that "a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense," 476 U.S. at 56, is not relevant because the House is not a private party, DOMA Section 3 is not a criminal statute, and the Department did not decline to defend an Act of Congress in that case.

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[8] *See also NL Indus.*, 777 F.2d at 436 (appeal by intervenor neither impermissible nor moot when Executive Branch co-defendant declined to appeal); *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (failure of government to appeal does not deprive intervenor of right to appeal adverse decision); *Perry*, 2012 WL 372713 at *2 (upholding intervention and subsequent appeal of sponsors of California constitutional ballot initiative to defend initiative where State itself would neither defend nor appeal).

In keeping with *Chadha's* holding, congressional entities – including specifically the House through its Bipartisan Legal Advisory Group – repeatedly have intervened to defend the constitutionality of legislation the Department has refused to defend. *See, e.g.*, *In re Koerner*, 800 F.2d 1358; *Ameron*, 787 F.2d 875. None of these cases suggests that the House lacked standing, and several were decided by federal courts in the District of Columbia – *e.g.*, *North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *Barnes*, 582 F. Supp. 163 – where circuit precedent requires would-be intervenors to demonstrate Article III standing. *See, e.g.*, *Bldg. and Const. Trades Dep't v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994).

Newdow is equally inapposite. In *Newdow*, this Court denied the Senate's request to intervene in an Establishment Clause case that challenged, among other things, a federal statute inserting the words "under God" into the Pledge of Allegiance, where the Department actively was *defending* the constitutionality of the statute in the litigation. In so holding, this Court distinguished a number of cases in which, unlike in *Newdow* (but exactly as here), a congressional body successfully intervened to defend the constitutionality of a statute that the Department had refused to defend. *Newdow*, 313 F.3d at 498.

The disturbing legal implication of the Department's position – that the House cannot pursue its appeal unless the Department permits it to – is that the Department has the power effectively to preclude judicial determination of the constitutionality of an Act of Congress by (i) first refusing to defend the Act's constitutionality, and (ii) then withholding or withdrawing its commitment to "provid[e] Congress a full and fair opportunity to participate in the litigation." Holder Letter at 3. Tying the House's ability to defend the constitutionality of an Act of Congress the Department refuses to defend, to the existence of a separate Department appeal (which it may choose to file or not file), would be tantamount to providing the Executive Branch with an extra-constitutional, post-enactment veto over federal statutes to which it objects. The Executive simply does not possess that kind of unilateral authority under our system of government. *See, e.g.*,

Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1122 (9th Cir. 1988), *vacated in part on other grounds*, 893 F.2d 205 (9th Cir. 1989) (law does not "permit the executive branch to interpret the Constitution so as to assume additional powers or thwart the constitutional functions of a coordinate branch").

In short, given that (i) the Department, in the most extraordinary, indefensible, and constitutionally suspect fashion, is seeking to invalidate a duly-enacted statute of the United States which it simply does not like; (ii) the Department has not identified, because it cannot, a single independent basis for its appeal; and (iii) the House is entitled to pursue its appeal entirely separate and apart from the Department – and is in fact doing so – the Department's appeal (No. 12-15409) is entirely superfluous.

DISCUSSION

1. As an initial matter, the House is constrained to point out that, notwithstanding the Department's repeated avowals that *the Executive Branch* has "determined" that DOMA Section 3 is unconstitutional – *see, e.g.*, Motion at 2 ("Section 3 is "a statute determined to be unconstitutional by the President and Attorney General"); *id*. at 3 ("Following the decision of the President and the Attorney General . . . that Section 3 of DOMA is unconstitutional . . . ."); *id*. at 5 ("The President and Attorney General have determined that Section 3 of DOMA is unconstitutional.") – that "determination" means nothing. While the Department

can, as a practical matter, abandon its constitutional responsibility and refuse to defend a duly-enacted federal statute, as it has here, the responsibility for determining whether a statute is consistent with the Constitution remains, under our system of government, the province of the judiciary. *See* U.S. Const. art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803).

2. By way of relief, the Department asks first that its appeal (No. 12-15409) be consolidated with the House's appeal (No. 12-15388). Motion at 4. Because the Department's appeal is entirely superfluous, it should be dismissed, for all the reasons stated above. *See supra* pp. 9-15.

If the Court does not dismiss the Department's appeal, the House does not oppose the consolidation of the two appeals. And should the Court choose to consolidate the two appeals, the House concurs in the Department's suggestion that the Court set one consolidated briefing schedule under which the House, as the real appellant, would file an opening brief; Ms. Golinski and the Department, as the appellees, would file a responsive brief; and the House then would file a reply brief. *See* Motion at 9.

3. The Department next asks that the Court expedite consideration of the Executive Branch Appellees' Petition. Motion at 7. While the House supports an expeditious ruling on the Petition, we are concerned that the pendency of that Petition necessarily puts the House in the position of not knowing whether it

should be drafting a panel brief – currently due June 4, 2012, *see* Order at 2 (Feb. 29, 2012) (ECF 3) – or a brief for the en banc court. In this case, the distinction between the two is substantial, as the Department itself acknowledges. *See* Motion at 8 ("briefing . . . will necessarily be substantially affected by whether . . . th[e] issue[s are] being briefed for a panel of this Court or instead for the en banc Court").

A panel is duty-bound to follow and apply Circuit precedent, including *Witt* and *High Tech Gays*, because "three judge panels of our Circuit are bound by prior panel opinions" unless they are overruled or undermined by *en banc* or Supreme Court decisions. *In re Findley*, 593 F.3d 1048, 1050 (9th Cir. 2010); *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Accordingly, if the House is required to draft a panel brief, it will explain why the district court erred in failing to follow *Witt* and *High Tech Gays*, and why DOMA Section 3 is constitutional under the rational basis review standard which those cases establish (a proposition with which the Department agrees, *see supra* at p. 7 n.4).

By contrast, the full Court would have a freer hand to reconsider Circuit precedent (although not in the absence of a compelling reason to depart from *stare decisis*). Accordingly, if the House is required to draft an en banc brief, it will focus more extensively on why heightened scrutiny is not the appropriate standard by which DOMA Section 3 should be evaluated.

So that the House is not placed in a bind not of its own making, the Court should stay further proceedings in this case, including all briefing, until such time as the full Court rules on the Petition. Such a stay is consistent with this Court's normal practice. *See, e.g.*, *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1169 (9th Cir. 2010) (order certifying question to California Supreme Court stayed pending disposition of petition for rehearing en banc); *Wang v. Mukasey*, 262 F. App'x 798, 799 (9th Cir. 2008) (mandate stayed pending decision on petition for rehearing en banc).

Once the full Court rules on the Petition, a new briefing schedule can be established as appropriate. However, given the number of cases the House is currently defending, the House requests that its opening brief be due no earlier than 45 days after the Court rules on the Petition, rather than 30 days as the Department suggests, Motion at 8, regardless of whether the Petition is granted or denied.

4. The Department next asks that oral argument be expedited, regardless of whether its Petition is granted or denied. Motion at 8. The House concurs.

5. With respect to the Petition itself, the House would appreciate the opportunity to respond, in accordance with Rule 35, particularly given that the Petition is written more like a merits brief than a request for en banc review. If permitted to respond, the House would make the following points:

a. The House believes a three-judge panel is fully capable of deciding this case, just as three- judge panels were fully capable of deciding, and did decide, *Witt*, 548 F.3d 1264 (denying rehearing en banc), and *High Tech Gays*, 909 F.2d 375 (same).

b. This Court should "bypass[ ] [its] regular three-judge panel hearing process" and grant initial en banc hearing "ordinarily . . . only when there is a direct conflict between two Ninth Circuit opinions and a panel would not be free to follow either," *John v. United States*, 247 F.3d 1032, 1033 (9th Cir. 2001) (en banc) (Reinhardt, J., concurring). There is no such intra-circuit conflict here.

c. If the full Court believes it is likely to review en banc any decision on DOMA Section 3's constitutionality rendered by a three-judge panel, then the full Court should grant the Petition in the interest of expedition. That is, if en banc review is inevitable, there is no reason for delay.

CONCLUSION

The House respectfully requests that the Court rule on the Motion to Consolidate and Expedite Appeals, and the House's Motion for Stay, in accordance with the foregoing.

Respectfully submitted,

BANCROFT PLLC

Paul D. Clement
By: */s/ H. Christopher Bartolomucci*
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Counsel for Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives[9]

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April 5, 2012

[9] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip decline to support the filing of this pleading.

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2012, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system, and served the foregoing document by first-class mail, postage prepaid, and by electronic mail (.pdf format), and on the following:

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/s/ Kerry W. Kircher
Kerry W. Kircher

EXHIBIT 1

Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans,* 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.,* Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia* , 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

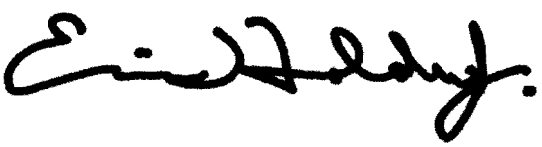
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General

EXHIBIT 2

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Healthcare and Insurance

MAR 0 9 2012

William Breskin
Vice President, Government Programs
Blue Cross and Blue Shield Association
1310 G Street, NW; Suite 900
Washington, DC 20005

Re: *Karen Golinski v. U.S. Office of Personnel Management and John Berry, Director*
No. 3:10-cv-00257 JSW (N.D. Ca.), Order dated Feb. 22, 2012

Dear Mr. Breskin:

The U.S. Office of Personnel Management (OPM) has received an Order of the United States District Court for the Northern District of California, dated February 22, 2012, attached. In compliance with that Order, OPM hereby withdraws any outstanding directive regarding the enrollment of Ms. Golinski's wife, Amy C. Cunninghis, in her family health benefits plan. Please implement an expeditious enrollment of Ms. Cunninghis, pursuant to the Standard Form 2809 dated September 2, 2008 as supplemented by this letter and consistent with the Court's Order of February 22, 2012.

We understand that system coding will need to occur prior to implementation of Ms. Cunninghis' coverage, and that this coding is expected to take up to approximately five business days. The coverage, once implemented, will be retroactively effective to February 22, 2012.

Please be aware that this letter withdraws the directive specifically regarding Ms. Golinski's spouse pursuant to court order, and has no effect on enrollments requested by other same-sex spouses. If you have any questions as to the withdrawal of the outstanding directive or the directive embodied in this letter, please do not hesitate to contact me.

Sincerely,

Shirley Patterson

Shirley Patterson
Assistant Director
Federal Employee Insurance Operations

Cc: Jena L. Estes, CPA, Vice President, Federal Employee Program
Nancy E. Ward, Deputy Assistant Director, Administrative Office of the U.S. Courts
Rita F. Lin, Morrison & Foerster, LLP
Tara L. Borelli, Lambda Legal Defense and Education Fund, Inc.
Christopher Hall, U.S. Department of Justice

Encl: Order Feb 22, 2012

EXHIBIT 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAGDISH RAI CHADHA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 77-1702

ORDER

Before: ELY, KENNEDY and HUG, Circuit Judges.

Upon due consideration, the motion to intervene, filed on behalf of the United States Senate and the United States House of Representatives, is granted. The clerk is requested to circulate the petition for rehearing en banc to the active judges of the court.