

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT**

JOANNE PEDERSEN, et al.,

Plaintiffs,

V.

**OFFICE OF PERSONNEL
MANAGEMENT, et al.,**

Defendants,

**BIPARTISAN LEGAL ADVISORY GROUP
OF THE UNITED STATES HOUSE OF
REPRESENTATIVES,**

Intervenor-Defendant.

Case No. 3:10-cv-01750 (VLB)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENOR-
DEFENDANT'S MOTION TO STAY PROCEEDINGS**

Plaintiffs are residents of Vermont, Connecticut and New Hampshire who are considered under state law to be legally married to a person of the same sex (or were considered under state law to be legally married in the case of Gerald V. Passaro II whose same-sex spouse passed away in 2009). See Am. Compl. ¶ 2 (Jan. 14, 2011) (ECF No. 33). Plaintiffs have challenged, on equal protection grounds, the constitutionality of Section 3 of the Defense of Marriage Act (“DOMA”), codified at 1 U.S.C. § 7. See Am. Compl. ¶ 11. Dispositive motions on the issue of Section 3’s constitutionality are now pending. See Pls.’ Mot. for Summ. J. (July 15, 2011) (ECF No. 60); [House]’s Mot. to Dismiss (Aug. 15, 2011) (ECF No. 80).

On June 6, 2012, the U.S. District Court for the Southern District of New York held that DOMA Section 3 is unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause. See Order, *Windsor v. United States*, No. 10-cv-08435 (S.D.N.Y. June 6, 2012) (ECF No. 93). The House, which also is an Intervenor-Defendant in that case, promptly noticed an appeal to the U.S. Court of Appeals for the Second Circuit. See Notice of Appeal of [House], *Windsor v. United States*, No. 10-cv-08435 (S.D.N.Y. June 8, 2012) (ECF No. 95). The Plaintiff/Appellee in *Windsor* has moved in the Second Circuit to expedite the briefing schedule in that case. See Mot. for Expedited Review, *Windsor v. United States*, No. 12-2335 (2d Cir. June 13, 2012) (ECF No. 25-1); Mem. of Law in Supp. . . . at 2, 12, *Windsor v. United States*, No. 12-2335 (2d Cir. June 13, 2012) (ECF No. 25-2) (asking Court to require House to file its opening brief by July 6, 2012).

While the House has resisted the "admittedly aggressive" briefing schedule, *id.* at 11, proposed by the Plaintiff/Appellee in that case, the House has proposed that it file its opening brief by August 10, 2012, an accelerated deadline which could result in the *Windsor* case being fully briefed before the Second Circuit by September 14, 2012 (provided the Plaintiff/Appellee in that case proceeds as quickly as she has said she would). See Appellant the [House's] Resp. to Mot. for Expedited Review at 2, 9, 11, *Windsor v. United States*, No. 12-2335 (2d Cir. June 20, 2012) (ECF No. 49).

In addition, on May 31, 2012, the U.S. Court of Appeals for the First Circuit held that DOMA Section 3 violates the equal protection component of the Fifth

Amendment's Due Process Clause. See Slip Op., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207 & 10-2214 (1st Cir. May 31, 2012) (ECF No. 5645268). The House now is preparing a petition for certiorari in the *Massachusetts* case, a petition which it intends to file by the end of this month. *Massachusetts* is a good candidate for Supreme Court review, as the First Circuit itself recognized: "Supreme Court review of DOMA is highly likely." *Id.* at 32. If the Supreme Court grants certiorari in *Massachusetts*, which we think is likely, the Court likely will docket the case for briefing, argument and decision during the October 2012 Term.¹

In light of these developments, this Court should stay the proceedings in the case pending a decision by the Second Circuit in *Windsor* because:

- the issue before this Court – the constitutionality of DOMA Section 3 under the equal protection component of the Fifth Amendment's Due Process Clause – is precisely the issue now before the Second Circuit in *Windsor*;
- a merits ruling by the Second Circuit in *Windsor* – or a ruling on Section 3's constitutionality by the Supreme Court in *Massachusetts*, should that occur first – clearly will inform, and likely will be fully dispositive of, this Court's disposition of Plaintiffs' equal protection claims in this case; and

¹ The Supreme Court itself has identified a lower court's invalidation of an Act of Congress as a reason for granting certiorari. See, e.g., *United States v. Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); see also Eugene Gressman, et al., *Supreme Court Practice* 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . , certiorari is usually granted because of the obvious importance of the case.").

- it appears likely that the Second Circuit will consider the *Windsor* appeal on an accelerated basis.

ARGUMENT

This Court has broad discretion to grant a stay. “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (quotation marks and brackets omitted)). “[A] court may decide in its discretion to stay civil proceedings when the interests of justice seem to require such action.” *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (quoting *SEC v. Dresser Indus.*, 628 F.2d 1368, 1372 (D.C. Cir. 1980) (en banc)) (ellipses and quotation marks omitted).

The determination of whether to grant a stay must “rest on considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.” *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). In addition, the Court’s judgment ““must weigh competing interests and maintain an even balance.”” *Louis Vuitton*, 676 F.3d at 97 (quoting *Landis*, 299 U.S. at 254–55). Notions of judicial economy and the interests of justice plainly counsel in favor of granting a stay in this case.

The overriding consideration here is that Plaintiffs' legal contention in this case – that DOMA Section 3 is unconstitutional under the Fifth Amendment's Due Process Clause – is legally identical to the issue now before the Second Circuit in *Windsor*. (Indeed, because the same legal issue was presented in both cases, the parties in this case agreed to use the same expert reports and expert depositions that were used in *Windsor*.) The Second Circuit's resolution of the *Windsor* appeal, therefore, almost certainly will be directly controlling here on the merits of Plaintiffs' claims. At a minimum, the Second Circuit's ruling in *Windsor* will significantly inform this Court's determination of the merits of Plaintiffs' claims in this case.

Although it is impossible to predict with certainty when the Second Circuit will rule in *Windsor*, the briefing is likely to be accelerated, as noted above, and neither the Plaintiff/Appellee in that case nor the House has any interest in delaying the Second Circuit's resolution of the case. The only exception would be if the Supreme Court were to grant certiorari in *Massachusetts*, in which case the House might seek a stay of the *Windsor* appeal pending the Supreme Court's resolution of the DOMA Section 3 constitutional issue. In that event, however, the grant of certiorari would itself be adequate reason for this Court to stay all proceedings, or to continue staying all proceedings, in this case.

Another case challenging the constitutionality of DOMA Section 3, filed last October in the District of Massachusetts, *McLaughlin v. Panetta*, No. 1:11-cv-11905 (D. Mass.), has been stayed since February 27, 2012, because the First Circuit was considering the constitutionality of DOMA Section 3 in the

Massachusetts case – just as the Second Circuit is now considering that issue in *Windsor*. See Electronic Order, *McLaughlin v. Panetta*, No. 1: 11-cv-11905 (D. Mass. Feb. 15, 2012) (granting motion to stay case for 60 days); Electronic Order, *McLaughlin v. Panetta*, No.1:11-cv-11905 (D. Mass. Apr. 22, 2012) (granting motion to stay defendants’ obligations to respond to complaint and to plaintiffs’ summary judgment motion until 21 days after First Circuit ruled in *Massachusetts*).

When the First Circuit issued its opinion in *Massachusetts* on May 31, 2012 – and simultaneously stayed its mandate pending the likelihood of Supreme Court review in that case, see Judgment, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. May 31, 2012) (ECF No. 5645272) – the district court in the *McLaughlin* case continued its stay until 30 days after First Circuit issues its mandate. See Electronic Order, *McLaughlin v. Panetta*, No. 1:11-cv-11905 (D. Mass. June 6, 2012).

This Court should follow the *McLaughlin* Court’s lead by staying all proceedings in this case until the Second Circuit rules in *Windsor*.

Respectfully submitted,

Paul D. Clement
/s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci
Conor B. Dugan
Nicholas J. Nelson

BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036

Telephone: (202) 234-0090
Facsimile: (202) 234-2806

*Counsel for Intervenor-Defendant the
Bipartisan Legal Advisory Group of the U.S.
House of Representatives*

OF COUNSEL:

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Christine Davenport, Senior Assistant Counsel
Todd B. Tatelman, Assistant Counsel
Mary Beth Walker, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
Telephone: (202) 225-9700
Facsimile: (202) 226-1360

June 20, 2012

CERTIFICATE OF SERVICE

I certify that on June 20, 2012, I served one copy of the Memorandum of Points and Authorities in Support of Intervenor-Defendant's Motion to Stay Proceedings by CM/ECF and by electronic mail (.pdf format) on the following:

Gary D. Buseck
Janson Wu
Mary L. Bonauto
Vickie L. Henry
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108-4720
617-426-1350
gbuseck@glad.org
jwu@glad.org
mbonauto@glad.org
vhenry@glad.org

Karen L. Dowd
Kenneth James Bartschi
Horton, Shields & Knox
90 Gillett St.
Hartford, CT 06105
860-522-8338
Fax: 860-728-0401
kdowd@hortonshieldsknox.com
kbartschi@hsklawfirm.com

David J. Nagle
Richard L. Jones
Sullivan & Worchester LLP
One Post Office Square
Boston, MA 02109
dnagle@sandw.com
rjones@sandw.com

Paul M. Smith
Luke C. Platzer
Daniel I. Weiner
Matthew J. Dunne
Jenner & Block
1099 New York Ave., N.W., Suite 900
Washington, DC 20001-4412
psmith@jenner.com
lplatzer@jenner.com
dweiner@jenner.com
mdunne@jenner.com

David Christopher Nelson
U.S. Attorney's Office – HTFD
450 Main St., Rm. 328
Hartford, CT 06103
david.c.nelson@usdoj.gov

Judson O. Littleton
U.S. Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Seventh Floor
Washington, DC 20530
judson.o.littleton@usdoj.gov

/s/ Kerry W. Kircher
Kerry W. Kircher