UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the Estate of THEA CLARA SPYER, Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:10-cv-8435 (BSJ) (JCF) ECF Case

UNOPPOSED MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE FOR A LIMITED PURPOSE

Pursuant to Rule 24(a), (b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 530D(b)(2), 2403, and for the reasons set forth in the accompanying Memorandum of Points and Authorities, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (hereinafter "the House") respectfully moves for leave to intervene as a party defendant in this matter for the limited purpose of defending the constitutionality of Section III of the Defense of Marriage Act, Pub. No. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 ("DOMA"), from attack on the ground that it violates the equal protection component of the Fifth Amendment Due Process Clause.[1] The Department of Justice has stated that it will

[1] The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong.

"continue to represent the interests of the United States" in this litigation, Letter from Tony West, Assistant Attorney General, to the Honorable Barbara S. Jones (Feb. 24, 2011), attached to Notice to the Court by Defendant United States of America (Feb. 25, 2011), and we understand that to mean that the Department will take full responsibility for litigating issues other than Section III's constitutionality under the equal protection component of the Due Process Clause.

Counsel for the House has conferred with Roberta A. Kaplan, Esq., counsel for plaintiff, who has (i) advised that plaintiff does not oppose the relief sought by this motion, and (ii) agreed that the House should not be required to file an Answer or other "pleading" in conjunction with this motion. The Department of Justice has also informed us that the United States does not oppose this motion to intervene for purposes of presenting arguments in support of the constitutionality of Section 3 of DOMA, but will be filing a response to explain its position. In addition, the United States agrees that the motion need not be accompanied by a pleading.

(1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory Group 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 motion.

A proposed Order is submitted herewith and oral argument is not requested.

Respectfully submitted,

/s/ Paul D. Clement

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April 18, 2011

[2] King & Spalding LLP has been "specially retained by the Office of General Counsel" of the House to litigate the constitutionality of Section III of DOMA on behalf of the House. Its attorneys are, therefore, "entitled, for the purpose of performing [that] function[], to enter an appearance in any proceeding before any court of the United States . . . without compliance with any requirement for admission to practice before such court . . . ." 2 U.S.C. § 130f(a).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the Estate of THEA CLARA SPYER, Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:10-cv-8435 (BSJ) (JCF) ECF Case

[PROPOSED] ORDER

UPON CONSIDERATION OF the Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose ("Motion"), and the entire record herein, it is by the Court this ____ day of April 2011 ORDERED

That the Motion is GRANTED for all the reasons set forth in the Memorandum of Points and Authorities filed in support of the Motion. It is further ORDERED

That the Bipartisan Legal Advisory Group of the U.S. House of Representatives be and hereby is authorized to participate as a party defendant in this matter for the limited purpose of litigating the constitutionality of Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7.

_____

James C. Francis, U.S. Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on April 18, 2011, I served one copy of the foregoing Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose by CM/ECF, by electronic mail (.pdf format), and by first-class mail, postage prepaid, on the following:

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the Estate of THEA CLARA SPYER, Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:10-cv-8435 (BSJ) (JCF) ECF Case

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNOPPOSED MOTION OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE FOR A LIMITED PURPOSE

INTRODUCTION

Plaintiff Edith Schlain Windsor asks this Court to declare "unconstitutional as applied to [her]," under the equal protection component of the Due Process Clause of the Fifth Amendment, Section III of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), 1 U.S.C. § 7. *See* Amended Complaint at 21-22 (Feb. 2, 2011). As the Court is aware, ordinarily it is the duty of the executive branch to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of the Department of Justice in particular, in furtherance of that responsibility, to defend the constitutionality of duly enacted federal laws when they are challenged in court. DOMA, of course, is such a law.

DOMA was enacted by the 104th Congress in 1996. The House and Senate bills which became DOMA passed by votes of 342-67 and 85-14, respectively. *See* 142 Cong. Rec. H7505-06 (July 12, 1996) (House vote on H.R. 3396), *and* 142 Cong. Rec. S10129 (Sept. 10, 1996)

(Senate vote on S. 1999). President Clinton signed the bill into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (Sept. 21, 1996).

While the Department has repeatedly defended the constitutionality of Section III of DOMA in the intervening years -- *see, e.g.*, Corrected Brief for the United States Department of Health and Human Services, *et al.* (Jan. 19, 2011), in *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.*, Nos. 10-2204, 10-2207, 10-2214 (1st Cir.) (pending) -- the Attorney General announced on February 23, 2011 that the Department would no longer do so. In particular, he announced that the Department would not defend the statute's constitutionality in this case. *See* Letter from Eric H. Holder, Jr., Attorney General, to Kerry Kircher, General Counsel (Feb. 23, 2011), attached as Exhibit 1.[1] At the same time, the Attorney General articulated his intent to "provid[e] Congress a full and fair opportunity to participate in the litigation in [the] cases [at issue]." *Id.* at 5-6.

In response, the Bipartisan Legal Advisory Group of the U.S. House of Representatives (hereinafter, "the House"), which articulates the institutional position of the United States House of Representatives in litigation matters, formally determined on March 9, 2011 to defend the statute in civil actions in which Section III's constitutionality has been challenged. *See* Press Release, Speaker of the House John Boehner, *House Will Ensure DOMA Constitutionality Is Determined by Courts* (March 9, 2011) ("House General Counsel has been directed to initiate a

[1] In so announcing, the Attorney General acknowledged that (i) *nine* U.S. circuit courts of appeal have rejected his conclusion that sexual orientation classifications are subject to a heightened standard of scrutiny under the Equal Protection Clause, *id.* at 3-4 nn.4-6, and (ii) "professionally responsible" arguments can be advanced in defense of the statute. *Id.* at 5 (appearing to draw distinction between arguments deemed to be "reasonable" and those that are merely "professionally responsible").

legal defense of [Section III of DOMA]"), *available online at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539. While the House most often appears in judicial proceedings as *amicus curiae*,[2] it also intervenes in judicial proceedings where appropriate. *See, e.g., North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *American Federation of Government Employees v. United States*, 634 F. Supp. 336, 337 (D.D.C. 1986). In particular, the House has intervened to defend the constitutionality of federal statutes when the Department has declined to do so. *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); *Synar v. U.S.*, 626 F. Supp. 1374, 1378-79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Ameron, Inc. v. U.S. Army Corp of Engineers*, 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. 1984), *rev'd on mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361, 362 (1987); *In re Production Steel, Inc.*, 48 B.R. 841, 842 (Bankr. M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 233 (Bankr. M.D.N.C.1985); *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 606 (Bankr. C.D. Cal. 1984); *In re Benny*, 44 B.R. 581, 583 (Bankr. N.D. Cal. 1984), *aff'd in part & dismissed in part*, 791 F.2d 712 (9th Cir. 1986).

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[2] *See, e.g., Dickerson v. United States*, 530 U.S. 428, 430 n.* (2000); *Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 154 (1989); *Morrison v. Olson*, 487 U.S. 654, 659 (1988); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 223 (1986); *Helstoski v. Meanor*, 442 U.S. 500, 501 (1979); *United States v. Helstoski*, 442 U.S. 477, 478 (1979); *United States v. Renzi*, No. 10-10088, 10-10122 (9th Cir. argued Feb. 17, 2011); *In re: Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 3 (D.C. Cir. 2006) (en banc); *Beverly Enterprises v. Trump*, 182 F.3d 183, 186 (3d Cir. 1999); *United States v. McDade*, 28 F.3d 283, 286 (3d Cir. 1996); *In the Matter of Search of Rayburn House Office Bldg.*, 432 F.Supp.2d 100, 104-05 (D.D.C. 2006), *rev'd sub nom. United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

In light of the Attorney General's February 23, 2011 announcement, we respectfully suggest that the Court allow the House to intervene here for the limited purpose of defending the constitutionality of Section III of DOMA against the argument that it violates the equal protection component of the Fifth Amendment Due Process Clause.

ARGUMENT

I. Intervention by the House Is Appropriate Here Under Rule 24.

Rule 24(a)(1) provides for intervention as of right where the proposed intervener "is given an unconditional right to intervene by a federal statute," while Rule 24(b)(1)(A) provides for permissive intervention where the proposed intervener "is given a conditional right to intervene by a federal statute." A "federal statute," namely, 28 U.S.C. § 2403, clearly contemplates that the federal government will defend the constitutionality of an act of Congress when challenged:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question, the court . . . *shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.* The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liability of a party as to the court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Id. § 2403(a) (emphasis added). Here, of course, the United States is a party, but in light of the Justice Department's decision to decline to play the role contemplated by § 2403(a), it makes sense to allow the House to intervene to discharge that function. *See Chadha*, 462 U.S. at 940; *see also* 28 U.S.C. § 530D(b)(2) (specifically contemplating that House and/or Senate may

intervene to defend constitutionality of federal statute where Justice Department declines to do so).

Ordinarily the Department not only intervenes under § 2403(a) where appropriate, but also more generally represents the United States in the defense of such challenged statutes. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). However, where, as here, the Department declines to defend a challenged statute, the Supreme Court has held that the legislative branch may, if it wishes, accept that responsibility: "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)). That is the precise situation at issue here. Moreover, as noted above, numerous other courts have followed *Chadha's* direction and permitted the House to intervene to defend the constitutionality of federal statutes. *See supra* at 3.

Accordingly, whether the Court construes 28 U.S.C. § 2403(a) as vesting the legislative branch with an "unconditional right to intervene," Rule 24(a)(1), or a "conditional right to intervene," Rule 24(b)(1)(A), intervention here by the House to defend the constitutionality of Section III of DOMA is clearly appropriate.

II. The Court Should Allow Intervention Without Requiring the Filing of a "Pleading" in Conjunction with the Motion to Intervene.

Rule 24(c) provides that a motion to intervene should "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." In light of Rule 7(a), the only "pleading" the House could conceivably file here would be an answer to the Amended Complaint.

The courts of this district, however, have construed Rule 24(c) as a "technical requirement," *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 393 n.8 (S.D.N.Y. 2002), to be applied flexibly in light of its obvious purpose to ensure that the court and the parties are informed about the would-be intervener's claims or defenses. "In general, Rule 24(c) requires the submission of a formal motion and supplemental pleadings in order to trigger the motion. Where, however, the position of the movant is apparent from other filings and where the opposing party will not be prejudiced, Rule 24(c) permits a degree of flexibility with technical requirements." *Id.* (citing *Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870, 874 (S.D.N.Y. 1991)); *see also Jones v. Ford Motor Credit Co.*, No. 00-8330, 2004 WL 1586412, at *2 n.1 (S.D.N.Y. July 15, 2004); *Official Comm. of Asbestos Claimants of G-I Holding Inc. v. Heyman*, No. 01-8539, 2003 WL 22790916, at *4 (S.D.N.Y. Nov. 25, 2003) ("'Although usually, the movant may not merely adopt a pleading of another party, a certain amount of leeway is allowed where such a practice will not prejudice any of the parties.'") (quoting *Werbungs und Commerz Union Austalt*, 782 F. Supp. at 874); *McCausland v. Shareholders Mgmt. Co.*, 52 F.R.D. 521, 522 (S.D.N.Y. 1971) (annexation of claims in complaint sufficient for "pleading" requirement of Fed. R. Civ. P. 24 where "[n]o doubt exists as to the precise and detailed nature of the interveners' claim, and [parties] have not been

prejudiced by the failure to annex to the motion a copy of the complaint already served upon them.").

Here, the Court should apply Rule 24(c) flexibly to dispense with the need for the House to file an Answer for several reasons. First, under the unique circumstances of this case, the motion to intervene itself and this memorandum place the plaintiff on notice of the defense the House will assert in this case, *viz.*, that Section III of DOMA is constitutional under the equal protection component of the Fifth Amendment Due Process Clause. Moreover, to the extent this litigation requires the resolution of other issues, the House will not participate. Intervention is sought for the limited purpose of defending Section III on equal protection grounds. Second, this case is new, no pleadings other than the Complaint and Amended Complaint have been filed to date, and it appears that the constitutional issue can be most appropriately resolved in the context of dispositive cross-motions, without the need for the filing of an Answer, as this Court has previously recognized. *See* Order (Dec. 3, 2010) (establishing schedule for filing of motion to dismiss, cross-motion for summary judgment, and appropriate responses). Third, counsel for plaintiff and the Department of Justice agree that the House should not be required to file an Answer or other pleading in conjunction with its motion to intervene.

CONCLUSION

For all the foregoing reasons, the Court should grant the House's motion to intervene for the limited purpose of defending the constitutionality of Section III of the Defense of Marriage Act from attack on equal protection grounds.

Respectfully submitted,

/s/ Paul D. Clement
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Counsel for the Bipartisan Legal Advisory Group of the U.S. House of Representatives

April 18, 2011

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

February 23, 2011

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Kircher:

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 2010, 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 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]

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[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."

[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,

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]

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).

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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)).

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 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

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[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 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.

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 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.").

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[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").

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).

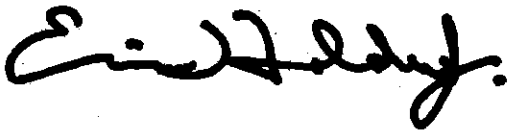
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be 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

CERTIFICATE OF SERVICE

I certify that on April 18, 2011, I served one copy of the foregoing Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose by CM/ECF, by electronic mail (.pdf format), and by first-class mail, postage prepaid, on the following:

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