No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW (Honorable Vaughn R. Walker)

MOTION TO VACATE STAY PENDING APPEAL OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY ET AL.

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INTRODUCTION

Plaintiffs filed this case in May 2009 because Proposition 8 stripped them of their fundamental human, civil, and constitutional right to marry the person of their choice. Plaintiffs sought a preliminary injunction against further enforcement of Proposition 8 because each and every day they were denied that fundamental right caused grievous, humiliating, and irreparable injury to them and their families. Proposition 8 relegates gay men and lesbians to a form of second-class citizenship and labels their families—including some 37,000 California children being raised by gay men and lesbians—second-rate. Each day plaintiffs, and gay men and lesbians like them, are denied the right to marry—denied the full blessings of citizenship—is a day that never can be returned to them.

The district court denied plaintiffs' request for a preliminary injunction, but made a concomitant commitment to an expedited trial and adjudication of the merits of plaintiffs' claims. The district court accordingly set the case for trial just six months after the preliminary hearing, less than eight months after the complaint had been filed. When an appeal of a discovery order threatened to derail the trial, this Court received briefing, held argument, and issued a decision all in the space of seven weeks. *See Perry v. Schwarzenegger*, No. 09-17241 (9th Cir.). When an issue involv-

ing cameras in the courtroom during trial arose, the Supreme Court of the United States resolved the matter in days.

After an historic trial in which the proponents of Proposition 8 were unable to establish that their effort to strip gay men and lesbians of their constitutional right to marry rationally advanced some legitimate governmental aim, plaintiffs prevailed. The district court held that "Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8." Doc #708 at 138. The district court accordingly granted plaintiffs' request for a permanent injunction against the enforcement of Proposition 8 on August 12, 2010.

Proponents sought a stay to permit the continued enforcement of Proposition 8's restriction on plaintiffs' right to marry. They argued that a stay would "at most subject Plaintiffs to a period of additional delay pending a final determination of whether they may enter a legally recognized marriage relationship." Mot. for Stay at 70. Plaintiffs opposed the stay, arguing that the "additional delay" that proponents marginalized was a delay in ending the deprivation of fundamental constitutional rights and that any such "additional delay" would perpetuate on a daily basis the serious, lasting, and irreparable damage to gay men and lesbians who wish to marry, their

families, and, particularly, their children. In short, justice delayed would be constitutional justice irreparably denied for every day delayed.

This Court granted proponents the stay they requested and thus denied to plaintiffs, at least temporarily, relief for their ongoing constitutional injuries. But, at the same time it did so, this Court ordered that "this appeal be expedited," and set a schedule that provided for full briefing and oral argument within four months.

Oral argument was held on December 6, 2010. In an order dated January 4, 2011, this Court expressed reservations as to whether proponents had Article III standing to maintain an appeal in federal court. *See* Certification Order at 6 ("It is not sufficiently clear to us, however, whether California law does so."). This Court thus certified a question to the Supreme Court of California that this Court characterized as potentially "dispositive of our very ability to hear this case." *Id.* at 7.

On February 16, 2011, the Supreme Court of California granted the request for certification but set a schedule for briefing and argument that will permit the case to be heard "as early as September, 2011," meaning that this case will be extended from the December argument date in this Court for at least nine additional months, and perhaps longer, just for oral argument, and perhaps up to three additional months for a decision from the California Supreme Court, after which the case would presumably return to this Court for yet further deliberations.

Moreover, events of this morning demonstrate that proponents likely cannot prevail even if this lengthy procedural detour were resolved in their favor. In a letter to Congress, the Attorney General of the United States announced the view of the United States 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" the Defense of Marriage Act ("DOMA")—which defines "marriage" under federal law to be "a legal union between one man and one woman"—"is unconstitutional." Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act at 2 (Feb. 23, 2011) (attached as Exhibit A).

These new developments—this Court's certification order, the California Supreme Court's response to it, and the Attorney General's announcement that the government will no longer defend DOMA—are materially changed circumstances that warrant vacatur of this Court's decision to grant a stay pending appeal. *See SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006).

ARGUMENT

The extraordinary relief of a stay is *only* warranted—and can *only* remain in place—when the stay applicant has made a "strong showing that [it] is likely to succeed on the merits" and a showing that "the applicant" itself—rather than some other party—"will be irreparably injured absent a stay." *Nken v. Holder*, 129 S. Ct. 1749,

1761 (2009) (internal quotation marks omitted). Courts must also consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies." *Id.* (internal quotation marks omitted). These factors weigh overwhelmingly in favor of immediately vacating the stay, particularly in light of this Court's order expressing serious concerns about whether proponents possess standing to pursue this appeal and certifying that "dispositive" question to the Supreme Court of California.

1. This Court's certification order makes it unmistakably clear that proponents cannot make the requisite "*strong* showing that [they are] likely to succeed on the merits" of their appeal. *Nken*, 129 S. Ct. at 1761 (emphasis added). As that order recognizes, this Court "cannot consider th[e] important constitutional question" regarding the constitutionality of Proposition 8 "unless the appellants . . . have standing to raise it." Certification Order at 1. In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court expressed "grave doubts" as to whether status as a ballot initiative proponent could confer Article III standing. *Id.* at 66. In this Court's view, "Proponents' claim to standing depends on Proponents' particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative." Certification Order at 6. Those "rights," however, "have not yet been clearly defined," and the Court therefore "request[ed] clarification" from the Supreme

Court of California "in order to determine whether [it] ha[s] jurisdiction to decide this case." *Id.* at 7. In short, proponents *a priori* cannot demonstrate a likelihood that they have standing to appeal, much less a likelihood to prevail on the merits of plaintiffs' constitutional challenge to Proposition 8.

The absence of a "clearly defined" provision of California law affording proponents "particularized interests" in the constitutionality of Proposition 8 or granting them "authority . . . to defend the constitutionality of the initiative"—together with the "grave doubts" expressed by the Supreme Court in *Arizonans*—eviscerates any notion that proponents can seriously be suggested to make a "strong showing" that they are likely to succeed on the merits of their appeal. *Nken*, 129 S. Ct. at 1761. That this Court felt compelled to certify the threshold standing question to the Supreme Court of California standing alone demonstrates that proponents cannot be said to be "likely" to succeed on the merits of their appeal. To the contrary, the fact that this Court has now sent a threshold question it acknowledges to be "dispositive" to be resolved by another tribunal must mean that proponents are *at least* as likely to fail on the merits as succeed. That is not remotely the kind of "strong showing" of likelihood of success that the Supreme Court has stated is *indispensable* to the issuance of a stay pending appeal. *Id.* Because this Court's own analysis demonstrates that proponents

no longer can assert a likelihood of success on the merits—much less a strong showing of that likelihood of success—vacatur of the stay pending appeal is warranted.

2. Recent events have confirmed that, even if they could establish standing to appeal, proponents would not have a likelihood of success on the merits of plaintiffs' constitutional challenge to Proposition 8. Today, the Attorney General of the United States announced that "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" and that "Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional." Attorney General Letter at 5. The President has therefore instructed the Department of Justice "not to defend the statute." *Id.*

The conclusion of the United States that heightened scrutiny applies to classifications based on sexual orientation is unquestionably correct. *See* Plaintiffs' Br. at 58-71. Proposition 8 cannot survive the requirements of heightened scrutiny because its invidious discrimination against gay men and lesbians could not conceivably further an important government interest. Indeed, proponents have made no serious attempt to defend Proposition 8 under that exacting standard.

3. Moreover, vacatur of the stay is appropriate because the certification order and, more particularly, the California Supreme Court's response to it, has decisively

tipped the balance of hardships between the parties overwhelmingly against the continuation of the stay.

The Supreme Court's decision in *Nken* requires a court adjudicating a request for a stay pending appeal to analyze, on the one hand, "whether the applicant will be irreparably injured absent a stay," and, on the other hand, "whether issuance of the stay will substantially injure the other parties interested in the proceeding." 129 S. Ct. at 1761. Proponents have *never* articulated how they will be personally harmed (much less irreparably harmed) if plaintiffs and gay men and lesbians like them were permitted to marry during the pendency of this appeal. Proponents instead invoked the irreparable harm that assertedly would be suffered *by the State* if gay men and lesbians were permitted to marry. Stay Mot. at 66. But the chief legal officer of the State, the Attorney General, categorically rejected this assertion, stating in his opposition to proponents' stay motion that "the harm to [plaintiffs] outweighs any harm to the state defendants." Attorney General's Opp. to Stay at 2. Proponents cannot invoke an interest of the State that the State itself denies exists.

The district court found that "proponents do not identify a harm to *them* that would result from denial of their motion to stay." Doc #727 at 7 (emphasis in original). Indeed, when asked during trial to identify what harms would befall opposite-

sex married couples if gay and lesbian couples could marry, proponents' counsel acknowledged, "I don't know." ER 44.

The California Supreme Court's response to this Court's certification order now makes clear beyond peradventure of a doubt that the Attorney General was correct. The briefing and oral argument schedule announced by that Court strongly suggests that it will not provide an answer to the certified question for 9-12 months—a full year after oral argument was heard in this Court, and nearly two years since plaintiffs proved convincingly to an experienced trial court the merits of their constitutional claims and their entitlement to injunctive relief. As the district court found, plaintiffs suffer irreparable harm each day that Proposition 8 continues to deny them the right to marry. *See* Doc #727 at 9 ("the trial record left no doubt that Proposition 8 inflicts harm on plaintiffs and other gays and lesbians in California"). By fencing them off from "the most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), Proposition 8 oppresses tens of thousands of couples—and, in a peculiar injustice, their children—with a scarring stigma that causes irreparable pain, anguish, and humiliation. That the California Supreme Court intends to take the better part of a year to answer a threshold question of standing law means that the "additional delay" proponents so easily dismissed in their stay papers now looks to be well more than a year in length—added to the nearly two years since plaintiffs filed their complaint.

That sharply and dispositively tips the balance of hardships in favor of plaintiffs. In fact, the "balance of hardships" is a tragic misnomer when plaintiffs will suffer grievous harm and the parties seeking the stay will suffer *no hardships whatsoever*. Particularly given that proponents point to no injury that *they* will suffer if gay men and lesbians are permitted to marry, there can be *no* justification for prolonging the suffering of plaintiffs and the tens of thousands of couples like them for an additional year. Having prevailed at trial, having demonstrated that they had a fundamental right to marry, and having shown beyond dispute that Proposition 8 works irreparable harm upon gay and lesbian Californians by denying them that right, it is simply intolerable for this Court to continue to deny them that right and to perpetuate their pain for such a length of time—especially given that this Court itself has recognized that Proponents may well have no right to appeal at all.

The standards long established by every court in this country cannot mean what they say if a stay of the district court's judgment is continued for one day longer in this case. Plaintiffs have a constitutional right to marry, and this Court's stay pending appeal denies to them the right to spend their lives together in marriage. This Court's January 4 order and the California Supreme Court's response make clear that the stay can no longer be justified and the "additional delay" it imposes will not be fleeting. Given these changed circumstances, the stay pending appeal should be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate the stay pending appeal.

Dated: February 23, 2011

By: /s/ Theodore B. Olson

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Exhibit A

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).

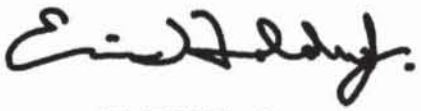
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

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

9th Circuit Case Number(s) 10-16696

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ].

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

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[Please see attached service list.]

Signature (use "s/" format) [/s/ Theodore B. Olson]

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