Nos. 12-15388, 12-15409 (Consolidated)

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.

KAREN GOLINSKI,
Plaintiff - Appellee,

v.

U.S. OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants - Appellant,

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

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

RESPONSE OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES TO THE PETITION FOR INITIAL HEARING EN BANC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

LEGISLATIVE AUTHORITY

OTHER AUTHORITIES

Pursuant to this Court's April 11, 2012 Order (ECF No. 22) ("April 11 Order"),[1] Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") responds to the Petition for Initial Hearing En Banc (Mar. 26, 2012) (ECF No. 18) ("Petition") filed by Appellees Office of Personnel Management ("OPM") and OPM Director John Berry (collectively, "Executive Branch Appellees").[2] For the reasons discussed below, the House believes that a panel is perfectly capable of hearing and deciding this case. However, if en banc review will eventually occur, it should occur expeditiously. On that basis, the House does not oppose the Petition. If, however, the Court believes that en banc review of a panel decision ultimately will be unnecessary, the Court should deny the Petition.

DISCUSSION

1. The House believes that a panel of this Court is fully capable of hearing and deciding this case involving Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, just as panels of this Circuit fully were capable of

[1] Appeal Nos. 12-15388 and 12-15409 have been consolidated, s*ee* April 11 Order at 2. The ECF numbers cited in this Response correspond with the docket for No. 12-15388.

[2] We refer to the Executive Branch defendants as "Appellees" in this Response because that is what they are in every practical sense in both cases, even though they technically are appellants in No. 12-15409. *See* Appellant [House's] . . . Response to Executive Branch Appellees' Motion to Consolidate and Expedite Appeals at 9-15 (April 5, 2012) (ECF No. 21).

deciding (and did decide) other cases involving sexual orientation classifications. *See Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *reh'g en banc denied*, No. 10-16797, 2012 WL 1109335 (9th Cir. Apr. 3, 2012); *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir.), *reh'g en banc denied*, 548 F.3d 1264 (9th Cir. 2008); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), *reh'g en banc denied*, 155 F.3d 1049 (9th Cir. 1998); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.), *reh'g en banc denied*, 909 F.2d 375 (9th Cir. 1990).

2. An en banc hearing is a disfavored procedure and only will be granted in extraordinary situations. *See* Fed. R. App. P. 35(a); *see also Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001) (en banc review is "exceedingly time-consuming and inefficient process"). An en banc hearing will be granted in only two circumstances: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

Consistent with Appellate Rule 35, this Court takes a narrow approach to consideration of cases en banc. This Court will "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) (citing *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc)). Where intra-circuit conflict may be reconciled or avoided there is no need for en banc review. *See United States v. Hardesty*, 958 F.2d 910, 912 (9th Cir. 1992) (no en banc review necessary where "a panel may follow the rule which has 'successfully posed as the law of the circuit for long enough to be relied upon.'") (quoting *Greenhow v. Sec'y of HHS*, 863 F.2d 633, 636 (9th Cir. 1988)). For this reason, the Ninth Circuit, in *Bryan v. MacPherson*, denied en banc review and criticized a dissenting opinion that proffered no intra-circuit conflict regarding the claims at issue. 630 F.3d 805, 810 (9th Cir. 2010) (Wardlaw, J., concurring).

Here, as in *Bryan*, there is no intra-circuit conflict. This Court consistently has held that rational basis review applies to equal protection challenges to classifications based on sexual orientation. *See Witt*, 527 F.3d at 821 (holding that rational basis review applied to the "Don't Ask, Don't Tell" policy and upholding dismissal of equal protection claims); *High Tech Gays*, 895 F.2d at 574 (applying rational basis review and rejecting equal protection challenge to Department of Defense policy of conducting expanded background investigations of homosexual applicants for secret and top secret security clearances); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982) ("We hold that Congress's decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages

has a *rational basis* and therefore comports with the due process clause and its equal protection requirements.") (emphasis added). A resolution of this case does not turn on the resolution of an intra-circuit conflict, because none exists. As the Executive Branch Appellees acknowledge, "this Court concluded [in *High Tech Gays*] that classifications based on sexual orientation are subject to rational basis review," and this Court held in *Witt* that circuit precedent "was 'not disturbed by'" *Lawrence v. Texas*, 539 U.S. 558 (2003). Petition at 8, 10. The law of this Circuit is clear.

The House agrees with the Executive Branch Appellees that "[t]he constitutionality of Section 3 of DOMA . . . is a question of exceptional and nationwide importance that calls for swift resolution." Petition at 13. But the House disagrees that "initial en banc hearing would best . . . provid[e] a swift and definitive resolution." *Id*. at 14. Initial en banc review likely would delay this Court's resolution of the case and a *definitive* resolution of Section 3's constitutionality by the Supreme Court. Furthermore, as noted above, this Court consistently has denied en banc review of cases involving sexual orientation classifications. In a case involving a similar DOMA Section 3 challenge, the First Circuit denied initial hearing en banc. *See* Order of the Ct., *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Aug. 23, 2011), copy attached at Addendum 1.

3. While a panel is perfectly capable of deciding this case, and likely would do so more rapidly than the en banc Court, if this Court believes it is likely to review en banc any decision rendered by a panel on DOMA Section 3's constitutionality, this Court should grant initial en banc hearing in the interest of expedition. That is, if en banc review is inevitable here, there is no reason for delay. In light of the Executive Branch's extraordinary decision not to defend Section 3 of DOMA, a definitive determination of Section 3's constitutionality by the Supreme Court seems all but inevitable. It is in all parties' interest that the Supreme Court resolve this issue sooner, rather than later. Thus, if en banc review will eventually occur, it should occur now.

4. Under the schedule set out in the April 11 Order, the House's opening panel brief currently is due June 4, 2012. The House has no concerns with the current briefing schedule should the Court deny the Petition. However, the pendency of the Petition creates uncertainty now about the type of brief that will ultimately be required of the House. The House's brief will be substantially different depending on whether a panel or an en banc Court hears this case.

A panel is duty-bound to follow and apply Circuit precedent, including *Witt* and *High Tech Gays*, because "three judge panels of [this] 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.

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.

The House wants to ensure that the taxpayer dollars not be expended needlessly in this litigation. If the Court were to grant the Petition *after* the House had substantially completed a panel brief, taxpayer dollars would be wasted because the House then would have to shift gears and prepare a substantially different brief.[3] For this reason, the House joins the Executive Branch Appellees' request for expeditious review of the Petition. *See* Mot. to Consolidate and Expedite Appeals at 7 (Mar. 26, 2012) (ECF No. 19).

In addition, however, the House respectfully suggests, in the event the Court is unable to rule on the Petition until after May 15, 2012—after which time the

[3] The Court has 35 days from the date of this Response to decide on the Petition. *See* Cir. Ad. Comm. N. (2) to R. 35-1 to 35-3. Thirty-five days from today is May 25, 2012, by which time, the House would be well on its way to completing a panel brief if there is no intervening ruling on the Petition.

House realistically will need to commit resources to drafting a brief that is tailored specifically for a three-judge panel in order to meet the June 4, 2012 deadline—that the Court consider resetting the briefing deadlines as follows, which deadlines would apply regardless of whether the Court ultimately grants the Petition or not:

Brief(s)	**Deadline**
House's Opening Brief (No. 12-15388)	*30 days from Petition decision*
Plaintiff's Responsive Brief (No. 12-15388); Executive Branch Appellees' Answering Brief (No. 12-15388) and Nominal Opening Brief (No. 12-15409)	*60 days for Petition decision*
House's Reply Brief (No. 12-15388) and Answering Brief (No. 12-15409)	*74 days from Petition decision*
Executive Branch Appellees' Limited Reply (No. 12-15409)	*88 days from Petition decision*

CONCLUSION

The House respectfully requests that the Court rule on the Petition in accordance with the foregoing.

Respectfully submitted,

BANCROFT PLLC

Paul D. Clement
By: */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
(202) 234-0090

Counsel for Appellant the Bipartisan Legal Advisory Group of the U.S. House of Representatives[4]

[4] 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 have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this case.

OF COUNSEL:

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Christine Davenport, Senior Assistant Counsel
Kirsten W. Konar, 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
(202) 225-9700

April 20, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, I certify that this Response to the Petition for Initial Hearing En Banc does not exceed 15 pages. I further certify that the foregoing Response is presented in proportionally-spaced font typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Kerry W. Kircher
Kerry W. Kircher

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, I electronically filed the foregoing Response of the Bipartisan Legal Advisory Group of the United States House of Representatives to the Petition for Initial Hearing En Banc with the Clerk of Court by using the CM/ECF system. I further certify that all participants to this case are registered CM/ECF users and will be served by the appellate CM/ECF service.

/s/ Kerry W. Kircher
Kerry W. Kircher

ADDENDUM 1

United States Court of Appeals
For the First Circuit

No. 10-2204

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff, Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants, Appellants.

No. 10-2207

NANCY GILL, ET AL.,

Plaintiffs, Appellees,

KEITH TONEY; ALBERT TONEY, III,

Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants, Appellants,

HILARY RODHAM CLINTON, in her official capacity as United States Secretary of State,

Defendant.

No. 10-2214

DEAN HARA,

Plaintiff, Appellee/Cross - Appellant,

NANCY GILL, ET AL.,

Plaintiffs - Appellees,

KEITH TONEY, ET AL.,

Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants, Appellants/Cross - Appellees,

HILARY RODHAM CLINTON, in her official capacity as United States Secretary of State,

Defendant.

Before

Lynch, Chief Judge,
Torruella*, Boudin, Lipez*, Howard and Thompson*,
Circuit Judges.

ORDER OF COURT
Entered: August 23, 2011

The plaintiffs-appellees in Gill v. Office of Personnel Mgmt., Nos. 10-2207, 10-2214, seek initial hearing en banc in these three consolidated appeals from the district court's decision striking down Section 3 of the Defense of Marriage Act. The petition for initial hearing en banc, having been considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the matter be heard en banc, is denied. In order to give the parties an appropriate interval in which to present their arguments, the briefing order entered by this court on June 16, 2011, as amended by the court's July 11 and 28 orders extending the due dates for opening and superseding briefs, is hereby further amended. The trigger date for the computation of time to file briefs contained in this court's June 16 order shall be the date this order issues. The motion of amicus Eagle Forum Education & Legal Defense Fund for leave to submit a response to the petition for initial hearing en banc is denied.

So ordered.

By the Court:

/s/ Margaret Carter, Clerk.

*TORRUELLA, LIPEZ, and THOMPSON, Circuit Judges, dissenting without comment as to the denial of the petition for initial hearing en banc.

cc:
Counsel of Record