Nos. 12-15388 & 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants,

and

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

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants-Appellants,

and

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

On Appeal from the United States District Court for the Northern District of California

ANSWER BRIEF OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN NO. 12-15409

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INTRODUCTION

The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") previously moved this Court to dismiss the appeal of the federal Executive Branch defendants. *See* Appellant [the House's] . . . Mot. to Dismiss No. 12-15409, No. 12-15409 (Apr. 5, 2012) (ECF No. 15-1) ("House Mot. to Dismiss"). This Court denied the House's motion to dismiss "without prejudice to its raising the issue in its brief in that appeal." Order at 2 (Apr. 11, 2012) (ECF No. 22). This Court authorized the House to file a reply brief in the House's own appeal, No. 12-5388, "and an answering brief in no. 12-15409." *Id*. at 3. As explained below, the Executive Branch defendants' appeal (No. 12-15409) should be dismissed because they fully prevailed below and, therefore, they are not aggrieved and their appeal is not necessary to enable the House to prosecute its earlier-filed appeal (No. 12-15388). Thus, the House has standing to appeal, and the Executive Branch defendants do not.

BACKGROUND

As the Court is aware, it is the constitutional responsibility of the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of the Justice Department ("DOJ") – in furtherance of that responsibility – to defend the constitutionality of duly-enacted federal laws when they are challenged in court. This case, brought by Karen Golinski, a staff attorney employed by this

Court, concerns the constitutionality of one such duly-enacted federal statute: Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), codified at 1 U.S.C. § 7, which defines "marriage" and "spouse" for purposes of federal law. DOMA was enacted in 1996 by substantial bipartisan majorities in both houses of Congress, and signed into law by President Clinton. *See* 142 Cong. Rec. H7505-06 (daily ed. July 12, 1996) (House vote 342-67 on H.R. 3396); 142 Cong. Rec. S10129 (daily ed. Sept. 10, 1996) (Senate vote 85-14 on S. 1999); 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996) (bill signed on Sept. 21, 1996).

DOJ Carries Out Its Constitutional Responsibility. Prior to 2004, there were no constitutional challenges to DOMA Section 3. However, from 2004-2011, DOJ repeatedly defended the constitutionality of Section 3 against all constitutional challenges. For example:

BUSH ADMINISTRATION – *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir.) (plaintiffs lacked standing to challenge DOMA Section 3), *cert. denied*, 549 U.S. 959 (2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (constitutional challenges to DOMA dismissed for failure to state claim); Order, *Sullivan v. Bush*, No. 1:04-cv-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting plaintiff's motion for voluntary dismissal after defendants moved to dismiss); Order, *Hunt v.*

Ake, No. 8:04-cv-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35) (constitutional challenges to DOMA Section 3 dismissed for failure to state claim); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (holding that DOMA Section 3 does not violate Fifth Amendment).

OBAMA ADMINISTRATION – Corrected Br. for the U.S. Dep't of Health and Human Servs., *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Jan. 19, 2011) (ECF No. 5520069); Fed. Defs.' . . . Mot. to Dismiss, *Dragovich v. U.S. Dep't of the Treasury*, No. 4:10-cv-01564 (N.D. Cal. July 2, 2010) (ECF No. 25); Mem. in Supp. of Defs.' Mot. to Dismiss Pl.'s First Am. Compl., *Golinski v. OPM*, No. 3:10-cv-0257 (N.D. Cal. May 10, 2010) (ECF No. 49); Br. in Supp. of Mot. to Dismiss . . . , *Bishop v. United States*, No. 4:04-cv-00848 (N.D. Okla. Oct 13, 2009) (ECF No. 138); Defs.' . . . Mot. to Dismiss, *Torres-Barragan v. Holder*, No. 2:09-cv-08564 (C.D. Cal. Mar. 5, 2010) (ECF No. 7).

DOJ Abandons Its Constitutional Responsibility. In February 2011, DOJ abruptly reversed course. The Attorney General publicly notified Congress of the President's and his conclusion that DOMA Section 3, "as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment," and their decision that, as a result, DOJ no longer would defend Section 3 in court against equal protection challenges. Letter

from Eric H. Holder, Jr., Att'y Gen., to the Honorable John A. Boehner, Speaker, U.S. House of Representatives at 1, 5 (Feb. 23, 2011) ("Holder Letter"), attached as Ex. 1 to House Mot. to Dismiss.

In so deciding, the Attorney General acknowledged, correctly, that (i) DOJ "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id*. at 5; (ii) binding precedents of *ten* U.S. circuit Courts of Appeals [actually eleven] – including this Court[1] – reject his conclusion that sexual orientation classifications are subject to a heightened standard of scrutiny, and instead hold that rational-basis scrutiny is appropriate for such classifications, *id*. at 3-4 nn.4-6; and (iii) "reasonable argument[s] for Section 3's constitutionality may be proffered under th[e] [rational basis] standard," *id.* at 6. In short, the Attorney General's own letter conceded that his decision to abandon the defense of DOMA Section 3 is a sharp departure from

[1] *See Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir.) (even after *Lawrence v. Texas*, 539 U.S. 558 (2003), sexual orientation classifications challenged as violative of equal protection properly analyzed under rational basis standard), *reh'g en banc denied*, 548 F.3d 1264 (9th Cir. 2008); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir.) ("rational basis review" proper for classifications based on sexual orientation), *reh'g and reh'g en banc denied*, 909 F.2d 375 (9th Cir. 1990). DOJ has acknowledged in this case that these precedents are "binding." Defs.' Br. in Opp'n to Mots. to Dismiss at 4, No. 3:10-cv-00257 (N.D. Cal. July 1, 2011) (ECF No. 145) ("Defs.' Opp'n to Mots. to Dismiss"); *see also Perry v. Brown*, 671 F.3d 1052, 1082, 1086 (9th Cir. 2012) (applying rational basis review).

past precedent and is not predicated primarily on constitutional or other legal considerations.[2] While DOJ, on a few occasions, has refused to defend the constitutionality of Acts of Congress that, in its view, unconstitutionally restricted or infringed the powers of the Executive Branch or could not be supported by any reasonable argument, DOMA Section 3 plainly is not such a statute, making DOJ's actions here, to our knowledge, wholly unprecedented. *See* Amici Curiae Br. of . . . Edwin Meese III and John Ashcroft [. . .] (June 11, 2012) (ECF No. 44-1).

In response, the House determined on March 9, 2011, to defend DOMA Section 3 in civil actions in which the statute's constitutionality has been challenged. *See* Press Release, Speaker of the House John Boehner, *House Will Ensure DOMA Constitutionality Is Determined by the Court* (Mar. 9, 2011) ("House General Counsel has been directed to initiate a legal defense of [DOMA Section 3]"), *available at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539.

[2] In his February 2011 public announcement, the Attorney General also said that "the President has instructed Executive agencies to continue to comply with Section 3 of DOMA . . . unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Holder Letter at 5. The Executive Branch recently has begun backing away from the promise of continued enforcement, particularly in the immigration context. *See* Proposed Intervenor's Reply to Executive Branch Defs.' Opp'n to Mot. for Denial of Voluntary Dismissal of Appeal at 3-4, *Torres-Barragan v. Holder*, No. 10-55768 (9th Cir. Mar. 26, 2012) (ECF No. 54-1).

This Case Works Its Way Through the District Court and to This Court. Ms. Golinski initially sought benefits for her same-sex spouse through non-constitutional mandamus relief, but the district court dismissed that claim shortly after DOJ abandoned its defense of DOMA. *See Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2011). In so ruling, the district court said that it "would, if it could, address the constitutionality of . . . the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages," but that it was "not able to reach these constitutional issues due to the unique procedural posture of this matter." *Id.* at 975. In light of this extraordinary judicial invitation, Ms. Golinski, not surprisingly, amended her complaint to challenge Section 3 on equal protection grounds. The House then sought, and was granted, leave to intervene. *See* Order Granting the Mot. of the [House] to Intervene . . . , No. 3:10-cv-00257 (N.D. Cal. June 3, 2011) (ECF No. 116).[3]

Notwithstanding that the Holder Letter said only that DOJ would *not defend* DOMA Section 3, beginning with *Golinski*, DOJ pivoted from that position to the even more extraordinary and constitutionally problematic position of aligning itself with DOMA plaintiffs to *affirmatively attack Section 3* in court and to accuse the

[3] At present, the House is defending DOMA Section 3 in 13 cases around the country (including this case) – four in the federal Circuit Courts (including one in which a decision already has been rendered), eight in federal district courts, and one in the Court of Veterans Appeals.

Congress that enacted DOMA – many of whose Members still serve – of doing so out of "animus." *See* Defs.' Opp'n to Mots. to Dismiss at 3-23 (arguing that Section 3 is subject to heightened scrutiny and is unconstitutional under that standard).[4]

Ultimately, the district court – not surprisingly in light of its unmistakable earlier signal – agreed with DOJ, holding that Section 3 is subject to heightened scrutiny and is unconstitutional under that standard. *Golinski v. OPM*, 824 F. Supp. 2d 968, 995, 1002 (N.D. Cal. 2012). It did so notwithstanding binding Ninth

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[4] That would be the very same statute (i) which DOJ had defended a few short months before, *see supra* pp. 2-4, and (ii) which DOJ acknowledges is constitutional under the equal protection standard that applies in this Circuit (rational basis review). *See* Defs.' Opp'n to Mots. to Dismiss at 18 n.14.

To date, DOJ has filed substantive briefs in eight other DOMA cases making this same argument. *See, e.g.*, Superseding Br. for the U.S. Dep't of HHS, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011) (ECF No. 5582082); Fed Defs.' Br. in Partial Supp. of Pls.' Mot. for Summ. J., *Dragovich v. U.S. Dep't of Treasury*, 4:10-cv-01564 (N.D. Cal. Jan. 19, 2012) (ECF No. 108); Br. of [DOJ] Regarding the Constitutionality of Section 3 of DOMA, *Cozen O'Connor, P.C. v. Tobits*, 2:11-cv-00045 (E.D. Pa. Dec. 30, 2011) (ECF No. 97); Resp. of Defs. [DOJ] to [House]'s Cross-Mot. for Summ. J., *Bishop v. United States*, 4:04-cv-00848 (N.D. Okla. Nov. 18, 2011) (ECF No. 225); Defs.' Mem. of Law in Resp. to Pls.' Mot. for Summ. J. & [House's] Mot. to Dismiss, *Pedersen v. OPM*, 3:10-cv-01750 (D. Conn. Sept. 14, 2011) (ECF No. 98); Defs.' Opp'n to [House]'s Mot. to Dismiss, *Lui v. Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 2, 2011) (ECF No. 28); Def. [DOJ]'s Mem. of Law in Resp. to Pl.'s Mot. for Summ. J. & [House]'s Mot. to Dismiss, *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y. Aug. 19, 2011) (ECF No. 71); Reply in Supp. of Mot. to Dismiss by [House] at 23 n.12, *Revelis v. Napolitano*, No. 1:11-cv-01991 (N.D. Ill. Apr. 23, 2012) (ECF No. 54).

Circuit precedent holding that sexual orientation classifications, like DOMA Section 3, are subject to rational basis review. *See Witt*, 527 F.3d at 821; *High Tech Gays*, 895 F.2d at 574.[5]

The House appealed that judgment on February 24, 2012, *see* [House's] Notice of Appeal, No. 3:10-cv-00257 (N.D. Cal. Feb. 24, 2012) (ECF No. 188) ("House Notice of Appeal"), as it was entitled to do by virtue of its status as an intervenor-defendant. *See, e.g., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); *NL Indus., Inc. v. Sec'y of Interior*, 777 F.2d 433, 436 (9th Cir. 1985) (same). The House appeal is No. 12-15388. Since then, Ms. Golinski's spouse has been permitted to enroll in the Federal Employee Health Benefit Program. *See* Letter from Shirley Patterson, Ass't Dir., Fed. Employee Ins. Ops., OPM, to William Breskin, V.P., Gov't Programs, Blue Cross and Blue Shield Ass'n (Mar. 9, 2012), attached as Ex. 2 to House Mot. to Dismiss.

Four days later, despite having fully prevailed below, DOJ filed a separate Notice of Appeal. *See* Notice of Appeal of Defs., No. 3:10-cv-00257 (N.D. Cal. Feb. 28, 2012) (ECF No. 192). That appeal was docketed as No. 12-15409. DOJ

[5] DOJ also prevailed in its defense of a statutory claim asserted by Ms. Golinski. *See Golinski*, 824 F. Supp. 2d at 981 n.3.

made clear it was appealing *the very same issue the House had appealed*. *Compare* [Dep't] Mediation Questionnaire, No. 12-15409 (9th Cir. Mar. 5, 2012) (ECF No. 5), *with* House Notice of Appeal. Ms. Golinski has not appealed the district court's denial of her statutory claim. *See supra* p. 8 n.5.

ARGUMENT

Wholly apart from the separation of powers principles that make clear that the House, and not DOJ, is the proper party to file and pursue this appeal, it is well established in the Supreme Court's cases that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980); *accord Forney v. Apfel*, 524 U.S. 266, 271 (1998); *see also Parr v. United States*, 351 U.S. 513, 516 (1956) (Petitioner's appeal "will not lie because petitioner has not been aggrieved. Only one injured by the judgment sought to be reviewed can appeal . . . ."); *Pub. Serv. Co. of Mo. v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) ("the successful party below has no standing to appeal").

I. DOJ's Appeal Is Superfluous and Cannot Be Supported by Interests DOJ Has Disowned and Is Working to Frustrate.

The defendants in this case obviously have assumed markedly different postures: while the House has defended DOMA's constitutionality, DOJ has disowned the statute and asked the courts to strike it down. When the court below agreed with DOJ and rejected the House's contentions, the House therefore quite

unremarkably noticed an appeal. What *was* remarkable was DOJ's noticing of a shadow appeal, identifying the very same issue. This serves no purpose other than to confuse the matters.

DOJ has offered two justifications for its behavior. First, it says "the interim invalidation of a statute itself causes recognized injury to the interests of the United States." Mot. to Consolidate and Expedite Appeals at 6-7, No. 12-15388 (9th Cir. Mar. 26, 2012) (ECF No. 19) ("DOJ Motion") (citing *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, J., in chambers); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). But to the extent that the Executive Branch defendants suffer any affront from the invalidation of a federal statute, they hardly can invoke that as a reason for appeal when, as here, they *requested* the invalidation themselves. Because the House and not DOJ is defending DOMA's constitutionality, it is the House and not DOJ that represents the interests of the United States with respect to any harm arising from DOMA's "interim invalidation."

None of the cases cited by DOJ presented this dynamic, as each of them involved Executive defendants that were defending the statute in question – and in fact were seeking a stay of an injunction against its enforcement, which DOJ has

failed to do here.[6] DOJ clearly is not aggrieved here in any reasonable sense of that word, having secured everything it sought below – indeed, it acknowledges that it "intend[s] to file briefs [with this Court as an appellee] supporting plaintiff's claims," DOJ Motion at 9, and, as an appellee in No. 12-15388, it will have ample opportunity to do so (and indeed already has done so).

Second, DOJ suggests that its appeal is necessary to enable the House to litigate in this Court. *See* DOJ Motion at 4 (Department appealed "in order to ensure the existence of a justiciable case or controversy for this Court to resolve on appeal"). That plainly is wrong. Where, as here, DOJ abandons its constitutional responsibility to defend a federal statute, the Legislative Branch has Article III standing to intervene to defend the law at all stages of the litigation. The Supreme Court "ha[s] long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983) (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946)).

In *Chadha*, a private party challenged the constitutionality of a federal

[6] In any event, these decisions, entered by a single justice, lack precedential value. *E.g.*, Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. Rev. 1020, 1046 (1985) ("In-chambers opinions on stays have no precedential effect on either the lower courts or the Supreme Court.").

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

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

does or does not do.[7]

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

Newdow is equally inapposite. In *Newdow*, this Court denied the Senate's request to intervene in an Establishment Clause case that challenged, among other

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[7] *See also Perry*, 671 F.3d at 1064 (upholding intervention and subsequent appeal of sponsors of California constitutional ballot initiative to defend initiative where State itself would neither defend nor appeal); *NL Indus. Inc.*, 777 F.2d at 436 (appeal by intervenor neither impermissible nor moot when Executive Branch co-defendant declined to appeal); *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) (failure of government to appeal does not deprive intervenor of right to appeal adverse decision).

In keeping with *Chadha's* holding, congressional entities – including specifically the House through its Bipartisan Legal Advisory Group – repeatedly have intervened to defend the constitutionality of legislation DOJ has refused to defend. *See, e.g.*, *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986). None of these cases suggests that the House lacked standing, and several were decided by federal courts in the District of Columbia – *e.g.*, *North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984) – where circuit precedent requires would-be intervenors to demonstrate Article III standing. *See, e.g.*, *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994).

things, a federal statute inserting the words "under God" into the Pledge of Allegiance, where DOJ actively was *defending* the constitutionality of the statute in the litigation. In so holding, this Court distinguished a number of cases in which, unlike in *Newdow* (but exactly as here), a congressional body successfully intervened to defend the constitutionality of a statute that DOJ had refused to defend. *Newdow*, 313 F.3d at 498.

The disturbing legal implication of DOJ's position – that the House cannot pursue its appeal unless DOJ permits it to – is that DOJ has the power effectively to preclude judicial determination of the constitutionality of an Act of Congress by (i) first refusing to defend the Act's constitutionality, and (ii) then withholding or withdrawing its commitment to "provid[e] Congress a full and fair opportunity to participate in the litigation." Holder Letter at 6. Tying the House's ability to defend the constitutionality of an Act of Congress that DOJ refuses to defend to the existence of a separate Department appeal (which it may choose to file or not file), would be tantamount to providing the Executive Branch with an extra-constitutional, post-enactment veto over federal statutes to which it objects. The Executive simply does not possess that kind of unilateral authority under our system of government. *See, e.g.*, *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1122 (9th Cir. 1988), *vacated in part on other grounds*, 893 F.2d 205 (9th Cir. 1989) (law does not "permit the executive branch to interpret the Constitution so as

to assume additional powers or thwart the constitutional functions of a coordinate branch").

II. After Prevailing Below, DOJ Lacks Standing to Appeal.

As the Supreme Court has made clear, a party has no standing to appeal when the lower court has granted all the relief the party has requested. *Roper*, 445 U.S. at 333; *Forney*, 524 U.S. at 271; *Parr*, 351 U.S. at 516; *Pub. Serv. Co. of Mo.*, 306 U.S. at 206. This Court's cases are, of course, to the same effect. This Court has said that the rule of *Roper* – that a party "not aggrieved" by a court's order "has no standing to appeal from that order" – is one of the "elementary rules of appellate procedure." *Christian Sci. Reading Room Jointly Maintained v. City & Cnty. of S.F.*, 784 F.2d 1010, 1017 (9th Cir. 1986); *see also Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 947 n.1 (9th Cir. 2002) ("Federal does not have standing to maintain its cross-appeal. . . . Federal was not the aggrieved party in this judgment."); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) ("We dismiss this appeal because the appellants won the case below."); *Native Vill. of Tyonek v. Puckett*, 957 F.2d 631, 633-34 (9th Cir. 1992) (same); *Whaley v. Rydman*, 887 F.2d 976, 979 (9th Cir. 1989) (same).

In this case, the Executive Branch defendants plainly lack standing to appeal the judgment entered below because, far from being aggrieved by it, they wanted it. The Executive Branch defendants affirmatively requested, and obtained, the

judgment that the district court entered striking down DOMA. "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, 445 U.S. at 333. The Executive Branch defendants "won the case below," *Good Samaritan Church*, 29 F.3d at 488; as district court winners, they are not proper appellants in this Court. Accordingly, their appeal should be dismissed as a matter of "elementary" appellate procedure. *Christian Sci. Reading Room*, 784 F.2d at 1017.

Chadha is not to the contrary. In that case, the Supreme Court held that the INS was "sufficiently aggrieved" to appeal a judgment striking down a legislative veto of the INS's suspension of a deportation, even though the INS had attacked the statute in the courts below. 462 U.S. at 930. But the *Chadha* Court expressly limited its holding to an interpretation of 28 U.S.C. § 1252, the since-repealed statute providing for mandatory Supreme Court appellate jurisdiction, which had provided that "[a]ny party" could appeal to the Supreme Court from a judgment holding an Act of Congress unconstitutional. The *Chadha* Court's conclusion therefore was carefully, and narrowly, circumscribed: "At least for purposes of deciding whether the INS is 'any party' within the grant of appellate jurisdiction in § 1252, we hold that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take." 462 U.S. at 930. Unlike § 1252, the statute conferring jurisdiction on this Court in this case,

28 U.S.C. § 1291, does not allow "any party" to appeal.

Additionally, the Supreme Court in *Chadha* held only that "an agency of the United States" could appeal when "the Act of Congress it administers is held unconstitutional." 462 U.S. at 931. The legislative veto invalidated in *Chadha* was entirely a part of the Immigration and Nationality Act, which the INS administered. *See id*. at 924 n.1. This case, however, does not fall within the parameters of *Chadha*'s holding because the statute the district court invalidated, DOMA Section 3, applies broadly to hundreds of different federal statutes and is not "administered" by any particular federal agency. OPM and the other Executive Branch defendants cannot be said to be "aggrieved" by DOMA's invalidation in the same way that the INS was in *Chadha*.

* * *

In short, given that (i) DOJ is seeking to invalidate a duly-enacted statute of the United States which it simply does not like; (ii) DOJ has not identified, because it cannot, a single independent basis for its appeal; and (iii) the House is entitled to pursue its appeal entirely separate and apart from DOJ – and is in fact doing so – DOJ's appeal (No. 12-15409) is entirely superfluous. More than that, because the judgment of the court below gave the Executive Branch defendants absolutely everything they sought – right down to the adoption of exactly the legal theory DOJ advocated and an injunction against the enforcement of the statute DOJ

claimed was unconstitutional – the Executive Branch defendants do not even have standing to appeal that judgment.

CONCLUSION

For the foregoing reasons, appeal No. 12-15409 should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,533 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

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 July 17, 2012.

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