

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

September 16, 2013

RONALD L. OLSON¹
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
GREGORY F. STONE
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TENKO
ROBERT B. KNAUSS
STEPHEN M. KRISTOVICH
JOHN W. SPIEGEL
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
LAWRENCE C. BARTH
KATHLEEN M. McDOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
RONALD C. HAUSMANN
PATRICK J. CAFFERTY, JR.
JAY M. FUJITANI
O'MALLEY M. MILLER
SANDRA A. SEVILLE-JONES
MARK H. EPSTEIN
HENRY WEISSMANN
KEVIN S. ALLRED
BART H. WILLIAMS
JEFFREY A. HEINTZ
JUDITH T. KITANO
KRISTIN LINSLEY MYLES
MARC T.G. DWORSKY
JEROME C. ROTH
STEPHEN D. ROSE
GARTH T. VINCENT
TED DANE
STUART N. SENATOR
MARTIN D. BERN
DANIEL P. COLLINS
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT

JONATHAN E. ALTMAN
MARY ANN TODD
MICHAEL J. O'SULLIVAN
KELLY M. KLAUS
DAVID B. GOLDMAN
KEVIN S. MASUDA
HOJON HWANG
PETER A. DETRE
CARL H. MOOR
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MALCOLM A. HEINICKE
GREGORY J. WEINGART
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ROHIT K. SINGLA
LUIS LI
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
MARK H. KIM
BRETT J. RODDA
SEAN ESKOVITZ
FRED A. ROWLEY, JR.
KATHERINE M. FORSTER
BLANCA FROMM YOUNG
RANDALL G. SOMMER
MARIA SEFERIAN
MANUEL F. CACHAN
ROSEMARIE T. RING
JOSEPH J. YBARRA
MICHELLE T. FRIEDLAND
TODD J. ROSEN
TRUC T. DO
MELINDA EADES LEMOINE
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
JOHN B. OWENS
DANIEL B. LEVIN
MIRIAM KIM
MISTY M. SANFORD
KATHERINE KU
SUSAN R. SZABO
LIKA C. MIYAKE

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THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

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HAILYN J. CHEN
BRAD SCHNEIDER
BETHANY W. KRISTOVICH
JACOB S. KREILKAMP
ERIC P. TUTTLE
HEATHER E. TAKAHASHI
KEITH R. D. HAMILTON, II
SORAYA C. KELLY
JEFFREY Y. WU
ALISSA BRANHAM
ADAM R. LAWTON
PUNEET K. SANDHU
JENNY H. HONG
AARON SEJUI LOWENSTEIN
LAURA D. SMOLOWE
LEO GOLDBARD
MATTHEW A. MACDONALD
MARGARET G. MARASCHINO
ESTHER H. SUNG
BENJAMIN J. MARO
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KYLE A. CASAZZA
AARON GREENE LEIDERMAN
ERIN J. COX
CLAIRE YAN
ALLISON S. WOODS
BRAM ALDEN
JESLYN A. MILLER
MARK R. SAYSON
WILLIAM B. SULLIVAN
CHRISTIAN K. WREDE
PETER E. GRATZINGER
ANJAN CHOUDHURY
JEREMY A. LAWRENCE
BENJAMIN E. FRIEDMAN
CHRISTOPHER M. LYNCH
RAY S. SEILIE
NICHOLAS C. SOLTMAN
ADAM I. KAPLAN
AMELIA L.B. SARGENT
KENNETH M. TRUJILLO-JAMISON
BRYAN H. HECKENLIVELY
LAURA WIRTH
JASMINE M. ROBERTS

JENNIFER A. JONES
LAURA K. SULLIVAN
KYLE W. MACH
JEFFREY M. OSOFSKY
ENRIQUE R. SCHAEERER
GREGORY M. SERGI
ACHYUT J. PHADKE
DAVID A. TAYLOR
NEWMAN NAHAS
JUSTIN WEINSTEIN-TULL
THIA W. ARROYO
MARI OVERBECK
JESSE MAX CREED
JOHN M. SENIOR
JOHN M. GILDERSLEEVE
JOSHUA C. McDANIEL
ERIC K. CHIU
CONNOR T. GANTS
SARAH L. GRAHAM
JESSICA BARCLAY-STROBEL
ZACHARY M. BRIERS
JENNIFER M. BRODER
CHRISTINA P. MONIODIS
JOHN P. MITTELBACH
EMMANUEL S. TEDDER
SARAH GARBER
SAMUEL T. GREENBERG
CAROLINE M. McKAY

OF COUNSEL
RICHARD D. ESBENSHADE¹
ROBERT K. JOHNSON¹
ALAN V. FRIEDMAN¹
RONALD K. MEYER
RICHARD E. DROOYAN
ALLISON B. STEIN
SUSAN E. NASH
WILLIANA CHANG

E. LEROY TOLLES
(1922-2008)

¹A PROFESSIONAL CORPORATION

WRITER'S DIRECT CONTACT
(213) 683-9135
(213) 683-5135 FAX
daniel.levin@mto.com

Molly C. Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *SmithKline Beecham Corp. v. Abbott Laboratories*, Nos. 11-17357, 11-17373

Dear Ms. Dwyer:

This letter responds to GSK's September 12, 2013 letter submitting a guidance memorandum from the Attorney General to Department of Justice attorneys.

GSK files its letter pursuant to FRAP 28(j), which permits parties to submit "pertinent and significant authorities," along with their "citations," that "come to their attention after the parties brief has been filed." But the DOJ guidance memorandum is not such an authority, and it has no citation. It simply sets forth internal guidelines for DOJ attorneys. Nothing in the memorandum alters the binding precedent in this Circuit that has applied rational basis review under the Equal Protection Clause to classifications based on sexual orientation. (Third Brief on Cross Appeal at 14-16.) Indeed, the memorandum instructs DOJ attorneys to consider precedent regarding the level of scrutiny applicable to classifications based on sexual orientation in their jurisdictions before raising a *Batson* challenge. (Memorandum at 3.) The Executive Branch's discretionary policy judgments do not bind the federal courts, nor do its *legal* positions—a point confirmed by the Supreme Court's refusal to adopt DOJ's position that DOMA was subject to heightened scrutiny.

Nor does anything in the guidance memorandum affect the *voir dire* record in this case, which demonstrates that GSK failed to establish a *prima facie* case of intentional discrimination in light of the facts that Juror B worked at this Court, was the only juror in the

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venire who had heard of any of the drugs at issue, and had had friends in the past with HIV.
(Third Brief on Cross Appeal at 21-28.)

Very truly yours,

s/ Daniel B. Levin
Daniel B. Levin

cc: All counsel via electronic filing