

**JUSTICE NEWS**

**Department of Justice**

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, February 23, 2011

Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act

WASHINGTON – The Attorney General sent the following letter today to Congressional leadership to inform them of the Department's course of action in two lawsuits, *Pedersen v. OPM* and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman. A copy of the letter is also attached.

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,<sup>i</sup> 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.<sup>ii</sup>

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).<sup>iii</sup>

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).<sup>iv</sup> 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.<sup>v</sup> 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 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*.<sup>vi</sup> 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.<sup>vii</sup> 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.”).

### **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

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<sup>i</sup>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.”

<sup>ii</sup> 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 Kandau*, 315 B.R. 123, 145 (Bkrcty. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

<sup>iii</sup> 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)).

<sup>iv</sup> 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).

<sup>v</sup> 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.

<sup>vi</sup> 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).

<sup>vii</sup> 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 “legitimizes 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”).

11-223

Attorney General

# EQUALITYMATTERS

## Overview: The Six Current DOMA Lawsuits

March 01, 2011 5:54 pm ET - by Carlos Maza

In the wake of the Obama administration's decision not to defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) in federal court, *Equality Matters* spotlights the six main DOMA lawsuits currently working their way through the legal system.

	Filed	Basis	Judge	Circuit
<b>MA v HHS</b>	2009	Section 3	Judge Tauro	1st
<b>Gill v OPM</b>	2009	Section 3	Judge Tauro	1st
<b>Dragovich v Treasury</b>	2010	Section 3	Judge Wilkin	9th
<b>Golinski v OPM</b>	2010	Section 3	Judge White	9th
<b>Pedersen v OPM</b>	2010	Section 3	Judge Bryant	2nd
<b>Windsor v US</b>	2010	Section 3	Judge Jones	2nd

[Via Stop8.org, 2/28/11]

**Massachusetts v. United States Department Of HHS et al and Gill et al. v. Office of Personnel Management et al.**

**The Cases:** *Commonwealth of Massachusetts v. United States Department Of Health And Human Services et al.*: On July 8, 2009, the Massachusetts Attorney General Martha Coakley filed a lawsuit challenging the constitutionality of section three of DOMA, arguing that it "codified an animus towards gay and lesbian people" as well as undermining each state's right to recognize marriages between same-sex couples.

A U.S. District Court Judge ruled in favor of the plaintiff, ruling that section three violates the Tenth Amendment and

falls outside of Congress' authority under the Spending Clause.

*Gill et al. v. Office of Personnel Management et al.*: On March 3, 2009, Gay & Lesbian Advocates & Defenders (GLAD) filed a lawsuit in Massachusetts' federal district court challenging section three of DOMA, arguing that the federal government should maintain deference to state interpretations of "marriage."

The same U.S. District Court Judge ruled for the plaintiffs, explaining that Section 3 of DOMA lacks a rational basis for discriminating against gay and lesbian couples.

**The Circuit:** Eventually, the two cases were consolidated. They were both appealed and sent to the First Circuit Court of Appeals.

**Latest Action:** On February 25, the Department of Justice notified the First Circuit Court of Appeals that it would "cease to defend" DOMA in both cases. Congress now has the opportunity to defend section three in either of the cases.

## Dragovich v. US Department of the Treasury

**The Case:** In 2010, The Legal Aid Society filed a lawsuit for several California public employees who were unable to include their spouses in their long-term pension and health care benefit plans due to Section 3 of DOMA.

On January 18, 2011, Ninth Circuit Federal Judge Claudia Wilkin rejected the federal government's motion to dismiss the case in a response that left some believing she would eventually find Section 3 of DOMA to be unconstitutional.

**The Circuit:** *Dragovich* was filed in the Ninth Circuit.

**Latest Action:** The Obama administration did not directly mention *Dragovich* in its announcement about DOMA, though it now seems more likely that Judge Wilkin will find Section 3 to be unconstitutional.

## Golinski v. Office of Personnel Management

**The Case:** In 2008, Karen Golinski, an employee of the Ninth Circuit Court of Appeals, requested that her wife be added to her family health insurance plan. When the US Office of Personnel Management (OPM) refused, citing DOMA, Golinski filed a lawsuit in the Ninth U.S. Circuit. She won her case, but the OPM refused to abide by the order. Golinski eventually sued again in order to force the OPM to comply with the decision.

**The Circuit:** *Golinski* was filed in the Ninth Circuit.

**Latest Action:** Despite the Obama administration's decision not to defend Section 3's constitutionality, it recently insisted that the law itself must be enforced until it is repealed by Congress or ruled unconstitutional.

## Pedersen et al v. Office of Personnel Management et al.

**The Case:**

On November 9, 2010, GLAD filed a lawsuit against Section 3 of DOMA in the U.S. District Court for the District of Connecticut. GLAD again argued that Section 3 violated the Fifth Amendment and the federal government's history of deference to the states on marriage issues.

**The Circuit:** *Pedersen et al.* was filed in the Second Circuit.



**Latest Action:** On February 25, the Department of Justice informed the Second Circuit that it would not be defending Section 3 of DOMA in *Pedersen*. Congress still has the opportunity to defend Section 3 in the case.

## Windsor v. United States

**The Case:** On November 9, 2010, Edith Windsor filed a lawsuit against the federal government for refusing to recognize her marriage to her partner of 44 years, Thea Spyer. When Thea passed away in 2009, Edith was forced to pay more than \$350,000 in federal estates taxes that she would not have had to pay if the government had recognized her marriage to Thea. The lawsuit was filed in New York's District Court and claimed Section 3 violated the equal protection guarantee of the U.S. Constitution.

**The Circuit:** *Windsor v. United States* was filed in the Second Circuit, along with *Pedersen*.

**Latest Action:** On February 25, the Department of Justice informed the Second Circuit that it would not be defending Section 3 of DOMA in *Windsor*. Congress still has the opportunity to defend Section 3 in the case.

Previously:

Conservative Talking Points On DOMA Debunked

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	No: 2:11-CV-01267-SVW (JCGx)	Date	September 28, 2011
Title	Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.		

JS - 6

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

**Proceedings:** IN CHAMBERS ORDER re DEFENDANTS' PARTIAL MOTION TO DISMISS; INTERVENOR'S MOTION TO DISMISS [18] [19]

**I. INTRODUCTION**

Plaintiffs Hamdi Lui ("Lui") and Michael Ernest Roberts, ("Roberts") (collectively "Plaintiffs") bring this suit challenging Defendants' denial of Roberts' Form I-130 Petition (the "Petition"). Roberts filed the Petition on behalf of Lui, seeking to classify Lui as an "immediate relative" in order for Lui to gain lawful permanent resident status in the United States. See 8 C.F.R. § 204.1(a). Plaintiffs challenge the denial of the Petition on two grounds. First, Plaintiffs claim that the denial of the Petition violates the Immigration and Nationality Act's ("INA") anti-discrimination provision based on alleged "sex" discrimination. (Compl., ¶¶ 8, 32, 35). Second, Plaintiffs challenge the constitutionality of the denial of the Petition as a result of the United States Citizenship and Immigration Services' ("USCIS") interpretation of the Defense of Marriage Act ("DOMA") Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7.

On June 17, 2011 Defendants filed their Partial Motion to Dismiss, which focuses solely on the INA "sex" discrimination claim. On the same day, Intervenor the Bipartisan Legal Advisory Group for the U.S. House of Representatives ("Intervenor") filed its Motion to Dismiss, which focuses solely on Plaintiffs' constitutional challenge to Section 3 of DOMA. Plaintiffs and Defendants filed separate Oppositions to Intervenor's Motion to Dismiss.<sup>1</sup>

<sup>1</sup>As Intervenor notes, in February of this year, the Department of Justice decided to forego defending the constitutionality of DOMA. Accordingly, Defendants filed an Opposition to Intervenor's Motion to Dismiss in order to argue that Section 3 of DOMA is unconstitutional.

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JS - 6

## II. BACKGROUND FACTS

Plaintiff Lui is a native and citizen of Indonesia. Plaintiff Roberts is a U.S. Citizen. Plaintiffs, same-sex couple, were legally married under the laws of Massachusetts on April 9, 2009. On the same day, Plaintiff Roberts filed the Petition on behalf of Plaintiff Lui with the USCIS California Service Center. (*Id.* ¶ 28). On August 28, 2009, Plaintiffs' Petition was denied. On January 20, 2011, the BIA dismissed Plaintiffs' appeal of the I-130 Petition Denial.

Plaintiffs claim that Defendants' refusal to grant the Petition on the basis of Plaintiffs' same-sex marriage constitutes "sex" discrimination in violation of the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A). (Compl. ¶ 8). Plaintiffs further contend that Defendants' application of DOMA's definition of marriage in making the determination that a same-sex spouse is not an "immediate relative" for I-130 petition purposes violated their constitutional due process and equal protection rights. (*Id.* ¶¶ 5, 18).

## III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (Citing *Iqbal*, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002). While a court does not need to accept a pleader's legal conclusions as true, the court reviews the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. *Kniesel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his Complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (Citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866

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JS - 6

F.2d 1149, 1160 (9th Cir. 1989)).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

IV. DISCUSSION

The gravamen of Plaintiffs' complaint is that Roberts' Petition was improperly rejected because Lui, as Roberts' same-sex spouse, qualifies as an immediate relative under the INA. Defendants maintain that the USCIS and the BIA do not engage in impermissible sex discrimination under the INA when they refuse to grant an I-130 petition under these circumstances. The Court finds that this proposition is well settled under Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), which also involved an I-130 immediate relative petition filed by a party to a same-sex marriage. See Adams, 673 F.2d at 1036 (holding that the agency's interpretation of marriage in the INA, 8. U.S.C. § 1151(b), as excluding same-sex couples did not violate plaintiffs' due process or equal protection rights under rational basis review).<sup>2</sup> Furthermore, Plaintiffs have failed to assert any facts to suggest the Defendants discriminated against them on the basis of their sex, as opposed to their sexual orientation. Accordingly, the Court GRANTS Defendants' Partial Motion to Dismiss without prejudice.

As noted above, USCIS relied on the definitions of marriage and spouse contained in Section 3 of DOMA in denying Plaintiffs' Petition. In this instance, Defendants walk a fine line, on the one hand

<sup>2</sup>As Intervenor notes, eleven federal circuits have held that homosexuals are not a suspect class. See Cook v. Gates, 528 F.3d 42, 61-62 (1st Cir. 2008), *cert. denied*, Pietrangelo v. Gates, 129 S. Ct. 2763 (2009); Citizens for Equal Prot., v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); Lofton v. Sec. of Dept. of Children & Fam. Servs., 358 F.3d 804, 818 & n.16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (7th Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984); Rich v. Sec'y of the Army, 735 F.2d 1220 (10th Cir. 1984); see also Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) (not applying heightened scrutiny).

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Case No. No: 2:11-CV-01267-SVW (JCGx)

Date September 28, 2011

Title Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.

arguing in their Partial Motion to Dismiss that they did not violate the INA by discriminating against Plaintiffs on the basis of their same-sex marriage while simultaneously arguing that Section 3 of DOMA, which excludes same-sex couples from the definitions of marriage and spouse for purposes of federal law, violates equal protection.

To the extent that Plaintiffs Challenge Section 3 of DOMA on equal protection grounds, that issue has been decided by Adams.<sup>3</sup> 673 F.2d at 1041.<sup>4</sup> In Adams, the Ninth Circuit held that "Congress's decision to confer spouse status . . . only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements."<sup>5</sup> Id. at 1042. The fact that DOMA was enacted years after the Ninth Circuit's decision in Adams is not persuasive given that marriage as defined in Section 3 of DOMA is consistent with Adams. While Plaintiffs and Defendants point out the alleged deficiencies in the reasoning in Adams, this Court is not in a position to decline to follow Adams or critique its reasoning simply because Plaintiffs and Defendants believe that Adams is poorly reasoned.<sup>6</sup> Furthermore, as Intervenor

<sup>3</sup>In addition to Adams, Intervenor argues that Baker v. Nelson, 409 U.S. 810 (1972) controls. In Baker, plaintiffs, a same-sex couple, appealed a decision of the Minnesota Supreme Court affirming rejecting a constitutional challenge to the rejection of their application for a Minnesota marriage license. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972). The Supreme Court unanimously dismissed plaintiffs' appeal "for want of a substantial federal question." The Court need not determine the effect of a summary disposition of the Supreme Court because we are bound to follow the Ninth Circuit's decision in Adams.

<sup>4</sup>See also, High-Tech Gays v. Def. Indus. Sec. Clearance Ofc., 895 F.2d 563, 571 (9th Cir. 1990) (rejecting the argument that "homosexuality should be added to the list of suspect or quasi-suspect classifications requiring strict or heightened scrutiny").

<sup>5</sup>The Court in Adams noted that Congress "has almost plenary power to admit or exclude aliens," and that, as a result, "the decisions of Congress [in the immigration context] are subject only to limited judicial review." Adams, 673 F.2d at 1041. While the Court noted that, pursuant to its plenary power in the immigration context, Congress "may enact statutes which, if applied to citizens, would be unconstitutional," the Court ultimately upheld the exclusion of same-sex couples from the definition of marriage under the INA under rational basis review, as opposed to "some lesser standard of review." Id. at 1042.

<sup>6</sup>The Court is aware of a similar case recently heard by District Judge R. Gary Klausner. See Torres-Barragan v. Holder, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. April 30, 2010) (ECF No. 24) *appeal docketed*, No. 10-55768 (9th Cir.). The only substantive difference between Torres-Barragan and the instant action is that Torres-Barragan arose prior to the Department of Justice's change in

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. No: 2:11-CV-01267-SVW (JCGx) Date September 28, 2011  
Title Handi Lui, et al. V. Eric H. Holder, U.S. Attorney General, et al.

argues, the

JS - 6

prerogative to overturn Ninth Circuit precedent rests not with this District Court, but with the *en banc* Ninth Circuit and the Supreme Court. See Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 877 (9th Cir. 2005) (citing Palmer v. Sanderson, 9 F.3d 1433, 1437 n.5 (9th Cir. 1993) ("As a general rule, a panel not sitting en banc may not overturn circuit precedent.")). The Court feels bound by Ninth Circuit precedent, and believes that those precedents are sufficiently clear.<sup>7</sup>

V. CONCLUSION

For the reasons set forth in this Order, Defendants' Partial Motion to Dismiss and Intervenor's Motion to Dismiss are hereby GRANTED without prejudice.

policy.

<sup>7</sup>The Court is aware of the District of Massachusetts' decision in Gill v. OPM, 699 F. Supp. 2d 374 (D. Mass. 2010) *appeal docketed*, No. 10-2204 (1st Cir.), in which the court held that Section 3 of DOMA violates equal protection under rational basis review. The Court notes that the plaintiffs in Gill were spouses of federal employees who brought suit on the basis of denial of certain federal marriage-based benefits, thus the context of that case was somewhat different from the present case, which arose in the context of immigration law. More importantly, the court's decision in Gill does not affect this Court's obligation to follow binding Ninth Circuit precedent.

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**Matter of Paul Wilson DORMAN, Respondent**

*Decided by Attorney General April 26, 2011*

U.S. Department of Justice  
Office of the Attorney General

The Attorney General vacated the decision of the Board of Immigration Appeals and remanded for the Board to make specific findings with regard to the respondent's eligibility for cancellation of removal.

**BEFORE THE ATTORNEY GENERAL**

Pursuant to my authority set forth in 8 C.F.R. § 1003.1(h)(1)(i), I order that the decision of the Board of Immigration Appeals ("Board") in this case applying Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, be vacated, and that this matter be referred to me for review.

In the exercise of my review authority under that regulation, and upon consideration of the record in this case, I direct that the order of the Board be vacated and that this matter be remanded to the Board to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is presented in this case, including, but not limited to: 1) whether respondent's same-sex partnership or civil union qualifies him to be considered a "spouse" under New Jersey law; 2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act; 3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and 4) whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal.


U.S. Department of Homeland Security  
500 12th Street, SW  
Washington, D.C. 20536



## U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors  
All Special Agents in Charge  
All Chief Counsel

FROM: John Morton  
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil  
Immigration Enforcement Priorities of the Agency for the  
Apprehension, Detention, and Removal of Aliens

### Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement<sup>1</sup>. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

<sup>1</sup> The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director<sup>2</sup> and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

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<sup>2</sup> Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).



Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

### Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

communication with represented individuals<sup>3</sup> and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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<sup>3</sup> For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

Secretary

U.S. Department of Homeland Security  
Washington, DC 20528



Homeland  
Security

August 18, 2011

The Honorable Dick Durbin  
United States Senate  
Washington, DC 20510

Dear Senator Durbin:

Thank you for your letter to President Obama regarding the Administration's immigration enforcement policies and the Development, Relief, and Education for Alien Minors (DREAM) Act. The President has asked me to respond on his behalf.

Over the past two years, the Department of Homeland Security (DHS) has established clear and well-reasoned priorities that govern how DHS uses its immigration enforcement resources. These priorities focus our resources on enhancing border security and identifying and removing criminal aliens, those who pose a threat to public safety and national security, repeat immigration law violators and other individuals prioritized for removal. Initially set forth in a March 2010 memorandum from U.S. Immigration and Customs Enforcement (ICE) Director John Morton, these priorities were recently reiterated and clarified in Director Morton's June 17, 2011 memorandum regarding the exercise of prosecutorial discretion by ICE personnel.

While additional work remains, we have made tremendous progress in our effort to focus DHS resources on these enforcement priorities. Our FY 2010 statistics are illustrative. In FY 2010, ICE removed 79,000 more aliens who had been convicted of a crime than it did in FY 2008. As a result, for the first time ever and due to the expansion of the Secure Communities program, over 50 percent of the aliens removed by ICE in a fiscal year were convicted criminals. Of those removed with no confirmed criminal conviction, more than two-thirds were either apprehended at the border or were repeat violators of our immigration laws. As enforcement directives continue to be implemented, we anticipate that these trends will increase in FY 2011.

The President has said on numerous occasions that it makes no sense to expend our enforcement resources on low-priority cases, such as individuals like those you reference in your letter, who were brought to this country as young children and know no other home. From a law enforcement and public safety perspective, DHS enforcement resources must continue to be focused on our highest priorities. Doing otherwise hinders our public safety mission—clogging immigration court dockets and diverting DHS enforcement resources away from individuals who pose a threat to public safety.

Accordingly, the June 17, 2011 prosecutorial discretion memorandum is being implemented to ensure that resources are uniformly focused on our highest priorities. Together

The Honorable Dick Durbin

Page 2

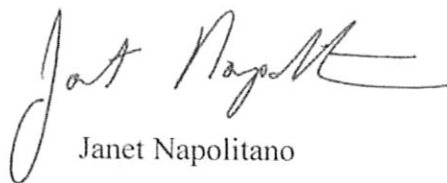
with the Department of Justice (DOJ), we have initiated an interagency working group to execute a case-by-case review of all individuals currently in removal proceedings to ensure that they constitute our highest priorities. The working group will also initiate a case-by-case review to ensure that new cases placed in removal proceedings similarly meet such priorities. In addition, the working group will issue guidance on how to provide for appropriate discretionary consideration to be given to compelling cases involving a final order of removal. Finally, we will work to ensure that the resources saved as a result of the efficiencies generated through this process are dedicated to further enhancing the identification and removal of aliens who pose a threat to public safety.

This case-by-case approach will enhance public safety. Immigration judges will be able to more swiftly adjudicate high priority cases, such as those involving convicted felons. This process will also allow additional federal enforcement resources to be focused on border security and the removal of public safety threats.

Although the process for implementing the June 17 memorandum will focus the Administration's immigration enforcement efforts on high priority cases, it will not provide categorical relief for any group. Thus, this process will not alleviate the need for passage of the DREAM Act or for larger reforms to our immigration laws. President Obama has called the DREAM Act the right thing to do for the young people it would affect, and the right thing to do for the country. Last December, I joined the President and several members of his Cabinet in urging the Congress to pass this important legislation. Earlier this year I was fortunate to be able to testify in favor of the Act. I continue to urge the 112<sup>th</sup> Congress to pass the DREAM Act as well as other necessary immigration reforms.

Thank you again for your letter. My office would be pleased to provide you with a briefing to discuss this process in greater detail. Identical responses have been sent to the Senators that co-signed your letter. Should you wish additional assistance, please do not hesitate to contact me at (202) 282-8203.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Janet Napolitano", with a stylized, flowing script.

Janet Napolitano

Enclosure



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August 18, 2011

# Fewer Youths to Be Deported in New Policy

By ROBERT PEAR

WASHINGTON — The Obama administration announced Thursday that it would suspend deportation proceedings against many illegal immigrants who pose no threat to national security or public safety.

The new policy is expected to help thousands of illegal immigrants who came to the United States as young children, graduated from high school and want to go on to college or serve in the armed forces.

White House and immigration officials said they would exercise “prosecutorial discretion” to focus enforcement efforts on cases involving criminals and people who have flagrantly violated immigration laws.

Under the new policy, the secretary of homeland security, Janet Napolitano, can provide relief, on a case-by-case basis, to young people who are in the country illegally but pose no threat to national security or to the public safety.

The decision would, through administrative action, help many intended beneficiaries of legislation that has been stalled in Congress for a decade. The sponsor of the legislation, Senator Richard J. Durbin of Illinois, the No. 2 Senate Democrat, has argued that “these young people should not be punished for their parents’ mistakes.”

The action would also bolster President Obama’s reputation with Latino voters as he heads into the 2012 election. Just a week ago the leaders of major Hispanic organizations criticized his record, saying in a report that Mr. Obama and Congress had “overpromised and underdelivered” on immigration and other issues of concern to Latino voters, a major force in some swing states.

The chairman of the House Judiciary Committee, Representative Lamar Smith, Republican of Texas, denounced the new policy.

“The Obama administration has again made clear its plan to grant backdoor amnesty to illegal

immigrants,” Mr. Smith said. “The administration should enforce immigration laws, not look for ways to ignore them. Officials should remember the oath of office they took to uphold the Constitution and the laws of the land.”

White House officials emphasized that they were not granting relief to a whole class of people, but would review cases one by one, using new standards meant to distinguish low- and high-priority cases.

“The president has said on numerous occasions that it makes no sense to expend our enforcement resources on low-priority cases, such as individuals” who were brought to this country as young children and know no other home, Ms. Napolitano said in a letter to Mr. Durbin.

She said that low-priority cases were “clogging immigration court dockets” and diverting enforcement resources away from individuals who pose a threat to public safety.

Mr. Durbin said he believed the new policy would stop the deportation of most people who would qualify for relief under his bill, known as the Dream Act (formally the Development, Relief and Education for Alien Minors Act).

Some experts have estimated that more than two million people might be eligible to apply for legal status under the Dream Act. Mr. Durbin’s office estimates that 100,000 to 200,000 could eventually earn citizenship, though the numbers are uncertain.

Under the new policy, the government will review 300,000 cases of people in deportation proceedings to identify those who might qualify for relief and those who should be expelled as soon as possible.

White House officials said the new policy could help illegal immigrants with family members in the United States. The White House is interpreting “family” to include partners of lesbian, gay and bisexual people.

Richard Socarides, a New York lawyer who was an adviser to President Bill Clinton on gay issues, said, “The new policy will end, at least for now, the deportations of gay people legally married to their same-sex American citizen partners, and it may extend to other people in same-sex partnerships.”

J. Kevin Appleby, director of migration policy at the United States Conference of Catholic Bishops, said the initiative would keep immigrant families together. “It is consistent with the teaching of the church that human rights should be respected, regardless of an immigrant’s legal status,” he said.

Cecilia Muñoz, a White House official who helped develop the new policy, said officials would suspend deportation proceedings in low-priority cases that, for example, involve “military veterans and the spouses of active-duty military personnel.”

Stephen W. Yale-Loehr, who teaches immigration law at Cornell, said the new policy could also benefit “illegal immigrants who were stopped for traffic violations and thrown into deportation proceedings, as well as people whose only violation of immigration law is that they stayed beyond the expiration of their visas or worked here illegally.” Ms. Napolitano said her agency and the Justice Department would do the case-by-case review of all people in deportation proceedings.

Those who qualify for relief can apply for permission to work in the United States and will probably receive it, officials said.

The new policy “will not provide categorical relief for any group” and “will not alleviate the need for passage of the Dream Act or for larger reforms to our immigration laws,” Ms. Napolitano said.

People in deportation proceedings stand to benefit most from the new policy. The new enforcement priorities also make it less likely that the government will begin such proceedings in the future against people who have no criminal records and pose no threat to national security.

White House officials said the new policy ratified guidance on “prosecutorial discretion” recently issued by John Morton, the director of immigration and customs enforcement at the Department of Homeland Security.

The Senate majority leader, Harry Reid, Democrat of Nevada, praised the new directive, saying it would allow federal agents to “focus on serious felons, gang members and individuals who are a national security threat, rather than college students and veterans who have risked their lives for our country.”

Roy H. Beck, the president of Numbers USA, a nonprofit group that wants to reduce legal and illegal immigration, said he could understand the decision to defer deportation in some cases. But he said the decision to grant work permits was distressing.

“This is a jobs issue,” Mr. Beck said. “The president is taking sides, putting illegal aliens ahead of unemployed Americans.”

*Julia Preston contributed reporting from Hershey, Pa.*