Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*.,
Defendants-Appellants.

NANCY GILL, *et al*.,
Plaintiffs-Appellees,

v.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

OFFICE OF PERSONNEL MANAGEMENT, *et al*.,
Defendants-Appellants/Cross-Appellees.

On Appeal from Final Orders of the U.S. District Court
for the District of Massachusetts

MOTION FOR LEAVE TO INTERVENE
OF THE BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") respectfully moves for leave to intervene in order to prosecute the appeal of the District Court's ruling that Section III of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 ("DOMA"), violates the equal protection component of the Fifth Amendment's Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[1]

The issue of Section III's constitutionality is presented in two of these three consolidated appeals: *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services, et al.*, No. 10-2204 ("*Massachusetts Case*"), and *Gill*

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[1] The House has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980s (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993), attached as Exhibit 1; Rule II.8, Rules of the House of Representatives, 112th Cong. (2011), *available at* http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf. While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory Group is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip decline to support the filing of this motion.

v. Office of Personnel Management, et al., No. 10-2207 ("*Gill Case*"). The cross-appeal filed by Dean Hara, *Hara v. Office of Personnel Management, et al.*, No. 10-2214 ("*Hara Case*"), does not present the issue of Section III's constitutionality and, accordingly, the House does not have an interest in the issues raised in the *Hara Case*.

Counsel for the House has conferred with Mary Bonauto, Esq. and Gary Buseck, Esq., counsel for appellees in the *Gill Case* (including Mr. Hara who is an appellee in that case, as well as the cross-appellant in the *Hara Case*); Maura T. Healey, counsel for the Commonwealth in the *Massachusetts Case*; and the Department of Justice ("Department"). Ms. Bonauto and Mr. Buseck informed us that their clients do not oppose this motion, provided that the Department withdraws all the equal protection arguments set forth in the Corrected Brief for the U.S. Department of Health and Human Services *et al*., Jan. 19, 2011 (ECF No. 0116160305) ("DOJ Brief"), either by submitting an amended brief which omits those arguments or by advising the Court of the specific pages in the DOJ Brief that are being withdrawn. Ms. Healey informed us that the Commonwealth does not consent to the motion and that it will file a response in the normal course. The Department informed us that the federal defendants-appellants do not oppose this motion to intervene for purposes of presenting arguments in support of the

constitutionality of Section III of DOMA, but they will be filing a response to explain their position.

BACKGROUND

The appellees in the *Gill Case* asserted that DOMA, as applied to them, violates the equal protection component of the Fifth Amendment's Due Process Clause. In the *Massachusetts Case*, the Commonwealth challenged DOMA on both Spending Clause and Tenth Amendment Grounds. The Spending Clause claim rests, in part, on the allegation that DOMA forces the Commonwealth to discriminate against its own citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment, in order to receive and retain federal funds in connection with two joint federal-state programs.

The District Court ruled for the appellees in both the *Gill* and *Massachusetts Cases*. *See Gill v. Office of Personnel Management, et al.*, No. 09-cv-10309-JLT (D. Mass. Aug. 12, 2010); *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services, et al.*, No. 09-cv-11156-JLT (D. Mass. Aug. 12, 2010). The federal defendants then appealed in both cases.

As the Court is aware, ordinarily it is the duty of the Executive Branch to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and of the Department in particular, in furtherance of that responsibility, to defend the constitutionality of duly-enacted federal laws when they are challenged in court.

DOMA, of course, is such a law. The statute was enacted by the 104th Congress in 1996. The House and Senate bills which became DOMA passed by votes of 342-67 and 85-14, respectively. *See* 142 Cong. Rec. H7505-06 (July 12, 1996) (House vote on H.R. 3396), *and* 142 Cong. Rec. S10129 (Sept. 10, 1996) (Senate vote on S. 1999). President Clinton signed the bill into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (Sept. 21, 1996).

The Department has repeatedly defended the constitutionality of Section III of DOMA in the intervening years, including in this very litigation. However, on February 23, 2011, the Attorney General abruptly reversed course and announced that the Department would no longer defend Section III of DOMA from challenges predicated on the equal protection component of the Fifth Amendment's Due Process Clause. *See* Letter from Eric Holder, Attorney General, to John A. Boehner, Speaker of the House (Feb. 23, 2011) ("Holder Letter"), attached to Letter from Benjamin S. Kingsley, Attorney Appellate Staff, to Margaret Carter, Clerk of the Court, Feb. 24, 2010 [sic] (ECF No. 00116175339).[2] On February 24, 2011, the Department specifically advised this Court that it would not defend

[2] In so announcing, the Attorney General acknowledged that (i) *nine* U.S. circuit courts of appeal have rejected his conclusion that sexual orientation classifications are subject to a heightened standard of scrutiny under the equal protection analysis, *id*. at 3–4 & nn.4–6, and (ii) "professionally responsible arguments" can be advanced in defense of the statute, *id*. at 5.

Section III's constitutionality in these consolidated cases. *See* Letter from Tony West, Assistant Attorney General, to Margaret Carter, Clerk of the Court (Feb. 24, 2011) ("West Letter"), attached to Letter from Benjamin S. Kingsley, Attorney Appellate Staff, to Margaret Carter, Clerk of the Court, Feb. 24, 2010 [sic] (ECF No. 0116175339).

At the same time, the Department articulated its intent to "provide Congress a full and fair opportunity to participate in the litigation [of these cases]," Holder Letter at 5–6, and its intent to "continue to represent the interests of the United States" in this litigation, West Letter at 1, which we understand means the Department will take full responsibility for litigating issues other than the issue of DOMA's constitutionality under the equal protection component of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

On March 9, 2011, in response to the Department's decision to turn its back on its responsibilities, the House formally determined to defend the statute in cases in which DOMA'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 [Section 3 of DOMA]"), *available at* http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539.

While the House sometimes appears in judicial proceedings as *amicus curiae*,[3] it also intervenes in judicial proceedings where appropriate. *See, e.g.*, *North v. Walsh*, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); *Am. Fed'n of Gov't Emps. v. United States*, 634 F. Supp. 336, 337 (D.D.C. 1986). In particular, the House frequently has intervened to defend the constitutionality of federal statutes when the Department has declined to do so. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1545 (10th Cir. 1991); *Synar v. United States*, 626 F. Supp. 1374, 1378-79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Ameron, Inc. v. U.S. Army Corp of Eng'rs*, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986); *Barnes v. Carmen*¸ 582 F. Supp. 163, 164 (D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21, 22 (D.C. Cir. 1984), *rev'd on mootness grounds sub nom. Burke v.*

[3] *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 430 n.* (2000); *Raines v. Byrd*, 521 U.S. 811, 818 n.2 (1997); *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 154 (1989); *Morrison v. Olson*, 487 U.S. 654, 659 (1988); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 223 (1986); *Helstoski v. Meanor*, 442 U.S. 500, 501 (1979); *United States v. Helstoski*, 442 U.S. 477, 478 (1979); *United States v. Renzi*, Nos. 10-10088, 10-10122 (9th Cir. argued Feb. 17, 2011); *In re: Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009); *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 3 (D.C. Cir. 2006) (en banc); *Beverly Enters. v. Trump*, 182 F.3d 183, 186 (3d Cir. 1999); *United States v. McDade*, 28 F.3d 283, 286 (3d Cir. 1994); *In the Matter of Search of Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 104–06 (D.D.C. 2006), *rev'd sub nom. United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007).

Barnes, 479 U.S. 361, 362 (1987); *In re Prod. Steel, Inc.*, 48 B.R. 841, 842 (M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 233 (M.D.N.C. 1985); *In re Tom Carter Enters., Inc.*, 44 B.R. 605, 606 (C.D. Cal. 1984); *In re Benny*, 44 B.R. 581, 583 (N.D. Cal. 1984), *aff'd in part & dismissed in part*, 791 F.2d 712 (9th Cir. 1986).

ARGUMENT

I. The House Is Entitled to Intervene to Defend DOMA on Equal Protection Grounds.

There is no Federal Rule of Appellate Procedure that specifically governs motions to intervene. However, this Circuit has held that motions to intervene in appellate proceedings should be "guide[d] . . . by analogy to Rule 24 of the Federal Rules of Civil Procedure." *Algonquin Gas Transmission Co. v. Fed. Power Comm'n*, 201 F.2d 334, 342 App. (1st Cir. 1953). Other circuit courts have adopted the same position. *See, e.g.*, *Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir. 2010) ("On appeal, we may grant either intervention of right or permissive intervention."); *Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1006-08 (6th Cir. 2006) (allowing Ohio Attorney General to intervene, pursuant to Rule 24, to defend constitutionality of state statute).

The House meets the Rule 24 requirements for intervention in this case.

A. Intervention Is Appropriate Under Rule 24(a)(2).

Federal Rule 24(a)(2) provides that:

> On timely motion, the court must permit anyone to intervene who:
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Under the law of this Circuit, four criteria must be satisfied before intervention as of right under this rule will be granted: (1) the motion to intervene must be timely; (2) the putative intervenor must have an interest relating to the property or transaction that forms the basis of the ongoing suit; (3) the disposition of the action threatens to create a practical impediment to the intervenor's ability to protect its interest; and (4) no existing party adequately represents the intervenor's interests. *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 544–45 (1st Cir. 2006) (citing *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998)). The House easily satisfies each of these requirements.

First, the House's motion is timely. The Attorney General only announced on February 23 the decision to no longer defend Section III of DOMA from equal protection challenges, and the House only determined on March 9 to accept the responsibility for defending the statute. On March 30, this Court ordered these consolidated cases held in abeyance until June 1 to allow the House the opportunity to file an appearance or otherwise seek to participate in these cases.

See Order of Court at 2 (Mar. 30, 2011) (ECF No. 0016189797). The Court also requested a status report from the Department by June 1 to address, among other things, the timing of any proposed submissions by the House. *Id*. The House is now moving to intervene in advance of June 1, and also including with this motion a proposed briefing schedule in order to facilitate the prompt resolution of the case. *See infra* Part III. Accordingly, the House's motion is timely.

Second, the House has a strong interest in defending the constitutionality of its legislative handiwork, given the House's central constitutional role in creating the legislation, U.S. Const. art. I, §§ 1, 7, 8, particularly where, as here, the House bill that became DOMA passed the House by a substantial and bipartisan majority a mere 16 years ago. *See supra* p. 4. "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 the plaintiffs that the statute is inapplicable or unconstitutional." *Chadha*, 462 U.S. at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946)).

Third, the disposition of this case obviously threatens the House's ability to protect its interest in seeing that DOMA's constitutionality is upheld because (i) the appellees contend that Section III is unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, and (ii) the Department now

refuses to defend against that challenge. Therefore, unless the House intervenes, it will have *no* ability to protect its constitutional interests.

And fourth, for exactly the same reason, none of the existing parties represent the House's interest in defending the constitutionality of Section III of DOMA against equal protection challenges. *See Chadha*, 462 U.S. at 940. While there is normally a rebuttable presumption that the government will adequately defend an action, that presumption is overcome where, as here, there is a divergence of interest between the governmental entity charged with defending an action (here, the Department) and the intervenor (here, the House). *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 35–36 (1st Cir. 2000).

While the Department has not technically withdrawn its brief in this matter, or more specifically the equal protection arguments made in that brief—*see* Joint Proposal Regarding Further Proceedings at 3 (Mar. 18, 2011) (ECF No. 00116185214) ("[T]he Department does not intend to withdraw its opening brief or to file a new, superseding opening brief.")—that is of no moment insofar as the House's motion to intervene is concerned. This is necessarily so because the equal protection arguments made in the DOJ Brief have been publicly repudiated at the very highest levels of the Department, and the Department has stated explicitly to this Court that it no longer supports those arguments:

- *See* Holder Letter at 1 ("[T]he President of the United States has made the determination Section 3 of [DOMA], as applied to same-sex couple who are legally married under state law, violates the equal protection component of the Fifth Amendment."); *id*. at 6 ("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*.") (emphasis added).
- *See* West Letter at 1 ("[T]he Department will cease its defense of Section 3 in [the *Gill* and *Massachusetts*] cases.").
- *See* Letter from Ronald Weich, Assistant Attorney General, to Kerry Kircher, General Counsel, U.S. House of Representatives at 1 (Feb. 25, 2011) (identifying *Gill* and *Massachusetts Cases* as among those "where Section 3 of [DOMA] has been challenged and where the Department of Justice will cease its defense of Section 3"), attached as Exhibit 2.

In short, the Department's disavowal of its equal protection arguments, and its expressed intent not to defend DOMA on that ground, could not be clearer, and, accordingly, the Court should regard those arguments as effectively withdrawn. It follows that intervention by the House as of right under Rule 24(a)(2) is appropriate.

B. Intervention Is Also Appropriate Under Rule 24(a)(1) and/or Rule 24(b)(1)(A).

Rule 24(a)(1) provides for intervention as of right where the proposed intervenor "is given an unconditional right to intervene by a federal statute," while Rule 24(b)(1)(A) provides for permissive intervention where the proposed intervenor "is given a conditional right to intervene by a federal statute." A "federal statute," namely, 28 U.S.C. § 2403, clearly contemplates that the federal government will defend the constitutionality of an act of Congress when challenged:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn into question, the court . . . *shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.* The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liability of a party as to the court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(a) (emphasis added). Here, of course, the United States, as well as agencies and officers of the United States, are parties, but in light of the Department's refusal to play the role contemplated by § 2403(a), the House should be allowed to intervene to discharge that function. *See Chadha*, 462 U.S. at 940;

see also 28 U.S.C. § 530D(b)(2) (specifically contemplating that House and/or Senate may intervene to defend constitutionality of federal statute where Justice Department declines to do so).

Ordinarily the Department not only intervenes under § 2403(a) where appropriate, but also more generally represents the United States (and its officers and agencies) in the defense of such challenged statutes. *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). However, where, as here, the Department refuses to defend a challenged statute, the Supreme Court has held that the Legislative Branch may, if it wishes, accept that responsibility: "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." *Chadha*, 462 U.S. at 940. That is the precise situation here. Moreover, as noted above, numerous other courts have followed *Chadha's* direction and permitted the House to intervene to defend the constitutionality of federal statutes. *See supra* pp. 6-7.

Accordingly, whether the Court construes 28 U.S.C. § 2403(a) as vesting the Legislative Branch with an "unconditional right to intervene," Rule 24(a)(1), or a

"conditional right to intervene," Rule 24(b)(1)(A), intervention here by the House to defend the constitutionality of Section III of DOMA is clearly appropriate.

II. The House Has Standing.

We expect the Department will contend, as it has in other cases, that the House lacks standing to intervene. Here, the Department is wrong in so contending for three reasons.

1. As an initial matter, so long as the Department of Health and Human Services, the Office of Personnel Management, and the other federal defendants remain parties to this action—and they will remain parties, regardless of the role the Department chooses to play or not play in this litigation, until they are dismissed out or the case concludes, neither of which has occurred—the House need not demonstrate any standing whatsoever. *See United States v. AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992) ("intervenor's standing was immaterial in the lower court [because of the presence of original parties]," but when intervenor was sole litigant seeking to appeal district court's decision, "its standing (or lack thereof) took on critical importance"); *see also U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to cases and controversies. The existence of a case or controversy having been established as between the [existing parties], there was no need to impose the

standing requirement upon the proposed intervenor [defendant].") (quotation marks, citations, and brackets omitted); *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) (Article III standing not required for defendant intervention where ongoing case or controversy); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (same); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (same).

2. Second, although the Court need not reach this issue, it is clear from *Chadha* that the House does have standing. In *Chadha*, a private party challenged the constitutionality of a federal statute that the Department declined to defend. After the Ninth Circuit ruled for the plaintiff, the House and Senate moved to intervene for the purpose of filing a petition for certiorari. *Chadha*, 462 U.S. at 930 n.5. The Ninth Circuit granted that motion, and the Supreme Court granted the subsequent House and Senate petitions for certiorari, holding—over the Department'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] 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 the Department 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.

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 the Department has refused to defend, including but not limited to: *In re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986) ("In response [to the Department's support for plaintiff's constitutional challenge to the Bankruptcy and Federal Judgeship Act of 1984], the United States Senate and the House Bipartisan Leadership Group intervened to defend the constitutionality of the 1984 Act."), and *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 879, 880 (3d Cir. 1986) (President Reagan declared Competition in Contracting Act ["CICA"] unconstitutional and "upon the advice of the Attorney General . . . ordered the executive department not to observe it"; the district court, "grant[ed] the motion of the Senate, the Speaker, and the Bipartisan Leadership Group of the House to intervene as plaintiffs to support the constitutionality of CICA."), *modified* 809 F.2d 979 (3d Cir. 1986); *see also Adolph Coors Co.*, 944 F.2d at 1545; *Barnes*, 582 F. Supp. at 164; *In re Moody*, 46

B.R. at 233; *In re Tom Carter Enters., Inc.*, 44 B.R. at 606; *In re Benny*, 44 B.R. at 583.

3. Finally, and in any event, in this Circuit, "an applicant who satisfies the 'interest' requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well." *Cotter*, 219 F.3d at 34 (citing *Transam. Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997)); *see also Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 110 (1st Cir. 1999) ("Although the two are not identical, the 'interest' required under Rule 24(a) has some connection to the interest that may give the party a sufficient stake in the outcome to support standing under Article III."). As discussed above, the House clearly satisfies the interest requirement of Rule 24(a)(2). *See supra* pp. 8-10. Moreover, this Court has repeatedly held that intervenors met the "rather modest requirements of Article III." *Daggett* 172 F.3d at 109, 114 (holding that defendant-intervenors possessed Article III standing and explaining that it was therefore unnecessary to decide whether an intervenor as of right must possess standing under Art. III); *see also Mangual v. Rotger-Sabat*, 317 F.3d. 45, 62 (1st Cir. 2003) (declining to decide the "complicated question" of whether standing is required to intervene if the original parties are still pursuing the case because "it is clear that [the intervenor] has sufficient standing under Article III").

III. Proposed Briefing Schedule

To permit the briefing and resolution of these consolidated cases to proceed as expeditiously as possible, the House proposes that the Court adopt the following schedule to govern the proceedings going forward:

July 1, 2011

- Opening Brief of Intervenor-Appellant House in *Gill* and *Massachusetts Cases*
- Revised or Amended Opening Brief of Federal Defendants/Appellants in *Gill* and *Massachusetts Cases* (non-equal protection issues), if any
- Opening Brief of Cross-Appellant Hara in *Hara Case*

August 1, 2011

- Response Brief of Plaintiffs/Appellees in *Gill* and *Massachusetts Cases*
- Response Brief of Federal Defendants/Cross-Appellees in *Hara Case*

August 15, 2011

- Reply Brief of Intervenor-Appellant House in *Gill* and *Massachusetts Cases*
- Reply Brief of Federal Defendants/Appellants in *Gill* and *Massachusetts Cases* (non-equal protection issues)
- Reply Brief of Cross-Appellant Hara in *Hara Case*

CONCLUSION

For all the foregoing reasons, the House's Motion to Intervene should be granted.

Respectfully submitted,

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May 20, 2011

CERTIFICATE OF SERVICE

On May 20, 2011, I filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit, using the appellate CM/ECF system, the foregoing Motion for Leave to Intervene of the Bipartisan Legal Advisory Group of the U.S. House of Representatives. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Kirsten W. Konar*
Kirsten W. Konar

EXHIBIT 1

Case: 10-2204 Document: 00116211257 Page: 2 Date Filed: 05/20/2011 Entry ID: 5552128

RULES

of the

HOUSE OF REPRESENTATIVES

EFFECTIVE FOR

ONE HUNDRED THIRD CONGRESS

PREPARED BY

DONNALD K. ANDERSON

Clerk of the House of Representatives

JANUARY 5, 1993

(Rev 1-5-93)

H940-3.

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RULES OF THE HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

RULE I

DUTIES OF THE SPEAKER

1. The Speaker shall take the Chair on every legislative day precisely at the hour to which the House shall have adjourned at the last sitting and immediately call the Members to order. The Speaker, having examined the Journal of the proceedings of the last day's sitting and approved the same, shall announce to the House his approval of the Journal, and the Speaker's approval of the Journal shall be deemed to be agreed to subject to a vote on agreeing to the Speaker's approval on the demand of any Member, which vote, if decided in the affirmative, shall not be subject to a motion to reconsider. It shall be in order to offer one motion that the Journal be read only if the Speaker's approval of the Journal is not agreed to, and such motion shall be determined without debate and shall not be subject to a motion to reconsider.

2. He shall preserve order and decorum, and, in case of disturbance or disorderly conduct in the galleries, or in the lobby, may cause the same to be cleared.

3. He shall have general control, except as provided by rule or law, of the Hall of the House, and of the corridors and passages and the disposal of the unappropriated rooms in that part of the Capitol assigned to the use of the House, until further order.

4. He shall sign all acts, addresses, joint resolutions, writs, warrants, and subpoenas of, or issued by order of, the House and decide all questions of order, subject to an appeal by any Member, on which appeal no Member shall speak more than once, unless by permission of the House. The Speaker is authorized to sign enrolled bills whether or not the House is in session.

5. (a) He shall rise to put a question, but may state it sitting; and shall put questions in this form, to wit: "As many as are in favor (as the question may be), say 'Aye'."; and after the affirmative voice is expressed, "As many as are opposed, say 'No'."; if he doubts, or a division is called for, the House shall divide; those in the affirmative of the question shall first rise from their seats, and then those in the negative. If any Member requests a recorded vote and that request is supported by at least one-fifth of a quorum, such vote shall be taken by electronic device, unless the Speaker in his discretion orders clerks to tell the names of those voting on each side of the question, and such names shall be recorded by electronic device or by clerks, as the case may be, and shall be entered in the Journal together with the names of those not voting. Members shall have not less than fifteen minutes to be counted from the ordering of the recorded vote or the ordering of clerks to tell the vote.

(b)(1) On any legislative day whenever a recorded vote is ordered or the yeas and nays are ordered, or a vote is objected to under clause 4 of rule XV on any of the following questions, the Speaker may, in his discretion, postpone further proceedings on each such question to a designated time or place in the legislative schedule on that legislative day in the case of the question of agreeing to the Speaker's approval of the Journal, or within two legislative days, in the case of the other questions listed herein:

(A) the question of passing bills;

(B) the question of adopting resolutions;

(C) the question of ordering the previous question on privileged resolutions reported from the Committee on Rules;

(D) the question of agreeing to conference reports;

(E) the question of agreeing to motions to suspend the rules; and

(F) the question of agreeing to motions to instruct conferees as provided in clause 1(c) of rule XXVIII: *Provided, however,* That said question shall not be put if the conference report on that measure has been filed in the House.

(2) At the time designated by the Speaker for further consideration of proceedings postponed under subparagraph (1), the Speaker shall put each question on which further proceedings were postponed, in the order in which that question was considered.

(3) At any time after the vote has been taken on the first question on which the Speaker has postponed further proceedings under this paragraph, the Speaker may, in his discretion, reduce to not less than five minutes the period of time within which a roll call vote by electronic device on the question may be taken without any intervening business on any or all of the additional questions on which the Speaker has postponed further proceedings under this paragraph.

(4) If the House adjourns before all of the questions on which further proceedings were postponed under this paragraph have been put and determined, then, on the next following legislative day the unfinished business shall be the disposition of all such questions, previously undisposed of, in the order in which the questions were considered.

6. He shall not be required to vote in ordinary legislative proceedings, except where his vote would be decisive, or where the House is engaged in voting by ballot; and in cases of a tie vote the question shall be lost.

7. He shall have the right to name any Member to perform the duties of the Chair, but such substitution shall not extend beyond three legislative days, except that with the permission of the House he may name a Member to act as Speaker pro tempore only to sign enrolled bills and joint resolutions for a period of time specified in the designation, notwithstanding any other provision of this clause: *Provided, however,* That in case of his illness, he may make such appointment for a period not exceeding ten days, with the approval of the House at the time the same is made; and in his absence and omission to make such appointment, the House shall proceed to elect a Speaker pro tempore to act during his absence.

8. He shall have the authority to designate any Member, officer or employee of the House of Representatives to travel on the business of the House of Representatives, as determined by him, within or without the United States, whether the House is meeting, has recessed or has adjourned, and all expenses for such travel may be paid for from the contingent fund of the House on vouchers solely approved and signed by the Speaker. However, expenses may not be paid from the contingent fund for travel of a Member after the date of the general election of Members in which the Member has not been elected to the succeeding Congress, or in the case of a Member who is not a candidate in such general election, the earlier of the date of such general election or the adjournment sine die

of the last regular session of the Congress.

9. (a) He shall devise and implement a system subject to his direction and control for closed circuit viewing of floor proceedings of the House of Representatives in the offices of all Members and committees and in such other places in the Capitol and the House Office Buildings as he deems appropriate. Such system may include other telecommunications functions as he deems appropriate. Any such telecommunications function shall be subject to rules and regulations issued by the Speaker.

(b)(1) He shall devise and implement a system subject to his direction and control for complete and unedited audio and visual broadcasting and recording of the proceedings of the House of Representatives. He shall provide for the distribution of such broadcasts and recordings thereof to news media, the storage of audio and video recordings of the proceedings, and the closed captioning of the proceedings for hearing-impaired individuals.

(2) All television and radio broadcasting stations, networks, services, and systems (including cable systems) which are accredited to the House radio and television correspondents' galleries, and all radio and television correspondents who are accredited to the radio and television correspondents' galleries shall be provided access to the live coverage of the House of Representatives.

(3) No coverage made available under this clause nor any recording thereof shall be used for any political purpose.

(4) Coverage made available under this clause shall not be broadcast with commercial sponsorship except as part of bona fide news programs and public affairs documentary programs. No part of such coverage or any recording thereof shall be used in any commercial advertisement.

(c) He may delegate any of his responsibilities under this clause to such legislative entity as he deems appropriate.

10. There is established in the House of Representatives an office to be known as the Office of the Historian of the House of Representatives.

11. There is established in the House of Representatives an office to be known as the Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. The Speaker shall appoint and set the annual rate of pay for employees of the Office of General Counsel.

12. To suspend the business of the House for a short time when no question is pending before the House, the Speaker may declare a recess subject to the call of the Chair.

Rule II

ELECTION OF OFFICERS

There shall be elected by a viva voce vote, at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, and Chaplain, each of whom shall take an oath to support the Constitution of the United States, and for the true and faithful discharge of the duties of his office to the best of his knowledge and ability, and to keep the secrets of the House; and each shall appoint all of the employees of his department provided for by law. The Clerk, Sergeant-at-Arms, and Doorkeeper may be removed by the House or by the Speaker.

Rule III

DUTIES OF THE CLERK

1. The Clerk shall, at the commencement of the first session of each Congress, call the Members to order, proceed to call the roll of Members by States in alphabetical order, and, pending the election of a Speaker or Speaker pro tempore, preserve order and decorum, and decide all questions of order subject to appeal by any Member.

2. He shall make and cause to be printed and delivered to each Member, or mailed to his address, at the commencement of every regular session of Congress, a list of the reports which it is the duty of any officer or Department to make to Congress, referring to the act or resolution and page of the volume of the laws or Journal in which it may be contained, and placing under the name of each officer the list of reports required of him to be made.

3. He shall note all questions of order, with the decisions thereon, the record of which shall be printed as an appendix to the Journal of each session; and complete, as soon after the close of the session as possible, the printing and distribution to Members, Delegates, and the Resident Commissioner from Puerto Rico of the Journal of the House, together with an accurate and complete index; retain in the library at his office, for the use of the Members, Delegates, the Resident Commissioner from Puerto Rico and officers of the House, and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; send, at the end of each session, a printed copy of the Journal thereof to the executive and to each branch of the legislature of every State; deliver or mail to any Member, Delegate, or the Resident Commissioner from Puerto Rico an extra copy, in binding of good quality, of each document requested by that Member, Delegate, or the Resident Commissioner which has been printed, by order of either House of the Congress, in any Congress in which he served; attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House, certify to the passage of all bills and joint resolutions.

4. He shall, in case of temporary absence or disability, designate an official in his office to sign all papers that may require the official signature of the Clerk of the House, and to do all other acts except such as are provided for by statute, they may be required under the rules and practices of the House to be done by the Clerk. Such official acts, when so done by the designated official, shall be under the name of the Clerk of the House. The said designation shall be in writing, and shall be laid before the House and entered on the Journal.

5. The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session.

6. He shall supervise the staff and manage any office of a Member who is deceased, has resigned, or been expelled until a successor is elected and shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the Member representing such district or other reason. Whenever the Clerk is acting as a supervisory authority over such staff, he shall have authority to terminate employees; and he may appoint, with the approval of the Committee on House Administration, such staff as is required to operate the office until a successor is elected. He shall maintain on the House payroll and supervise in the same manner staff appointed pursuant to section 800 of Public Law 91-655 (2 U.S.C. 31b-5) for sixty days following the death of a former Speaker.

Rule IV

DUTIES OF THE SERGEANT-AT-ARMS

1. It shall be the duty of the Sergeant-at-Arms to attend the House during its sittings, to maintain order under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker.

2. The symbol of his office shall be the mace, which shall be borne by him while enforcing order on the floor.

Rule V

DUTIES OF THE DOORKEEPER

1. The Doorkeeper shall enforce strictly the rules relating to the privileges of the Hall and be responsible to the House for the official conduct of his employees.

EXHIBIT 2

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 25, 2011

Mr. Kerry Kircher
General Counsel
U.S. House of Representatives
Washington, DC 20515

Re: Information on Defense of Marriage Act Litigation

Dear Mr. Kircher:

Pursuant to the Attorney General's letter to you under 28 U.S.C. § 530D, dated February 23, 2011, we are providing follow-up information concerning those pending cases where Section 3 of the Defense of Marriage Act has been challenged and where the Department of Justice will cease its defense of Section 3. While we will remain a party to these cases in order to represent the interests of the United States, we are notifying you of the details of these specific cases in order to provide Congress a full and fair opportunity to participate in the litigation of them. A list of all pending cases is enclosed, along with significant upcoming litigation deadlines in those cases. Should you have any questions regarding participation in these matters, please direct them to Judith C. Appelbaum, Deputy Assistant Attorney General, Office of Legislative Affairs, at 202-514-2141.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

Pending cases where the Defense of Marriage Act is being challenged:

Bishop v. United States, No. 04-848 (N.D. Okla.)

- No impending deadlines, but motion to dismiss pending decision.

Commonwealth of Massachusetts v. U.S. Dep't of Health and Human Services, et al., No. 09-11156 (D. Mass), *on appeal*, No. 10-2204 (1st Cir.), *consolidated with Gill v. OPM*, Nos. 10-2207 & 10-2214.

- Appellees' brief for plaintiffs due March 1, 2011
- Consolidated reply brief for defendants due April 4, 2011

Dragovich, et al. v. Department of the Treasury, et al., No. 10-1564 (N.D. Cal.)

- Defendants' discovery on class certification due February 28, 2011
- Plaintiff's motion for class certification due April 14, 2011
- Defendants' response to motion for class certification due May 12, 2011
- Plaintiffs' reply in support of motion for class certification due May 26, 2011
- Hearing on class certification scheduled for June 9, 2011
- Discovery closes on September 30, 2011
- Defendants' summary judgment brief due October 6, 2011
- Plaintiffs' opposition/cross motion for summary judgment due November 3, 2011
- Defendants' reply/opposition to cross motion due December 1, 2011
- Plaintiffs' reply due December 22, 2011
- Hearing on the cross motions for summary judgment scheduled for January 5, 2012

Gill, et al. v. Office of Personnel Management, et al., No. 09-10309 (D. Mass.), *on appeal*, Nos. 10-2207 & 10-2214 (1st Cir.), *consolidated with Commonwealth of Massachusetts v. HHS*, No. 10-2204.

- Plaintiff's brief as appellee due March 1, 2011
- Consolidated reply brief of defendants due April 4, 2011

Golinski v. Office of Personnel Management, No. 10-00257 (N.D. Cal.)[1]

- Response to court inquiry due February 28, 2011

Hara v. Office of Personnel Management, No. 09-3134 (Fed. Cir.)

- No impending deadlines

Lui v. Holder, No. 09-72068 (9th Cir.)

- Case stayed pending administrative action and no impending deadlines

Pedersen et al. v. OPM et al., No. 10-CV-1750 (D. Conn.)

- Defendants' motion to dismiss due March 11, 2011
- Plaintiffs' opposition and cross-motion for judgment on pleadings or summary judgment due March 31, 2011
- Defendants' reply and opposition to plaintiffs' brief due May 16, 2011.
- Plaintiffs' reply brief due June 20, 2011

Torres-Barragan v. Holder, No. 10-55768 (9th Cir.), *consolidated with* Nos. 08-73745 & 09-71226 for purposes of calendaring

- Defendant's brief as appellee due on March 28, 2011

Torres-Barragan v. Holder, Nos. 08-73745 & 09-71226 (9th Cir.), *consolidated with* No. 10-55768 for purposes of calendaring

- Fully briefed and awaiting oral argument

Windsor v. United States, No. 10-CV-8435 (S.D.N.Y.)

- Defendant's motion to dismiss due March 11, 2011
- Plaintiff's opposition to motion dismiss and cross-motion for summary judgment due April 11, 2011
- Defendant's reply in support of its motion to dismiss and government's motion, if any, to stay briefing and consideration of plaintiff's cross-motion for summary judgment due April 25, 2011
- If no motion to stay is filed by the government, then opposition to plaintiff's motion for summary judgment due May 9, 2011

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[1] While this case does not assert a direct challenge to the constitutionality of Section 3 of DOMA, the district court previously ordered supplemental briefing on this issue, and the parties provided such briefing.