

Congress of the United States
Washington, DC 20515

March 26, 2012

The Honorable John A. Boehner
Speaker of the House
H-232, The Capitol
Washington, D.C. 20515

Dear Mr. Speaker,

We write to bring your attention to another court decision declaring Section 3 of the “Defense of Marriage Act” (DOMA) unconstitutional and to again urge you to work with us to repeal this harmful law rather than prolonging it through litigation. In the alternative, we again request that you arrange for a briefing regarding the continued defense of this law in court by outside counsel retained at your direction following the divided 3-2 vote of the Bipartisan Legal Advisory Group (BLAG), and over the strong objection of the Democratic Leaders Pelosi and Hoyer.

On February 22, 2012, Judge Jeffrey S. White ruled that Section 3 of DOMA fails heightened scrutiny and cannot even survive rational basis review because the law does not further any conceivable federal interest. See *Golinski v. OPM*, No. No. C 10-00257, 2012 WL 569685, at *26 (N.D. Cal. Feb. 22, 2012) (“after concluding that neither the law nor the record can sustain any of the interests suggested, the Court, having tried on its own, cannot conceive of any additional interests that DOMA might further.”). Judge White joins Judge Joseph L. Tauro, who also declared the law unconstitutional after finding that “the government’s proffered rationales, past and current, are without ‘footing in the realities of the subjected addressed by [DOMA].’ . . . [T]his law lacks a rational basis to support it.” *Gill v. OPM*, 699 F.Supp.2d 374, 396 (D. Mass. 2010). At your direction, outside counsel is appealing these decisions, making additionally urgent our request that you to reconsider the continued defense of this law.

As we noted in our previous letters of April 4, 2011 and September 26, 2011, we have long believed that DOMA is unconstitutional. There simply is no legitimate federal interest served by denying married same-sex couples the federal responsibilities and rights that other married couples receive, and the harm caused to these families is unjustifiable. Two federal courts have agreed, and it is no longer credible to claim that the law is not constitutionally suspect.

It has been fifteen years since Congress enacted DOMA, and the materials and arguments being made to defend the law do not withstand the test of time or scrutiny. We already expressed concern in our September 26, 2011 letter that the outside counsel retained at your direction are making arguments on behalf of the House that are not supportable. As we noted then, it is incumbent upon all lawyers – especially those paid for by taxpayers and responsible for representing a branch of our government – to undertake representation in an objective manner that is factually and legally sound.

Judge White’s recent decision indicates that our concerns are well-founded. For example, despite clear and overwhelming peer-reviewed research demonstrating that children raised by gay

and lesbian parents are as healthy and well-adjusted as children raised by heterosexual parents, outside counsel that purports to represent the House continues to argue that DOMA furthers Congress's interest in procreation and child-rearing. This argument is demeaning and harmful to many families in this country; it is also without legitimate empirical support. The reliance by BLAG's lawyers on non-scientific online articles and critiques that overlook relevant research and selectively analyze existing data is not acceptable, and certainly not sufficient in a court of law. *See Golinski*, 2012 WL 569685, at *17 (characterizing one source relied upon by BLAG's counsel as "a three-page, non-scientific article by an author with no professional expertise in child development, published by a popular online magazine without peer review"); *id.* (describing another source as "neither a study nor published in a peer-reviewed journal and its questionable analysis is based on outdated and selectively-chosen data").

These arguments should be abandoned. The United States House of Representatives should not be making harmful and baseless arguments that demean its credibility, and that of the American people.

We also again ask that you arrange for a briefing by the outside counsel that you have retained so that interested Members have the chance to hear from these lawyers regarding their legal defense of this law, and have an opportunity to express concerns with that defense directly to these lawyers. If the Republican leadership is willing to authorize \$1.5 million in taxpayer funds to defend this harmful law, and if counsel continues to purport to represent the House as an institution, then all Members are clients and, as such, are entitled to such a briefing.

As we have explained before, this is particularly important in light of the harm that DOMA imposes on married same-sex couples and their families, and the fact that this time-consuming and costly litigation is being paid for by the American people. At a time when families are struggling to make ends meet and asking Congress to focus on jobs, the economy, and federal spending, all Members should be concerned that taxpayers dollars are being used to pay costly legal fees to make arguments that lack adequate factual or legal support, in pursuit of a law that is not worthy of a defense.

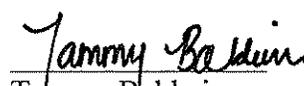
Thank you for your assistance with this matter, and we look forward to your prompt reply.

Best regards,


Jerrold Nadler
Member of Congress


John Conyers
Member of Congress


Barney Frank
Member of Congress


Tammy Baldwin
Member of Congress


Jared Polis
Member of Congress


David Cicilline
Member of Congress