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February 8, 2012

By Hand

The Honorable Barbara S. Jones
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Windsor v. *United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

On behalf of plaintiff, Edith Schlain Windsor, we respectfully submit this letter to bring to the Court's attention yesterday's ruling issued by the United States Court of Appeals for the Ninth Circuit in *Perry* v. *Brown*, No. 10-16696 (9th Cir. Feb. 7, 2012). The court in *Perry* held that California's Proposition 8, which prohibits marriage between same-sex couples, is unconstitutional, reasoning that laws that single out gays and lesbians as a class solely "for disfavored legal status" are unconstitutional under *Romer* v. *Evans*, 517 U.S. 620 (1996). *Perry*, at 76.

While the issues presented in *Perry* were different than those presented in this case, which is an equal protection challenge to Section 3 of the Defense of Marriage Act ("DOMA"), we respectfully direct the Court's attention to certain aspects of the Ninth Circuit's decision that are relevant, including its holding that its analysis was controlled by *Romer*, *id.* at 46, and that under *Romer*, gays and lesbians cannot be singled out "for disfavored legal status." *Id.* at 44 (quoting *Romer*, 517 U.S. at 633).

The Ninth Circuit also recognized that where the government acts to exclude same-sex couples from existing protections, the appropriate question under equal protection analysis is what government interest is served by that exclusion. *Id.* at 59–63; *see, e.g.*, *id.* at 59 ("[T]he question is whether there is a legitimate governmental interest in *withdrawing* access to marriage from same-sex couples.") (emphasis in original). The court recognized that Proposition 8 excluded same-sex couples from marriage, a right they previously "had enjoyed on equal terms with all other citizens." *Id.* at 51. Here too, Section 3 of DOMA altered existing federal law, which had recognized all valid state marriage for federal purposes, to exclude married same-sex couples from recognition.

In addition, the Ninth Circuit considered and rejected numerous interests that the appellants claimed were advanced by Proposition 8, holding that no legitimate state interest was furthered by the law. *Id.* at 55; *see, e.g.*, *id.* at 63 ("[T]he argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of oppose-sex marital relationships lacks any . . . footing in reality."); *id.* at 56–63 (rejecting asserted advancement of putative interest in "responsible procreation and childrearing"); *id.* at 64–66 (rejecting putative interest in "proceeding with caution" on changes to definition of "marriage").

Finally, the court held that "[a]bsent any legitimate purpose," the "inevitable inference" was that Proposition 8 was motivated solely by animus towards and "disapproval of gays and lesbians as a class." *Id.* at 72. The Ninth Circuit held that the law "sen[t] a message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status[,]" and "enact[ed] nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class." *Id.* at 73. The court held that "[e]nacting a rule into law based solely on the disapproval of a group . . . 'is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.'" *Id.* at 74 (quoting *Romer*, 517 U.S. at 635).

We enclose a copy of the *Perry* decision for the Court's reference.

Respectfully submitted,

Roberta Kaplan /NPK

Roberta A. Kaplan

Enclosure

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