UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA, Claimant-Appellant, v. ERIC K. SHINSEKI, Secretary of Veterans Affairs, Respondent-Appellee, and BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor-Appellee.	Vet. App. No. 11-3083

INTERVENOR-APPELLEE'S MOTION TO POSTPONE NOVEMBER 29, 2012 ORAL ARGUMENT FOR GOOD CAUSE PENDING U.S. SUPREME COURT RULING ON EIGHT PETITIONS FOR WRIT OF CERTIORARI

Pursuant to Rule 26(b), Intervenor-Appellee Bipartisan Legal Advisory Group of the U.S. House of Representatives (the "House") respectfully urges this Court to postpone for forty-five days the November 29, 2012 oral argument currently scheduled in this action, pending the U.S. Supreme Court's disposition of eight petitions for writ of certiorari, which the Court recently announced will be considered during its November 20, 2012 conference.[1] Accordingly, in the interest of judicial and party economy, as

[1] Pursuant to Rule 27(a)(5), the House has consulted with the other parties

(*Continued . . . .*)

detailed herein, the House requests that the Court reschedule the hearing in this case for a date certain during the Court's January oral argument term. As this Court is aware, this appeal primarily concerns the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, and 38 U.S.C. §101(31) under the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g.*, Claimant-Appellant's Principal Br. at 1, 4-28 (Apr. 19, 2012). This Court is scheduled to hear argument on November 29, 2012, on the constitutionality of DOMA Section 3, as raised in the following briefs: (i) Appellant's Principal Brief (Apr. 19, 2012); (ii) Brief of Appellee Secretary of Veterans Affairs (June 11, 2012); (iii) Brief of Intervenor-Appellee Bipartisan Legal Advisory Group of the U.S. House of Representatives (Aug. 31, 2012); (iv) Reply Brief of Appellee Secretary of Veterans Affairs (Sept. 14, 2012); and (v) Appellant's Reply Brief (Sept. 14, 2012).[2] *See* October 17, 2012 Order.

The United States Supreme Court will consider, on November 20, 2012, eight petitions for certiorari in four cases, all of which directly concern the constitutionality of Section 3 of DOMA – the same statute the constitutionality of which Claimant-Appellant challenges in this action. The eight certiorari petitions (the "DOMA Section 3 Petitions")

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concerning this motion. The Respondent-Appellee takes no position with regard to the House's request for postponement of the November 29 hearing. The Claimant-Appellant opposes the request.

The House and Claimant-Appellant have not previously sought a postponement of this oral argument. On October 17, 2012, this Court granted Respondent-Appellee's motion to reschedule an oral argument set for November 15, 2012, postponing the argument by two weeks.

[2] Several amicus curiae briefs concerning the constitutionality of DOMA Section 3 are similarly pending before this Court.

are as follows:

- On June 29, 2012, the House asked the Supreme Court to review the First Circuit's decision in *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1 (1st Cir. 2012). *See* Pet. for a Writ of Cert., *Bipartisan Legal Advisory Grp. of the U.S. House of Representatives v. Gill*, No. 12-13 (S. Ct. June 29, 2012), 2012 WL 2586935; S. Ct. Docket, No. 12-13, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-13.htm (petition distributed for conference on Nov. 20, 2012).

- On July 3, 2012, the Executive Branch parties petitioned for a writ of certiorari in the same case. *See* Pet. for a Writ of Cert., *U.S. Dep't of HHS v. Massachusetts*, No. 12-15 (S. Ct July 3, 2012), 2012 WL 2586937; S. Ct. Docket Entries, No. 12-15, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-15.htm (petition distributed for conference on Nov. 20, 2012).

- On July 20, 2012, the Commonwealth of Massachusetts filed a "conditional" cross-petition for writ of certiorari in the same case. *See* Conditional Cross-Pet. for a Writ of Cert., *Massachusetts v. U.S. Dep't of HHS*, No. 12-97 (S. Ct. July 20, 2012), 2012 WL 3027167; S. Ct. Docket, No. 12-97, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-97.htm (petition distributed for conference on Nov. 20, 2012).

- On July 3, 2012, the Executive Branch party in *Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 15388 & 15409 (9th Cir.), petitioned for pre-judgment Supreme Court review in that case. *See* Pet. for a Writ of Cert. Before J., *Office of Pers. Mgmt. v. Golinski*, No. 12-16 (S. Ct. July 3, 2012), 2012 WL 2586938;[3] S. Ct. Docket, No. 12-16, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-16.htm (petition distributed for conference on Nov. 20, 2012).

- On July 16, 2012, the plaintiff in *Windsor v. United States*, Nos. 12-2335 & 12-2435 (2d Cir.), petitioned for pre-judgment Supreme Court review in that case. *See* Pet. for Writ of Cert. Before J., *Windsor v. United States*, No. 12-63 (S. Ct. July 16, 2012), 2012 WL 2904038; S. Ct. Docket, No. 12-63, *available*

[3] Karen Golinski, the plaintiff-appellee in that case, has supported the Executive Branch party's request for pre-judgment review. *See* Br. of the Resp't in Supp. of Pet. for Cert. Before J., *Office of Pers. Mgmt. v. Golinski*, No. 12-16 (S. Ct. July 25, 2012), 2012 WL 3027182.

at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-63.htm (petition distributed for conference on Nov. 20, 2012).

- On September 11, 2012, the Executive Branch party petitioned for a writ of certiorari in the same case. *See* Pet. for a Writ of Cert. Before J., *United States v. Windsor*, No. 12-307 (S. Ct. July 16, 2012), 2012 WL 3991414; S. Ct. Docket, No. 12-307, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm (petition distributed for conference on Nov. 20, 2012).

- On August 21, 2012, the plaintiffs in *Pedersen, et al. v. Office of Pers. Mgmt., et al*., Nos. 12-3273 & 12-3872 (2d Cir.), petitioned for pre-judgment Supreme Court review in that case. *See* Pet. for Writ of Cert. Before J., *Pedersen et al. v. Office of Pers. Mgmt., et al*., No. 12-231 (S. Ct. Aug. 21, 2012), 2012 WL 3613467; S. Ct. Docket, No. 12-231, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-231.htm (petition distributed for conference on Nov. 20, 2012).

- And, on September 11, 2012, the Executive Branch parties petitioned for a writ of certiorari in the same case. *See* Pet. for a Writ of Cert. Before J., *Office of Pers. Mgmt., et al. v. Pedersen et al.*, No. 12-302 (S. Ct. Sept. 11, 2012), 2012 WL 3991479; S. Ct. Docket, No. 12-302, *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-302.htm (petition distributed for conference on Nov. 20, 2012).

The Supreme Court is expected to announce on or before November 26, 2012 whether it has granted any of these eight petitions,[4] and a decision by that Court to review one or more lower court rulings on the constitutionality of DOMA Section 3 will have a

[4] The U.S. Supreme Court typically publishes its decisions regarding certiorari on the Monday after the Court considers the petitions in conference. Accordingly, the Court will likely issue a decision on or before November 26, 2012 regarding the eight DOMA Section 3 Petitions being considered at the November 20 conference. *See* Supreme Court Case Distribution Schedule, http://www.supremecourt.gov/casedistribution/casedistributionschedule.aspx ("Generally, if a case is considered at a Conference, viewers can expect that the disposition of a case will be announced on an Orders List that will be released at 9:30 a.m. the following Monday.").

direct and significant impact on the course of this litigation. Because the Supreme Court typically grants certiorari where, as here, the constitutionality of an Act of Congress is drawn into question and lower courts have issued conflicting rulings, the Court is likely to grant one of the eight petitions under consideration at the November 20 conference. *See, e.g.*, S. Ct. R. 10. Given the importance of the constitutional question presented by the DOMA Section 3 Petitions and this appeal, other courts have noted that "Supreme Court review of DOMA [Section 3] is highly likely." *Massachusetts*, 682 F.3d at 17, *petition for cert. filed*, No. 12-15, 2012 WL 2586937 (S. Ct. July 3, 2012). Indeed, the Ninth Circuit – prior to the Supreme Court even setting the November 20 conference date – *sua sponte* vacated oral argument in a DOMA Section 3 appeal scheduled for September 10, 2012, holding the case "in abeyance pending resolution of the petition of certiorari" and, "if certiorari is granted . . . , pending determination of the case on the merits." Order, *Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 12-15388 & 12-15409 (9th Cir. July 27, 2012) (ECF No. 147), *petition for cert. filed*, No. 12-16, 2012 WL 2586938 (S. Ct. July 3, 2012); *c.f. In re Itron, Inc.*, 31 F. App'x 664, 665 (Fed. Cir. 2002) (finding no abuse of discretion where district court ordered a short stay pending Supreme Court consideration of appeal involving identical issues); *Armentros v. Gober*, 14 Vet. App. 180, 181 (2000) (per curiam) (postponing proceedings in the interest of judicial economy pending issuance of opinion in separate case concerning same central issue).

In the event the Supreme Court grants certiorari of any DOMA Section 3 Petition, the House (potentially along with at least one other party) will file a motion to stay consideration of this case, pending the relevant Supreme Court decision. The parties will

need time to submit briefing on the motion to stay, and the Court will need time to consider the arguments. On the other hand, in the unlikely event that the Supreme Court denies all eight pending DOMA Section 3 Petitions, the parties will not be prejudiced by a short delay, rescheduling the hearing for the January oral argument term.

Under these circumstances, there is good cause to postpone the November 29 oral argument in this case for a brief period pending the Supreme Court's imminent consideration of these eight petitions. It would be an inefficient use of judicial and party resources for this Court, counsel, and the parties to expend time and resources preparing for oral argument, the immediate need for which will be obviated if and when the Supreme Court grants certiorari as to one of the DOMA Section 3 Petitions under consideration at the November 20, 2012 conference.

Because this Court currently is scheduled to hear argument in this action on November 29 – approximately one week subsequent to the Supreme Court's consideration of the eight DOMA Section 3 Petitions – this Court should postpone the hearing for forty-five days and set a date certain during the January oral argument term. This will enable the Court to consider the effect of the Supreme Court's grant of certiorari in the DOMA Section 3 Petitions.

Respectfully submitted,

Paul D. Clement
/s/ H. Christopher Bartolomucci
H. Christopher Bartolomucci
Nicholas J. Nelson
Michael H. McGinley

BANCROFT PLLC

1919 M Street, N.W., Suite 470
Washington, D.C. 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806
cbartolomucci@bancroftpllc.com

Counsel for Intervenor-Appellee the Bipartisan Legal Advisory Group of the U.S. House of Representatives[5]

Of Counsel:

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Christine Davenport, Senior Assistant Counsel
Todd B. Tatelman, Assistant Counsel
Mary Beth Walker, Assistant Counsel
Eleni M. Roumel, Assistant Counsel

OFFICE OF GENERAL COUNSEL,
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
Telephone: (202) 225-9700
Facsimile: (202) 226-1360

November 8, 2012

[5] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, currently is 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 Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this case.

CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2012, a copy of the foregoing Intervenor-Appellee's Motion to Postpone November 29, 2012 Oral Argument for Good Cause Pending U.S. Supreme Court Ruling on Eight Petitions for Writ of Certiorari was filed electronically via the court's CM/ECF system and served by mail on anyone unable to accept electronic filing. Parties may access this filing through the court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system.

/s/ Eleni M. Roumel
Eleni M. Roumel