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 KAREN GOLINSKI

16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA  
 18 SAN FRANCISCO DIVISION

20 KAREN GOLINSKI,  
 21 Plaintiff,  
 22 v.  
 23 UNITED STATES OFFICE OF PERSONNEL  
 MANAGEMENT, and JOHN BERRY, Director  
 24 of the United States Office of Personnel  
 Management, in his official capacity,  
 25  
 26 Defendants.

Case No. 3:10-cv-0257-JSW

**PLAINTIFF'S REPLY TO  
 DEFENDANTS' RESPONSE TO  
 FEBRUARY 23, 2011 ORDER TO  
 SHOW CAUSE**

1 Plaintiff respectfully submits the following reply to defendants' February 28, 2011  
2 response to the Court's Order to Show Cause dated February 23, 2011.

3 The Executive now acknowledges that its interference with the provision of equal benefits  
4 to plaintiff is an unconstitutional act in violation of the Equal Protection Clause. Nonetheless, the  
5 Executive declares that it plans to proceed with its concededly unconstitutional and illegal actions  
6 until this Court orders it to stop. Plaintiff respectfully asks the Court to do so forthwith.

7 Multiple administrative orders issued over the past two years have squarely found that  
8 plaintiff has suffered from unlawful discrimination and that the harm to her and her family is  
9 irreparable. Defendants' chief response has been to assert that they are "immune" from obeying  
10 those orders. It is well-established, however, that sovereign immunity does not shield  
11 government officials from injunctive relief ordering them to stop unconstitutional conduct.  
12 Although sovereign immunity is also inapplicable for a host of other reasons noted in plaintiff's  
13 prior briefing, the Court need not necessarily reach those other reasons, now that the Executive  
14 has acknowledged its conduct to be unconstitutional. Nothing bars immediate enforcement of  
15 Chief Judge Kozinski's order that defendants cease their interference with the Judiciary's  
16 provision of equal benefits to its employees as required under the Constitution and the Ninth  
17 Circuit's non-discrimination policy.

18 **I. Question 1: Does the OPM intend to reassess its position on its original**  
19 **instruction to plaintiff's insurer to decline to extend benefits to her same-sex**  
20 **spouse?**

21 The Executive now acknowledges that its conduct violated the Equal Protection Clause,  
22 but asserts that it is bound to continue on its unconstitutional course until ordered by a court to  
23 cease. Plaintiff, who continues to suffer admittedly unlawful discrimination on a daily basis,  
24 respectfully asks the Court to do so as soon as is reasonably possible.

25 **II. Question 2: How does the Executive reconcile the position that it intends to**  
26 **enforce a statute that it has affirmatively declared to be unconstitutional and**  
27 **deemed inappropriate to defend?**

28 The Executive's principal argument in this action is that defendants purportedly enjoy  
sovereign immunity from Chief Judge Kozinski's order requiring them to cease their interference  
with the Judiciary's provision of equal benefits to plaintiff. (Defs.' Opp'n to Pl.'s Mot. for

1 Prelim. Inj. [ECF No. 37] at 7:10-18:28; Defs.’ Mot. to Dismiss [ECF No. 49] at 8:1-19:7.) Yet,  
2 the Executive now concedes that its conduct was and is illegal and violates the basic  
3 constitutional guarantee of equal protection. It is black-letter law that sovereign immunity does  
4 not bar injunctive relief requiring government officials to cease unconstitutional acts. (Pl.’s Supp.  
5 Br. [ECF No. 81] at 2:8-18, 3: 16-22; Pl.’s Reply ISO Supp. Br. [ECF No. 84] at 2:12-3:13.)

6 In sum, sovereign immunity does not apply, and the Executive has no basis to refuse  
7 compliance with Chief Judge Kozinski’s orders, which were duly issued pursuant to the statutory  
8 authority vested by Congress in the Ninth Circuit Judicial Council. (Pl.’s Opp’n Mot. to Dismiss  
9 [ECF No. 61] at 15:21-19:25; Pl.’s Reply ISO Supp. Br. [ECF No. 84] at 4:20-5:17.) Plaintiff’s  
10 motion for preliminary injunction should be granted, and defendants’ motion to dismiss denied.

11 **III. Question 3: Should the Court remand this matter to the Ninth Circuit’s**  
12 **administrative process for proper adjudication of plaintiff’s access to benefits**  
13 **for her wife?**

14 Plaintiff agrees with the Executive that remand for further administrative proceedings is  
15 not warranted here, albeit for different reasons. As to defendants John Berry and the Office of  
16 Personnel Management (“OPM”), the Ninth Circuit’s administrative process has concluded in all  
17 respects and in plaintiff’s favor. In Chief Judge Kozinski’s November 2009 order, he invited  
18 OPM to “appeal so much of this order as concerns it using the procedures outlined in the [EDR]  
19 plan.” *In the Matter of Karen Golinski et ux.*, 587 F.3d 956, 964 (9th Cir. 2009). Those  
20 procedures permit any “party or individual aggrieved by a final decision of the chief judge” to  
21 seek an administrative appeal of that decision. (Golinski Decl. ISO Prelim. Inj. [ECF No. 9] at  
22 Ex. A, p. 9.) OPM declined to do so. Accordingly, the November 2009 order became “final and  
23 preclusive on all issues decided therein as to others who could have, but did not appeal, such as  
24 the Office of Personnel Management.” (McGuire Decl. ISO Prelim. Inj. [ECF No. 10] at Ex. K.)  
25 There is thus nothing to remand to the Ninth Circuit’s administrative process with regard to OPM,  
26 and the Executive’s recent acknowledgment that antigay discrimination generally should be  
27 presumed invalid, and that DOMA in particular cannot be justified, does not change this.  
28

1 **IV. Question 4: On what basis can OPM defend its position to decline to extend**  
2 **benefits in a case in which such declination was based on the defense of**  
3 **unconstitutional legislation?**

4 The Executive asserts, without citation to any authority, that it can permissibly engage in  
5 conduct that it has determined to be unconstitutional, and therefore in violation of the law, in  
6 order to “defer[]” to Congress and the Judiciary, even in the face of multiple administrative orders  
7 requiring it to cease such conduct. (Defs.’ Resp. to Feb. 23, 2011 Order [ECF No. 96] at 2:15-  
8 18.) Plaintiff is aware of no legal principle that supports such a position.

9 The Executive repeatedly notes that Congress may wish to intervene in the various cases  
10 addressing DOMA’s constitutionality in which it plans not to defend the statute. But, because the  
11 Executive has already given and is continuing to give a full defense of its actions in this matter,  
12 and is continuing its refusal to cease its interference with plaintiff’s receipt of equal benefits, any  
13 such intervention would be an unnecessary and inappropriate second bite at the apple. Prior to  
14 the Executive’s recent change of heart, the parties had already fully briefed the issue of whether  
15 section 3 of DOMA is constitutional as applied here, with extensive argument from the Executive  
16 in favor of DOMA’s constitutionality. This case thus is different from those in which the  
17 Executive has not yet fully briefed a defense of DOMA and does not plan to do so.<sup>1</sup>

18 There is no basis to further delay resolution of this action.<sup>2</sup> Plaintiff’s preliminary  
19 injunction motion was filed over a year ago. Plaintiff’s spouse continues to be underinsured, as  
20 are the spouses of several other employees in the Ninth Circuit and its district courts, whose  
21 administrative hearings have been stayed pending resolution of this matter.

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22 <sup>1</sup> See, e.g., *Commonwealth of Massachusetts v. U.S. Dep’t of Health and Human Services*,  
23 *et al.*, No. 09-11156 (D. Mass), *on appeal*, No. 10-2204 (1st Cir.); *Gill, et al. v. Office of*  
24 *Personnel Management, et al.*, No. 09-10309 (D. Mass.), *on appeal*, Nos. 10-2207 & 10-2214  
25 (1st Cir.); *Dragovich, et al. v. Department of the Treasury, et al.*, No. 10-1564 (N.D. Cal.);  
*Pedersen et al. v. OPM et al.*, No. 10-CV-1750 (D. Conn.); *Windsor v. United States*, No. 10-CV-  
8435 (S.D.N.Y.).

26 <sup>2</sup> If this Court disagrees with plaintiff and is nonetheless inclined to invite intervention  
27 despite the lack of any such request, plaintiff respectfully requests that Congress be required to  
28 state within a week whether it intends to intervene.

1 Dated: March 3, 2011

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By:                 /s/ Rita F. Lin                

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