

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

UNIT 3601, OFFICE TOWER A, BEIJING FORTUNE PLAZA
NO. 7 DONGSANHUAN ZHONGLU
CHAORYANG DISTRICT
BEIJING 100020
PEOPLE'S REPUBLIC OF CHINA
TELEPHONE (86-10) 5828-6300

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

12TH FLOOR, HONG KONG CLUB BUILDING
3A CHATER ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

RECEIVED

APR 17 2014

WRITER'S DIRECT DIAL NUMBER

212.373.3086

WRITER'S DIRECT FACSIMILE

212.492.0086

WRITER'S DIRECT E-MAIL ADDRESS

rkaplan@paulweiss.com

DEBORAH S. HUNT, Clerk

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, U.K.
TELEPHONE (44 20) 7367 1600

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

MATTHEW W. ABBOTT
ALLAN J. ARFF
ROBERT A. ATKINS
DAVID J. BAL
JOHN F. BAUGHMAN
LYNN B. BAYARD
DANIEL J. BELLER
GREG A. BENSON
MITCHELL L. BERG
MARK S. BERGMAN
BRUCE BIRENBOIM
H. CHRISTOPHER BOEHNING
ANGELO BONVINO
JAMES I. BROCHIN
RICHARD J. BRONSTEIN
DAVID W. BROWN
SUSANNA M. BUERGEL
PATRICK S. CAMPBELL
JESSICA S. CAREY
JEANETTE K. CHAN
YVONNE V. CHAN
LEWIS R. CLAYTON
JAY COHEN
KEIL COHEN
CHRISTOPHER J. CUMMINGS
CHARLES E. DAVIDOW
DOUGLAS R. DAVIS
THOMAS V. DE LA BASTIDE III
ARIEL J. DECKELBAUM
ALICE BELISLE EATON
ANDREW J. EHRLICH
GREGORY A. EZRING
LESLIE GORDON FAGEN
MARC FALCONE
ANDREW C. FINCH
BRAD J. FINKELSTEIN
ROBERTO FINZI
PETER F. FISCH
ROBERT E. FLEDER
MARTIN FLUMENBAUM
ANDREW J. FOLEY
HARRIS B. FREIDUS
MANUEL S. FREY
ANDREW L. GAINES
KENNETH A. GALLO
MICHAEL E. GERTZMAN
PAUL D. GINSBERG
ADAM M. GIVERTZ
SALVATORE GOGLIORMELLA
ROBERT D. GOLDBAUM
NEIL GOLDMAN
ERIC S. GOLDSTEIN
ERIC GOODSON
CHARLES H. GOOGE, JR.
ANDREW G. GORDON
UDI GROFMAN
NICHOLAS GROOMBRIDGE
BRUCE A. GUTENPLAN
GAINES GWATHMEY, III
ALAN S. HALPERIN
JUSTIN G. HAMILL
CLAUDIA HAMMERMAN
GERARD S. HARPER
BRIAN S. HERMANN
ROBERT M. HIRSH
MICHELE HIRSHMAN
MICHAEL S. HONG
JOYCE S. HUANG
DAVID S. HUNTINGTON
LORETTA A. IPPOLITO

JEH C. JOHNSON
MEREDITH J. KANE
ROBERTA A. KAPLAN
BRAD S. KARP
JOHN C. KENNEDY
ALAN W. KORNBERG
DANIEL J. KRAMER
DAVID K. LAKSHMI
STEPHEN P. LAMB
JOHN E. LANGE
DANIEL J. MARELL
XIAOYU GREG LIU
JEFFREY D. MARELL
MARC V. MASOTTI
EDWIN S. MAYNARD
DAVID W. MAYO
ELIZABETH R. MCCOLM
MARK F. MENDELSON
WILLIAM B. MICHAEL
TOBY S. MYERSON
CATHERINE NYARADY
JOHN J. O'NEIL
ALEX YOUNG K. OH
BRAD R. OKUN
KELLEY D. PARKER
MARC E. PERLMUTTER
VALERIE E. RADWANER
CARL L. REISNER
WALTER G. RICCIARDI
WALTER RIEMAN
RICHARD A. ROSEN
ANDREW N. ROSENBERG
JACQUELINE P. RUBIN
RAPHAEL M. RUSSO
JEFFREY D. SAFERSTEIN
JEFFREY B. SAMUELS
DALE M. SARRO
TERRY E. SCHIMEK
KENNETH M. SCHNEIDER
ROBERT B. SCHUMER
JAMES H. SCHWAB
JOHN M. SCOTT
STEPHEN J. SHIMSHAK
DAVID R. SICULAR
MOSES SILVERMAN
STEVEN SIMKIN
JOSEPH J. SIMONS
MARILYN SOBEL
AUDRA J. SOLOWAY
TARUN M. STEWART
ERIC ALAN STONE
AIDAN SYNNOTT
ROBYN F. TARNOFSKY
MONICA K. THURMOND
DANIEL J. TOAL
LIZA M. VELAZQUEZ
MARIA T. VULLO
ALEXANDRA M. WALSH
LAWRENCE G. WEE
THEODORE V. WELLS, JR.
BETH A. WILKINSON
STEVEN J. WILLIAMS
LAWRENCE J. WITDORCHIC
MARK B. WLAZLO
JULIA MASON WOOD
JORDAN E. YARETT
KAYE N. YOSHINO
TONG YU
TRACEY A. ZACCONE
T. ROBERT ZACHOWSKI, JR.

*NOT ADMITTED TO THE NEW YORK BAR

April 17, 2014

By Hand

Beverly Harris
En Banc Coordinator
United States Court of Appeals for the Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

RE: *DeBoer v. Snyder*, No. 14-1341 *Obergefell v. Himes*, No. 14-3057

Dear Ms. Harris:

We have recently been retained on a *pro bono* basis by Equality Ohio and the Equality Ohio Education Fund, who have an interest in the outcome of the above-referenced appeals. Equality Ohio and the Equality Ohio Education Fund are non-profit organizations based in Columbus, Ohio that are devoted to advocating for and educating about LGBT rights in Ohio. The decision reached by this Court in the above-referenced cases will almost certainly determine the rights of the gay couples they represent. We previously represented, on a *pro bono* basis, Edith Windsor in *United States v. Windsor*. *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Beverly Harris

2

We write to inform the Court of our intent to file a motion to intervene in the above-referenced appeals as soon as practicable.

We recognize that this letter is highly unusual as a procedural matter, since we have not yet filed our motion to intervene. We are sending this letter, however, as per our conversation of April 15, 2014, due to the unique circumstances of the case, in particular the exigent timing due to the fact that a motion for en banc review is currently *sub judice* before this Court in *DeBoer v. Snyder*, No. 14-1341.

As discussed below, our clients, in contrast to the gay couple appellees in *DeBoer*, would support the granting of en banc review, but for very different reasons than those proffered by the State of Michigan. Indeed, we believe that this Court should be made aware of what we believe to be a very compelling rationale for the granting of en banc review in these cases that was not discussed in the prior briefing.

More specifically, under Sixth Circuit precedent, laws that discriminate against gay people are evaluated under the lowest tier of equal protection scrutiny, known as the rational basis standard. *See Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012) (“Because this court has not recognized sexual orientation as a suspect classification, Davis’s claim is governed by rational basis review.”); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 260-61 (6th Cir. 2006) (“[H]omosexuality is not a suspect class in this circuit. . . .”); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (applying rational basis test “for the evaluation of laws which uniquely burdened the interest of homosexuals.”). We believe that a heightened level of scrutiny should apply when evaluating laws impacting gay people, a holding which has been adopted by a number of other federal courts, including one judge whose decision is the subject of the above-captioned appeals. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480-81 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987 (S.D. Ohio 2013).

We do not agree with the reasoning in the Sixth Circuit cases stating that laws that discriminate against gay people should not receive any form of heightened scrutiny, and do not believe that they are controlling. Indeed, in our view, the Supreme Court’s decision in *Windsor*, while it does not discuss this issue explicitly, provides further grounds for reconsideration by this Court. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480-81 (9th Cir. 2014). Nevertheless, we understand that this Court has repeatedly held that “[a] published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decisions or this Court sitting en banc overrules the prior decision.’” *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec’y of Health & Human Servs.*, 774 F.3d 685, 689 (6th Cir. 1985)). For this reason, we believe that en banc review of the above-mentioned appeals should be granted since it would allow the Court to have the full range of arguments and principles before it

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Beverly Harris

3

when deciding these cases of great importance to our clients and many thousands of others throughout the Sixth Circuit.

We greatly appreciate the Court's attention to this matter. Again, we have submitted this letter only because of the exigent timing; these (and other) points will be more fully addressed in our forthcoming motion to intervene.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

By: *Roberta A. Kaplan / 3/17/14*
Roberta A. Kaplan

BAKER & HOSTETLER LLP

Thomas D. Warren