

Congress of the United States
Washington, DC 20515

July 31, 2012

The Honorable Janet Napolitano
Secretary
United States Department of Homeland Security
Washington, DC 20528

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Dear Secretary Napolitano:

We write to follow up on a letter we sent to you on September 27, 2011 about a critical group of immigrants in the United States who need your verbal Department of Homeland Security (DHS) policy of prosecutorial discretion to be put into writing in order to prevent deportation and separation from their lesbian, gay, bisexual, and transgender (LGBT) U.S. citizen partners and spouses. Since our last letter to you, there have been several key developments which show that the verbal policy you articulated to protect LGBT families in and of itself remains inadequate, and with the lifting of the injunction on Arizona's SB1070 and other state copycat laws, families face a greater threat of separation. As such, a written policy is needed now more than ever.

As written in the June 2011 memo from United States Immigration and Customs Enforcement (ICE) Director John Morton ("Morton Memo"), a key positive factor in exercising prosecutorial discretion is a "person's ties and contributions to the community, including family relationships." On August 18, 2011, the Obama Administration and DHS announced a new effort to focus immigration enforcement on the priorities established in the Morton Memo. At that time, high-ranking DHS and White House officials participating in several community forums and phone calls, as well as press calls,¹ stated, for purposes of exercising prosecutorial discretion, ICE would include LGBT relationships—specifically the relationships of immigrants in same-sex marriages and partnerships with U.S. citizens—in the definition of "family relationships."

¹ Pear, R. (2011, Aug. 18). Fewer Youths to Be Deported in New Policy. *N.Y. Times*. Available at <http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all>; Johnson, C. (2011, Aug. 18). Immigration Could Help Gay Nationals Facing Deportation. *Washington Blade*. Available at <http://www.washingtonblade.com/2011/08/18/immigration-change-could-help-gay-foreign-nationals-facing-deportation/>; Lockhead, C. (2011, Aug. 20). Fed Deportation Decision May Benefit SF Gay Couple. *The San Francisco Chronicle*. Available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/08/20/MNTN1KPJ57.DTL>; Geidner, C. (2011, Aug. 18). Prosecutorial Discretion: Homeland Security announces implementation of changes that will enable some in same-sex relationships to avoid deportation. *Metro Weekly*. Available at <http://www.metroweekly.com/news/?ak=6513>

President Obama reiterated this year that it is the policy of his Administration, with respect to immigration enforcement, that family ties include LGBT families. In a statement to the *Advocate* on March 7, 2012, President Obama said that DHS has put “a lower priority on the cases of undocumented immigrants with family members, including same-sex partners, in the United States.”² Unfortunately, this recognition that family ties include LGBT relationships has never been put in writing.

On September 27, 2011, a month after your prosecutorial discretion announcement, sixty-nine members of the U.S. House of Representatives signed a letter to you asking you to put this critical policy in writing. Concerns were expressed that, without specific, written guidance, there remains the very real risk agency officers, agents, and attorneys making decisions about individual cases would overlook LGBT family ties, particularly the ties of immigrants to their U.S. citizen same-sex partners or spouses, and thereby, decline to exercise prosecutorial discretion.

In DHS’s response to the letter on October 25, we were extremely disappointed to read the following: “Director Morton’s June 17, 2011 memorandum makes clear that one factor relevant to determining whether a case is a low priority is the individual’s ties and contributions to the community. In assessing these factors, LGBT individuals’ ties and contributions to the community are taken into account. These same principles apply to the interagency working group’s efforts to design a method for reviewing cases to ensure that the Administration immigration enforcement resources are best focused on our highest priorities.” As previously expressed, this statement appears to be a major retreat from your announced policy that the family ties of immigrants to their U.S. citizen same-sex spouses and partners would be a factor for prosecutorial discretion.

In November 2011, DHS again missed an opportunity to unambiguously include LGBT relationships in its prosecutorial discretion guidance.³ Instead, DHS’s guidance simply noted that a person who has a “very long-term presence in the United States has an immediate family member who is a United States citizen, and has established compelling ties and made compelling contributions to the United States” is not generally an enforcement priority for DHS.

Until the policy regarding LGBT persons is put into writing, ICE enforcement officials and attorneys who are responsible for actually implementing DHS policy, plus other key stakeholders, may remain unaware of its existence. This may lead to continued and tragic separations of foreign nationals from their U.S. citizen same-sex spouses and partners. Having this policy in writing will increase awareness of DHS’s position on this issue among DHS staff, adjudicators, the immigration bar, and affected individuals. By issuing written guidance, DHS can keep LGBT families from being separated and thus prevent the irreparable, permanent harm

² Garcia, M. (2012, Mar. 7). President Obama Responds to Candidate Scorecard. *The Advocate*. Available at <http://www.advocate.com/politics/election/2012/03/07/obama-johnson-karger-and-republicans-gay-issues?page=0.4>

³ Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases before the Executive Office for Immigration Review. Available at http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf, Vincent, Peter S. (2011, Nov. 17). Case-by Case Review of Incoming and Certain Pending Cases. Available at <http://www.immigrationpolicy.org/sites/default/files/docs/DHS%20PD%20Case%20Review%20Memo%20111711.pdf>

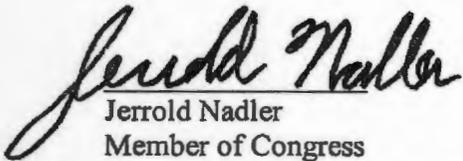
to families that is caused by the so-called Defense of Marriage Act—discrimination the Department of Justice has determined to be unconstitutional. It would be beyond senseless to see LGBT persons with family ties here in the United States deported simply because the affected persons, their attorneys, and/or ICE officials were unaware of DHS's verbal policy. Yet sadly, we are aware of several instances since August 18, 2011 where ICE attorneys did not offer prosecutorial discretion to foreign nationals with LGBT family ties, until members of Congress, advocacy organizations, or the media weighed in to convince ICE to reverse its position.

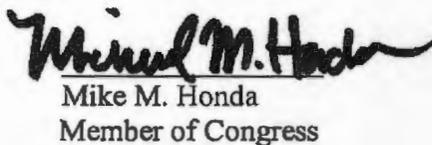
Additionally, the Supreme Court's decision to tentatively uphold Section 2(B) of Arizona's SB1070 will increase the danger that an LGBT person will be detained and deported without obtaining the full benefit of DHS's prosecutorial discretion policy. Many more immigrants in Arizona and other states with similar laws may be referred to ICE for possible removal. Administration officials have clarified following the Supreme Court decision that DHS "will not be issuing detainers on individuals unless they clearly meet our defined priorities."⁴ While we appreciate your clarification that prosecutorial discretion will continue to be implemented, the raised stakes with the Supreme Court's decision make it all the more critical that DHS staff in Arizona and beyond recognize that the ties of a foreign national to a U.S. citizen same-sex partner or spouse are a positive factor for prosecutorial discretion.

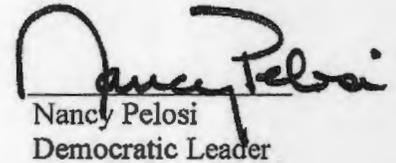
We therefore again ask that you issue a written field guidance or a memorandum to explicitly state the policy of your August 18, 2011 announcement which would direct DHS personnel to consider LGBT family ties as a positive factor for the exercise of prosecutorial discretion. A written policy is the best way to ensure that the decision by President Obama and DHS to recognize LGBT family ties for immigration purposes will be implemented so that families will remain together.

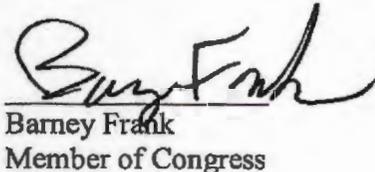
Thank you for your time and attention to this matter. We look forward to your prompt response.

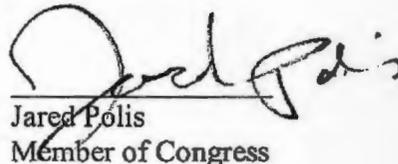
Sincerely,

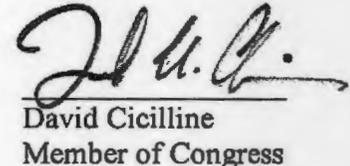

Jerrold Nadler
Member of Congress


Mike M. Honda
Member of Congress

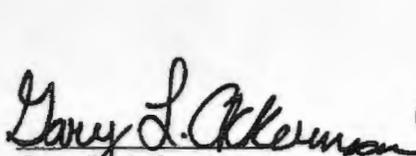

Nancy Pelosi
Democratic Leader

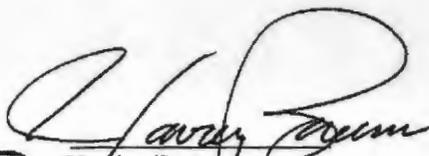

Barney Frank
Member of Congress

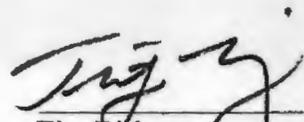

Jared Polis
Member of Congress

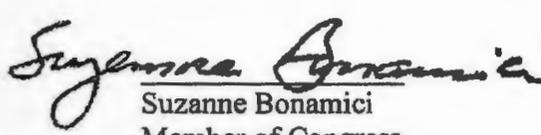

David Cicilline
Member of Congress

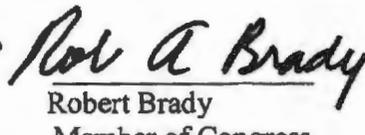
⁴ Dinan, S. (2012, June 25). Homeland Security suspends immigration agreements with Arizona police. *Washington Times*. Available at <http://www.washingtontimes.com/news/2012/jun/25/homeland-security-suspends-immigration-agreements/>

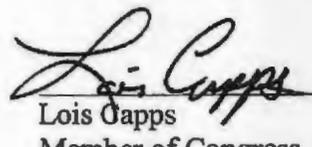

Gary L. Ackerman
Member of Congress

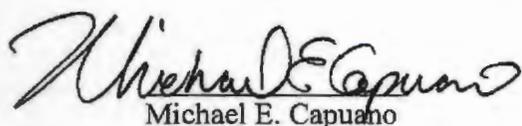

Xavier Becerra
Member of Congress

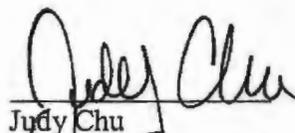

Tim Bishop
Member of Congress

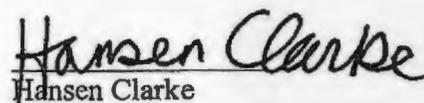

Suzanne Bonamici
Member of Congress


Robert Brady
Member of Congress


Lois Capps
Member of Congress


Michael E. Capuano
Member of Congress

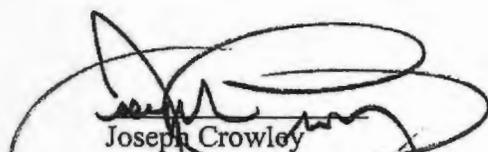

Judy Chu
Member of Congress

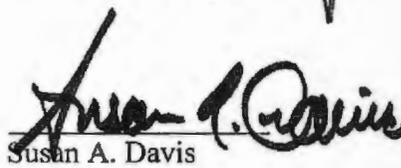

Hansen Clarke
Member of Congress


Yvette D. Clarke
Member of Congress


Gerald E. Connolly
Member of Congress

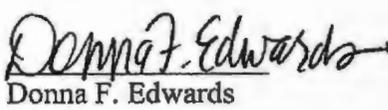

John Conyers
Member of Congress

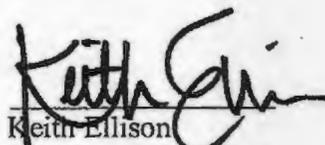

Joseph Crowley
Member of Congress


Susan A. Davis
Member of Congress


Diana L. DeGette
Member of Congress

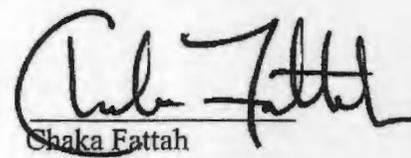

Ted Deutch
Member of Congress

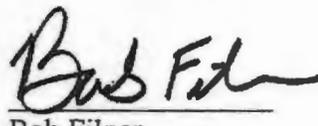

Donna F. Edwards
Member of Congress

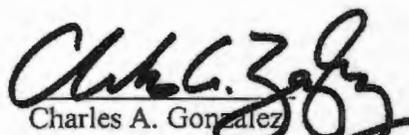

Keith Ellison
Member of Congress

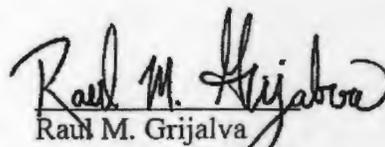

Eliot L. Engel
Member of Congress

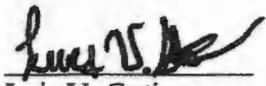

Sam Farr
Member of Congress

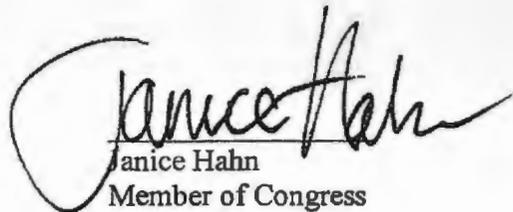

Chaka Fattah
Member of Congress

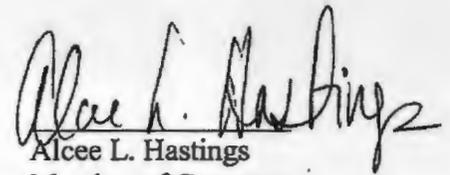

Bob Filner
Member of Congress

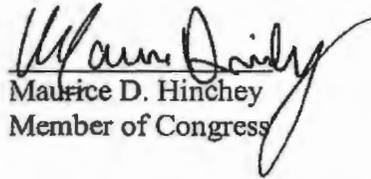

Charles A. Gonzalez
Member of Congress

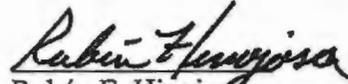

Raul M. Grijalva
Member of Congress

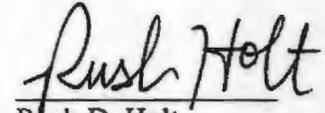

Luis V. Gutierrez
Member of Congress

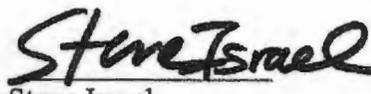

Janice Hahn
Member of Congress

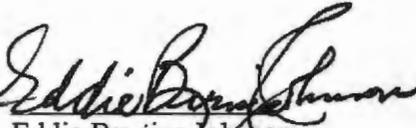

Alcee L. Hastings
Member of Congress

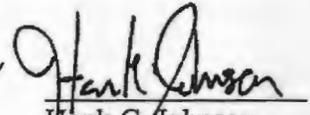

Maurice D. Hinchey
Member of Congress

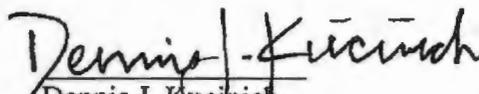

Rubén E. Hinojosa
Member of Congress

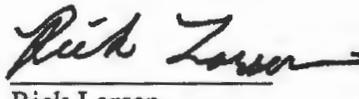

Rush D. Holt
Member of Congress

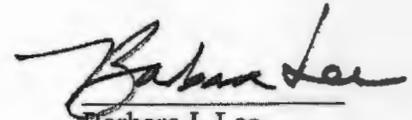

Steve Israel
Member of Congress

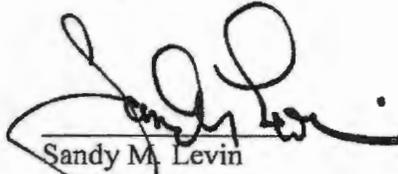

Eddie Bernice Johnson
Member of Congress

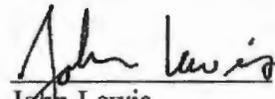

Hank C. Johnson
Member of Congress

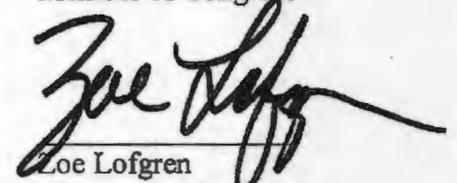

Dennis J. Kucinich
Member of Congress

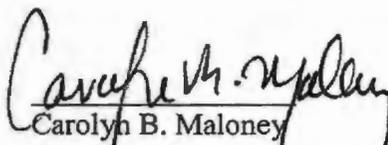

Rick Larsen
Member of Congress

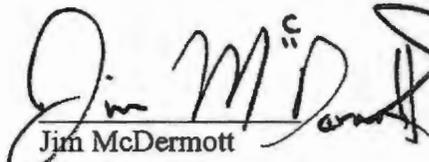

Barbara J. Lee
Member of Congress

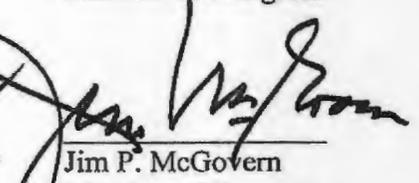

Sandy M. Levin
Member of Congress


John Lewis
Member of Congress


Zoe Lofgren
Member of Congress

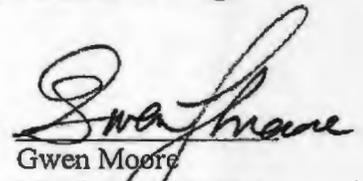

Carolyn B. Maloney
Member of Congress

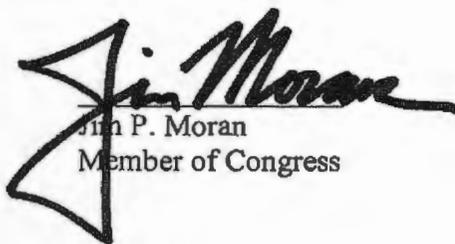

Jim McDermott
Member of Congress

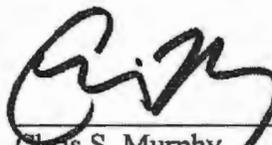

Jim P. McGovern
Member of Congress

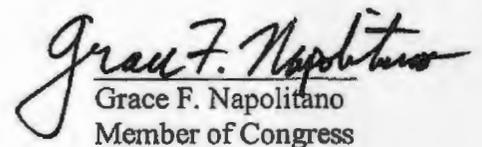

Michael H. Michaud
Member of Congress


George Miller
Member of Congress


Gwen Moore
Member of Congress


Jim P. Moran
Member of Congress


Chris S. Murphy
Member of Congress


Grace F. Napolitano
Member of Congress