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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI,

Plaintiff,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, and JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,

Defendants.

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

PLAINTIFF'S REPLY TO BIPARTISAN LEGAL ADVISORY GROUP'S OPPOSITION TO HER MOTION FOR SUMMARY JUDGMENT

Date: September 16, 2011
Time: 9:00 a.m.
Dept.: Courtroom 11
Judge: Hon. Jeffrey S. White

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SUMMARY OF ARGUMENT

BLAG has opted not to respond on the merits to plaintiff's motion for summary judgment with contentions of law or disputed material fact, asserting instead that summary judgment should be denied simply because (a) its motion to dismiss should be granted, and (b) it needs more time for discovery. Neither assertion justifies denial of summary judgment, given the indisputable nature of the material facts and law demonstrating DOMA's unconstitutionality.

Laws that discriminate based on sexual orientation should be subject to heightened scrutiny. As alleged in plaintiff's complaint, sexual orientation has no bearing on a person's ability to contribute to society. (SAC ¶ 40.) Though BLAG relies on its motion to dismiss, BLAG offers no explanation of how this Court could properly ignore those allegations on a motion to dismiss. Nor does BLAG offer any evidence creating a dispute of material fact. BLAG insists that sexual orientation is a matter of "conduct" engaged in as a matter of choice, but both the Supreme Court and the Ninth Circuit have rejected that proposition. BLAG cannot escape heightened scrutiny or demonstrate any valid government interest satisfying such scrutiny.

Moreover, even if rational basis review applied, BLAG offers no justification for singling out marriages between same-sex couples for federal non-recognition. Three recent federal court decisions have upheld claims that DOMA fails rational basis review, and BLAG does not distinguish those cases. Instead, BLAG argues that DOMA is defensible as an exercise in "line-drawing." DOMA, however, does not draw a rational, justifiable line among options along a continuum. Instead, it takes the unitary category of valid state law marriages and arbitrarily singles out *one* sub-category of marriages for non-recognition. BLAG identifies no way in which excluding same-sex couples from equal spousal health coverage encourages more heterosexuals to get or stay married or otherwise serves any legitimate purpose.

BLAG's claim that it needs discovery also does not justify denial of summary judgment. BLAG has had ample opportunity to obtain written discovery prior to filing its opposition brief, but it declined to do so. BLAG asserts that it "may" wish to depose plaintiff and "may" designate its own expert on unspecified topics. That does not even come close to identifying the *specific* facts to be developed in discovery as required by Rule 56(d).

REPLY MEMORANDUM

I. BLAG CANNOT AVOID SUMMARY JUDGMENT SIMPLY BY ASSERTING THAT ITS MOTION TO DISMISS SHOULD BE GRANTED.

Rather than present any evidence in opposition to summary judgment, BLAG asserts that summary judgment should be denied because its motion to dismiss should be granted. That assertion should be rejected by this Court, and summary judgment should be entered for plaintiff on the basis of the law and undisputed facts.

A. *Baker* and *Adams* Are Irrelevant to the Questions Presented Here and Do Not Control.

BLAG contends that its motion to dismiss should be granted based on the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972). BLAG does not dispute that the precedential value of summary dismissals is limited only to "the *specific challenges* presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added). The question raised in *Baker*, whether a same-sex couple must be permitted to marry under state law, is entirely distinct from the question here, whether the federal government has an adequate interest in singling out one class of valid marriages for non-recognition. For example, because it addresses only state law, *Baker* does not address whether there is a legitimate government interest in a "uniform" federal definition of marriage when the federal government tolerates wide variations in state marriage laws in every respect *but* the sex of the spouses. *Baker* does not control.[1]

BLAG also argues that *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), pre-dating enactment of DOMA and sustaining the limitation on spousal immigration relief to those in different-sex marriages, requires grant of its motion to dismiss. *Adams* relied on the courts' "limited judicial review" over Congress's plenary immigration power. *Id*. at 1041. DOMA is not

[1] Even if *Baker* spoke to the question in this case, the Supreme Court has expressly limited the precedential reach of a summary dismissal when doctrinal developments have undermined it. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). At the very least, the Supreme Court's recognition that gay people cannot be denied equal protection based on moral disapproval, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996), and that they enjoy the same autonomy as others in forming personal relationships, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), has caused a tectonic shift in federal jurisprudence regarding discrimination on the basis of sexual orientation.

an exercise of that power. Moreover, *Adams* is inapplicable because its ruling is based on the unsound conclusions that (1) "homosexual marriages never produce offspring," (2) "are not recognized in most, if in any, of the states," and (3) "violate traditional and often prevailing societal mores." *Id.* at 1042-43. The first rationale is contradicted by the allegations of the complaint, which explain that Ms. Golinski and her wife have a son, as well as indisputable facts about the substantial numbers of same-sex couples rearing children together. (SAC ¶ 15; *see also* Dkt. 133 at 24-27.) The second rationale is no longer true. Because *Adams* was decided before any state granted same-sex couples the right to marry, the court never had the opportunity to consider the issue presented: the constitutionality of singling out certain marriages validly entered under the laws of multiple states for denial of all federal recognition. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 394 (D. Mass. 2010); *Commonwealth of Mass. v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 251 n.152 (D. Mass. 2011). And the third rationale was overruled in *Lawrence*, 539 U.S. at 577-78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). *Adams'* obsolescence is further bolstered by its reliance on a now-defunct blanket immigration exclusion for lesbians and gay men, repealed in 1990. *Adams*, 673 F.2d at 1040 (justifying its ruling based on prior statutes that "clearly express an intent to exclude homosexuals").

B. BLAG Cannot Escape Application of Heightened Scrutiny.

1. *High Tech Gays* Does Not Foreclose Heightened Scrutiny.

BLAG asserts that *High Tech Gays* bars application of heightened scrutiny.[2] BLAG concedes that district courts are not bound by a circuit opinion where a higher court has undercut the reasoning and rendered the cases irreconcilable. (Dkt. 150 at 5.) *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). It is difficult to imagine how two cases could be more

[2] BLAG all but concedes that if heightened scrutiny applies, its motion to dismiss fails. BLAG's sole attempt to demonstrate that DOMA survives heightened scrutiny is a footnote asserting that a purported desire to proceed with "caution" in the marriage arena satisfies heightened scrutiny. (Dkt. 150 at 23 n.16.) As discussed below, neither this nor any other justification advanced for DOMA satisfies even rational review.

irreconcilable than, on the one hand, *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), denying heightened scrutiny based on states' power to criminalize same-sex intimacy upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and, on the other, *Lawrence*, 539 U.S. 558, overruling *Bowers* as "not correct when it was decided" and declaring unconstitutional laws infringing on the liberty shared by gay people to engage in sexual intimacy. 539 U.S. at 578.

Nor did *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008), resurrect *High Tech Gays*. Unlike here, both *Witt* and *High Tech Gays* involved challenges in the unique national security context, where judicial deference to congressional authority is "at its apogee." *Witt*, 527 F.3d at 821 (internal quotation marks and citation omitted). *See also High Tech Gays*, 895 F.2d at 577 (noting "[s]pecial deference" to Congress in national security context). That special deference has no application here. Moreover, in *Witt*, the Ninth Circuit was not asked to rule on the type of equal protection claim presented here, *i.e.*, a classification separating validly married gay people from married heterosexuals and subjecting them to worse treatment. *Witt* instead presented a different type of claim—that gay people were improperly subject to discharge from the military, "while others equally offensive, such as child molesters, are not categorically subject to discharge." *Witt*, 527 F.3d at 824 n.4 (Canby, J., concurring in part, dissenting in part); *see also id.* at 821. *Witt* merely affirmed (a) that the military's Don't Ask, Don't Tell policy "does not violate equal protection under rational basis review," and (b) that *Lawrence* did not overrule prior holdings to that effect. *Id.* at 821. This narrow holding has no application here.

2. Government Discrimination Against Lesbians and Gay Men Warrants Heightened Scrutiny.

BLAG's argument that sexual orientation discrimination does not satisfy the criteria for heightened scrutiny should be rejected. As defendants forcefully argue in their opposition to BLAG's motion, "discrimination based on sexual orientation is subject to heightened scrutiny," (Dkt. 145 at vi), and BLAG offers no legal or factual basis to conclude otherwise.

a. Plaintiff Need Not Demonstrate "Animus" for Heightened Scrutiny to Apply.

BLAG incorrectly suggests that the Court would have to conclude that the President and

hundreds of legislators were motivated by bigotry in enacting DOMA for heightened scrutiny to apply. (Dkt. 150 at 8.) A prima facie equal protection claim requires that a plaintiff demonstrate either a facially discriminatory classification *or* an intent to discriminate. *See Wayte v. United States*, 470 U.S. 598, 610 n.10 (1985). DOMA classifies lesbians and gay men for differential treatment on its face, obviating the need to demonstrate discriminatory intent—though such intent is evident in DOMA's legislative history (*see* Dkt. 133 at 2-3).[3]

b. Sexual Orientation Is a Core, Deeply-Rooted Characteristic.

While immutability is not required for heightened scrutiny,[4] the Ninth Circuit already has decided that sexual orientation qualifies as an immutable trait. *See Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005). BLAG ignores this binding precedent and argues at length that sexual orientation is merely behavioral, but as Judge Canby previously observed, one could "make 'behavioral' classes out of" any group, including "persons who go to church on Saturday, persons who speak Spanish, or persons who walk with crutches." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J. and Norris, J., dissenting from denial of en banc review). Supreme Court precedent vindicates Judge Canby's view. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010)

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[3] Moreover, a finding of discriminatory intent does not require an active desire to harm others, and instead "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *See also Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) ("a well-meaning . . . belief that the races would be better off apart" could not have saved segregation).

[4] *See, e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (focusing on history of discrimination and ability to contribute to society as most important factors and holding that heightened scrutiny is appropriate where a group has been "saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process") (internal quotation marks and citation omitted) (emphasis added); *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) (discussing this feature of federal test); *In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (same).

("[o]ur decisions have declined to distinguish between status and conduct").[5] BLAG's mischaracterization of sexual orientation as an "associational choice[]" and a "desire to engage in a certain kind of conduct" (Dkt. 150 at 8, 9) is contrary to the law and undisputed evidence. (*See* Peplau Decl., Dkt. 137 ¶¶ 14-15 (most adults can readily categorize their sexual orientation).)[6]

c. Lesbian and Gay Men's Procreative Capacity Bears No Relation to Their Ability to Contribute to Society.

A central consideration for heightened scrutiny is whether a trait bears any "relation to the individual's ability to participate in and contribute to society." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (internal quotation marks and citation omitted). BLAG makes no colorable claim regarding this standard, but instead suggests that because same-sex couples' "sexual activity does not result in the conception of new life" (Dkt. 150 at 11), heightened scrutiny of discrimination targeting the members of such couples is somehow inappropriate. This is no argument against application of heightened scrutiny, and, as discussed below, fails as even a rational government interest that could justify DOMA. *Lawrence*, moreover, confirms that the Constitution demands respect for autonomy in "marriage, procreation, contraception, family relationships, [and] child rearing," and that same-sex couples "may seek autonomy for these purposes, just as heterosexual persons do"—laying to rest the idea that their procreative capacity can justify discrimination against them, or warrant a less serious examination by the courts of such differential treatment. 539 U.S. at 573-74.

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[5] *See also Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."); *id*. at 583 (O'Connor, J., concurring) ("the conduct targeted by this law is . . . closely correlated with being homosexual" and thus is "directed toward gay persons as a class").

[6] BLAG relies on the fact that a small percentage of lesbians and gay men report experiencing some choice about their sexual orientation. (Dkt. 150 at 10.) But the undisputed evidence that the great majority *do not* experience such a choice demonstrates the fundamental injustice of asking lesbians and gay men to attempt to deny this central part of their identity in order to be treated fairly by their government. *See Karouni*, 399 F.3d at 1173 (the "sexual identities" of gay people "are so fundamental to their human identities that they should not be required to change them"); *see also* Peplau Decl., Dkt. 137 ¶ 23.

d. Lesbians and Gay Men Indisputably Face Significant Obstacles to Protection from Discrimination Through the Political Process.

Plaintiff has presented extensive evidence of the manifold obstacles to political power for lesbians and gay men and the limited nature of relief from discrimination that has been accomplished to date. (*See* Segura Decl., Dkt. 138 ¶¶ 21-27.) BLAG's assertions that lesbians and gay men have obtained some limited relief from ongoing discrimination (such as protection from hate crimes) ignores the legal standard for political powerlessness. The relevant test is not absolute powerlessness (Dkt. 133 at 12-14), but rather whether the "discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440. BLAG identifies no legal or factual basis to conclude that discrimination against lesbians and gay men will soon be rectified, particularly given that federal law continues to offer no prohibition on discrimination based on sexual orientation.

3. DOMA Classifies Lesbians and Gay Men for Differential Treatment Based on Sex, Meriting Heightened Scrutiny.

BLAG's motion to dismiss also fails for another reason: heightened scrutiny applies to DOMA because it discriminates based on sex. BLAG's only response is to observe that, while courts conclude that DOMA classifies on the basis of sexual orientation, none has yet to apply a sex discrimination theory in a DOMA challenge. But DOMA's discrimination based on sex is manifest, and a number of cases, including *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), and *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR Op. 2009), have recognized that denying same-sex couples the same rights granted to different-sex couples does indeed discriminate on the basis of sex. (*See* Dkt. 133 at 16.)

4. Heightened Scrutiny Applies Because DOMA Violates Plaintiff's Substantive Due Process Rights.

BLAG presents no evidence to avoid heightened scrutiny based on DOMA's violation of plaintiff's due process rights. Instead, BLAG relies on its motion to dismiss, which mistakenly asserts that Ms. Golinski's due process claim is premised on her constitutional right to marry. (Dkt. 150 at 16.) As Ms. Golinski has repeatedly stated, her claim does not specifically hinge on the right to marry but on the well-established constitutionally protected interest in forming family

relationships. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977). BLAG then argues that DOMA does not penalize Ms. Golinski's right to form a same-sex family relationship, since she did not receive health coverage for Ms. Cunninghis before her marriage either. (Dkt. 150 at 16.) That is not the relevant comparison. Absent DOMA, Ms. Golinski would receive the same full spousal coverage as her married heterosexual coworkers. DOMA strips her of this coverage because the spouse she has chosen is a woman. Accordingly, DOMA penalizes her based on the family relationship she has formed, and as such, is subject to heightened scrutiny.

C. Even if Rational Basis Review Applied, BLAG Still Identifies No Legitimate Government Interest Advanced by DOMA.

Plaintiff's complaint specifically alleges that DOMA's denial of equal spousal health coverage for same-sex couples does not make heterosexual marriages more stable, secure, or desirable. (*See, e.g.*, SAC ¶ 39.) Plaintiff's summary judgment motion further submits expert declarations substantiating that point. (*See, e.g.*, Lamb. Decl., Dkt. 136.) BLAG offers no evidence to the contrary and no basis for challenging the factual allegations in the complaint. That is fatal. *See Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 590-91 (9th Cir. 2008) (whether a classification passes rational basis review is a factual determination governed by the allegations of the complaint on a motion to dismiss and by the evidence submitted on summary judgment).

Nothing justifies DOMA's radical departure from the federal government's longstanding adherence to state definitions of marriage. Already, three federal courts have upheld claims that DOMA fails rational basis scrutiny. *See Gill*, 699 F. Supp. 2d at 387; *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1188-90 (N.D. Cal. 2011); *In re Balas*, No. 11-bk-17831, 2011 Bankr. LEXIS 2157, at *29-30 (C.D. Cal. Bankr. Jun. 13, 2011). BLAG offers no basis for ruling otherwise here.

1. Singling Out Marriages Between Same-Sex Couples for Non-Recognition Is Not an Act of Permissible "Line-Drawing."

BLAG argues that it need not show that the denial of equal spousal health coverage to same-sex couples will encourage more heterosexuals to marry or stay married, and that courts do not require a justification for excluding a group from benefits when "Congress had to draw the line somewhere." (Dkt. 150 at 17-18) (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 316

(1993).) DOMA, however, is not the kind of line-drawing statute warranting such deference. As explained in the principal case on which BLAG relies, line-drawing measures are those where "differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims." *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976). *Mathews* found that Congress rationally required five years of continuous residency for Medicare eligibility, though the line could just as easily have been drawn at six years or four. *Id.* at 69. DOMA does not involve such "differences in degree" along a continuum. Congress accepted without question all the various lines that states have drawn around marriage (such as age of eligibility to marry), but carved out a *single* exception to the otherwise unitary class of valid state-law marriages in order to exclude lesbian and gay couples alone.

That act of exclusion must be justified by some legitimate governmental purpose. It is not enough to say that Congress rationally could choose to continue benefits to married heterosexuals without offering some valid justification for the *exclusion* of married lesbian and gay couples who qualify in every other respect for those same benefits.[7] The sheer desire to disfavor the excluded group does not provide a rational basis for a law. *See Romer*, 517 U.S. at 633 (prohibiting classifications "drawn for the purpose of disadvantaging the group burdened by the law").[8]

That is particularly true where, as here, the law at issue is designed to exclude a politically unpopular group and to regulate personal relationships rather than economic transactions. As explained in plaintiff's motion to dismiss opposition, these circumstances require particularly

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[7] *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972) (examining whether state law prohibiting contraception to unmarried couples served a legitimate end, rather than limiting inquiry to whether married people benefited from having access to contraception); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973) (examining whether exclusion of households of unrelated adults from food stamps served a legitimate end, rather than considering only the benefits of food stamps for households of related adults); *Romer*, 517 U.S. at 635 (examining whether excluding lesbian and gay people from antidiscrimination protections was justified rather than considering only whether other minority groups benefited from their ongoing inclusion in antidiscrimination measures).

[8] To the extent BLAG suggests that DOMA seeks to favor married heterosexuals rather than to disfavor married same-sex couples, that is a "distinction without a difference." *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (A law should not "stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another.").

careful and searching rational basis review. (*See* Dkt. 133 at 18-19.) BLAG offers no response to the case law on this point and, as explained below, identifies no interest that could survive review.

2. DOMA Cannot Be Justified as Furthering a "Uniform" Federal Definition of Marriage.

Though BLAG asserts that DOMA advances a "uniform" federal definition of marriage, DOMA *undermines* uniformity by taking a single category—valid state law marriages—and dividing it into those marriages recognized under federal law and those not. BLAG ignores the undisputed history of marriage law, which has varied widely across the states over hotly contested social issues. For decades, interracial marriage was an issue that "bitterly divided" the states, with some recognizing those marriages and others not. (Cott Decl., Dkt. 135 ¶ 57.) The same has been true of standards for divorce (*id.* ¶¶ 58-63), and states remain divided to this day on such issues as first-cousin and common-law marriages. (*Id.* ¶¶ 37, 43.) Nonetheless, the federal government has long tolerated these variations in state marriage law, and continues to defer to state marriage laws in every respect *except* when it comes to the sex of the spouses. (*Id.* ¶¶ 38, 41, 44, 57, 64.) *See Gill*, 699 F. Supp. 2d at 392. BLAG offers no rational explanation as to why Congress should be perfectly willing to accept "confusion" regarding the marital status of many types of couples who cross state lines with marriages not uniformly recognized, but find such confusion intolerable when it comes to married lesbian and gay couples. *See, e.g., Garrett*, 531 U.S. at 366 n.4 (finding that law failed rational review where "purported justifications . . . made no sense in light of how the [government] treated other groups similarly situated"); *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985) (holding that distinction in tax obligation between similarly situated groups bore no relation to statutory purpose and thus failed rational review).

3. DOMA Cannot Be Justified as a Rational Act of "Caution."

BLAG's motion to dismiss further asserts that DOMA can be justified as an exercise in "caution" about what a future with married same-sex couples might hold. (Dkt. 150 at 22.) At best, this is an argument that, some day, a rational basis might surface to justify DOMA, even if none exists today. BLAG identifies nothing in equal protection law that permits the government to single out for no legitimate reason a disfavored class of individuals for exclusion today, in case

a legitimate excuse might materialize tomorrow. Indeed, the Supreme Court has rejected that view. In *Romer*, the state characterized the law as a response to the "deeply divisive issue of homosexuality" and claimed to need leeway to handle matters calmly over time. No. 94-1039, Brief for Petitioners at 47 (April 21, 1995), *Romer*, 517 U.S. 620. The Court disagreed, finding no rational basis for the law. 517 U.S. at 635.

Moreover, even if a wait-for-a-basis-to-develop approach were rational, marriages of same-sex couples are "untested" only because states have historically discriminated against lesbians and gay men by refusing to recognize their unions. (Dkt. 150 at 24.) That discrimination is a basis for striking down DOMA, not for enshrining it in federal law. (*See* Dkt. 133 at 23.)

In any event, there is nothing "cautious" about DOMA's radical departure from the federal government's longstanding deference to state marriage law. BLAG protests that DOMA is not so radical because some federal statutes require more than just a valid state law marriage to obtain benefits. (Dkt. 150 at 28.) For example, the Social Security Act requires some couples to be married for at least one year. *See* 42 U.S.C. § 416. Immigration law discounts marriages entered solely to obtain immigration status. 8 U.S.C. § 1186a(b)(1). Those requirements, however, in no way purport to create a federal definition of marriage. Rather, those statutes impose requirements *in addition to marriage* in order to further their particular legislative goals.[9]

4. The Denial of Equal Spousal Health Coverage Cannot Be Justified as an Attempt to "Incentivize" Different-Sex Parents to Raise Children.

There is no rational basis to believe that different-sex parents are superior to same-sex parents. As courts have repeatedly found, and the scientific evidence has unanimously shown, it is beyond scientific dispute that same-sex parents are just as likely to raise well-adjusted children as different-sex parents. (Dkt. 133 at 24-25; Dkt. 142 at 12-13.) BLAG derides that evidence as "highly dubious proposition in the context of this divisive issue" but identifies nothing to the

[9] BLAG argues that DOMA's unprecedented federal intrusion into the definition of marriage is based on Congress's power to determine the scope of federal rights. That misses the point. Congress's allocation of benefits must advance a valid *federal* interest, such as limiting Social Security to true dependents. But the power to establish criteria for marriage lies at the core of *state* sovereignty. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Gill*, 699 F. Supp. 2d at 391.

contrary. (Dkt. 150 at 23.) Instead, BLAG asserts that Congress "could not be found irrational for failing to predict this supposed consensus." (*Id.*) The inquiry, however, is whether DOMA is rationally related to a legitimate interest, not whether Congress subjectively believed DOMA to be so at the time of enactment. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (statute may fail rational review where facts on which it is premised have ceased to exist).

Moreover, there is no rational basis to believe that denying spousal health benefits to same-sex couples will incentivize more heterosexuals to marry or have children. *See Gill*, 699 F. Supp. 2d at 389 ("[D]enying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure."). BLAG's principal response is to assert that it is irrelevant whether "refusing . . . benefits to same-sex couples would in and of itself benefit traditional marriages." (Dkt. 150 at 18.) BLAG points to equal protection cases approving the decision to grant benefits to a preferred group without requiring a showing that the preferred group changed its behavior as a result of receiving benefits. (*Id.* at 18-19.) In those cases, however, the courts did not require such a showing because the government did not claim that the *purpose* of the preferential treatment was to "incentivize" conduct by those persons. Unlike here, the preferential treatment had some different purpose, such as providing support for a particularly needy group.[10]

BLAG then falls back on the suggestion that blocking spousal health coverage for same-sex married couples sends a "message" that marriage is "[i]nextricably [b]ound [u]p [w]ith" childrearing. (Dkt. 150 at 26) (italics omitted). That argument improperly contradicts the factual allegations of plaintiff's complaint. (SAC ¶ 39.) It also makes no sense. Same-sex married couples often rear children, as plaintiff and her spouse are doing.[11] Refusing federal recognition

[10] *See Schweiker v. Wilson*, 450 U.S. 221, 236-37 (1981) (purpose was to allocate fiscal responsibility to the states); *Califano v. Boles*, 443 U.S. 282, 291-93 (1979) (purpose was to limit Social Security to those financially dependent); *Mass. Bd. of Ret.*, 427 U.S.at 315-17 (purpose of retirement age was to "assur[e] physical preparedness" of police force).

[11] *See* Adam P. Romero, The Williams Institute, *Census Snapshot*, at 1, 2 (December 2007) (census data "show that 20% of same-sex couples in the U.S. are raising children" and as of 2005 an estimated 270,313 of the country's children were living in households headed by same-sex couples), *available at* http://www3.law.ucla.edu/williamsinstitute/publications/USCensus Snapshot.pdf.

of the marriages in which those children are raised only *increases* the number of children being raised outside federally recognized wedlock, further decoupling marriage from childrearing.[12]

If Congress's intent was truly to send a message that marriage is intertwined with childrearing, the exclusion of same-sex married couples from spousal health coverage is a bizarre and irrational way to accomplish that goal. Although rational basis review permits a degree of under- or over-inclusivity in legislative classifications, the Supreme Court has refused to credit a legislature's choice of an attenuated path toward a supposed goal when a far more direct path is readily available. *Cleburne*, for example, invalidated under rational review a zoning ordinance barring a home for mentally disabled. The Court held that, if the city's interest were truly in preventing overcrowding, it could have easily passed a zoning regulation limiting the number of occupants. 473 U.S. at 449-50. The same skepticism should apply here. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (citations omitted).

II. RULE 56(D) DOES NOT ALLOW BLAG TO ESCAPE SUMMARY JUDGMENT.

BLAG argues, in the alternative, that a ruling on the merits of plaintiff's summary judgment motion would be "premature." (Dkt 149 at 1.) BLAG does not dispute that a Rule 56(d) delay is appropriate only when the nonmoving party identifies "specific facts" that are "essential" to its opposition. (*See* Dkt. 142 at 17-18.) It cites *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 769 (9th Cir. 2003), for

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[12] BLAG argues that there "may be" a connection between declining birth rates and the recognition of marriages between same-sex spouses in Scandinavia and the Netherlands. (Dkt. 150 at 26 n. 18.) That connection has been conclusively disproven. *See* M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, Sexuality Research and Social Policy Journal, at 8 (Sept. 2004) (finding that "no evidence" supports that connection, that birth rates have changed across Scandinavia, Europe, and the United States "regardless of whether or not they adopted same-sex partnership laws," and that this trend was "underway well before the passage of laws that gave same-sex couples rights" in Scandinavia); *see also* William Eskridge & Darren Spedale, *Gay Marriage, For Better or For Worse?* (2006) (concluding that the Scandinavian evidence shows that marriages between same-sex couples would *strengthen* the institution).

the proposition that Rule 56(d) requests should be granted "fairly freely" when the nonmovant has had no realistic opportunity to pursue needed facts. (Dkt. 149 at 4.) But *Burlington Northern* neither relieved the nonmovant of its obligation to identify specific sought-after facts "essential" to its opposition nor suggested that "early" Rule 56(d) requests should be granted absent such a showing. In *Burlington Northern*, the Ninth Circuit *rejected* one of the defendants' two 56(f) requests, because "[a]ny such discovery would be futile." 323 F.3d at 774. It granted the other request only after identifying *specific* evidence needed to "show that there is a genuine issue of material fact" on a key issue. *Id*. 774-75. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (the Rule applies to discovery "essential" to oppose summary judgment). BLAG's efforts to identify "specific facts" it hopes to elicit from further discovery "essential to resist the summary judgment motion" reveal its Rule 56(d) request for what it is: a delay tactic.[13]

BLAG first argues that it "may" (or may not) wish to identify "one or more" expert witnesses of it own, on unspecified topics. (Dkt. 149 at 6.) Similarly, BLAG argues that it "may" (or may not) wish to depose plaintiff. (*Id*. at 8.) But Ninth Circuit precedent rejects Rule 56(d) requests based on vague, non-committal claims such as these. *See Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001) (party seeking discovery extension must "make clear what information is sought and how it would preclude summary judgment") (citation omitted). (*See also* Dkt. 142 at 17-19.) BLAG also argues—although it is now willing to accept plaintiff's offer to stipulate to the admissibility of BLAG's depositions of plaintiff's experts from other DOMA matters, which are complete—that it needs further time to "digest" the depositions. This assertion rings hollow: plaintiff offered to set a schedule that would afford BLAG time to "digest" those depositions, but BLAG refused this offer. (Lin Decl., Dkt. 144 ¶ 8, Exs. F-I.)[14]

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[13] BLAG also incorrectly asserts that "[t]his Court's Order of June 15, 2011, ECF No. 128, recognized that a *ruling* on the *merits* of a summary judgment motion would be premature given the posture of this case." (Dkt. 149 at 4; emphasis added.) The Court's order addressed an administrative motion requesting leave to file a consolidated overlength brief. The motion did not broach the propriety of a "ruling on the merits," and the Court expressed no view on the subject.

[14] If the Court believes that BLAG needs more time to "digest" the depositions, plaintiff respectfully requests that the Court give BLAG a one-week continuance to digest the five deposition transcripts and re-brief its opposition; permit plaintiff one week thereafter to amend her reply brief; and set the hearing for the first date available on the Court's calendar.

BLAG also claims that it will seek written discovery on whether "homosexuals lack political power" and whether "homosexuality is an immutable characteristic." (Dkt. 149 at 6.) But BLAG does not explain what personal knowledge or documents it expects *Ms. Golinski* to provide on those broad topics of social science, which are the subject of expert testimony as to which BLAG has already taken depositions. In any event, BLAG has had ample opportunity to pursue such discovery. Had BLAG served discovery when plaintiff first approached it to discuss the briefing schedule and BLAG's discovery plans in early June, it would now have plaintiff's responses. Instead, it declined to inform plaintiff of the discovery it intended to seek, and to date has failed to serve any discovery, despite its stated intention to do so this week (Dkt. 149 at 6). (Lin Decl., Dkt. 144 ¶¶ 8-12, Exs. F-I; *see also* Reply Lin Decl., filed herewith, ¶ 2.) It cannot now rely on its own failure to conduct discovery to oppose summary judgment. *See Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir.1986) (a litigant who failed to take discovery cannot challenge decision to proceed with summary judgment ruling); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006) (a party seeking a Rule 56(d) delay must have "diligently pursued previous discovery opportunities").

Next, BLAG requests proof that plaintiff is lawfully married because, it argues, "[a]llegations in a complaint do not suffice." (Dkt. 149 at 7.) Plaintiff did not rely, however, on "allegations in a complaint." Plaintiff swore in her declaration, under oath, that she is lawfully married under the laws of the State of California. (Golinski Decl, Dkt. 143 ¶ 3.) Rule 56 certainly permits such evidence. *See* Fed. R. Civ. P. 56(c)(4). In any event, to remove any doubt, a copy of plaintiff's marriage license is provided herewith. (Golinski Suppl. Decl, Ex. A.)

Finally, BLAG purports to require discovery "to determine what economic loss, if any, plaintiff has suffered" to "confer standing." (Dkt. 149 at 8.) But plaintiff provided documentation detailing her financial losses, including the significantly higher deductibles and out-of-pocket costs under her spouse's private plan (which the back pay award does not cover). (Golinski Decl., Dkt. 143 ¶¶ 6, 12-15 & Exs. B, G.) BLAG does not indicate that it intends to dispute the validity of that evidence. BLAG cites Chief Judge Kozinski's orders regarding back pay at length, but fails to mention that he expressly found "[that] no health insurance plan on the

private market provides exactly the same benefits as Ms. Golinski's [plan]," and that "this remedy—ongoing back pay," is "inadequate." *In re Golinski*, No. 09-80173, Slip. Op. at 1, 3 (9th Cir. EDR March 5, 2010).[15] In all respects, BLAG asserts only that it wishes to probe what "economic loss, if any," plaintiff has suffered, but it ignores the numerous other ways in which plaintiff has been harmed. Plaintiff has detailed, for example, the anxiety she suffers as a result of her spouse's under-insured status; the greater health risks her family has endured; and the stigma of the government's discrimination. These injuries, which BLAG does not dispute, are more than sufficient to establish standing. (*See* Dkt. 142 at 16-17 (citing cases holding those harms to constitute not only injury-in-fact but irreparable harm).)

Rule 56(d) requires specific facts that are "essential" to the nonmovant's effort to identify a genuine dispute, not merely any *conceivable* further discovery. BLAG identifies no reason to delay consideration of plaintiff's summary judgment motion.[16]

CONCLUSION

For the forgoing reasons, plaintiff's motion for summary judgment should be granted.

Dated: July 22, 2011

MORRISON & FOERSTER LLP

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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[15] The Chief Judge explained: "[i]ts computation will undervalue the benefit Ms. Golinski is being denied because all of the private plans identified as potentially comparable are inferior to the BC/BS plan; back pay may have adverse tax consequences . . . that can't be remedied;" back pay is "a burdensome hassle for Ms. Golinski," and "it relegates her to a *de facto* separate, and therefore inherently unequal, benefits system based on her sex and sexual orientation." *Id*. at 3.

[16] If the Court nonetheless grants BLAG's request to permit further discovery, plaintiff respectfully requests a revision of the schedule proposed by BLAG to permit plaintiff to resubmit her summary judgment motion following discovery. (*See* Reply Lin Decl. Ex. E.)