Nos. 12-15388, 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:10-cv-0257-JSW
The Honorable Jeffrey S. White, District Judge.

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STATEMENT OF THE ISSUES

1. Whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which excludes state-sanctioned marriages of same-sex couples from recognition by the federal government for all purposes, violates the Fifth Amendment's equal protection guarantee.

2. Whether DOMA's exclusion of same-sex couples' marriages from all federal recognition should be afforded heightened scrutiny because it discriminates based on sexual orientation and sex and burdens same-sex spouses' fundamental liberty interest in building family relationships together.

STATEMENT OF THE FACTS

Karen Golinski is a Staff Attorney in the Motions Unit of the Ninth Circuit, where she has been employed for more than 20 years. (Supplemental Excerpts of Record ("S.E.R.") 182.) Ms. Golinski met Amy Cunninghis in 1989 and has been in a committed relationship with her ever since. (*Id.*) They were legally married under the laws of the State of California on August 21, 2008, and remain lawfully married. (*Id.*) They have a nine-year-old son. (*Id.*)

On September 2, 2008, Ms. Golinski attempted to add Ms. Cunninghis to her existing Blue Cross/Blue Shield family coverage employee health insurance plan, which at the time covered Ms. Golinski and their son. (*Id.* 182-83.) As a result of DOMA, her request was refused. (*Id.* 183, 194, 196.) Hence, although

Ms. Golinski paid the full rate for self and family health insurance coverage, she received coverage only for herself and her son, not for her entire family. (*Id.* 182.)

Because of the denial, Ms. Golinski received significantly less compensation, in terms of employment benefits, than her similarly situated colleagues with different-sex spouses. If Ms. Golinski were a man, she would have been able to add Ms. Cunninghis to her existing family health plan as a matter of course at no additional cost. (*Id*. 183, 198, 225-27.) Ms. Golinski had to purchase separate individual insurance for Ms. Cunninghis, which provided significantly inferior coverage, because no comparable coverage was available on the private market. (*Id.* 182, 188-92.) The family ran the risk of significant financial hardship if Ms. Cunninghis were to develop a serious medical condition, and Ms. Cunninghis went without uncovered preventive care. (*Id.*) Ms. Golinski lived daily with the stigma of second-class treatment: despite her long service in a job in which she took great pride, she received inferior compensation because of her sex and sexual orientation. (*Id*. 185; *see also* District Court Docket ("Dist. Ct. Dkt.") 142 at 3-5.)

STATEMENT OF THE CASE

Ms. Golinski filed a complaint under the Ninth Circuit's Employment Dispute Resolution ("EDR") Plan on October 2, 2008. Although her employer ruled in her favor, the Office of Personnel Management ("OPM") moved to block

the provision of coverage. (Excerpts of Record ("E.R.") 3-5 (summarizing EDR proceedings).) Ms. Golinski's First Amended Complaint sought a writ of mandamus to direct OPM's compliance with the EDR orders. The district court dismissed Ms. Golinski's mandamus claim but granted her leave to amend to challenge DOMA directly. Ms. Golinski filed her Second Amended Complaint on April 14, 2011, asserting claims for violation of her equal protection and due process rights secured by the Fifth Amendment.[1]

On February 23, 2011, the Attorney General notified Congress that because Section 3 of DOMA is unconstitutional as failing the heightened scrutiny that should be applied to the sexual orientation discrimination it manifests, the Department of Justice would forgo defense of the statute. (S.E.R. 1015.) The Attorney General indicated that "Section 3 will continue to be enforced by the Executive Branch." (*Id.* 1020.) The Bipartisan Legal Advisory Group ("BLAG") moved to intervene "for the limited purpose of defending the constitutionality of" DOMA (Dist. Ct. Dkt. 103), and the district court permitted intervention for this purpose. (Dist. Ct. Dkt. 116.)

BLAG moved to dismiss, and Ms. Golinski moved for summary judgment shortly thereafter. Ms. Golinski submitted extensive expert testimony

[1] Contrary to the suggestion of *amicus* Eagle Forum, Ms. Golinski did not seek and was not awarded monetary damages in this case, and jurisdiction therefore is proper in this Circuit.

demonstrating that classifications based on sexual orientation merit heightened scrutiny. (Dist. Ct. Dkt. 142 at 5-10; *see also* S.E.R. 630-720, 858-950.) She also introduced extensive expert testimony showing that, even under rational basis review, DOMA's discriminatory treatment of married same-sex couples cannot rationally be deemed to promote interests relating to "responsible procreation" and childrearing. (Dist. Ct. Dkt. 142 at 12-14; *see also* S.E.R. 721-857.)[2] BLAG offered no rebuttal expert testimony nor any other admissible evidence. In an apparent attempt to avoid subjecting its sources to deposition or cross-examination at trial, BLAG instead cited a handful of articles outside the record and relied on excerpts from Ms. Golinski's experts' depositions that ultimately did not contradict the material facts. (Dist. Ct. Dkt. 174; *id*. 176 at 3-5, 12-13.)

The district court ruled that DOMA, as applied, violates the Constitution's guarantee of equal protection and concluded that sexual orientation classifications should be reviewed with heightened judicial scrutiny. In so ruling, the court carefully analyzed the evidence on each of the considerations the Supreme Court

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[2] Ms. Golinski submitted testimony on the following topics: the history of regulating marriage in the U.S. (Nancy F. Cott, Ph.D.) (S.E.R. 681); the history of homosexuality and discrimination experienced by lesbians and gay men (George Chauncey, Ph.D.) (*id.* 630); the minority group politics and public attitudes regarding lesbians and gay men (Gary Segura, Ph.D.) (*id.* 900); the psychology of personal relationships and sexual orientation (Letitia Anne Peplau, Ph.D.) (*id.* 858); and children's psychology, child development and adjustment (Michael Lamb, Ph.D.) (*id.* 721).

has sometimes evaluated to determine whether a statutory classification is suspect. (E.R. 19-25.) The court found "no dispute in the record" that "lesbians and gay men have experienced a long history of discrimination," and "that sexual orientation has no relevance to a person's ability to contribute to society." (*Id*. 19-20 (citation omitted).) The court concluded that, although heightened scrutiny is not limited to classifications based on immutable characteristics, sexual orientation is such a trait. (*Id.* 20-21.) The court further noted that there is no genuine dispute in the record that lesbians and gay men are a minority and "continue to suffer discrimination 'unlikely to be rectified by legislative means.'" (*Id*. 24 (citation omitted).) The court accordingly applied heightened scrutiny, which it held DOMA fails to meet. (*Id.* 25-32.)

The court also ruled, in the alternative, that DOMA fails even rational basis review because DOMA bears no rational relationship to "responsible procreation" or any other conceivable government interest. (*Id*. 32-43.) Assessing the expert evidence, the court found that there was no "genuine issue of disputed fact regarding whether same-sex married couples function as responsible parents," and emphasized that "[t]he denial of recognition and withholding of marital benefits to same-sex couples does nothing to support opposite-sex parenting, but rather merely serves to endanger children of same-sex parents." (*Id.* 29.) It permanently

enjoined Defendants from interfering with the enrollment of Ms. Golinski's spouse in her health plan and entered judgment. (*Id*. 43-44.) This appeal followed.

DOMA'S BACKGROUND

A. The Passage Of DOMA In 1996.

The Defense of Marriage Act sweepingly excludes same-sex couples from any recognition of their valid marriages for all federal purposes. 1 U.S.C. § 7 (codifying Section 3 of DOMA).[3] Congress hastily enacted DOMA in 1996 in anticipation of the possibility that same-sex couples might be permitted to marry in Hawaii. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, __F.3d__, 2012 U.S. App. LEXIS 10950 (1st Cir. May 31, 2012). Despite DOMA's blunderbuss impact on hundreds of federal programs and rights dependent on marital status, Congress conducted virtually no fact-finding. *Id*. at 379. "Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare." *Id*.

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[3] Section 3 provides: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Despite BLAG's assertion that Congress proceeded cautiously by enacting DOMA, Congress expressly rejected calls to study whether DOMA would advance the policies of the more than one thousand federal laws it affects that allocate benefits or responsibilities based on marital status. *See, e.g.*, Markup Session, H.R. 3396, H. Comm. on Judiciary, Subcomm. on the Constitution, 104th Cong. 2d sess. 67-68 (May 30, 1996) (statement of Rep. Frank). And the House specifically voted to *reject* a proposed amendment that would have required the General Accounting Office to analyze the law's budgetary impact. 142 CONG. REC. H7503-05 (daily ed. July 12, 1996). As the First Circuit recently explained:

> Despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA[4] . . . and none of the testimony concerned DOMA's effects on the numerous federal programs at issue. Some of the odder consequences of DOMA testify to the speed with which it was adopted.
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> The statute . . . is devoid of the express prefatory findings commonly made in major federal laws.

Massachusetts, 2012 U.S. App. LEXIS 10950, at *32-33 (citations and footnote omitted).

As the House Report described, many in Congress supported DOMA to demonstrate their "moral disapproval of homosexuality, and a moral conviction

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[4] Citing hearing of House Committee on Judiciary, Subcommittee on the Constitution. The Senate likewise held only one day of subcommittee hearings. *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 2d sess. (1996).

that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664 at 16 (1996) (footnote omitted), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07. "In the floor debate, members of Congress repeatedly expressed their disapprobation of homosexuality, calling it 'immoral,' 'depraved,' 'unnatural,' 'based on perversion,' and 'an attack upon God's principles.'" *Gill*, 699 F. Supp. 2d at 378 (citing 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); 142 CONG. REC. H7494 (statement of Rep. Smith)). Rep. Henry Hyde, then-Chairman of the House Judiciary Committee, stated: "most people do not approve of homosexual conduct . . . . [A]nd they express their disapprobation through the law. . . . It is . . . the only way possible to express this disapprobation." 142 CONG. REC. H7501 (daily ed. July 12, 1996).

The House Judiciary Committee's Report on DOMA acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664 at 3. Nonetheless, the Report described the potential recognition of marriage for same-sex couples in Hawaii as part of an "orchestrated legal assault being waged against traditional heterosexual marriage" and announced Congress' intent to "defend the institution of traditional heterosexual marriage." *Id.* at 2-3, 12. It emphasized that "same-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal

status that most people . . . feel ought to be illegitimate." *Id*. at 16; *see also id*. at 15-16 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails [a] moral disapproval of homosexuality.").

B. DOMA's Departure From Longstanding Federal Deference To State Marriage Determinations.

DOMA's broad-based repudiation of a single class of state-conferred marriages was an unprecedented departure from the federal government's historical deference to state marriage determinations since the nation's beginning. As Professor Nancy Cott explained in her expert testimony below, "[m]arriage rules have varied from state to state, and legislators and judges in every state have changed those rules and interpretations significantly over time" on such issues as the age of consent to marry, degree of consanguinity permitted, recognition of common law marriage and interracial marriage, and grounds for divorce. (S.E.R. 688, 690-700.) State laws differ to this day in many of these areas, and these differences have "resulted in a patchwork quilt of marriage rules in the United States." (*Id*. 689.) Nevertheless, before DOMA, the federal government always "fully embraced these variations and inconsistencies in state marriage laws," even though many involved "similarly politically-charged, protracted, and fluid debates at the state level." *Gill*, 699 F. Supp. 2d at 392. (*See also* S.E.R. 688-89.)

This deference to the states in the areas of family and marriage law was not mere historical accident. Under well-accepted concepts of federalism, with the exception of meeting minimum federal equal protection and due process constraints, "[t]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States." *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citation omitted); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" have "long been regarded as a virtually exclusive province of the States"); *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("there is no federal law of domestic relations"). As such, the district court was correct to conclude that DOMA marked both "a stark departure from tradition" and a "blatant disregard of the well-accepted concept of federalism in the area of domestic relations." (E.R. 40 (citation omitted).)

For these reasons, two of BLAG's major contentions require correction. First, other than DOMA, Congress has never supplied a "federal definition of marriage" supplanting the requirement of an underlying valid state marriage. At most, Congress has imposed some requirements in addition to a valid state marriage that advance policy objectives specific to that federal program. BLAG's examples of purported federal marital definitions all fit this pattern. (Brief of

Intervenor-Appellant BLAG ("Br.") 8-9).[5] This is precisely why the First Circuit recently found that "no precedent exists for DOMA's sweeping general 'federal' definition of marriage for all federal statutes and programs." *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *28. Second, Congress certainly does not advance any *state* interests in marriage through DOMA because the federal government neither marries couples nor dissolves their relationships. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (regulation of marriage touches police power "denied the National Government and reposed in the States"). Congress thus cannot invoke state interests in who may marry regardless of whether some federal legislators believed that states should exclude same-sex couples from marriage.

SUMMARY OF ARGUMENT

Last week Chief Justice Roberts observed that "sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress' action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 2012 U.S.

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[5] *See* I.R.C. § 2(b)(2) (imposing additional tax-related requirements to be considered "married" or "spouse," without defining those terms); I.R.C. § 7703 (same); 42 U.S.C. § 416 (clarifying in § 416(h)(1)(A)(i) that state court of domicile determines marital status; adding qualifying conditions) and § 1382c(d)(2) (extending benefits to additional class of needy people by treating them as married); 8 U.S.C. § 1186a(b)(1) (imposing additional requirement that qualifying marriage not be fraudulently entered). BLAG cites 5 U.S.C. §§ 8341(a) and 8101(6), (11) *et seq.*, but these federal employee benefits laws default to state marriage determinations. *See* 5 U.S.C. § 8341(a) (defining "widow" and "widower" as surviving "wife" or "husband" who "was married," *without* defining "wife," "husband," or "marriage"); *id.* § 8101 (similar).

LEXIS 4876, at *40 (Jun. 28, 2012) (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 Sup. Ct. 3138, 3159 (2010) (slip op., at 25) (internal quotation marks omitted)). DOMA is an unprecedented departure from this nation's federalist tradition, the first time in our history that Congress has intruded on the states' sovereignty in determining who is validly married. DOMA's singling out of same-sex married couples for exclusion merits heightened review. DOMA cannot, however, even satisfy proper application of rational basis review, let alone the heightened scrutiny that should apply to it.

BLAG instead urges this Court to abdicate its role. (Br. 57-58.) But assessing whether a statute unconstitutionally discriminates against a vulnerable minority group is at the core of the judicial function and is fundamental to ensuring that "the democratic majority . . . accept[s] for themselves and their loved ones what they impose on you and me." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). When the democratic majority encroaches on minority rights without adequate reason, "[i]t is emphatically the province and the duty of the judicial department to say what the law is" and to declare the legislation unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Particularly where the executive and legislative branches take diametrically opposed views on DOMA's constitutionality, it is critical that the Court not simply defer to one branch, such as Congress, over the other.

Regardless of the level of review, DOMA cannot be justified by BLAG's proffered interests. DOMA was no cautionary act, but rather a blunt, preemptive law that foreclosed, rather than provided for, any future movement on federal recognition of same-sex couples' valid marriages. The Supreme Court has made clear that efforts to preserve the public fisc cannot be drawn along invidious lines, and in any event DOMA costs rather than saves money for the federal government. BLAG's claim that Congress intended DOMA to "preserv[e] prior legislative judgments" merely reifies Congress' intentional decision to treat same-sex spouses differently, rather than supplying a reason for doing so. And DOMA bears no relation to who becomes a parent and hurts rather than helps an entire class of children solely because their parents are same-sex spouses.

Perhaps recognizing that its purported federal interests fall woefully short, BLAG reaches for the *states*' interests in marriage, as if they can somehow be incorporated by reference. But as the sole sovereigns that regulate access to civil marriage, the states have interests DOMA does not and cannot advance. Only the states confer marriage on committed couples such as Ms. Golinski and her spouse. Philosophical disagreements on the part of some members of Congress do not vest the federal government with the same interests as the states, which uniquely govern marital eligibility.

BLAG also asks the Court not to reach these issues on the basis of *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), and *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), but neither decision predetermines whether DOMA survives constitutional review.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT DOMA IS SUBJECT TO HEIGHTENED SCRUTINY.

A. Classifications Based On Sexual Orientation Call For Heightened Judicial Scrutiny.

DOMA targets for extraordinary harm lesbians and gay men, a minority group subject to severe historical discrimination. The Court should reach the proper standard of review for sexual orientation classifications, and decide that heightened judicial scrutiny is appropriate to rectify entrenched discrimination against this group. So long as the appropriate level of review remains an open question, the issue must be re-litigated in each case, and the government remains without guidance about the standards to which it must conform. Moreover, uncertainty about the level of scrutiny incorrectly signals that ongoing discrimination against lesbian and gay men may be tolerable.

Contrary to BLAG, the level of scrutiny appropriate for sexual orientation classifications remains unsettled. Although the Supreme Court has yet to rule that sexual orientation classifications are suspect (Dist. Ct. Dkt. 119-1 at 20), it has

never rejected that argument, instead finding it unnecessary to resolve. *Romer v. Evans*, 517 U.S. 620 (1996), did not need to look beyond rational basis review because the state's attempt to strip gay people of all antidiscrimination protections was a "denial of equal protection . . . in the most literal sense," and "confound[ed] [the] normal process of judicial review." *Id.* at 632-33. The Ninth Circuit recently expressly followed *Romer*'s approach, finding rational review adequate to resolve the questions in *Perry*. *Perry v. Brown*, 671 F.3d 1052, 1080 n.13 (9th Cir. 2012), *reh'g en banc denied*, Nos. 10-16696, 11-16577 (9th Cir. June 5, 2012).

While *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), addressed the issue, it has been so undercut by intervening authority in the last 22 years that it can no longer be considered binding. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

High Tech Gays relied in significant part on *Bowers v. Hardwick*, 478 U.S. 186 (1986), concluding that laws classifying lesbians and gay men for adverse treatment are not subject to heightened scrutiny "because homosexual conduct can . . . be criminalized." *High Tech Gays*, 895 F.2d at 571. *Lawrence v. Texas* renounced that premise. 539 U.S. 558, 578 (2003).[6] *High Tech Gays* also relied

[6] The discredited *Bowers* decision was likewise the basis for other inapposite Circuit Court decisions addressing sexual orientation discrimination in the unique military context. *See Steffan v. Perry*, 41 F.3d 677, 685 n. 3 (D.C. Cir. 1994); *Ben-*

[Footnote continued on following page.]

on the mistaken assumption — now authoritatively rejected by the Supreme Court — that sexual orientation is merely "behavioral," rather than a deeply rooted, immutable characteristic warranting heightened judicial protection. *High Tech Gays*, 895 F.2d at 573-74. The Supreme Court has rejected this artificial distinction, noting that its "decisions have declined to distinguish between status and conduct in th[e] context" of sexual orientation. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010).[7]

[Footnote continued from previous page.]

Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

In other Circuit Court cases, the courts either mistakenly concluded that *Romer* had decided that rational basis is the governing test, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008), *Massachusetts*, 2012 U.S. App. LEXIS 10950 at *21 (deferring to *Cook*), *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), and *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); without considering the issue, rested on the fact that the Supreme Court had not yet held a higher level of scrutiny required, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); uncritically followed other cases making these errors with no independent consideration of the appropriate level of scrutiny, or relied on the misstatement in the *Romer* dissent regarding what the majority in that case held, *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004), *Lofton v. Sec'y. of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); simply performed no analysis of the issue, *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); or were not presented with a claim to heightened scrutiny, *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998).

[7] Contrary to BLAG's argument (Br. 29 n.8), neither *Christian Legal Society's* discussion of sexual orientation, nor the authorities cited on that point, were cabined to the First Amendment context. *See* 130 S. Ct. at 2990.

The other justification on which *High Tech Gays* relied — that lesbians and gay men are too politically powerful to warrant heightened protection — is irreconcilable with the Supreme Court's treatment of race- and sex-based classifications, and was so even when *High Tech Gays* was decided. Since then, the Supreme Court has specifically noted that lesbians and gay men constitute a "politically unpopular group," *Romer*, 517 U.S. at 634 (internal quotation marks omitted), and reaffirmed application of heightened scrutiny for race- and sex-based classifications despite still further political progress by those groups. *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).[8]

Nor did *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008), revive *High Tech Gays*. 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 omitted). *See also High Tech Gays*, 895 F.2d at 577 (noting "[s]pecial deference" in national security context). That special deference has no application here.

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[8] *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), and *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), did not breathe life into *High Tech Gays*. Both pre-dated much of the intervening authority above, including *Lawrence*'s overruling of *Bowers*. *See Philips*, 106 F.3d at 1425; *Holmes*, 124 F.3d at 1132-33.

Moreover in *Witt*, the Ninth Circuit was not asked to rule on the type of equal protection claim presented here, instead challenging the propriety of a classification separating gay soldiers from "child molesters," or other individuals whose sexual behavior might be found "offensive." *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. That narrow ruling presumed rational review applied, without squarely addressing the issue. Where the Court assumes a legal principle without expressly addressing it, the Court remains free to address the merits of the issue in a subsequent case. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *see also Serv. Emps. Int'l Union, Local 102 v. Cnty. of San Diego*, 60 F.3d 1346, 1354 (9th Cir. 1994).

Rather than rely on the undermined decision in *High Tech Gays*, this Court should analyze the traditional considerations for determining whether heightened scrutiny is warranted. These compel application of elevated scrutiny for sexual orientation-based classifications. *See, e.g.*, *Watkins v. U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd* 671 F.3d 1052 (9th Cir. 2012); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*,

183 P.3d 384, 442-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-61 (Conn. 2008).

While no single consideration is dispositive, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976), and all point in the same direction here, the Supreme Court invariably has placed "far greater weight" on (1) the history of discrimination and (2) the lack of any relationship between the group's distinguishing characteristic and the ability to contribute to society. *Kerrigan*, 957 A.2d at 427-29; *Varnum*, 763 N.W.2d at 889 n.16.

1. Lesbians And Gay Men Have Endured A Long History Of Discrimination.

As this Court recognized over two decades ago and reaffirmed very recently, lesbians and gay men have suffered a history of purposeful unequal treatment. *High Tech Gays*, 895 F.2d at 573; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"). *See also Lawrence*, 539 U.S. at 571. Both DOJ and Ms. Golinski's expert have detailed this long, painful, and ongoing history, and BLAG has conceded this point in other DOMA

litigation. (Dist. Ct. Dkt. 145; S.E.R. 72, 88, 632-65.) No court has found otherwise.[9]

2. Sexual Orientation Bears No Relation To The Ability To Contribute To Society.

Rather than resting on "meaningful considerations," *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), laws that discriminate based on sexual orientation target a characteristic that "bears no relation to ability to perform or contribute to society." *Id.* Undisputed expert testimony in this case confirms that lesbians and gay men are productive, contributing members of society who support their families and nurture their children. (S.E.R. 861, 867-69); *see also Perry*, 704 F. Supp. 2d at 1002 ("by every available metric . . . as partners, parents and citizens, opposite-sex couples and same-sex couples are equal"); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987), *rev'd in part on other grounds*, 895 F.2d 563 (9th Cir. 1990); *Watkins*, 875 F.2d at 725 (Norris, J., concurring).

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[9] To the extent BLAG might claim, as it has before, that this history of discrimination was short-lived and has dissipated, this Court should not be persuaded. The expert testimony below establishes the long history of hostility toward the sexual conduct that would come to be identified with gay people as a class, that twentieth century discrimination drew on that history of vilification, and that this discriminatory treatment continues to the present day. (S.E.R. 108-09, 112.)

3. Lesbians And Gay Men Are A Politically Vulnerable Minority.

The Supreme Court has sometimes considered whether a group targeted by a classification is "a minority *or* politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (emphasis added); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (same). While not required for heightened scrutiny, consideration of political powerlessness further reinforces the need for careful scrutiny of sexual orientation classifications. This consideration examines *relative* political powerlessness, *i.e.*, whether the "discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440.

High Tech Gays erred by requiring a finding of *absolute* rather than relative political powerlessness, fatally "skew[ing] equal protection analysis as ordained by the Supreme Court." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375, 376 (9th Cir.) (Canby, J., dissenting from denial of rehearing en banc).[10] Had the Supreme Court applied such a standard to race- and sex-based classifications, neither would have won more than rational basis review. When

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[10] BLAG's *amicus* Concerned Women for America ("CWFA") urges the same error upon this Court (Ninth Circuit Docket ("Dkt.") 58-1). Nothing in CWFA's brief counters the expert testimony below, demonstrating that lesbians and gay men remain vulnerable because of a dearth of antidiscrimination protections, while many of this group's modest successes in remediating discrimination remain dependent on the whim of a governing majority and subject to reversal. (S.E.R. 906-14.)

Korematsu v. United States, 323 U.S. 214 (1944), was decided, race discrimination was prohibited by three federal constitutional amendments and federal civil rights enactments dating back to 1866. *See High Tech Gays*, 909 F.2d at 378. When the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Congress had "manifested an increasing sensitivity to sex-based classifications" by enacting protections under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and approving the federal Equal Rights Amendment for state ratification. *Id.* at 685, 686 n.17, 687.

As was true for women at the time of *Frontiero*, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17. Congress has only four openly gay members. (S.E.R. 915.) No openly gay person has ever served as President, on the U.S. Supreme Court, in the U.S. Senate, or as a Cabinet-level appointee. (*Id.*)

Although efforts to combat entrenched discrimination against lesbians and gay men have brought some progress, they also have been met with powerful resistance and backlash. Indeed, the political process has in many ways uniquely disadvantaged them. Lesbians and gay men persistently have been stripped of basic protections through the legislative process, and the initiative power "has now been used specifically against gay men and lesbians more than against any other social group." (*Id.* 914.) Ballot initiatives in more than three-fifths of the states

have sought to eliminate their right to marry, and at least ten additional states deny that right through statute. (*Id.* 911.)

To this day, lesbians and gay men remain unprotected in a majority of states against discrimination in the most basic transactions of ordinary life, including in private employment, housing, and public accommodations. (*Id.* 908-10.) Almost four decades after the first federal sexual orientation antidiscrimination legislation was introduced, no such legislation has passed. (*Id.* 908.) "[M]ore searching judicial inquiry" is warranted exactly where, as here, majoritarian bias "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). *See also Varnum*, 763 N.W.2d at 894-95 ("greater acceptance" of lesbians and gay men "has done little to remove barriers" surrounding marriage).[11]

4. This Court Already Has Reaffirmed That Sexual Orientation Is A Core, Defining Trait.

Although federal equal protection doctrine has never treated immutability of a personal trait as a prerequisite for heightened scrutiny,[12] this Circuit has

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[11] BLAG's reference to a few recent statements of public support from some public officials (Br. 27 n.7) conveniently disregards its own role on behalf of the House leadership who intervened to vigorously defend DOMA. While a number of House of Representatives members have joined amicus efforts to overturn DOMA, the great majority of the House has declined to do so.

[12] Laws that classify based on religion, alienage, and legitimacy all are subject to some form of heightened scrutiny, even though people may convert to different

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reaffirmed that sexual orientation is a core, immutable trait — consistent with the settled consensus of the major expert professional organizations. *See, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (same).[13]

Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be

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religions, undocumented individuals may naturalize, and illegitimate children may be adopted. *See Watkins*, 875 F.2d at 725 (Norris, J., concurring).

[13] BLAG introduced not a scintilla of admissible evidence on this point, leaving unrebutted Ms. Golinski's expert evidence that sexual orientation is a core, defining trait. (S.E.R. 866-67 (expert testimony that no credible evidence demonstrates safety or efficacy of efforts to change sexual orientation and, to the contrary, virtually all major mental and behavioral health organizations have issued statements warning against such efforts).)

In its briefing below, BLAG attempted to distort the work of scholars in this field by quoting them selectively and out of context, an effort now echoed by *amicus* Frederick Douglass Foundation (Dkt. 59). (*See* S.E.R. 1-5, 858-99.) Neither BLAG nor its *amicus* acknowledges, let alone calls into question, the consensus of major behavioral and mental health organizations on this point, precisely the authoritative evidence that led this Court to recognize sexual orientation as an immutable trait more than a decade ago. *Hernandez-Montiel*, 225 F.3d at 1093.

abhorrent for government to penalize a person for refusing to change [it]." *Watkins*, 875 F.2d at 726 (Norris, J., concurring); *Perry*, 704 F. Supp. 2d at 966 ("[n]o credible evidence supports a finding that an individual may . . . change his or her sexual orientation"); *In re Balas*, 449 B.R. 567, 576 (Bankr. C.D. Cal. 2011) (decision of 20 Bankruptcy Court Judges). *See also Lawrence*, 539 U.S. at 567 (government lacks even legitimate interest in coercing same-sex couples to sever their "enduring" bonds).

Sexual orientation classifications thus violate the fundamental principle that burdens should not be distributed — by a majority that would not inflict them upon itself — "upon groups disfavored by virtue of circumstances beyond their control." *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982).[14]

B. DOMA Also Merits Heightened Scrutiny As A Sex-Based Classification.

As BLAG admitted below, Ms. Golinski would qualify for spousal health coverage if she were a man married to a woman, but is ineligible as a woman married to a woman (S.E.R. 154) — though her sex bears no relation to her

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[14] The suggestion by *amicus* that lesbians and gay men are not an identifiable group is insupportable. (Dkt. 59 at 15-25.) As Ms. Golinski's expert demonstrated, lesbians and gay men constitute a "discrete and insular minorit[y]." *Carolene Prods.*, 304 U.S. at 153 n.4; (*see also* S.E.R. 862). Surely the Supreme Court understood it was considering a class of people in *Romer*, *Lawrence*, and *Christian Legal Society* — and so did Congress when it targeted gay people for differential treatment under DOMA.

workplace contributions. This is sex discrimination meriting heightened scrutiny. *See Perry*, 704 F. Supp. 2d at 996 (sex and sexual orientation "are necessarily interrelated;" restriction arising because of same-sex partner thus constitutes "discrimination based on sex"); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009); *Balas*, 449 B.R. at 577; *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). Moreover, DOMA's insistence that, to have her marriage respected, Ms. Golinski should have married a man rather than a woman, constitutes impermissible sex stereotyping.

DOMA is no less invidious because it equally denies men and women eligibility for a same-sex spouse's insurance coverage. *Loving v. Virginia*, 388 U.S. 1 (1967), discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Moreover, the Supreme Court has established that the Fourteenth Amendment prohibits discrimination not only against an individual, but also based on one's committed relationship. For example, *Loving* explains that a classification prohibiting interracial *relationships* discriminates based on race. *See* 388 U.S. at 2; *see also McLaughlin*, 379 U.S. at 195-96, and *Frontiero*, 411 U.S. at 678-79.

C. Heightened Scrutiny Also Applies Because DOMA Impermissibly Burdens Substantive Due Process Rights.

The district court's application of heightened scrutiny also should be sustained because DOMA impermissibly burdens same-sex spouses' constitutional liberty to build family life together. Family relationships enjoy constitutional protection because they permit "the ability independently to define one's identity that is central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). *See also Moore v. E. Cleveland*, 431 U.S. 494, 506 (1977); *Lawrence*, 539 U.S. at 573-74 ("our laws and tradition afford constitutional protection to personal decisions" relating to marriage, family relationships, and childrearing). The Court found inconsistent with those protections a statute that not only prohibited certain private sexual conduct, but also penalized "personal relationship[s]" between same-sex partners that are "within the liberty of persons to choose." *Id.* at 567. Laws cannot withstand constitutional scrutiny when they impose "state-sponsored condemnation" on such "personal relationship[s]." *Id.* at 567, 576.

DOMA penalizes Ms. Golinski for having exercised, in a manner disapproved by Congress, her fundamental liberty interest in a private family relationship, thus requiring heightened scrutiny. *See Witt*, 527 F.3d at 819. Heightened scrutiny is appropriate even if the state has not criminally prohibited a right, as in *Lawrence*, or if the privilege denied is not itself constitutionally

guaranteed. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974).

For these reasons, the district court properly subjected DOMA to heightened scrutiny, which BLAG does not even suggest, much less demonstrate, DOMA could satisfy.

II. THE DISTRICT COURT ALSO CORRECTLY FOUND THAT EVEN IF ONLY RATIONAL BASIS REVIEW APPLIED, DOMA WOULD FAIL THAT LEVEL OF SCRUTINY AS WELL.

A. Rational Basis Review Requires Meaningful Examination Of The Relationship Between The Legislative Classification And Its Purpose.

Rational basis scrutiny requires that classifications at minimum be "rationally related to a legitimate government purpose." *Cleburne*, 473 U.S. at 446; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632.

Of course, "[l]aws such as economic or tax legislation . . . normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring) (citation omitted). But that

presumption has less force where, as here, a law targets "a politically unpopular group" or "inhibits personal relationships." *Id.* at 580. In those circumstances, courts "have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Id.* (collecting cases); *see also Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group."); *Kelo v. New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring); *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *25. DOMA, denying a group historically subject to purposeful unequal treatment all federal recognition and protections for its members' marriages, is precisely the type of law warranting particularly searching examination.

In these circumstances, courts more rigorously examine the fit between legislative means and ends, requiring substantiation that the differential treatment in fact advances a legitimate government interest. *See Romer*, 517 U.S. at 632-33; *Moreno*, 413 U.S. at 533-38; *Cleburne*, 473 U.S. at 447-50; *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *22 ("Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications."). The Supreme Court thus has been especially vigilant in requiring the law to be

"grounded in a sufficient factual context . . . to ascertain some relation between the classification and the purpose it serve[s]," *Romer*, 517 U.S. at 632-33, thereby evaluating whether the burden on the group rationally furthers a legitimate interest based on real-world facts, *see, e.g.*, *Cleburne*, 473 U.S. at 446, 448-49. A challenged classification is more apt to be rejected if it is significantly over- or under-inclusive. *See, e.g., id.* at 449-50. In such cases, concerns with the logic of a law's means reinforce doubt about the legitimacy of its ends. *See, e.g.*, *Moreno*, 413 U.S. at 533, 536-37.

DOMA's unprecedented intrusion into state family law and denial of any federal recognition in any context to valid state-sanctioned marriages further compels meaningful rational review. (*See supra* at 9-11.) *Morrison*, 529 U.S. at 615-16 (cautioning skepticism about legislative rationales for federal intrusion into such areas of traditional state regulation as marriage); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (carefully scrutinizing, and rejecting, rationales that could justify federal regulation of "family law (including marriage, divorce, and child custody)"). As the First Circuit recently concluded: "Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns." *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *32. The unprecedented nature

of Congress' intrusion also warrants close examination. "The absence of precedent for [the law] is itself instructive; 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (citation omitted).

BLAG argues that rational review should be particularly deferential here because DOMA purportedly was merely routine legislative "line-drawing." (Br. 31-32.) BLAG cites *Mathews v. Diaz*, 426 U.S. 67 (1976), but that decision explained that 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." *Id.* at 83-84. It 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 or four. *Id*. at 69. DOMA does not involve such "differences in degree" along a continuum, but rather a sweeping denial to one class of married people of all federal marital protections, bearing no specific connection to each of the differing policies advanced by the hundreds of disparate laws it affects.[15] It was just such a

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[15] *Contrast Schweiker v. Wilson*, 450 U.S. 221, 231 n.13, 234 (1981) (emphasizing that classification did *not* burden "discrete group;" even then, standard of review was not "toothless"); *FCC v. Beach Comm's*, 508 U.S. 307, 309 (1993) (distinction between cable television facilities "that serve separately owned and managed buildings" and those "under common ownership."). If a classification could be viewed as "line-drawing" simply because it draws distinctions between discrete

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classification imposing a "broad and undifferentiated disability on a single named group" that the Supreme Court struck down in *Romer*. 517 U.S. at 632-34.

Congress had always accepted without question all the various lines states have drawn around marriage, but with DOMA it carved out a single, yet broad, exception to exclude lesbian and gay couples alone. That is a deliberate act of exclusion, not mere rational line-drawing. As such, it is subject to *more*, not less, searching review.

B. DOMA Fails Rational Basis Review.

1. BLAG's Purported "Uniquely Federal Interests" Do Not Justify DOMA.

a. DOMA Cannot Be Justified Based On An Interest In Uniformity.

BLAG and some of its *amici* suggest that DOMA sought to create "uniformity" in eligibility for federal benefits and avoid administrative "confusion" that could arise in light of interstate variations in recognition of marriages of same-sex couples. (Br. 33, 35, 37; Brief of *Amicus Curiae* United States Senators in Support of BLAG, Dkt. 43 at 26-27.) But the federal government has long accepted significant inconsistencies among states affecting determinations of marital status for federal benefits. Marriage eligibility requirements have always

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groups, virtually all legislation would satisfy that criterion and thus be beyond equal protection review, since "most legislation classifies for one purpose or another." *Romer*, 517 U.S. at 631.

varied over time and across state lines. (S.E.R. 688-98.) For example, states differ widely on recognition of common law marriage (*id*. 690-92); first-cousin marriage (*id*. 692-93); and minimum age for marriage. (*Id*. 692.) Historically, there was great variation in state treatment of interracial marriage. (*Id*. 693-97.) States likewise differ widely in requirements for divorce, which historically resulted in interstate conflicts over marital status. (*Id*. 697-98.)

And yet, until DOMA, the federal government never imposed "uniform" standards preempting any of these state law variations. Rather, "the relevant status quo prior to DOMA was the federal government's recognition of any marriage declared valid by state law." *Windsor v. United States*, 833 F. Supp. 2d 394, 405 (S.D.N.Y. 2012) (citation omitted); (*see also supra* at 9-10.) As a practical matter, this routinely entailed countless administrative determinations of residence and application of corresponding state marriage law and choice-of-law rules in a myriad of federal contexts.[16] Against this backdrop, the suggestion that DOMA

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[16] *See, e.g.*, Social Security Ruling ("SSR") 84-18: Validity of Marriage – Estoppel – Ohio (applying law of claimant's state of residence to determine marital status, where law of state where marriage was performed would have yielded contrary result); SSR 63-20 - Validity of Marriage Between First Cousins (same); 42 U.S.C. § 416(h)(1)(A)(i) (marriage for Social Security benefit eligibility turns on law of state where couple resides at time of application); 38 C.F.R. § 3.1(j) (veterans' benefits); 29 C.F.R. § 825.113 (Family and Medical Leave Act); *see also* 5 C.F.R. §§ 831.613(e)(1)(v), 842.605(e)(1)(v), 1651.5(b); 20 C.F.R. §§ 10.415, 222.13, 404.726; 28 C.F.R. § 32.3; Rev. Rul. 58-66, 1958 C.B. 60 (all involving determination of validity of common law marriages for purposes of administering

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was a benign administrative measure to address state variations in recognition of marriages of same-sex couples is simply not credible. "An enactment that precludes federal recognition of certain marriages because they involve same-sex couples cannot be justified as promoting uniformity where federal law otherwise accepts wide variation in state marriage law." *Dragovich v. U.S. Dep't of Treasury*, 2012 U.S. Dist. LEXIS 72745, at *39 (N.D. Cal. May 24, 2012), *appeal docketed* No. 12-16461.

BLAG also asserts that DOMA ensures "similarly-situated couples will be eligible for the same federal marital status regardless of which state they happen to live in." (Br. at 33.) Of course, equal protection does require that similarly situated persons be treated alike. *Cleburne*, 473 U.S. at 439. DOMA irrationally treats identically situated same-sex and different-sex couples in marriages recognized under state law differently, leaving only the latter eligible for federal protections. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (classification fails rational basis review where "purported justifications . . . ma[ke] no sense in light of how the city treated other groups similarly situated in relevant respects"). To the extent BLAG suggests it would be unfair if some

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federal programs); *United States v. White*, 545 F.2d 1129 (8th Cir. 1976) (marital privilege denied where common law marriage invalid under state law); 20 C.F.R. § 404.1101 (Supp. 1952) (applying choice of law rules to interracial marriages).

married same-sex couples have access to federal rights that others do not based on the happenstance of where they reside (Br. 33-34), this concern certainly cannot justify raining injustice on *all* married same-sex couples (and *only* same-sex couples) by denying federal benefits even to those otherwise fully eligible to receive them.

Moreover, the federal government illegitimately treads on state interests and federalism constraints in advancing its own definition of marriage in defiance of state definitions. (*See supra* at 9-11.) *See also Windsor*, 833 F. Supp. 2d at 405. DOMA is unlike the examples BLAG offers of conditions imposed on eligibility for specific federal benefits, beyond a valid marriage, to further a specific *federal* purpose. (*See supra* note 5). Instead, DOMA's blanket non-recognition of any state-conferred marriage is untethered from and does not advance the specific policy objectives underlying each of the myriad federal statutes it affects.[17]

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[17] BLAG's cases only confirm the basic premise that when Congress imposes a federal law requirement, it must do so to advance a legitimate purpose of the program at issue. *See In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002) (application of uniform federal interest rate prevents any single creditor from taking disproportionate share of remaining assets in bankruptcy case); *Dailey v. Veneman*, 2002 U.S. App. LEXIS 24623 (6th Cir. Dec. 3, 2002) (permitting only federally inspected plants to ship meat across state lines furthers federal interest in consumer safety); *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (applying extremely deferential standard applicable to alienage classifications and concluding that deportation statute could properly treat convictions expunged under federal law differently than convictions expunged under potentially less stringent state laws).

b. DOMA Cannot Be Justified By An Interest In Preserving The Public Fisc Or Prior Legislative Judgments.

DOMA cannot be justified as a cost-saving measure. As an initial matter, the 1996 House's *rejection* of the proposal to analyze DOMA's budgetary impact belies cost-saving as the motive for DOMA. 142 CONG. REC. H7503-05 (daily ed. July 12, 1996). Moreover, a later report by the Congressional Budget Office confirms that DOMA actually *costs* the government money on a net basis, which is not surprising given that DOMA has such effects as disrupting means-testing for federal benefits and allowing married same-sex couples to avoid higher income brackets attendant to joint tax filings.[18] Even if the possibility of cost savings was a legitimate and rational basis for DOMA when enacted, BLAG could no longer rely on this rationale, negated by subsequent developments. *See Carolene Prods.*, 304 U.S. at 153 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") (citation omitted); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) (same).

More fundamentally, even if DOMA saved the federal government money, there is no legitimate reason to single out same-sex married couples to bear the

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[18] Cong. Budget Office, The Potential Budgetary Impact of Recognizing Same-Sex Marriages (June 21, 2004), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

burden of cost-cutting. *Any* denial of benefits to a particular group might be deemed to conserve resources, but the guarantee of equal protection requires a valid and rational reason for deciding who must bear that burden. *See Plyler*, 457 U.S. at 227 (citation omitted) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *Dragovich* v. *U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011). To pass rational review, the government must have a legitimate reason to impose on same-sex but not different-sex married couples the burden of conserving the public fisc. *See Plyler*, 457 U.S. at 227; *Romer*, 517 U.S. at 635. As this Court held, ostensible savings to the government that "depend upon distinguishing between homosexual and heterosexual [couples] similarly situated . . . cannot survive rational basis review." *Diaz v. Brewer*, 656 F.3d 1008, 1012-14 (9th Cir. 2011), *petition for cert. filed*, __U.S.L.W. __ (July 2, 2012); *see also Windsor*, 833 F. Supp. 2d at 406.[19]

Moreover, even if there were some legitimate basis to single out same-sex married couples to bear the burden of cost-cutting, that purported goal is

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[19] BLAG concedes that saving money alone may not justify denying a benefit to a class of people previously offered the benefit or if a fundamental right is infringed, but wrongly claims that DOMA does neither (Br. 38). In fact, "DOMA eliminated numerous established federal rights generally available to married couples by precluding federal recognition of same-sex couples legally married under state law." *Dragovich*, 2012 U.S. Dist. LEXIS 72745, at *31. As discussed above, DOMA also infringes on same-sex couples' fundamental liberty interests.

thoroughly discontinuous with the breadth of the statute. DOMA sweeps in all marriage-related federal statutes, non-pecuniary as well as pecuniary, imposing burdens as well as benefits. Depriving same-sex couples the right to invoke the spousal privilege in federal court, or exempting same-sex partners from conflict-of-interest rules involving their spouses, does nothing to save federal money. Even where DOMA amends programs with a fiscal component, it does so haphazardly, both costing and saving money in arbitrary ways.[20] Where a law's "sheer overbreadth is so discontinuous with the reasons offered for it," the presumption of constitutionality gives way. *Romer*, 517 U.S. at 632; *see also Levenson*, 587 F.3d at 1150-51.

Nor does DOMA preserve the "legislative judgments of countless earlier Congresses," as BLAG contends. (Br. 37.) Instead, DOMA *departs* from Congress' longstanding reliance on state law to assess marital status, imposing for the first time an across-the-board federal definition of marriage. Even if prior Congresses had intended to exclude same-sex couples from marital benefits, the district court correctly recognized that this "does not independently constitute a rational basis upon which to differentiate among classes of citizens." (E.R. 36 n.8

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[20] *See, e.g.*, Tara Bernard, "For Children of Same-Sex Couples a Student Aid Maze," *N.Y. Times*, Oct. 14, 2011, http://www.nytimes.com/2011/10/15/your-money/for-children-of-same-sex-couples-a-student-aid-maze.html?pagewanted=all (documenting how DOMA prevents appropriate assessment of financial aid eligibility for children of married same-sex couples).

(citation omitted).) There must be some independent legitimate basis justifying differential treatment of a specific group, *see Diaz*, 656 F.3d at 1014; *Plyler*, 457 U.S. at 227, 229; that the group historically was excluded is not enough. *Heller v. Doe*, 509 U.S. 312, 326 (1993).

c. DOMA Cannot Be Justified As A Rational Act Of "Caution."

Congress exercised anything but caution in its hurried enactment of DOMA, with virtually no fact-finding, testimony from government or other experts, analysis of DOMA's costs, consideration of its effects on hundreds of federal laws and state interests, or concern for the impact on lesbian and gay couples and their families. DOMA was not framed as a temporary measure and instead "preempt[ed] any opportunity to test the impact of state laws evolving to recognize same-sex marriage." *Dragovich*, 2012 U.S. Dist. LEXIS 72745, at *34. This Court in *Perry* rejected a similar "caution" rationale given that Proposition 8, like DOMA, erected a barrier to incremental policy-making and lacked any mechanism, such as a time-specific moratorium, for studying the issue. 671 F.3d at 1090.

Nor does DOMA "preserve" the institution of marriage as between a man and a woman. (Br. 42-43.) States continue to determine, independent of DOMA, whether to recognize marriages of same-sex couples, and a growing number do. "To the extent Congress had any independent interest in approaching same-sex

marriage with caution . . . DOMA does not further it." *See Windsor*, 833 F. Supp. 2d at 404. BLAG does not identify any legitimate reason this evolution in state marriage law, as opposed to other, often dramatic, historical shifts should be met with special "caution" and interference from the federal government.

The "caution" rationale essentially is an argument that *someday* a rational basis may surface to justify DOMA, even if none existed in 1996 or exists today. Nothing in equal protection law, however, permits the government to discriminate against a disfavored group today in the hope that a legitimate excuse for doing so might materialize tomorrow. Indeed, the Supreme Court rejected this view in *Romer*, where the state characterized a law targeting lesbian and gay individuals as a response to the "deeply divisive issue of homosexuality" and claimed to need leeway to handle matters calmly over time. (S.E.R. 159.) The Court disagreed, finding no rational basis for the law.

At bottom, BLAG's argument seems to be that DOMA is justified by "tradition[]" alone. (Br. 42.) But, as BLAG acknowledges (*id*.), tradition itself does not provide a rational basis for a law. *Lawrence*, 539 U.S. at 577-78 (noting that history and tradition could not justify sodomy prohibition); *Heller*, 509 U.S. at 326 (classification's "ancient lineage" does not make it rational); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) (law failed rational basis scrutiny even though

"custom . . . dates back to medieval England and has long been practiced in this country").

2. DOMA Cannot Be Justified As An Attempt To "Encourage Responsible Procreation."

BLAG asserts that DOMA was enacted to promote a "common federal-state interest" in "responsible procreation" by heterosexual parents, an interest purportedly underlying some states' exclusion of same-sex couples from marriage. (Br. 43.) This not only is a wholly irrational justification for DOMA, as discussed below, but also fails to explain why the constitutionally limited power of the federal government should be used to impose a single nationwide federal marriage policy preferring the interests or needs of different-sex couples and their children over same-sex couples and theirs, rather than deferring to the states on a subject properly within each state's province. *See Sosna*, 419 U.S. at 404. A number of states have rightly rejected the so-called responsible procreation argument in order to promote the welfare of lesbian and gay couples and their children through marriage. BLAG never explains why there is a federal interest in disregarding those states' domestic relations policies as they relate to same-sex couples and their children.

The district court correctly concluded that "the rationale of promoting responsible child-rearing finds no 'footing in the realities of the subject addressed by the legislation,' and thus cannot be credited as rational." (E.R. 37 (citation

omitted).) The First Circuit likewise rejected the notion that excluding valid marriages of lesbians and gay men from federal recognition promotes "responsible procreation," *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *35 n.10, and many other courts have agreed.[21]

"Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill*, 699 F. Supp. 2d at 388. The leading authorities in the fields of pediatrics, psychology, and child welfare have issued official statements confirming this conclusion.[22]

As Ms. Golinski's expert, Dr. Michael Lamb, explained, decades of scholarship and empirical study overwhelmingly demonstrate that children raised by same-sex parents are as likely to be emotionally healthy and educationally and socially successful as those raised by different-sex parents. (S.E.R. 730-33 (describing 30 years of scholarship, including more than 50 peer-reviewed

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[21] *Dragovich*, 764 F. Supp. 2d at 1190; *Balas*, 2011 Bankr. LEXIS 2157, at *29; *Windsor*, 833 F. Supp. 2d at 404-05; *Varnum*, 763 N.W. 2d at 899 n.26. *Cf. Perry*, 704 F. Supp. 2d at 999-1000 (holding that "same-sex parents and opposite-sex parents are of equal quality").

[22] *See Gill*, 699 F. Supp. 2d at 389 n.106 (citing policy statements of the American Psychological Association, American Medical Association, American Academy of Pediatrics, and Child Welfare League of America).

empirical reports); *see also id*. 724-25 (it is "beyond scientific dispute" that same-sex married couples are nothing less than equally capable parents).) The district court found that "[t]he evidence presented by Professor Lamb demonstrates that parents' genders are irrelevant to children's developmental outcomes." (E.R. 27.)

BLAG offered no expert testimony to rebut this overwhelming consensus and failed to cite a single empirical study reaching a different conclusion. Instead, BLAG relies solely on a smattering of articles in an effort to identify supposed "deficiencies in the research." (Br. 52.) BLAG criticizes (1) sample sizes and sampling techniques, (2) purported insufficiencies in control groups, and (3) the quantity of studies of children raised by same-sex male (as opposed to female) couples. (Br. 53-54.) But, as Professor Lamb explained: (1) the sampling methodologies of the studies he discussed are "routinely used in psychological research" and "appropriate" (S.E.R. 9-11, 13-15); (2) the research has in fact used control or comparison groups when appropriate (*id.* 13); and (3) studies of gay male parents had the "same" results as the lesbian family research (*id*. 8, 167). The district court correctly rejected BLAG's critiques: "[t]he Court finds that these criticisms of the studies relied upon by Professor Lamb do not alter their validity." (E.R. 28.) It remains "beyond scientific dispute" that same-sex parents are as fit as different-sex parents. (S.E.R. 724; *see also id.* 12, 730-31.)

In any event, as the district court recognized, BLAG's criticisms and the publications it cites "do not present any independent affirmative evidence necessary to create a genuine issue of disputed fact regarding whether same-sex married couples function as responsible parents." (E.R. 29.)

BLAG's *amicus* cites a recent paper by Mark Regnerus purporting to present empirical evidence of differences in outcomes for children raised by lesbian and gay parents. (Brief of American College of Pediatricians, at 6-8.)[23] This study, however, compared children of "intact biological famil[ies]" not to children raised by "intact" same-sex couples but instead primarily to children raised by single parents and in unstable family settings, with loosely-applied criteria for categorizing a parent as lesbian or gay.[24] The paper itself concedes that it cannot

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[23] The American College of Pediatricians, formed in 2002, has as an organizational objective "[t]o promote the basic father-mother family unit as the optimal setting for childhood development." *See* About Us, Am. College of Pediatricians, http://www.acpeds.org/About-Us/. The American Academy of Pediatrics disagrees with this group's position. (*Supra* note 22.)

[24] *See, e.g.*, Nathaniel Frank, "Dad and dad vs. mom and dad," L.A. Times, June 13, 2012, http://www.latimes.com/news/opinion/commentary/la-oe-frank-same-sex-regnerus-family-20120613,0,392991.story. The study itself concedes that its "gay father" and "lesbian mother" categories consist largely of children that were the product of a "failed heterosexual union." *See* Regnerus, Mark, "How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study," 41 SOCIAL SCIENCE RESEARCH 4, at 757 (July 2012). Following release of the Regnerus paper, the American Psychological Association issued a statement noting its ongoing monitoring of research and reaffirming that "there is no scientific evidence that parenting effectiveness is

[Footnote continued on following page.]

answer any "questions of causation."[25] This paper does nothing to undercut the consistent social science findings over decades of research.[26]

Nor can DOMA be justified by a federal interest favoring "biological" over other forms of parenting. (*See* Br. 50.) The federal government actively *encourages*, rather than discourages, parenting by people without biological connections to the children they rear, including through numerous supports and protections for foster care and adoption.[27] Federal statutes extend benefits to children through their parents whether the parent-child relationship is genetic or not.[28] Indeed, the Supreme Court has held that equal protection *forbids* penalizing children based on the circumstances of their birth. *See Weber v. Aetna Cas. &*

[Footnote continued from previous page.]

related to parental sexual orientation."*See* APA on Children Raised by Lesbian and Gay Parents, *available at* http://www.apa.org/news/press/response/gay-parents.aspx.

[25] Regnerus, *supra* note 24, at 755 & 761.

[26] *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d at 824-26, cited by BLAG, involved no expert testimony on this topic. *See Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383-84 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004); (S.E.R. 11-12). *Cf. Witt*, 527 F.3d at 818 n.6 (criticizing *Lofton*). Likewise, the court in *Hernandez v. Robles* did not have the benefit of expert testimony and relied merely on its own "[i]ntuition and experience." 855 N.E.2d 1, 7 (N.Y. 2006).

[27] *See, e.g.*, 42 U.S.C. §§ 670, 1996(p); 26 U.S.C. §§ 36C, 137, 151-52; Adoption and Safe Families Act of 1997, P.L. 105-89, H.R. 867.

[28] *See, e.g.*, 42 U.S.C. § 416(e); 5 U.S.C. §§ 8441(4), 9001(5)(c); 26 U.S.C. § 152(f)(1); 28 U.S.C. §§ 1738A, 1738B; 38 U.S.C. § 101.

Surety Co., 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). DOMA cannot be justified by an interest in penalizing *married* parents whose children are unrelated to them both by biology, and in turn penalizing these children.[29]

Even if different-sex married parents could be deemed somehow superior to same-sex married parents, or if the government had a valid interest in favoring biological parenting, DOMA is not rationally related to those concerns, as the district court correctly concluded. (E.R. 36-39.) DOMA has no effect on who can or should become a parent under any law, state or federal. Following DOMA's passage, state law can — and does, in Ms. Golinski's home state — continue to treat same-sex and different-sex couples identically for purposes of adoption and child-rearing. *See, e.g.*, Cal. Fam. Code §§ 297.5(d), 9000(b) (authorizing

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[29] None of the authorities cited by BLAG suggests otherwise. *Santosky v. Kramer*, 455 U.S. 745, 761 (1982), addressed the standard of proof necessary for the state to *terminate* parents' rights upon a finding that the child is "permanently neglected," *id*. at 747, but did not suggest a state interest in favoring childrearing by biological parents over other forms of parenting. Similarly, *Stanley v. Illinois*, 405 U.S. 645 (1972), ruled that due process prohibits "dismemberment of [a] family" through termination of parental rights absent good cause. *Id*. at 658. *Mullins v. Oregon*, 57 F.3d 789 (9th Cir. 1995), ruled that, although there may be no "affirmative right" to adopt, there *is* a right "to be free of governmental interference in an already existing familial relationship" — even those that are *not* biological parent-child relationships. *Id*. at 794.

adoption by same-sex couples). DOMA does not change that. *Cf. Perry*, 671 F.3d at 1086-87.

BLAG does not dispute that many children are reared by same-sex married couples.[30] Refusing federal recognition to their parents' marriages only harms these children and further decouples marriage from childrearing. This case is a perfect illustration. Ms. Golinski and her spouse already have a child, who is punished by DOMA because the family was required to spend more resources for medical insurance and care that different-sex spouses and their families can take for granted.

Moreover, DOMA does nothing to support different-sex couples' parenting or encourage heterosexuals to "channel[] potentially procreative heterosexual activity" into marriage for the sake of "unplanned children." (Br. 44, 47.) There is no rational reason to believe that the federal government's refusal to recognize marriages of lesbians and gay men will have any impact on the "potentially procreative activity" of heterosexuals or encourage heterosexuals to marry. *Cf. Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have

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[30] *See* Gary J. Gates & Abigail M. Cook, United States Census Snapshot: 2010, The Williams Institute, Sept. 2011, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (31% of married same-sex couples, and over 111,000 of all same-sex couples, are raising children).

children outside of marriage or otherwise affect the stability of opposite-sex marriages.").

The irrationality of these parenting and procreation rationales "is not merely a matter of poor fit of remedy to perceived problem . . . but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *36 (internal citations omitted); *see also Windsor*, 833 F. Supp. 2d at 404; *Dragovich*, 764 F. Supp. 2d at 1190.

BLAG makes much of the fact that, under rational basis review, the government does not bear the initial burden to put forth empirical evidence of a rational justification (Br. 30), and even suggests the Court should ignore the pertinent social science evidence altogether (Br. 51). Even if heightened scrutiny did not apply, however, it certainly is the Court's role to examine the facts to determine whether the asserted rationales bear any rational connection to DOMA:

> [T]he Supreme Court has cautioned that "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." . . . Consistent with this admonition, our circuit has allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose.

Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 590-91 (9th Cir. 2008) (internal citations omitted); *see also Romer*, 517 U.S. at 632-33 (classification must be "narrow enough in scope and grounded in sufficient factual context" to ascertain rational relationship).

Implicitly conceding it cannot identify any valid interest rationally advanced by singling out one class of married couples for inferior treatment across the entire corpus of federal law, BLAG claims that the district court erred even in *analyzing* whether DOMA's differential treatment of same-sex couples serves a legitimate purpose. DOMA must be upheld, BLAG argues, as long as *different-sex* married couples are served by the marriage benefits and recognition *they* receive. (Br. 46.) That, of course, is not the law. Equal protection requires the government to treat similarly situated individuals in like fashion and have valid and rational reasons when it singles out a class of persons for differential treatment. *See, e.g.*, *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 439-40.[31]

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[31] *Johnson v. Robison*, 415 U.S. 361 (1974), is not to the contrary. In *Johnson*, conscientious objectors claimed entitlement to veterans' education benefits. The Court did not, as BLAG argues, merely ask whether those benefits help military veterans and stop there; it carefully analyzed whether conscientious objectors were in fact similarly situated to military veterans, and found they were not. *Id*. at 382 (conscientious objectors "not required to leave civilian life to perform their service;" goal of making service more attractive has no bearing on individuals objecting for religious reasons).

If Congress' intent was truly to send a message, as BLAG suggests, that marriage is "to promote permanence and stability" for "the welfare of the children" (Br. 43, 48), DOMA is a particularly irrational way to accomplish that goal. Although rational review does not require legislative classifications to be narrowly tailored, the Supreme Court has expressly refused to credit a legislature's choice of an implausible path toward a purported goal. *See, e.g.*, *Romer*, 517 U.S. at 632 (law's "sheer breadth is so discontinuous with the reasons offered for it" that it lacks rational basis); *Bd. of Trs. of the Univ. of Ala.*, 531 U.S. at 366 n.4 (law failed rational review where "purported justifications . . . made no sense in light of how the [government] treated other groups similarly situated"); *Cleburne*, 473 U.S. at 449-50; *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1979).

3. Finding That DOMA Fails Rational Basis Review Does Not Require Concluding That Bigotry Motivated The Legislators Enacting It.

DOMA fails constitutional scrutiny because there is no legitimate federal interest in singling out same-sex married couples for exclusion from the class of valid state-law marriages recognized by the federal government. BLAG attempts to distort the issue by suggesting that holding DOMA unconstitutional requires concluding that the legislators who enacted it were "bigoted." (Br. 15, 57.) That is flatly incorrect. The Supreme Court has expressly recognized that legislation

adopted without hostile intent can ultimately fail constitutional scrutiny upon deeper examination. *See Lawrence*, 539 U.S. at 579 ("later generations can see that laws once thought necessary and proper in fact serve only to oppress"). That a law lacks a rational basis does not necessarily imply "malice or hostile animus" but rather "simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different." *Bd. of Trs. of Univ. of Ala.*, 531 U.S. at 374-75 (Kennedy, J., concurring). DOMA fails constitutional scrutiny for the simple reason that it is not even rationally related to a legitimate federal interest, let alone tailored to an important or compelling one.

III. CONTRARY TO BLAG'S CONTENTIONS, NEITHER THE SUPREME COURT NOR THIS COURT HAS PREDETERMINED DOMA'S CONSTITUTIONALITY.

A. *Baker v. Nelson* Is Not On Point And Has Been Superseded By Doctrinal Developments.

Baker v. Nelson, 409 U.S. 810 (1972) (mem.), does not control the issues before this Court. *Baker*, a 40-year-old summary dismissal predating DOMA by over 20 years, involved federal claims brought by a same-sex couple who sought to marry in Minnesota. *See Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972) (mem.). After the Minnesota Supreme Court rejected their claims, the couple appealed to the U.S. Supreme Court

pursuant to former 28 U.S.C. § 1257(2),[32] which summarily dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810. Today *Baker* holds little if any precedential value on *any* question, and none on the question here — whether the federal government has sufficient justification to refuse all recognition to valid marriages already sanctioned under state law.

As a limited vehicle for resolving a case, a summary dismissal "is an affirmance of the judgment only," and is specific "to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). A summary dismissal does not "have the same precedential value . . . as does an opinion . . . on the merits." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). Lower courts are bound only by "the *specific* challenges presented in the statement of jurisdiction," such that they cannot come "to opposite conclusions on the *precise* issues presented and *necessarily decided* by those actions." *Mandel*, 432 U.S. at 176 (emphasis added).

BLAG claims that, if a state may exclude same-sex couples from marriage, "[i]t follows that the federal government may do the same." (Br. 16.) But the federal government does not perform the same functions as the states with respect to marriage, and neither includes nor excludes couples from marriage. This alone

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[32] Until 1988, this statute afforded the Supreme Court mandatory appellate jurisdiction for review of state court decisions rejecting federal constitutional challenges to state laws.

sets *Baker* apart, as the last four courts to consider BLAG's *Baker* claims have concluded. *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *18; *Windsor*, 833 F. Supp. 2d at 399; *Dragovich*, 2012 U.S. Dist. LEXIS 72745, at *21; E.R. 14 n.5.[33]

This Court's recent guidance on *Baker's* limited precedential value underscores this conclusion. *See Perry*, 671 F.3d at 1082 n.14 (finding that whether voters may strip lesbians and gay men of present right to marry under state law was "wholly different question" than one in *Baker*). Though both *Baker* and *Perry* examined whether a state must allow same-sex couples to marry under certain circumstances, *Perry* held that the difference between removing an existing right to marry (as in *Perry*) and denying that right in the first instance (as in *Baker*) rendered *Baker* inapposite. That difference here is even starker. Whether the *federal* government has an adequate interest in disregarding valid marriages of same-sex couples is an issue that *Baker* could not have imagined let alone decided.

BLAG struggles to minimize the difference between *Baker* and this case by suggesting the two are merely separated by the difference between a Fifth, rather than Fourteenth, Amendment equal protection claim. (Br. 22.) But the district

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[33] Older decisions concerning couples that were not recognized as married are inapposite. *See McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976); *Adams*, 673 F.2d at 1039. The statement in *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005), that *Baker* "addressed the same issues" was in error. Unlike the plaintiffs in *Baker*, the plaintiffs in *Wilson* were already married, and, as here, objected only to the federal government's disregard of their *existing* marriage.

court distinguished *Baker* not because it involved the Fourteenth Amendment, but because this case raises questions about the federal government as an entirely different sovereign than the states, with different interests relating to marriage. (E.R. 14 n.5.) *See also Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005), *aff'd in part and vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006) (the "issue of allocating benefits is different from the issue of sanctifying a relationship presented in *Baker's* jurisdictional statement").

Even assuming *Baker* presented the same challenge asserted here, which it did not, subsequent doctrinal developments have extinguished its precedential force. In the 40 years since the Supreme Court summarily dismissed the *Baker* appeal, the Supreme Court has recognized that sex-based classifications require heightened scrutiny, *Frontiero*, 411 U.S. at 688; that a bare desire to harm gay people cannot constitute a legitimate government interest, *Romer*, 517 U.S. at 634-35; and that lesbian and gay individuals have the same liberty interest in private family relationships as heterosexuals, *Lawrence*, 539 U.S. at 578.[34]

Though BLAG makes much of *Lawrence*'s observation that it did "not involve whether the government must give formal recognition to any relationship"

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[34] BLAG incorrectly contends that summary dismissals bind lower courts until the Supreme Court itself expressly overturns them (Br. 23-24). Rather, summary decisions "bind lower courts, *unless* subsequent developments suggest otherwise." *United States v. Blaine Cnty.*, 363 F.3d 897, 904 (9th Cir. 2004) (emphasis added) (citation omitted).

of same-sex couples (Br. 24), that statement merely confirms that the question remains undecided; the statement would have been unnecessary if *Baker* already foreclosed it. 539 U.S. at 578. As discussed above, whatever interest a state may have in "preserving the traditional institution of marriage," *see id.* at 585 (O'Connor, J., concurring), DOMA does not advance it. Moreover, BLAG's suggestion that *Lawrence*'s due process ruling has no implications for equal protection jurisprudence is flatly contradicted by *Lawrence* itself. *Id.* at 574-75.[35]

B. *Adams v. Howerton* Also Is No Barrier In This Case.

Adams v. Howerton, predating DOMA by a decade and a half, is similarly inapposite. In *Adams*, a bi-national same-sex couple in Colorado attempted to adjust the non-citizen's immigration status by seeking recognition as spouses. 673 F.2d at 1038. Although Colorado had no law allowing same-sex couples to marry, the couple managed to obtain a marriage license and ceremony. *Id.* Unlike the couple in *Adams*, Ms. Golinski and her spouse undeniably are validly married. *Adams* did not "involve[] the displacement of a state marital status determination by a federal one" and "carries little weight." *Massachusetts v. U.S. Dep't of*

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[35] BLAG also misconstrues *Witt*, 527 F.3d at 821, as holding that *Lawrence* worked no change to the whole of "this Court's equal protection jurisprudence." (Br. 24.) *Witt* made no such sweeping pronouncement. *See Witt*, 527 F.3d at 821. As *Perry* reaffirmed, *Lawrence* plays an important role in shaping the federal courts' equal protection jurisprudence for same-sex couples. *Perry*, 671 F.3d at 1093-94 (applying *Lawrence* in Court's equal protection analysis of government's purported interests).

Health & Human Servs., 698 F. Supp. 2d 234, 251 n.152 (D. Mass. 2010), *aff'd*, __ F.3d __, 2012 U.S. App. LEXIS 10950.

Moreover, *Adams* is no longer good law because each of its rationales has been undercut or rendered obsolete by subsequent authority. *Miller*, 335 F.3d at 900. *Adams* relied on since-repealed statutes that excluded lesbian and gay immigrants as having a "psychopathic personality." 673 F.2d at 1040; *see also Boutilier v. INS*, 387 U.S. 118, 121 (1967); Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978 (1990).

Adams also emphasized the highly deferential review courts traditionally afford Congress' plenary immigration power, 673 F.2d at 1041-42, inapplicable here. DOMA, however, was not an exercise of immigration power, but rather a sweeping enactment that "affects a thousand or more generic cross-references to marriage in myriad federal laws." *Massachusetts*, 2012 U.S. App. LEXIS 10950, at *12. While *Adams* declined to decide whether a distinctive form of rational basis review is warranted for immigration laws, the particularly deferential review it applied led the Court to accept premises it could not accept today: that marriages of same-sex couples (1) "never produce offspring," (2) "are not recognized in most, if in any, of the states," and (3) "violate traditional and often prevailing societal mores." 673 F.2d at 1042-43. The first assumption is manifestly incorrect. *See Perry*, 671 F.3d at 1077 (under California law, same-sex couples

"[r]aise children together, and have the same rights and obligations as to their children as spouses have"). The second is no longer true, and thus *Adams* never had the opportunity to consider the constitutionality of singling out certain marriages validly entered under the laws of multiple states for denial of all federal recognition. The third rationale now is precluded as a matter of law. *See Lawrence*, 539 U.S. at 577-78; *Dragovich*, 2012 U.S. Dist. LEXIS 72745, at *23.

CONCLUSION

For all the foregoing reasons, Ms. Golinski respectfully submits that the judgment of the district court should be affirmed.

DATED: July 3, 2012

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee identifies the following related case pending in this Court: *Michael Dragovich, et al v. David Beers, et al.*, No. 12-16461, addresses the constitutionality of Section 3 of the Defense of Marriage Act.[36] Appellee is aware of no other cases pending in this Court that are related to this action.

[36] The issues in *Dragovich* are not precisely the same as the issues in this case, in a number of ways. Unlike in this case, the plaintiffs in *Dragovich* include couples who are registered domestic partners under California law in addition to married couples, and the defendants include agencies and officers of the state of California in addition to the federal government.

CERTIFICATE OF COMPLANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 13,822 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003, in 14-point Times New Roman font.

DATED: July 3, 2012 By: */s/ Rita F. Lin*
Rita F. Lin

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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