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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI,

Plaintiff,

v.

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

Defendants.

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

PLAINTIFF GOLINSKI'S SUPPLEMENTAL BRIEF PURSUANT TO OCTOBER 15 ORDER

Date: December 17, 2010
Time: 10:00 a.m.
Place: Courtroom 11, 19th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

SUMMARY OF ARGUMENT

Although the Court may reach DOMA's constitutionality, it need not do so in order to find mandamus relief appropriate here. Berry's acts of interference are beyond the scope of his statutory and constitutional authority for several additional reasons: (1) FEHBA authorizes OPM only to enter into contracts and to issue regulations, and Berry's acts constitute neither; (2) nothing grants Berry statutory authority to override orders of the Judicial Council regarding judicial administration; and (3) Berry's acts transgress the constitutional separation of powers.

If the Court should reach the issue, however, doing so would be entirely in keeping with the grave constitutional concerns raised in Chief Judge Kozinski's orders. Although Chief Judge Kozinski did not need to decide whether OPM's actions were unconstitutional under *Larson* because OPM elected not to appear before him and instead first raised its sovereign immunity defense to this Court, nothing precludes this Court's full consideration of the merits of that issue.

DOMA's application here is flatly unconstitutional. Requiring the Judiciary to provide less compensation to Golinski than her coworkers would discriminate against her based on her sexual orientation and sex, and the way in which she exercised protected constitutional rights, and, for each of those reasons, must be afforded heightened scrutiny.

DOMA cannot survive even rational basis review, let alone heightened scrutiny. The government has no valid federal interest in a discriminatory benefits scheme. Because plaintiff already pays for a family plan covering her son, the government would incur no further cost from enrollment of her spouse in that plan. Moreover, even if the denial of benefits saved resources, Congress must demonstrate, at a minimum, a valid and rational line by which to impose the burdens of cost-cutting. As a federal court in Massachusetts recently ruled in finding that the denial of equal benefits under DOMA is unconstitutional, "[t]his court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]' are decidedly impermissible bases upon which to ground a legislative classification." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (citation omitted).

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Plaintiff respectfully submits the following supplemental brief in response to the Court's October 15, 2010 Order.

I. QUESTION 1: Does plaintiff contend that the conduct of John Berry, although ostensibly within his statutory powers, was beyond constitutional limits because enforcement of the Defense of Marriage Act ("DOMA") in this context is an unconstitutional act? If so, are Defendants not immune from enforcement of Judge Kozinski's order?

SHORT ANSWER: Yes. The Court need not reach the issue of whether enforcement of DOMA in this context is unconstitutional, however, in order to decide that sovereign immunity does not preclude this suit.

Sovereign immunity does not shield a government officer from prospective injunctive relief requiring him to cease actions beyond the scope of his proper legal authority. *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 701-02 (1949). The reason for this is that the officer does not act on behalf of the government when he "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Id.* at 689. Here, defendant John Berry's refusal to cease OPM's interference with valid, binding orders issued by Chief Judge Kozinski is beyond the scope of both Berry's statutory and constitutional authority, for four independent reasons, only one of which is that DOMA's enforcement in this context would be unconstitutional. Accordingly, although the Court may reach the issue of DOMA's constitutionality, it need not do so in order to enforce Chief Judge Kozinski's orders.

First, Berry's actions are beyond the scope of OPM's authorizing statute, the Federal Employee Health Benefits Act ("FEHBA"). To the extent that Question 1 presupposes that Berry's actions are within his statutory powers, plaintiff respectfully submits that Berry has in fact exceeded the scope of that authority under the plain language of the FEHBA. The FEHBA limits OPM's authority to the power (a) to "contract with" qualifying insurers for health benefits and (b) to "prescribe regulations necessary to carry out this chapter." 5 U.S.C. §§ 8902, 8903, and 8913. Although defendants repeatedly reference these powers (*see, e.g.*, Defs.' Opp'n to Pl's. Mot. for Prelim. Inj. at 20:3-21:8), they never explain how OPM's unsolicited letter to plaintiff's health insurer instructing it to refuse enrollment of her spouse could be considered to fall within either of them. That letter did not constitute a regulation prescribed by OPM in order to carry out

its duties. Nor did that letter constitute the negotiation or execution of any contract. (*See* Pl's. Reply in Support of Mot. for Prelim. Inj. at 4:11-17.)[1]

Second, Berry does not have statutory authority to interfere with a valid, binding order issued by an EDR tribunal. By statute, Congress delegated to the Judicial Council of the Court of Appeals for the Ninth Circuit, on whose behalf the EDR tribunal acted, the authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," 28 U.S.C. § 332(d)(1), including "[a]dministering the personnel system of the court of appeals of the circuit." 28 U.S.C. § 332(e)(2). (Pl's. Reply in Support of Mot. for Prelim. Inj. at 8:7-9:6.) Congress did not delegate the authority to OPM to override, review, or otherwise interfere with those orders of the Judicial Council. Although OPM contends that orders issued by the Judicial Council can only bind members of the Judiciary (Defs.' Reply in Support of Mot. to Dismiss at 8:3-10:14), both the statutory language of section 332 and the case law indicate otherwise. Section 332(d)(1) states that the *subject matter* of judicial council orders is limited to "administration of justice within the circuit," but places no limitation on the binding effect of those orders. (Pl's. Reply in Support of Mot. for Prelim. Inj. at 8:15-20.) Case law confirms that judicial councils routinely issue orders on subjects of judicial administration that persons not within the Judiciary are required to obey. *See Hilbert v. Dooling*, 476 F.2d 355, 360 (2d Cir. 1973) (section 332(d) authorizes creation of court rules that bind federal prosecutors); *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1491, 1499 (11th Cir. 1986) (section 332(d)(1) authorizes subpoenas to former judicial employees).

Third, the Constitution precludes Berry from interfering with the relief ordered by an EDR tribunal, because such interference violates the separation of powers. (Pl's. Reply in Support of

[1] Nothing in DOMA provides statutory authority for Berry's actions either. Section 3 of DOMA provides that, in "determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies . . . , the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Nothing in the statute authorizes OPM or any other federal agency to interfere with the extension of equal benefits to relationships outside DOMA's restrictive federal definition of marriage. *See Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006) ("Section 3 of DOMA (1 U.S.C. § 7) is definitional . . . . It does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition.").

Mot. for Prelim. Inj. at 6:24-7:16.) As Chief Judge Kozinski concluded, to require EDR remedies to pass Executive approval would render the Judiciary a mere "handmaiden of the Executive." *In re Golinski et ux.*, 587 F.3d 956, 961 (9th Cir. 2009) (citation omitted). Yet, that is precisely the power Berry seeks to exercise. Such Executive countermand of employment decisions by the Judiciary directly threatens judicial independence and transgresses the constitutional imperative of separation of powers. *See Miller v. Clinton Cty.*, 544 F.3d 542, 553 (3d Cir. 2008) ("The authority to supervise and to discharge court appointed employees is not only a necessary corollary to this appointment power but it is also essential to the maintenance of an independent judiciary."); *Russillo v. Scarborough*, 727 F. Supp. 1402, 1409 n.13 (D.N.M. 1989) (citation omitted) ("The regulation of court employees' conduct is essential for the judiciary to carry out its constitutional mandate . . . ."), *aff'd*, 935 F.2d 1167 (10th Cir. 1991) ; *cf. Mowrer v. Rusk*, 618 P.2d 886, 893 (N.M. 1980) (separation of powers barred employment terms of state court employees from being determined by the city's employee merit system, because "[t]he power to control the personnel and functions of the court . . . is the power to coerce the judiciary into compliance with the wishes or whims of the executive").

Fourth, as explained in response to Question 3 below, Berry's interference violates plaintiff's rights to equal protection and due process by denying her benefits provided to her similarly situated colleagues because of her sexual orientation and sex and her exercise of constitutionally protected rights. For this reason as well, defendants' actions are not shielded by sovereign immunity. *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 859 (9th Cir. 1986) ("suits that charge federal officials with unconstitutional acts are not barred by sovereign immunity.").

II. QUESTION 2: Judge Kozinski did not address the constitutionality of DOMA in his decisions. To determine whether the OPM must follow Judge Kozinski's orders and cease interference with plaintiff's acquisition of health benefits for her wife, may the Court examine the constitutionality of the underlying act of enforcing DOMA? In other words, can this Court enforce the orders on grounds not explicitly articulated by Judge Kozinski?

SHORT ANSWER: Yes. Plaintiff notes that Chief Judge Kozinski did address the grave constitutional concerns raised by DOMA's application to preclude plaintiff's receipt of equal benefits, although he did not find it necessary to rule on whether that application would indeed be unconstitutional.

Chief Judge Kozinski's orders do not address whether sovereign immunity shields OPM from complying with those orders, because OPM elected not to appear in the EDR proceedings or to appeal the November 19 Order, despite being invited to do so and receiving service of the Order. Accordingly, Chief Judge Kozinski did not need to address whether OPM's actions were unconstitutional under *Larson*.

It is in the current proceeding that OPM has first asserted a sovereign immunity defense. In addressing that defense, the Court may decide to reach the question of the constitutionality of DOMA in evaluating OPM's interpretation of FEHBA, although, as explained above, that question need not be addressed in order to reject that defense. That Chief Judge Kozinski had the opportunity to rule on DOMA's constitutionality, but found it unnecessary to do so, does not preclude this Court from considering and rejecting the assertion of sovereign immunity on any basis. To the contrary, defendants have repeatedly urged this Court to consider questions of sovereign immunity not raised before Chief Judge Kozinski. (Defs.' Opp'n to Pl's. Mot. for Prelim. Inj. at 18:4-7 (arguing that a "collateral attack . . . is permissible" on issues of "sovereign immunity" (citing *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 n.6 (2009))).)[2]

Moreover, a finding that DOMA's application here is unconstitutional would be wholly consistent with Chief Judge Kozinski's orders. Applying the doctrine of constitutional avoidance,

[2] Indeed, it would be highly disingenuous for defendants to suggest that Chief Judge Kozinski's orders would stand on different ground had he reached DOMA's constitutionality rather than deciding the matter on statutory grounds. Defendants have made clear that they would have disobeyed Chief Judge Kozinski's orders either way. *See In re Levenson*, 587 F.3d 925, 929 (9th Cir. EDR Op. 2009) (noting that OPM had "intervened to prevent [the health benefits] enrollment" of a legally married federal employee's same-sex spouse in another EDR matter, in which Judge Reinhardt had found DOMA's application to be unconstitutional).

Chief Judge Kozinski interpreted FEHBA as permitting the provision of equal benefits to the same-sex spouses of federal employees because he found that grave constitutional concerns would be raised by an interpretation barring extension of such equal benefits. *In re Golinski*, 2009 U.S. App. LEXIS 25778, at *4-5 (9th Cir. Jan. 12, 2009). He concluded that the constitutionality of compensating plaintiff less than her similarly situated colleagues based solely on her sex and sexual orientation was "doubtful," at best, particularly since "disapproval of homosexuality isn't itself a proper legislative end." *Id.* He also concluded that a "discriminatory benefits law" raises hard questions about whether "DOMA impermissibly punishes homosexuality." *Id.*, at *6-7. As he noted, plaintiff's out-of-pocket expense to purchase additional health insurance for her spouse "exceed[s] the total fine imposed in *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)]," in which the Supreme Court concluded that a statute criminalizing same-sex sodomy impermissibly punished homosexuality. *Id.* In sum, it would be entirely in keeping with Chief Judge Kozinski's underlying orders to hold that the application of DOMA to bar plaintiff from receiving benefits would be unconstitutional, even though Chief Judge Kozinski did not need to rule on that question, just as this Court need not.

III. QUESTION 3: If the Court were to address the constitutionality of Section 3 of DOMA in this case, on what bases do the parties contend the statute is or is not constitutional?

SHORT ANSWER: Application of Section 3 of DOMA to prevent plaintiff's receipt of equal benefits would violate the constitutional guarantees of equal protection and due process by denying her compensation afforded her similarly situated colleagues based on her sexual orientation and sex and her exercise of constitutionally protected rights.

If Section 3 of DOMA were to be applied to eliminate plaintiff's eligibility to add her spouse to her family coverage health insurance plan, a benefit that her federal employer provides to heterosexual married employees (*see* Request for Judicial Notice ("RJN"), filed herewith, at Exs. 1-2), simply because plaintiff's spouse is a person of the same sex, it would violate plaintiff's constitutional rights to equal protection and due process.[3] The federal government has

[3] For the sake of simplicity in responding to the Court's question, OPM's interpretation of section 3 of DOMA as barring the provision of equal benefits is referred to as "DOMA" or "DOMA's application." Plaintiff notes, however, that DOMA and FEHBA do not in fact bar the extension of benefits here, for the reasons explained in Chief Judge Kozinski's orders.

no legitimate interest in compensating plaintiff differently than her colleagues based on her sexual orientation and sex, characteristics that have nothing to do with her ability to perform her job. As the federal district court of Massachusetts recently ruled, DOMA's provision of unequal benefits to federal employees with same-sex spouses (among other inequalities required by the statute) "violates core constitutional principles of equal protection." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (enjoining DOMA's enforcement). That analysis applies with equal force here.

DOMA's application here must be subjected to heightened constitutional scrutiny because it denies equal treatment based on a characteristic — sexual orientation — that is unlikely ever to be relevant to the achievement of a legitimate state interest and is instead likely to reflect historical prejudice toward lesbians and gay men and their relative lack of political power. DOMA also must receive heightened scrutiny because it discriminates based on plaintiff's sex relative to the sex of her spouse and because it impairs rights protected by due process.

DOMA, however, cannot survive even rational basis review, let alone heightened scrutiny, because there is no valid interest in compensating employees differently based on sexual orientation and sex or how they exercise their rights of intimacy. In short, DOMA's application to bar provision of equal benefits to plaintiff and her family would be unconstitutional.

A. DOMA's Application Here Should Be Subjected to Heightened Scrutiny.

1. Discrimination Based on Sexual Orientation Satisfies the Classic Criteria for Heightened Scrutiny.

Neither the Supreme Court nor the Ninth Circuit has settled the appropriate level of scrutiny for sexual orientation classifications. The Supreme Court reviewed a sexual orientation classification in *Romer v. Evans*, 517 U.S. 620 (1996), but it declined to decide whether the classification requires heightened scrutiny because, it found, the challenged law "fail[ed], indeed defie[d], even" rational basis review. *Id*. at 632. The Ninth Circuit previously *did* apply heightened scrutiny to classifications based on sexual orientation. *Hatheway v. Sec'y of the Army*, 641 F.2d 1376, 1382 (9th Cir. 1981). Although it reversed course and applied rational basis review in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir.

1990), its principal authority for so doing was *Bowers v. Hardwick*, 478 U.S. 186 (1986). Now that the Supreme Court has overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003), it is an open question in the Ninth Circuit what level of scrutiny applies.[4]

This does not mean, however, that the Court is without guideposts on the question. To determine whether a law should be subject to heightened scrutiny, courts consistently examine whether the law burdens a class of persons that has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)). Furthermore, courts look to whether the law targets a class that is "a minority or politically powerless," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987), because in these circumstances the "discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440. Finally, courts have sometimes also considered whether the class "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen*, 483 U.S. at 602-03 (citation omitted).[5] Although the inquiry is not a formulaic

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[4] For this reason, *High Tech Gays* is no longer good law. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that the Circuit's precedent is not binding where an intervening higher authority effectively overrules the decision). The Ninth Circuit has subsequently applied rational basis review to sexual orientation classifications, but on each occasion it has relied solely on *High Tech Gays*. *See, e.g.*, *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (all decided prior to *Lawrence* and in reliance on *High Tech Gays*). Similarly, *Witt v. Department of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008), relied solely on *Philips*, and the plaintiff did not dispute that *Philips* was controlling as to the standard of equal protection scrutiny but instead simply preserved the issue for potential reconsideration by the en banc court. *See id.* at 823-24 & n.4 (Canby, J., concurring in part and dissenting in part). Moreover, *Witt* was decided before the Supreme Court's recent decision in *Christian Legal Society Chapter of the University of California v. Martinez*, 130 S. Ct. 2971 (2010), which ruled that the Constitution's protections for gay men and lesbians do not rest on a distinction between status and conduct, rejecting a central rationale of *High Tech Gays*, *Philips*, and their progeny. Therefore, the proper standard of review remains an open question in the Ninth Circuit.

[5] An immutable characteristic, however, is not required. The Supreme Court has applied heightened scrutiny to laws that classify based on religion, alienage, and legitimacy, none of which is an immutable trait. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage); *Christian Sci. Reading Room Jointly Maintained v. City & Cty. of S.F.*, 784 F.2d 1010, 1012 (9th Cir. 1986) (religion).

one, sexual orientation classifications raise *each* of these concerns. *See In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. EDR Op. 2009) (finding that heightened scrutiny likely should apply to a challenge to DOMA; collecting cases); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (concluding, after trial, that "gays and lesbians are the type of minority strict scrutiny was designed to protect").

a. Lesbians and Gay Men Have Experienced a History of Discrimination.

It is beyond reasonable dispute that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," *Lawrence*, 539 U.S. at 571, and that "state-sponsored condemnation" of homosexuality has led to "discrimination both in the public and in the private spheres." *Id*. at 575-76. The Ninth Circuit stated more than twenty years ago that "homosexuals have suffered a history of discrimination," *High Tech Gays*, 895 F.2d at 573, and the Circuit reiterated that observation just last year. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009). This history alone suggests that legal classifications based on sexual orientation are especially likely to reflect bias and are unlikely to be based on the pursuit of legitimate objectives. *See Plyler v. Doe*, 457 U.S. 202, 217-18 n.14 (1982).

b. Sexual Orientation Is Unrelated to the Ability to Contribute to Society.

Rather than resting on "meaningful considerations," *Cleburne*, 473 U.S. at 441, laws that discriminate based on sexual orientation, like laws that discriminate based on race, national origin or sex, target a characteristic that "bears no relation to ability to perform or contribute to society." *Id*. "[B]y every available metric . . . as partners, parents and citizens, opposite-sex couples and same-sex couples are equal." *Perry*, 704 F. Supp. 2d at 1002. *See also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987) (quoting the American Psychological Association for the proposition that homosexuality "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities"), *rev'd in part on other grounds*, 895 F.2d 563 (9th Cir. 1990); *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (internal quotations omitted) ("Sexual orientation plainly has no relevance to a person's ability to

perform or contribute to society.") (Norris, J., concurring) . There has been no suggestion in these proceedings, nor could there be, that plaintiff, a successful government attorney and devoted spouse, or the thousands of other married lesbian and gay Americans, are any less able to "perform or contribute to society" than are their fellow citizens.

c. Lesbians and Gay Men Face Significant Obstacles to Overcoming Discrimination Through the Political Process.

Empirical studies consistently demonstrate that lesbians and gay men constitute a minority of the country's population.[6] While their minority status complicates their efforts to seek redress through ordinary democratic means, their difficulty in so doing is greatly exacerbated by entrenched prejudice that "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). This prejudice manifests itself in a range of political obstacles that prevent lesbians and gay men from effectively overcoming the discrimination against them through ordinary democratic channels.[7]

Voters (through ballot measures) as well as lawmakers repeatedly have passed measures denying lesbians and gay men protections against discrimination.[8] Lesbians and gay men have been unable to redress policies that discriminate against them in a number of arenas, including military service and, in many jurisdictions, custody of children, adoption, and marriage.[9] Surveys

[6] *See* Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 Duke J. Gender L. & Pol'y 385, 388 & n.41 (May 2010) (hereinafter, "Powers").

[7] Although there are no rigid criteria to determine whether a history of discrimination is "unlikely to be soon rectified by legislative means," *Cleburne*, 473 U.S. at 440, courts examine factors such as the group's representation in law-making bodies and whether the group is able to garner the concern of lawmakers or voters for its needs. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 & n.17 (1973) (Brennan, J., concurring); *Watkins*, 875 F.2d at 726-27 (Norris, J. concurring).

[8] *Romer*, 517 U.S. at 635-36 (striking down state referendum designed to prevent any level of Colorado government from protecting gay people against discrimination); *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (invalidating Oklahoma statute that aimed to nullify adoptions of children by lesbian and gay couples).

[9] Matt Viser, *GOP blocks repeal of 'don't ask'; Filibuster stalls vote on military's gay rule*, The Boston Globe, Sept. 22, 2010, at National, pg. 1; Donald K. Sherman, *Sixth Annual*

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further demonstrate that there are insufficient safeguards to protect lesbian and gay adults and youth from discrimination and harassment.[10] Although openly gay or lesbian legislators are more likely to introduce and to support measures to address the needs of their communities,[11] lesbians and gay men remain grossly underrepresented in the nation's decision-making bodies. *See, e.g.*, *Watkins*, 875 F.2d at 726-27 (Norris, J. concurring); *Andersen v. King County*, 138 P.3d 963, 1030 (Wash. 2006).

These political obstacles are compounded by societal pressures to conceal that one is lesbian or gay in order to avoid violence or discrimination.[12] These pressures impede the ability of lesbian and gay individuals to use the political process to redress discrimination. "Ironically, by 'coming out of the closet' to protest against discriminatory legislation and practices, homosexuals expose themselves to the very discrimination that they seek to eliminate. As a result, the voices of many homosexuals are not even heard, let alone counted."[13] Similarly,

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Review of Gender and Sexuality Law: Child Custody and Visitation, 6 Geo. J. Gender & L. 691, 706-10 (2005) (surveying states in which a parent's homosexuality may or will negatively affect custody or visitation); Powers, at 396 n.85 (citing statutes prohibiting same-sex couples from jointly petitioning to adopt). Furthermore, forty-two states, through constitutional amendment or statute, expressly deny same-sex couples the freedom to marry. Lambda Legal, *An Unfulfilled Promise: Lesbian and Gay Inequality Under American Law*, *available at* http://data.lambdalegal.org/publications/downloads/fs_an-unfulfilled-promise.pdf.

[10] Lambda Legal and Deloitte Financial Advisory Services LLP, *2005 Workplace Fairness Survey*, at 4-5 (2006),available at http://data.lambdalegal.org/pdf/641.pdf . *See also* M.V. Lee Badgett et al., The Williams Institute, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Executive Summary, at 1 (2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf; Joseph Kosciw, Emily Gretak, Elizabeth Diaz, & Mark Bartkiewcz, *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools* xvi (2010) (reporting that 84.6% of lesbian and gay students had been verbally harassed because of their sexual orientation and 40.1% had been physically harassed), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-5.PDF.

[11] Powers, at 392-93.

[12] *See, e.g.*, Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 811-36 (2002); Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 Stan. L. & Pol'y Rev. 37, 46 (2001).

[13] *Watkins*, 875 F.2d at 727 (Norris, J., concurring). *See also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., joined by Marshall, J., dissenting from

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heterosexual politicians often have been unwilling to support gay rights for fear that they will be thought to be gay, and closeted gay politicians (and others) have been less willing to stand up for gay rights for fear that they might be outed for taking pro-gay positions.

The fact that lesbians and gay men may have achieved sporadic successes in combating discrimination does not obviate the significant, ongoing obstacles that they confront. The question is not whether a group has achieved *any* successes but rather its relative political power and whether substantial obstacles persist to the group's ability to achieve redress through democratic means. Classifications based on gender, for example, warrant heightened scrutiny,[14] despite the fact that (1) "the position of women in America has improved markedly in recent decades"; (2) key protective legislation had been enacted; and (3) "women do not constitute a small and powerless minority." *Frontiero v. Richardson*, 411 U.S. 677, 685-86 & n.17 (1973). The obstacles that lesbians and gay men confront in redressing discrimination through the political process underscore the need for heightened scrutiny of sexual orientation classifications.

d. Sexual Orientation Is a Defining and Immutable Characteristic.

As the Ninth Circuit has repeatedly recognized, "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). *Accord Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

Judge Walker likewise concluded after trial in *Perry v. Schwarzenegger* that "[n]o credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation." 704 F. Supp.

(Footnote continued from previous page.)

denial of certiorari); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 730-31 (1985).

[14] *United States v. Virginia*, 518 U.S. 515, 531-33 (1996) (describing the "heightened review standard" applied to gender-based classifications).

2d at 964. *See also Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation").

In sum, a requirement that the Judiciary compensate a federal employee differently because of her sexual orientation — an immutable characteristic that has no bearing on her job performance and is a historical basis for discrimination against a politically disadvantaged minority group — presents all of the classic characteristics that trigger heightened scrutiny.

2. DOMA Should Also Be Subject to Heightened Scrutiny Because It Discriminates on the Basis of Sex.

DOMA's application to preclude equal benefits here is also subject to heightened scrutiny for another reason: it denies plaintiff equal protection based on her sex in relation to the sex of her spouse. Sex-based classifications require heightened scrutiny, *United States v. Virginia*, 518 U.S. at 524, and courts have recognized that discrimination against gay people based on their forming a life partnership with a same-sex partner rather than a different-sex partner is sex discrimination. *See Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *Levenson*, 560 F.3d at 1147; *In re Marriage Cases*, 43 Cal. 4th 757, 853-54 (2008).

As Judge Walker explained in *Perry*, sex and sexual orientation "are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." 704 F. Supp. 2d at 996. A restriction arising because a lesbian or a gay man has a life partner of the same sex as their own constitutes "discrimination based on sex," as well as a claim of sexual orientation discrimination. *Id*.

These principles operate similarly here. DOMA's preclusion of equal benefits targets lesbians and gay men "in a manner specific to their sexual orientation and, because of their relationship to one another . . . specifically due to sex." *Id*. As Judge Reinhardt reasoned in *Levenson*, if Golinski were a man, she could secure health benefits for her spouse. Simply because Golinski is a woman, however, DOMA has denied her that important component of her compensation. 560 F.3d at 1147.

3. Heightened Scrutiny Also Applies Because DOMA Burdens Rights Protected by the Due Process Clause.

In *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), the Ninth Circuit ruled that, "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*," the law is subject to heightened scrutiny. *Id*. at 819.[15] DOMA's application to preclude equal health benefits treads on the private life of plaintiff in a manner that implicates the rights identified in *Lawrence*.

In *Lawrence*, the Supreme Court reaffirmed "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 539 U.S. at 573-74. The Court found inconsistent with those protections a law that not only prohibited certain private sexual conduct, but also sought to penalize "personal relationship[s]" between same-sex couples that are "within the liberty of persons to choose." *Id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). Laws cannot withstand constitutional scrutiny, it found, when they place a government-imposed "stigma"—"state-sponsored condemnation"—on such private relationships and in so doing constitute "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id*. at 575-76. The government "cannot demean their existence or control their destiny," *id*. at 578, the decision found, by penalizing same-sex relationships.

DOMA's preclusion of equal benefits, in both purpose and effect, penalizes the most sacrosanct and enduring embodiment of plaintiff's relationship with her long-time life partner, their marriage, and as such, impinges on the liberty interests identified in *Lawrence*.[16] DOMA

[15] *Witt* stated that the appropriate standard "is similar to intermediate scrutiny in equal protection cases": "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest." *Id*. at 819 & n.7.

[16] DOMA's application also penalizes Golinski for having exercised her "fundamental right to marry," *Perry*, 704 F. Supp. 2d 991, in a way in which Congress disapproved.

seeks to "demean" the private, lawful marriages of gays and lesbians like plaintiff and her wife by enshrining in federal law broad-based disadvantages on the relationship itself. It erases lawful same-sex marriages from federal recognition for all purposes — thereby implicating approximately 1,138 federal laws that tie benefits, protections, rights, or responsibilities to married status. *See Gill*, 699 F. Supp. 2d at 379. Although DOMA does not proscribe specific conduct, its "stigma" as well as the broad-based burdens that it imposes on marriages between same-sex couples relative to marriages of their different-sex counterparts is inconsistent with the protections for individual dignity, 539 U.S. at 567, and "respect" for "private lives," *id*. at 578, that *Lawrence* guarantees to lesbians and gay men, as to others.

B. DOMA Fails Heightened Scrutiny.

Laws survive strict scrutiny only if the government can "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 216-17. When heightened scrutiny (strict or intermediate) applies, "[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. at 533. DOMA fails this exacting standard by a wide margin. As plaintiff explains in the following section, DOMA cannot even survive rational basis review because it supports *no* valid federal governmental interest, compelling or otherwise.

C. The Application of DOMA to Preclude the Judiciary's Extension of Equal Benefits to Plaintiff Would Fail Even Rational Basis Review.

Even if the Court were to apply rational basis review rather than heightened scrutiny, there is no valid federal interest in compensating government employees differently based on sexual orientation and sex. Rational basis scrutiny requires that classifications be "rationally related to a legitimate government purpose." *Cleburne*, 473 U.S. at 446; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Under rational basis review, courts must examine whether disadvantages are imposed arbitrarily or for improper reasons. *Romer*, 517 U.S. at 634-35 (striking down measure based on "bare desire to harm" lesbian and gay persons). This is precisely what DOMA does.

In *Gill*, Judge Tauro found DOMA unconstitutional because, after examining the interests advanced by the government and the evidence submitted by both sides, he was "convinced that 'there exists no fairly conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective." 699 F. Supp. 2d at 387. That logic applies with equal force here.[17]

1. Rational Basis Review Must Be Undertaken In a Careful and Searching Fashion In This Case.

Although rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), the standard of review "is not a toothless one." *Matthews v. De Castro*, 429 U.S. 181, 185 (1976) (citation omitted). The government interest claimed to be furthered by discriminating against a particular group must still be "legitimate," meaning not only that it must be a proper basis for government action, but also that it must be "properly cognizable" by the governmental body at issue, *Cleburne*, 473 U.S. at 448, and "relevant to interests" the classifying body "has the authority to implement." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001). This ensures that the interest supposedly advanced is within the purview of those making the classification. *See, e.g., Plyler*, 457 U.S. at 225 (overturning state law discriminating against aliens and noting that although it is a "routine and normally legitimate part of the business of the Federal Government to classify based on the basis of alien status . . . only rarely are such matters relevant to legislation by a State") (internal citation omitted); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976) (Civil Service Commission could not justify rule barring employment of aliens because asserted interests in encouraging nationalization were "not matters

[17] Judge Tauro declined to address the plaintiffs' arguments that heightened scrutiny should be applied because, he found, "DOMA fails to pass constitutional muster even under the highly deferential rational basis test." *Gill*, 699 F. Supp. 2d at 387. Plaintiff notes that Judge Tauro was bound, in *Gill*, by a First Circuit decision that arguably foreclosed heightened review. *Cook v. Gates*, 528 F.3d 42, 62 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). Here, as explained above, the level of scrutiny applicable in the Ninth Circuit is an open question.

which are properly the business of the Commission"). This concern is particularly acute here, where the federal government has legislated in an area traditionally a matter of state concern.

In addition, the classification must be "narrow enough in scope and grounded in sufficient factual context . . . to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33. The classification drawn "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446; *Garrett*, 531 U.S. at 366 n.4 (no rational basis where the "purported justifications . . . ma[k]e no sense in light of how the [government] treated other groups similarly situated in relevant respects"). As the Supreme Court made clear in *Romer*, rational basis review invalidates a measure whose "sheer breadth" is "discontinuous with the reasons offered for it . . . ." 517 U.S. at 632.

Moreover, the requirement of a "reasonably conceivable state of facts" demands that any claimed factual basis for a categorization be plausible. *Romer*, 517 U.S at 635 (rejecting justifications where "[t]he breadth of the [measure] is so far removed from these particular justifications that we find it impossible to credit them"); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (law discriminating between married and unmarried persons in access to contraceptives "so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim").

Courts take a particularly careful approach to rational basis review where, as here, laws single out and selectively burden disfavored groups, or when important rights are at stake. *See 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 burdened by the law."); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *id*. ("We have been most likely to apply rational basis review to hold a law unconstitutional . . . where . . . the challenged legislation inhibits personal

relationships" or reflects a "'desire to harm a politically unpopular group.'") (collecting cases); *Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing between the analysis applied to "economic regulation" and that applied to classifications intended to injure a particular group).

As shown below, the government's interest in barring the Judiciary from compensating plaintiff equally with her similarly situated heterosexual colleagues utterly fails this test.

2. The Interests Asserted by Congress Cannot Support DOMA.

Congress claimed to advance four interests when it enacted DOMA: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources." *Gill*, 699 F. Supp. 2d at 388 (citing H.R. Rep. No. 104-664, at 12-18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07). As Judge Tauro ruled, these justifications each either constitute an illegitimate interest or bear no rational relationship to DOMA, or both.

a. DOMA Does Not Encourage Responsible Procreation and Child-Rearing.

In the *Gill* case, Judge Tauro had no trouble "readily dispos[ing]" of the notion that DOMA was intended to "encourag[e] responsible procreation and child-bearing." *Gill*, 699 F. Supp. 2d at 378, 388. He was correct to do so.

As Judge Tauro explained, "[s]ince 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." *Id*. at 388. This conclusion is supported by the official policy statements and publications on the subject by the nation's leading authorities on pediatrics, psychology, and child welfare.[18]

[18] *See id*. at 389 n.106 (citing American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Coparent or second-parent adoption by same-sex parents*, 109 PEDIATRICS 339 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics; American Psychological Association, *Policy Statement on Lesbian and Gay Parents*, http://www.apa.org/about/governance/council/policy/parenting.aspx; American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*,

(Footnote continues on next page.)

Furthermore, the "encouragement of procreation" cannot provide a rational basis by which to exclude same-sex unions from federal recognition, because "the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country," *Gill*, 699 F. Supp. 2d at 389, and indeed "the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

Even if Congress believed at the time of DOMA's passage that children had the best chance at success if raised jointly by their biological mothers and fathers, DOMA is not rationally related to this concern. As Judge Tauro explained:

> a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure," when afforded equal recognition under federal law.

Gill, 699 F. Supp. 2d at 388-89. This case is a perfect illustration of that principle. Plaintiff already has a child. DOMA serves not to encourage responsible child rearing but instead only to punish plaintiff's child insofar as it forces plaintiff to spend more for medical insurance and care than would a similarly situated heterosexual married family, and as such it adversely affects plaintiff's ability to provide for her child. Congress's stated goal of "encouraging responsible procreation and child-bearing" provides no rational justification for DOMA's sweeping burdens on the marriages that have been lawfully entered by same-sex couples.

b. DOMA Does Not Promote Heterosexual Marriage.

Similarly, Congress's stated interest in defending or promoting the institution of

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(Footnote continued from previous page.)

http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, *AMA Policy Regarding Sexual Orientation*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.html.

"traditional heterosexual marriage" cannot support DOMA. The denial of medical benefits to plaintiff and her spouse bears no conceivable relationship to the likelihood that they, or anyone else, will enter or remain in a "heterosexual marriage."

Plaintiff is *already* married. More generally, as Judge Tauro aptly explained, "this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex." *Gill*, 699 F. Supp. 2d at 389. *Accord Levenson*, 560 F.3d at 1150. Furthermore, "denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure." *Gill*, 699 F. Supp. 2d at 389. "What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it 'only by punishing same-sex couples who exercise their rights under state law.' And this the Constitution does not permit." *Id.*; *see also In re Levenson*, 587 F.3d 925, 932 (9th Cir. EDR Op. 2009) ("denying married same-sex spouses health coverage is far too attenuated a means" of achieving this objective); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). This putative "interest" provides no rational justification for DOMA.

Congress's putative interest in promoting heterosexual marriage is unavailing for another reason: the federal government has no valid interest in advancing a particular concept of marriage because, under well-accepted notions of federalism, "[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 Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" have "long been regarded as a virtually exclusive province of the States," and "[t]he State . . . has absolute right" to regulate marriage); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 ("declarations of status, *e.g.* marriage, annulment, divorce, custody, and paternity," lie at the "core" of domestic relations law reserved to States) (Blackmun, J., concurring).

The federal government has no business treading on these long-standing state prerogatives in an effort to impose a competing definition of marriage. "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations." *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (internal citation omitted). *See also United States v. Morrison*, 529 U.S. 598, 618 (2000) (regulation of marriage touches on the police power, "which the Founders denied the National Government and reposed in the States"). Even when the Supreme Court has been divided on the scope of federal power *vis-à-vis* the States, it has unanimously reaffirmed that regulation of familial relations, including marriage, remains beyond the scope of federal power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting reading of Commerce Clause that could lead to federal regulation of "family law (including marriage, divorce, and child custody)," an area "where States historically have been Sovereign"); *id*. at 585 (Thomas, J., concurring); *id*. at 624 (Breyer, J., dissenting).

In fact, in a companion case to *Gill* filed by the Commonwealth of Massachusetts, Judge Tauro ruled that DOMA is unconstitutional for the additional reason that it violates the Tenth Amendment in that it exceeds the scope of congressional authority and improperly intrudes on matters reserved to the States. *Commonwealth of Mass. v. U.S. Dep't of Health & Human Servs,*, 698 F. Supp. 2d 234 (D. Mass. 2010). Congress's effort to restructure the concept of marriage to its liking is not a cognizable federal governmental interest.

c. DOMA Cannot Be Justified as Defending "Traditional Notions of Morality."

Congress also attempted to justify DOMA by asserting an interest in defending "traditional notions of morality." As the Supreme Court has repeatedly explained, however, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (citation omitted). *See also Romer*, 517 U.S. at 634-35 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a

bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *Cleburne*, 473 U.S. at 448; *Levenson*, 587 F.3d at 931-32. The Constitution does not permit the federal government to advance its "traditional" notion of morality by imposing unique burdens on same-sex married couples.

d. DOMA Does Not Preserve Scarce Resources.

Finally, Congress sought to justify DOMA by asserting an interest in preserving scarce resources. The history of DOMA, however, indicates that Congress made no effort to tailor its legislation to this particular goal:

> though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact prior to passage. *See* 142 CONG. REC. H7503-05 (daily ed. July 12, 1996).

Gill, 699 F. Supp. 2d at 390 n.116 (citations omitted). Furthermore,

> Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, 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. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state's marital status determinations.

Id. at 379.

Perhaps not surprisingly given this history, DOMA's application in this case does *not* in fact advance this goal. Indeed, the denial of spousal health care coverage to plaintiff forces the government to spend *more* money. Plaintiff already has a health plan that covers herself and her family because she covers her son. (RJN Ex. 1 ¶ 4.) Under the government's contract with plaintiff's insurer, the government would not need to incur any additional cost for her spouse to be covered, if such coverage were authorized. "Both the government and the employee pay[] the same amount to cover an employee with one dependent on their plan or ten dependents. Every

health plan agrees to cover 'self and family' at the same rate no matter the number of dependents on the plan." (*Id.* ¶ 8, Ex. F.) However, because plaintiff has been unable to enroll her spouse in that family plan, Chief Judge Kozinski ordered prospective back pay to compensate plaintiff for purchasing separate, inferior coverage, which is all that is available on the private market. *In re Golinski et ux.*, 587 F.3d 956, 960 (9th Cir. 2009). As Chief Judge Kozinski noted, the absurd result of OPM's interference is that plaintiff is receiving a "lesser remedy at substantial taxpayer expense when she can have a full remedy at zero cost to the taxpayers." *Id.* at 961.

The irrationality of this interest is further evidenced by the the broad efforts the federal government has taken to *extend* benefits to same-sex domestic partners in almost all areas except for health care insurance and pensions. President Obama recently issued a Presidential Memorandum explaining that his Administration has undertaken the "extension to same-sex domestic partners of benefits currently available to married people of the opposite sex," wherever the Administration believes existing law permits. The government did this not only to "to achieve greater equality" for "hard-working, dedicated, and patriotic public servants," but also because doing so is in the government's own interests: "[e]xtending available benefits will help the Federal Government compete with the private sector to recruit and retain the best and the brightest employees."[19] Thereafter, OPM — the defendant in this action — issued a press release "prais[ing] the issuance of the Presidential Memorandum," and quoting OPM Director John Berry as stating that this is "a good business practice — this will help us retain valuable employees and better compete with other employers for top talent."[20] The President and OPM have determined

[19] The Memorandum explained that the Administration "has identified areas in which statutory authority exists to achieve greater equality for the Federal workforce through extension to same-sex domestic partners of benefits currently available to married people of the opposite sex" and will extend those benefits. It further ordered a review by "all other executive departments and agencies, in consultation with the Office of Personnel Management . . . , to determine what authority they have to extend such benefits to same-sex domestic partners of Federal employees." Presidential Memorandum of June 17, 2009, *Federal Benefits and Non-Discrimination*, Fed. Reg. Vol. 74, No. 118 (June 22, 2009).

[20] OPM News Release, *OPM Director John Berry Lauds Signing of Presidential Memorandum on the Extension of Benefits to Same-Sex Domestic Partners of Federal Employees* (June 2, 2010), *available at* http://www.opm.gov/news/opm-director-john-berry-lauds-signing-of-presidential-memorandum-on-the-extension-of-benefits-to-samesex-domestic-partners-of-federal-employees,1564.aspx.

that it is in the government's interest not to deny federal benefits to same-sex couples in committed relationships, but to extend those benefits.

In all respects, even if Congress could rationally have believed that DOMA would conserve scarce resources, this putative interest does not justify DOMA: "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. *Any* denial of benefits to a particular group might be deemed to conserve resources, but the question, at the very least, is whether Congress selected a valid and rational line by which to impose the burdens of cost-cutting. *See id*. (the government "must do more than justify its classification with a concise expression of an intent to discriminate"); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[a state] must do more than show that denying welfare benefits to new residents saves money"), *overruled in part on other grounds by Edelmann v. Jordan*, 415 U.S. 651 (1974); *Levenson*, 587 F.3d at 932-33.

Simply put, Congress cannot impose the burdens of its cost-cutting measures solely on same-sex married couples while sparing similarly situated different-sex married couples. As Judge Tauro reasoned, "[t]his court can discern no principled reason to cut government expenditures at the particular expense of plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage. And 'mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]' are decidedly impermissible bases upon which to ground a legislative classification." *Gill*, 699 F. Supp. 2d at 390.

3. DOMA Advances No Other Valid Governmental Interests.

The "interests" that Congress actually identified to justify DOMA are so indefensible or irrational that, in the recent challenge to the statute in the District of Massachusetts, the government "disavowed Congress's stated justifications for the statute," *Id.* at 388, and instead asserted new justifications for the legislation.

Specifically, the government argued that DOMA is justified by its desire to "preserve the 'status quo'" or to "proceed incrementally" as the contentious debate regarding same-sex marriage plays out in the states, to eliminate "state-to-state inconsistencies in the distribution of federal marriage-based benefits," and to ease the administrative burden presented by "a changing

patchwork of state approaches to same-sex marriage." *See id. at* 390-95. Judge Tauro correctly determined that these new justifications fared no better than Congress's original justifications for the statute.

The federal government's desire to "preserve the status quo" or to "proceed incrementally" pending resolution of a socially contentious debate in the states regarding allowing same-sex couples to marry provide no support for DOMA. *First*, this rationale "relies on a conspicuous misconception of what the status quo was *at the federal leve*l in 1996." *Id.* at 393. DOMA did not maintain the status quo but rather drastically altered the status quo. At the time Congress enacted DOMA, "the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level." *Id*.; *see also Levenson*, 587 F.3d at 933-34.[21] *Second*, "preserving the status quo" and "proceeding incrementally" are not government interests in and of themselves. At best, they are merely descriptions of what a law does; they are not reasons for doing it: "[s]taying the course is not an end in and of itself, but rather a means to an end." *Gill*, 699 F. Supp. 2d at 390-94. *Third*, these rationales also fail insofar as they imply that the federal government has a valid role to play in shaping this socially contentious debate. As plaintiff has explained, the federal government has no such interest because the field of domestic relations, including marriage, is reserved for the States. *See id*. at 390-95.

Judge Tauro also correctly found that the putative interest in eliminating "state-to-state inconsistencies in the distribution of federal marriage-based benefits," or in easing the administrative burden presented by "a changing patchwork of state approaches to same-sex marriage," likewise must fail. "Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex

[21] There is nothing "incremental" about denying all married same-sex couples every federal marital right and benefit without qualification. *See Gill*, 699 F. Supp. 2d at 394 n.134.

married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy." *Id*. at 394. Furthermore, eligibility requirements for marriage have varied widely over time and across states, and they continue to vary from state to state, for example, with respect to age requirements. *Id*. at 390-95. Nevertheless, the federal government has never before found such inconsistencies to be a problem, and it continues to tolerate inconsistency in every respect other than sexual orientation. A claimed interest in "consistency" cannot support a law that treats similarly situated individuals differently. *See id*. at 394-95.

Similarly, differing state laws with respect to the ability of same-sex couples to marry create no administrative burden for the federal government, because the federal government is not burdened with the task of implementing these changing laws. Rather, the federal government simply distributes federal benefits to those couples that have obtained state-sanctioned marriage licenses. This task is not made administratively more difficult simply because some of those couples are of the same sex, or because some of those couples previously did not qualify for marriage. *Id*. at 395.[22] In short, DOMA is not rationally related to *any* valid federal government interest and therefore cannot withstand constitutional scrutiny even under rational basis review.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be granted and defendants' motion to dismiss denied.

Dated: November 8, 2010

MORRISON & FOERSTER LLP
LAMBDA LEGAL

By: /s/ Rita F. Lin
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[22] In fact, "DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not." *Id*.