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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI,

Plaintiff,

v.

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

Defendants.

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

PLAINTIFF'S REPLY IN SUPPORT OF HER SUPPLEMENTAL BRIEF PURSUANT TO THE 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

Defendants' supplemental brief has abruptly changed course. Unable to support their previous sovereign immunity argument, defendants now contend that, even if immunity does not shield their conduct, mandamus may not issue to require an agency to cease conduct if complex constitutional issues are involved. Defendants assert that such complexity means their duty is not "plainly prescribed." That misconstrues the Mandamus Act. The test is whether the acts required of defendants need the exercise of discretion — not whether a reasonable person could disagree with the duty to comply. *See Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975). Courts have repeatedly authorized mandamus actions in cases involving "complex constitutional issues which have not yet been definitively settled." *Mattern v. Weinberger*, 519 F.2d 150 (3d Cir. 1975). Moreover, defendants confuse the issue. Plaintiff does not assert that the source of defendants' duty is any constitutional right. Rather, the source is Chief Judge Kozinski's orders directing defendants to cease interfering with plaintiff's acquisition of equal benefits. The constitutionality of DOMA arises only because *defendants* have asserted a sovereign immunity defense. That defense does not change the ministerial nature of the act required of defendants.

Defendants also offer no sound defense of DOMA's unconstitutional application here. They candidly admit that DOMA discriminates against lesbians and gay men. They do not attempt to dispute that sexual orientation discrimination carries all of the classic hallmarks triggering heightened scrutiny or that DOMA discriminates based on sex and thus warrants heightened scrutiny on that basis as well. They ignore the coercive burdens DOMA imposes on the fundamental rights of intimacy and autonomy of personal relationships. Instead, they oppose heightened scrutiny relying solely on reasoning that the Supreme Court has expressly repudiated.

Even if rational basis review applied, defendants fail to identify *any* valid governmental interest advanced by providing unequal employment benefits to plaintiff due to her sexual orientation, her sex, and the way in which she exercises her fundamental rights. Instead, turning equal protection analysis on its head, they suggest the history of discrimination against gay people in the states somehow justifies similar discrimination by the federal government now. The Supreme Court has, with good reason, rejected that notion.

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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?

Defendants assert that, even if sovereign immunity does not shield them, mandamus nevertheless would be inappropriate because defendants' duty is not "so plainly prescribed as to be free from doubt."[1] (Defs.' Supplemental Brief ("Opp'n") at 1:24, ECF No. 83.) Defendants misconstrue the relevant requirement of the Mandamus Act. The test is whether the acts required of defendants in Chief Judge Kozinski's orders are ministerial and can be fulfilled without exercising discretion — not whether a reasonable person could disagree with those orders or defendants' duty to comply with them.

Knuckles v. Weinberger, 511 F.2d 1221 (9th Cir. 1975), is instructive. There, the plaintiffs brought a mandamus action alleging that the Secretary of Health, Education, and Welfare's failure to provide sufficient notice and an evidentiary hearing regarding their benefits violated the constitutional guarantee of due process. *Id.* at 1222. The district court dismissed the action on the ground that the duty to provide notice and hearing was not sufficiently "free from doubt." *Id.* The Ninth Circuit reversed, holding that "the fact that a statute requires construction by the administrator or the court in order to determine what duties it creates does not mean that mandamus is not proper to compel the officer to perform the duty, once it is determined." *Id.* "[O]nce the court interprets the law, the defendant's duty will be clear; the court is not telling the defendant how to exercise his discretion." *Id.*; *see also Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir. 1982) (in mandamus action, rejecting government's argument that "statutory duty is not clearly defined," because "[i]f the appellees' duty is clear after the court interprets the statute, the court has jurisdiction"); *Soler v. Scott*, 942 F.2d 597, 602 (9th Cir. 1991) (same, holding that duty was clear regardless of the need to rely on legislative history to construct ambiguous statute, because no official discretion was implicated), *vacated as moot sub nom.*

[1] This argument is not responsive to the Court's question of whether defendants are "immune." Plaintiff addresses the argument in this section because that is where it appears in defendants' brief.

Sivley v. Soler, 506 U.S. 969 (1992); *Martinez v. Dunlop*, 411 F. Supp. 5, 9 (N.D. Cal. 1976) ("Even assuming arguendo, that the [statute] did not impose a clear duty on the federal officials, the Court is now being asked to clarify that duty by construing the statute. Mandamus is appropriate even when a statute requires judicial or administrative construction to clarify a duty so long as the construing body is not telling the defendant how to exercise his discretion.").

Here, Chief Judge Kozinski's orders quite clearly prescribe defendants' obligations: that is, to "rescind [their] guidance or directive to the Blue Cross and Blue Shield Service Benefit Plan" and to "cease at once [their] interference with the jurisdiction of [the EDR] tribunal." *In re Golinski et ux.*, 587 F.3d 956, 963 (9th Cir. EDR Order 2009). Defendants identify no ambiguity or room for discretion in that directive. Once the Court has construed the law concerning defendants' obligation to comply with the Chief Judge's orders, defendants' duty is clear.

Unable to dispute the ministerial nature of their duty, defendants instead suggest, in a footnote, that *Larson* does not apply to a suit against a government official in his official capacity. (Opp'n at 2 n.1.) That is incorrect. *Larson* itself was a suit against the Administrator of the War Assets Administration "in his official capacity." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684 (1949). The Ninth Circuit has expressly recognized the applicability of *Larson* to suits against federal officials in their official capacities. "United States officials, while acting in their *official capacities*, enjoy sovereign immunity, and a state court may not entertain an action against them unless their immunity has been waived by consenting to suit or *unless the official has exceeded his statutory or constitutional authority*." *Beeman v. Olson*, 828 F.2d 620, 621 (9th Cir. 1987) (emphasis added) (applying *Larson* analysis to a suit against federal officers in their official capacities, and concluding that the officers had acted within their authority). Other courts have concurred. *See, e.g., Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (applying *Larson* to hold that sovereign immunity did not bar suit against federal official in his official capacity); *Wildwood Child & Adult Care Food Program, Inc. v. Colorado Dep't of Pub. Health & Env't*, 122 F. Supp. 2d 1167, 1171 (D. Colo. 2000) (federal officials sued in official capacity

were not immune because "sovereign immunity does not apply . . . when an officer is acting in his official capacity but is acting in a manner which is unconstitutional").

Defendants' sole authority for their proposition is *Veterans for Common Sense v. Peake*, No. C-07-3758-SC, 2008 WL 686099 , at *2 (N.D. Cal. Mar. 13, 2008). That opinion, though, *declines* to reach the issue of whether *Larson* applies to an official capacity suit. *Id.* at *2-3 (speculating in passing that an official capacity suit "may be enough to remove any connection to the *Larson* exception" but declining to reach the issue because the complaint "fails to allege that [the federal official in question] is acting outside the scope of any statutory authority or pursuant to an unconstitutional statute"). Defendants further note that *Veterans for Common Sense* cited *Balser v. Department of Justice, Office of United States Treasury*, 327 F.3d 903, 907 (9th Cir. 2003), but *Balser* makes no mention of *Larson*. In the end, defendants cannot escape the fact that sovereign immunity does not shield conduct beyond defendants' statutory and constitutional authority.

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?

Defendants assert that, under the Mandamus Act, this Court cannot order "performance of any . . . duty on grounds other than those specifically articulated by Judge Kozinski" because such a duty would not be "ministerial." (Opp'n at 3:5-7.) That fundamentally confuses the issue. Plaintiff does not assert that the source of defendants' duty is any constitutional right. Rather, the source of defendants' duty is Chief Judge Kozinski's order directing defendants to cease their interference with plaintiffs' acquisition of health benefits for her wife.[2] The issue of DOMA's

[2] Defendants balk at Chief Judge Kozinski's conclusion that they "interfered" with the remedy ordered by the EDR tribunal. (Opp'n at 4:15-24.) Any such challenge was waived when defendants declined to appeal that ruling. (*See* Pl.'s Mem. in Support of Prelim. Inj. at 9:3-10, ECF No. 8.) In any event, defendants' conduct — sending an unprompted letter instructing plaintiff's insurer to ignore the EDR order regarding the benefits at issue — speaks for itself.

constitutionality arises only because *defendants* have asserted a sovereign immunity defense. That asserted defense does not change the ministerial nature of the act required of defendants.

Moreover, even if the unconstitutional nature of defendants' conduct had been the basis on which plaintiff had sought mandamus relief, defendants are incorrect to suggest that mandamus is somehow unavailable to compel an official to cease unconstitutional conduct. (Opp'n at 3:11-14.)[3] Courts have repeatedly permitted mandamus suits requiring federal officials to cease unconstitutional conduct. In *Mattern v. Weinberger*, 519 F.2d 150 (3d Cir. 1975), *vacated on other grounds sub nom. Mathews v. Mattern*, 425 U.S. 987 (1976), for example, the court rejected the government's argument that the "broad and indeterminate scope of the due process clause" prevented a conclusion that the duty imposed was "ministerial" and "so plainly prescribed as to be free from doubt." 519 F.2d at 156-57. Though the case "present[ed] complex constitutional issues which have not yet been definitively settled," "the duty alleged involves no element of discretion or room for judgment on the part of the Secretary, and if we agree with plaintiff's contention on the merits, the result will be to place the Secretary under a binding, non-discretionary duty." *Id.*; *see also Knuckles*, 511 F.2d at 1222 (same as to due process claim); *Holmes v. United States Bd. of Parole*, 541 F.2d 1243, 1249 (7th Cir. 1976) (finding a "clear ministerial and preemptory duty" where "this case on its merits presents constitutional issues of a complex nature"), *overruled on other grounds*, *Solomon v. Benson*, 563 F.2d 339 (7th Cir. 1977). Consideration of constitutional issues in a mandamus action is entirely proper.[4]

Defendants then argue that, even if sovereign immunity does not apply, the EDR tribunal supposedly lacked authority to issue the orders at issue. (Opp'n at 4:2-6.) Any such collateral attack on the EDR tribunal's authority was waived when defendants declined to appeal those orders. (*See* Pl.'s Mem. in Support of Prelim. Inj. at 9:3-10; Pl.'s Reply Prelim. Inj. at 2:7-3:2.)

[3] Defendants criticize plaintiff for not bringing a suit on this basis. (Opp'n at 3:15-20.) Ninth Circuit law, however, bars plaintiff, as a judicial employee, from bringing suit regarding employment matters before any forum other than the EDR tribunal. (Pl.'s Reply in Support of Prelim. Inj. ("Pl.'s Reply Prelim. Inj.") at 5:13-6:21, ECF No. 39.)

[4] The sole authority cited by defendants is *Finch v. Weinberger*, 407 F. Supp. 34, 39 (N.D. Ga. 1975). That case, however, *declined* to rule on the applicability of the Mandamus Act as a basis for jurisdiction. *Id.* at 41 (noting that the issue was "academic").

Moreover, the EDR tribunal *did* have authority, as a result of both the express statutory grant in 28 U.S.C. § 332(d)(1) and the Judiciary's inherent authority to govern its affairs without interference from other branches. (Pl.'s Opp'n Mot. to Dismiss ("Opp'n Mot. to Dismiss") at 15:21-19:25, ECF No. 61.) Defendants protest that such authority must be rooted in a specific statutory grant. But it is well-established that the Judiciary's inherent powers do not require statutory authorization from Congress. (*Id.* at 17:22-19:25.) And, in any event, there *is* a specific statutory grant: section 332(d)(1) authorizes the judicial council, on whose behalf the EDR tribunal acts, to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." Although defendants complain that this does not expressly single out the possibility of a judicial council order requiring compliance or non-interference by an Executive agency, section 332 broadly authorizes orders by the judicial council without placing any special limits on the effect of those orders. Where Congress delegates broad authority to an entity, there is no need to identify a narrower delegation of power for acts already encompassed within that broad authorization. (Opp'n Motion to Dismiss at 17:1-21.) Defendants cannot escape their duty to comply with Chief Judge Kozinski's orders by relying on a challenge to the EDR tribunal's authority that has long since been waived and, in any event, fails on the merits.

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?

Defendants candidly admit that DOMA, on its face, discriminates against lesbians and gay men. (Opp'n at 15:20-23.) Moreover, defendants make no attempt to dispute that DOMA discriminates against plaintiff based on a characteristic — sexual orientation — that is unlikely ever to be relevant to a legitimate state interest, presenting a classic case for strict scrutiny. Nor do they offer any response to the fact that DOMA discriminates based on sex, and thus warrants heightened scrutiny on that basis as well. Defendants also ignore the burdens imposed by DOMA on the fundamental rights of intimacy and autonomy of personal relationships. Instead, defendants insist that strict scrutiny is inappropriate, relying solely on reasoning that the Supreme Court has expressly repudiated.

In any event, even under the rational basis test that defendants urge this Court to apply, the application of section 3 of DOMA here still fails to pass constitutional scrutiny. Defendants fail to identify a single valid governmental interest advanced by the provision of unequal employment benefits to plaintiff as a result of her sex, her sexual orientation, and the way in which she exercises her fundamental rights. Instead, turning equal protection analysis on its head, their principal argument is that the history of discrimination against lesbians and gay men in the states somehow justifies similar discrimination by the federal government today. The Supreme Court has, with good reason, rejected that notion.

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

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

In her supplemental brief, plaintiff explained that courts apply heightened scrutiny to laws that allocate benefits and burdens along lines that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Defendants do not disagree. Moreover, defendants do not dispute that sexual orientation classifications implicate *all* of the criteria that courts normally use to identify such "suspect classifications." Statutes that classify on the basis of sexual orientation therefore present a classic case for strict scrutiny: defendants offer no argument to the contrary.[5]

Rather than contesting the merits of plaintiff's arguments for heightened scrutiny, defendants oppose heightened scrutiny based solely on a single sentence of *dicta* in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). In *Witt*, the Ninth Circuit ruled that

[5] Plaintiff explained in her supplemental brief that lesbians and gay men have experienced a history of discrimination; that sexual orientation is unrelated to an individual's ability to contribute to society; that lesbians and gay men face significant obstacles to overcoming the discrimination against them through the political process; and that sexual orientation is a defining and immutable characteristic. (Pl's Supplemental Mem. Pursuant to October 15 Order ("Pl.'s Suppl. Mem.") at 7-12, ECF No. 81.)

the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), *does* mandate heightened scrutiny of the military's Don't Ask Don't Tell policy under the Due Process Clause. *Witt*, 527 F.3d at 818. It did not decide whether rational basis review remains the proper standard for sexual orientation classifications under the Equal Protection Clause. Indeed, the plaintiff had not advanced an equal protection claim. *See id.* at 823-24 (Canby, J., concurring in part and dissenting in part) (noting that the plaintiff "d[id] not pursue" an equal protection claim but instead merely "preserve[d] her right to assert the claim in the event she seeks en banc review" and stating that *Philips* and *High Tech Gays* no longer "t[ie] our hands"). The Court was not presented with, and did not address, a claim that *Lawrence* had overruled *Bowers*, the case on which *High Tech Gays* relied, thereby repudiating the Ninth Circuit authority that mandated rational basis review.[6] Because the Ninth Circuit has yet to evaluate the proper standard of review for sexual orientation classifications following *Lawrence*, and because such classifications invoke the classic concerns rendering a classification suspect, the Court should apply heightened scrutiny.

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

Plaintiff also explained in her opening brief that DOMA should be subject to heightened scrutiny under the Equal Protection Clause for the additional reason that it discriminates on the basis of sex. (Pl.'s Suppl. Mem. at 12:7-26.) Defendants offer no response to this point or to the well-established notion that laws that discriminate on the basis of sex are subject to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 524 (1996).

[6] Defendants suggest that the application of heightened scrutiny in *Lawrence* and *Witt* is irrelevant because those cases analyzed the issue under the Due Process Clause. As plaintiff explained in her supplemental brief, the equal protection analysis of *High Tech Gays* and its progeny relied predominantly on *Bowers*, even though *Bowers* was decided under the Due Process Clause. (Pl.'s Suppl. Mem. at 6:18-7:3 & n.4.) *High Tech Gays* emphasized that the equal protection and substantive due process components of the Fifth Amendment are "intertwined for purposes of equal protection analyses of federal action." *High Tech Gays v. Def. Indust. Sec. Clearance Office*, 895 F.2d 563, 573 n.9 (9th Cir. 1990); *see also Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

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

Finally, plaintiff noted in her supplemental brief that DOMA intrudes on the personal and private lives of lesbians and gay men in a manner that tramples upon the fundamental rights to intimacy and autonomy of personal relationships. *See Lawrence v. Texas*, 539 U.S. 558 (2003). Defendants respond by ignoring the pertinent constitutional right. Defendants mischaracterize plaintiff's argument as seeking to vindicate a constitutional right "to enroll her spouse in her FEHBP health insurance plan." (Opp'n at 7:8-10) Rather than confront the fundamental rights analysis outlined in *Lawrence*, defendants rely on decisions that pre-date *Lawrence* and pertain to a different fundamental right: the right to marry. (*Id.* at 7:22-8:2 (citing *Califano v. Jobst*, 434 U.S. 47, 54 (1977); *Druker v. Comm'r of Internal Revenue*, 697 F.2d 46, 60 (2d Cir. 1982).)

Although DOMA certainly impinges on the right to marry and to be treated as such, plaintiff has emphasized that, in this context, it also treads heavily upon the rights of intimacy and autonomy of personal relationships identified in *Lawrence*. In *Lawrence*, the Supreme Court struck down a Texas law that penalized same-sex relationships, because the law's "penalties and purposes" sought to "control" a "personal relationship" that fell within liberty interests protected by the Constitution. 539 U.S. at 567.[7] As Judge Kozinski explained, *Lawrence* rests on the proposition that "one's sexual orientation . . . enjoys protection from punishment." *In re Golinski*, 587 F.3d 901, 904 (9th Cir. EDR Op. 2009). DOMA, like the statutes at issue in *Lawrence* and *Bowers*, imposes a substantial penalty on the private lives of lesbians and gay men. In *Lawrence*, the criminal penalty at issue — a misdemeanor that was "a minor offense in the Texas legal system," 539 U.S. at 575 — imposed a small fine of $200 (plus court costs) that was rarely, if ever, enforced as a matter of practice. Here, plaintiff's expense *each month* to purchase

[7] The Supreme Court explained that the liberty interests protected by the Constitution extend beyond intimate sexual conduct and include an autonomy of "personal relationships": "[t]o say that the issue . . . was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.*

additional, inferior health insurance for her spouse exceeds the total fine imposed in *Lawrence*. *In re Golinski*, 587 F.3d at 904. (*See also* RJN Ex. A, ECF No. 82-1 (Golinski Decl. ¶¶ 7-10).)

Lawrence struck down the state statute not only due to its monetary sanction, but also due to the "stigma" that the law imposed on relationships of gay men and lesbians. The mere existence of a law targeting the relationships of lesbians and gay men, *even if it were not enforced*, the Supreme Court explained, "demeans the lives of homosexual persons" and serves as a public "declaration" that "in and of itself [is] an invitation to subject homosexual persons to discrimination both in the public and the private spheres." 539 U.S. at 575. Here, DOMA "demeans" and stigmatizes the relationships of gay people no less than the law addressed in *Lawrence*. DOMA is an unambiguous official pronouncement that the lawful marriages of same-sex couples are unworthy of respect and recognition.

For these reasons, there can be no doubt that DOMA "intrude[s] upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*," and for this additional reason must be subjected to heightened scrutiny. *Witt*, 527 F.3d at 819.

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

Although the Court should strictly scrutinize DOMA's application to plaintiff, defendants' arbitrary refusal to extend plaintiff health care benefits equal to those of similarly situated married employees cannot withstand even rational basis review. In cases such as this where a law targets a politically unpopular group or regulates personal relationships, courts undertake a particularly careful approach to rational basis review. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633 (1996) (applying rational basis review to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law"). DOMA squarely implicates these concerns. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377-79 (D. Mass. 2010) (summarizing the legislative history, which makes clear that DOMA was passed to "reflect Congress' 'moral disapproval of homosexuality . . . .'").[8]

[8] This fact differentiates this case from the decisions on which defendants rely (Opp'n at 10:3-26), which all concerned economic regulation. Such economic regulations may or may not be

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To their credit, defendants make no effort to defend the putative federal interests that Congress actually articulated when it passed DOMA. Indeed, defendants expressly disavow those interests. (Opp'n at 11 n.8.) Instead, defendants argue that DOMA is justified by a single governmental purpose: "maintain[ing] the *status quo* as to the definition of marriage for purposes of federal programs and benefits" while the "States have continued to examine and debate the subject" of marriage for same-sex couples. (*Id.* at 11:13-17.) This, however, is not a permissible government interest and instead serves only to highlight the statute's true purpose: "disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

The government's claimed interest in "maintaining the status quo" with respect to marriage of same-sex couples misapprehends what the *status quo* was at the time of DOMA's enactment. When Congress passed DOMA in 1996, the *status quo* in federal law was neutrality with respect to lesbian and gay couples and equal recognition of all marriages lawfully entered under state law. *Gill*, 699 F. Supp. 2d at 393. DOMA substantially altered the federal government's stance with respect to marriage. DOMA "mark[ed] the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage — or any other core concept of domestic relations, for that matter." *Id*. at 392 (emphasis in original). In fact, "[t]his is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry." *Id*. The government's unprecedented intrusion into family law is a reason to be skeptical of the law, not a justification supporting the law: "[t]he absence of precedent for [a statute] is itself instructive; 'discriminations of an unusual character especially suggest careful

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rationally related to a legitimate government interest, but they are unlikely to be drawn so as to disadvantage any particular historically vulnerable group or to inhibit personal relationships. *See Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing the analysis applied to "economic regulation" from that applied to classifications intended to injure a particular group). (*See also* Pl.'s Suppl. Mem. at 16:3-17:6.)

consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (citation omitted). *See also Gill*, 699 F. Supp. 2d at 393.[9]

Moreover, "maintaining the status quo" and "proceeding incrementally" are not valid governmental interests in and of themselves. At best, they are a means to an end; a description of how a law proceeds toward some goal. *See Gill*, 699 F. Supp. 2d at 395 n.135 (explaining that incrementalism is a legislative means, not an independent legislative goal). Defendants' argument brings the distinction into stark relief. Defendants explain that their goal is to "maintain the *status quo* as to the definition of marriage" for federal purposes. (Opp'n at 11:13-15.) They describe that "status quo" as "recognizing only opposite-sex marriage." (*Id*. at 13:12-15.) In other words, defendants' position is that DOMA is justified by a federal interest in "recognizing only opposite-sex marriage." This is entirely circular. Defendants have merely explained what DOMA does; they have provided no reason for doing it. *Gill*, 699 F. Supp. 2d at 393-94. Essentially, defendants' sole justification for the federal government's dramatic change of policy with respect to marriage and family law is that Congress preferred the new policy.

Alternately, defendants might be understood to argue that the government can enshrine discriminatory burdens upon lesbians and gay men in federal law simply because gay people historically have suffered similar discrimination under state law. This, however, is not a valid justification for legislation either. *See, e.g.*, *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law . . . .").[10]

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[9] Contrary to defendants' suggestion (Opp'n at 13 n.11), the First Circuit's decision in *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009), is not to the contrary. That decision examined the meaning of the word "spouse" as used in the Immigration and Nationality Act. It ruled that the word should be given "its common, ordinary meaning." 567 F.3d at 25. For this, it looked to Black's Law Dictionary (Sixth Edition), which defined the word as follows: "One's husband or wife, and 'surviving spouse' is one of a married pair who outlive the other." *Id*. Defendants fail to explain how this definition (which would encompass plaintiff's spouse) is inconsistent with conventional concepts in family law. In fact, the decision rejected the government's request that it define "spouse" with reference to Section 3 of DOMA rather than according to the term's "common, ordinary meaning." *Id*. at 24-25.

[10] Similarly unavailing is defendants' statement that "Congress may later decide to allocate federal benefits with recognition of same-sex marriages or domestic partners . . . ." (Opp'n at

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Defendants have identified no authority supporting their claim that "preserving the *status quo*" and "proceeding incrementally" are valid legislative ends in and of themselves. They cite several decisions for a putative governmental interest in the "status quo," but in each case, maintaining the *status quo* or an incremental, step-by-step approach was merely a means of addressing some independent legislative goal.[11] Courts certainly have ruled that legislatures may deal with problems one step at a time and need not tackle large problems in one stroke. But no authority suggests that maintaining the *status quo* — that is, taking no steps — is a valid governmental interest in and of itself.

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14:1-2.) A hope that Congress will eliminate a discriminatory and unconstitutional law in the future does not justify upholding the discriminatory law today.

[11] *See FCC v. Beach Commc'ns*, 508 U.S. 307, 317-19 (1993) ("[A]t least two possible bases" justified a cable television regulation. First, that the classification was "indicative of those systems for which the costs of regulation would outweigh the benefits to consumers." Second, the "potential for effective monopoly power . . . ."); *Butler v. Apfel*, 144 F.3d 622, 625 (9th Cir. 1998) (finding it legitimate for government to conserve "scarce welfare resources" by treating Social Security recipients incarcerated for committing serious crimes differently than recipients living in other public facilities, such as nursing homes and mental hospitals); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (finding that "reducing domestic automobile emissions is hardly a tentative step" toward addressing global warming); *SEC v. Chenery Corp.*, 332 U.S. 194, 213 (1947) (discussing SEC's approach to "the problem of management trading during reorganization," and ruling that the SEC may deal with this problem through case-by-case adjudication rather than rulemaking); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses . . . . Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every *duplication* of a lens should be accompanied by a prescription from a medical expert.") (emphasis in original); *Merrifield v. Lockyer*, 547 F.3d 978, 987 (9th Cir. 2008) (licensing and training requirements for "structural pest controllers" served various purposes, including "ensur[ing] that structural pest controllers have perspective, judgment, and skills related to their occupation"; "increas[ing] the safety of [the] profession"; and "competence in the field"). *See also Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1234-35 (11th Cir. 2003) (rejecting challenge to temporary "standstill arrangements" which allowed individuals temporarily to occupy certain structures within a national park; those allowed the National Park Service time to complete an "amendment to the General Management Plan," which provided for an environmental impact statement and longer-term management plans for the structures); *Teigen v. Renfrow*, 511 F.3d 1072, 1084 (10th Cir. 2007) (among several other justifications for the challenged governmental action, finding that a government employer may wish to maintain the *status quo* during the pendency of the administrative proceedings "to avoid undermining its litigation strategy or inserting unforeseen complexities into the administrative process.").

Similarly, defendants assert that DOMA serves to "preserve consistency in the definition of marriage with respect to the distribution of federal benefits and administration of federal programs." (Opp'n at 13:3-5.) This rationale fares no better. DOMA does *not* "preserve consistency" in the definition of marriage: "[d]ecidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy." *Gill*, 699 F. Supp. 2d at 394. DOMA takes the previously unitary class of "married couples" and divides it into two — those that are also married for federal purposes and those that are not — thereby creating an *in*consistency in the definition of marriage and in the allocation of benefits among married couples.

If defendants' point is that DOMA preserves "consistency" in the federal treatment of *same-sex* couples (whether married or not), that argument is again simply a description of what DOMA does, not a reason for doing it. Defendants offer no explanation for why preserving "consistency" in the (non)recognition of married same-sex couples, while creating an *in*consistency in the overall treatment of married couples, advances any legitimate goal. Any law that creates categories could be said to promote consistency or uniformity by requiring adherence to the categories created. The test is whether a relevant and permissible characteristic is used to distinguish those who are entitled to receive benefits from those who are not. *See City of Cleburne*, 473 U.S. at 439 (equal protection of the laws is "essentially a direction that all persons similarly situated should be treated alike"). Here, defendants offer no explanation as to why sex and sexual orientation are relevant criteria by which to allocate marriage-based benefits, as opposed to, for example, marital status. *See Gill*, 699 F. Supp. 2d at 395 & n.138.[12] The federal

[12] The decisions on which defendants rely confirm that, much like an interest in maintaining the "status quo," an abstract interest in "consistency" or "uniformity" cannot alone justify a law, absent a governmental interest served thereby. In each case cited by defendants, the law at issue sought "uniformity" in order to advance some independent governmental purpose. *Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1236 (9th Cir. 2002) (finding that application of a uniform interest rate to a judgment creditor of a bankrupt entity served "two interests, fairness among creditors and administrative efficiency"); *Ricards v. United States*, 683 F.2d 1219, 1225 (9th Cir. 1981) (upholding a provision of the Internal Revenue Code that disallowed a certain marital deduction because the provision sought to "equaliz[e] the estate tax burden between

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government has always tolerated, and still tolerates, state-by-state variations in eligibility for marriage, including variations arising from social debates at least as divisive as the debate over marriage equality for same-sex couples, if not more so. *See id.* at 391-92, 394. Defendants provide no justification for their unprecedented stance of categorically ignoring this single targeted class of lawfully married Americans.

Insofar as defendants claim that DOMA facilitates the "administration of federal programs" (Opp'n at 13:4-5), the argument is equally unavailing. Defendants make no effort to explain how DOMA assists — or rationally could be understood to assist — the administration of federal programs. As Judge Tauro explained:

> Federal agencies are not burdened with the administrative task of implementing changing state marriage laws — that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex.

Gill, 699 F. Supp. 2d at 395. 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*.

Moreover, defendants offer no response to the fundamental point that the federal government has no valid interest in dictating the contours of marriage and family law, subjects that, under well-settled principles of federalism, are reserved for the states. Congress had no legitimate basis to take sides in or to influence the outcome of the "debate regarding same-sex marriage" that "was just beginning in the States." (Opp'n at 11:3-4.) *See, e.g.*, *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("The whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States."). All of defendants' arguments "assume[] that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest." *Gill*,

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residents in community property and non-community property states," even though it did not fully do so).

699 F. Supp. 2d at 391. This is so because "[t]here can be no dispute that the subject of domestic relations is the exclusive province of the states," and the definition and regulation of marriage "lie at the very core of such domestic relations law." *Id.* (*See also* Pl.'s Suppl. Mem. at 19:18-20:20 (collecting cases).) DOMA's application to deny plaintiff equal employment benefits advances *no* valid governmental interest, and could not rationally be understood do so.

CONCLUSION

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

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