

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

KAREN GOLINSKI,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 10-00257 JSW
)	
UNITED STATES OFFICE OF PERSONNEL)	
MANAGEMENT and JOHN BERRY,)	
Director of the United States)	
Office of Personnel Management, in)	
his official capacity,)	
)	San Francisco, California
Defendants.)	Friday
)	December 16, 2011
)	9:56 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:	MORRISON & FOERSTER LLP
	425 market Street
	San Francisco, California 94105-2482
BY:	RITA F. LIN, ESQ.
	JAMES R. MCGUIRE, ESQ.
	GREGORY P. DRESSER, ESQ.
	and
	LAMBDA LEGAL
	3325 Wilshire Boulevard
	Suite 1300
	Los Angeles, California 90010
BY:	TARA L. BORELLI, ESQ.
	JON W. DAVIDSON, ESQ.

(Appearances continued, next page)

APPEARANCES, CONTINUED:

**For the United States: U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
BY: TONY WEST, ESQ.
ASSISTANT ATTORNEY GENERAL**

**For Intervenor Bipartisan Legal Advisory Group:
BANCROFT, PLLC
1919 M Street, N.W.
Suite 470
Washington, D.C. 20036
BY: CONOR DUGAN, ESQ.**

**Reported by: BELLE BALL, CSR #8785, RMR, CRR
Official Reporter, U.S. District Court**

1 **FRIDAY, DECEMBER 16, 2011**

9:56 A.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Case No. C-10-257, Karen Golinski versus
4 United States Office of Personnel Management, et al.

5 Counsel, please step forward to the podiums and state
6 your appearances.

7 **MS. LIN:** Your Honor, Rita Lin, I'm an associate at
8 Morrison & Foerster, for Plaintiff Karen Golinski.

9 **THE COURT:** Good morning.

10 **MS. LIN:** I'll be addressing Your Honor's Questions 6
11 through 10.

12 **THE COURT:** All right. Do me a favor, since I might
13 not remember two minutes from now, you can stand up and tell me
14 who -- the primary counsel or the first counsel that's arguing
15 can say, "I'm going to defer to Ms. Lin," or whatever. Okay?

16 **MS. LIN:** Your Honor, I'd also like to introduce
17 Ms. Golinski and her wife, Amy Cunninghis, who are here today.

18 **THE COURT:** Welcome.

19 **MR. MCGUIRE:** Good morning, Your Honor. James
20 McGuire, Morrison & Foerster, for Plaintiff Golinski.

21 **THE COURT:** Good morning.

22 **MS. BORELLI:** Good morning, Your Honor. Tara Borelli
23 with Lambda Legal, on behalf of the Plaintiff. And I will be
24 addressing Questions 1 through 5.

25 **THE COURT:** Good morning.

1 **MR. DAVIDSON:** Good morning, Your Honor. Jon
2 Davidson from Lambda Legal.

3 **THE COURT:** Good morning.

4 **MR. DRESSER:** Good morning, Your Honor. Gregory
5 Dresser, Morrison & Foerster, for Plaintiff Karen Golinski.

6 **THE COURT:** Good morning. Welcome.

7 **MR. WEST:** Good morning, Your Honor. Tony West,
8 Assistant Attorney General for the Civil Division, on behalf of
9 the United States.

10 **THE COURT:** Good morning. Welcome.

11 **MR. DUGAN:** Good morning, Your Honor. Conor Dugan
12 for the intervenor.

13 **THE COURT:** Good morning.

14 Counsel, would you mind having a seat at this point,
15 because I want to make a statement just to put the matter in
16 context.

17 Procedurally -- and you don't have to come forward, I
18 just want to make sure for housekeeping reasons -- I assume
19 this is correct, based upon having received additional
20 information from the parties, but just for the Record, Ms. Lin,
21 have you received and had an opportunity to review the Court's
22 questions?

23 **MS. LIN:** We have, Your Honor.

24 **THE COURT:** And, Mr. West?

25 **MR. WEST:** Yes, Your Honor, we have.

1 **THE COURT:** And --

2 **MR. DUGAN:** Yes, Your Honor.

3 **THE COURT:** Okay, very well. Thank you.

4 So, I just want to read a statement -- or make a
5 statement that puts this in context, and maybe gives the
6 parties a little bit more of the Court's thinking as you
7 approach these questions, and then we will go forward from
8 there.

9 Some of these things may be obvious, but this is
10 what -- the facts and the matters that the Court has taken
11 notice of as it prepared for this very important hearing.

12 Ms. Golinski, an employee of the office of staff
13 attorneys for the Ninth Circuit Court of Appeals, is, under the
14 laws of the State of California, married to her long-time
15 domestic partner and co-parent. After seeking to enroll her
16 spouse in the family coverage plan by her employer, the
17 Administrative Office of the Courts advised Ms. Golinski that
18 her election form would not be processed because her spouse
19 shared her gender and the extension of coverage to her spouse
20 would violate the Defense of Marriage Act, or DOMA, D-O-M-A,
21 and that's at 1 United States Code, Section 7.

22 Notwithstanding multiple orders requiring the
23 extension of coverage authored by Chief Judge Kozinski, sitting
24 as the Ninth Circuit administrator, the Office of Personnel
25 Management instructed Ms. Golinski's health insurance carrier

1 not to enroll her spouse on the basis that DOMA prohibited such
2 coverage.

3 Ms. Golinski filed a mandamus action to enforce Chief
4 Judge Kozinski's orders, which was dismissed by this Court.
5 Following dismissal of her original suit based on the
6 procedural complexities of the mandamus action, Ms. Golinski
7 filed an amended complaint presenting a direct challenge to the
8 constitutionality of Section 3 of DOMA as applied.

9 Specifically, Ms. Golinski alleges that, by operation
10 of DOMA, she has been denied marriage-based federal benefits
11 that are available to similarly-situated heterosexual married
12 persons, in violation of her rights to equal protection and due
13 process as secured by the United States Constitution.

14 I want to say a word about the Equal Protection
15 Clause because it is something that is central to the case.
16 The history of the Equal Protection Clause is a colorful and
17 storied one. After nearly a century of sanctioning slavery, in
18 amending the Constitution, the American people sought to
19 guarantee equality to all persons, thereby expanding the
20 breadth of the promise of equality founded in the Declaration
21 of Independence. The amendment changed the Constitutional text
22 to read that all persons were created equal, not just that all
23 men were created equal. Redeeming the Constitution from the
24 sins of slavery, the phrase, quote, "We the People," unquote,
25 made equality a binding guarantee of the Constitution and

1 extended protection to all persons.

2 This historical transformation is marked by rulings
3 of the Supreme Court honoring the promise of equality for all
4 persons, including *Brown versus Board of Education*, striking
5 down racial segregation; *Reed versus Reed*, prohibiting
6 discrimination against women; and most recently, *Romer v.*
7 *Evans*, striking down discrimination based on sexual
8 orientation.

9 Here, the Court is faced with enforcing the Equal
10 Protection Clause in the context of a fundamental right, that
11 is marriage. As far back as 1888, our Supreme Court recognized
12 that marriage is "the most important relation in life," and
13 "the foundation of the family and of society, without which
14 there would be neither civilization nor progress." More
15 recently, the Court established that the right to marry and to
16 establish a home and bring up children, quote, "is a central
17 part of the liberty protected by" unquote, the Constitution.
18 The question before this Court is whether the law denying gay
19 men and lesbians equal access to the benefits of marriage
20 contravenes the Constitution's guarantee of the equal
21 protection and due process of law.

22 The purpose of this hearing is to have the parties
23 help the Court resolve the constitutionality of Section 3 of
24 DOMA, as applied to a lawfully married same-sex couple. In
25 light of the Executive's pronouncement that DOMA is

1 unconstitutional and will no longer -- and will no longer
2 defend it in court, the Bipartisan Legal Advisory Group, or
3 BLAG, has taken up the defense of the statute. The Court is,
4 frankly, concerned about the defense of the statute by a
5 non-party.

6 In this case, the Court is confronted with an issue
7 of equal access to one of the most central fundamental freedoms
8 of our time: the freedom to marry the person of our choice.
9 Interestingly, the Court must resolve the issue as presented by
10 all three branches of government.

11 Now, just a housekeeping point here. The Court
12 instructs the parties to refrain from rearguing the material
13 covered in their extensive briefing on the issues, and rather,
14 to focus on the Court's questions. Once the parties have
15 addressed the Court's specific questions, the parties will have
16 an opportunity to address any other issues they may wish to
17 bring to the Court's attention.

18 With that, let us begin, and let us bring forward
19 counsel who are going to be dealing with the initial questions,
20 or the first question.

21 Now, before we -- even before we do that, counsel
22 has -- the parties have filed additional materials in response
23 to the Court's questions, which thereby manifests what this
24 Court calls its vacuum theory, which is, nature hates a vacuum
25 and lawyers hate a vacuum, and when given an opportunity to

1 fill that vacuum with briefing or argument which was invited by
2 the Court, will do so.

3 And so the Court has reviewed -- although briefly,
4 given the amount of time involved -- the additional authorities
5 submitted late yesterday afternoon by both parties. The Court
6 has concerns that some of the authorities indicate that perhaps
7 the parties may have misunderstood or misinterpreted some of
8 the questions posed. Accordingly, the Court would like to
9 clarify its position with respect to those questions.

10 Although it is clear that the parties have received
11 the Court's proposed questions for this hearing, for the sake
12 of those in the gallery and the completeness of the oral record
13 for whatever court may review this matter, the Court will read
14 into the Record each of the questions before engaging the
15 parties' arguments. I don't normally do that but, given the
16 nature of the case, I thought it would be helpful to do so.

17 And I'm going -- I'll read the questions in their
18 entirety, although I would obviously like counsel to respond to
19 the subparts. And I'm going to leave out the specific pin
20 cites and just mention the names of the cases, since the
21 citations are in the Record since the Court e-filed its
22 questions.

23 Question No. 1: The passage of Section 3 of the
24 Defense of Marriage Act ("DOMA") marks a unique departure from
25 the recognition the federal government historically has

1 afforded to State marital status determinations. And I have
2 this citing, *Elk Grove Unified School District versus Newdow*
3 case, N-E-W-D-O-W, holding that "the whole subject of the
4 domestic relations of husband and wife, parent and child,
5 belongs to the laws of the States and not to the laws of the
6 United States." See also *Boggs v. Boggs*, B-O-G-G-S, holding
7 that family law, including "declarations of status, for
8 example, marriage, annulment, divorce, custody and paternity,"
9 is the archetypal area of local concern.

10 Question 1.a: As DOMA represents a stark departure
11 from the federalist tradition and implicates a core State power
12 to govern domestic relations, is there any authority for the
13 Court to subject the statute to a more rigorous constitutional
14 scrutiny?

15 1.b: The few unique examples cited by BLAG --
16 B-L-A-G -- when Congress legislated in the area of domestic
17 relations occurred when Congress was explicitly acting in the
18 role of state government. Are there any historical examples in
19 which Congress legislated on behalf of the federal government,
20 in the area of domestic relations?

21 Now, I usually don't do this much talking, ever, but
22 certainly not in court, except when I'm giving jury
23 instructions. But I think it's important because the parties
24 have given the Court additional materials.

25 With respect to Question 1.a, and as interpreted by

1 BLAG, Question 7.a, which the Court shall have the parties
2 address separately, the Court has received the authorities from
3 BLAG, and is concerned that the group, this group seeks to
4 reframe the question posed. The Court is not concerned about
5 federal officials in any particular case having any authority
6 to determine whether any particular individual is validly
7 married under state law. In other words, the Court is
8 concerned, not with the specific adjudication, whether
9 individuals are married under state law, as there is no contest
10 here that Ms. Golinski is validly married under California law.
11 Rather, the Court is concerned with the new proposition that
12 the federal government should be involved with the
13 determination, whether any particular state's set of
14 requirements defining marriage is inherently valid, and thus
15 deserving of recognition for the purposes of federal benefits.
16 The Court's question addresses the introduction of the federal
17 definition and requirements for marriage, which have
18 historically been an area of exclusive state dominion.

19 So, with that, I'm going to start with Question 1.a,
20 and I think it is appropriate to have Plaintiff initially
21 respond to Question 1.a. And would you mind, as you get up,
22 restate your name, just so the Record's clear who's speaking.

23 **MS. BORELLI:** Sure. Thank you, Your Honor. My name
24 is Tara Borelli.

25 And, with respect to Question 1.a, we think that

1 Romer *versus Evans* speaks particularly powerfully to the
2 Court's question. *Romer*, just as this case presents,
3 confronted a question about an amendment to the Colorado
4 Constitution that was an unprecedented enactment. And the
5 Court noted that, and said that the absence of precedent from
6 the two is instructive. Discriminations of an unusual
7 character especially suggest careful consideration to determine
8 whether they are obnoxious to the constitutional provision.

9 We think this also makes sense, just as a matter of
10 first, principles, Your Honor, if we step back for a moment and
11 consider why it is that the courts subject some actions of
12 other branches of government to more exacting scrutiny. It's
13 when a branch might overreach, like the legislative branch, by
14 singling out a vulnerable minority group for deferential
15 treatment. And that's particularly a circumstance when the
16 ordinary political process is unlikely to correct that kind of
17 a problem.

18 This unprecedented action by Congress presents a
19 similar problem. Where the federal government overreaches in a
20 way that targets a vulnerable minority group, that similarly is
21 quite unlikely to be rectified by the ordinary political
22 process, and that's why it's certainly appropriate for the
23 Court to subject DOMA, at a minimum, to a careful and searching
24 form of rational-basis review.

25 **THE COURT:** All right. Thank you, Counsel.

1 I think it's appropriate at this point, given the
2 Executive Branch's position, to ask Assistant Attorney General
3 West to respond next to address the Court's question next, 1.a.

4 **MR. WEST:** Your Honor, we certainly believe that this
5 Court ought to subject DOMA to a heightened scrutiny analysis.
6 We think it's appropriately done under the Equal Protection
7 Clause.

8 With respect to this specific question that the Court
9 asks, we have not been able to find any authority on point for
10 the proposition that a -- a statute that deals with domestic
11 state relations should be subjected to more rigorous scrutiny.
12 But, we don't think that means DOMA should not get that
13 scrutiny from this Court.

14 We think that, as a matter of -- of course, that
15 there's a distinction to be made, and the *Srail* case made this
16 distinction. The District Court in the Central District of
17 California made this distinction between the issue of
18 allocating benefits, which we think is exactly what this case
19 is about, and sanctifying a relationship, which is more toward
20 the question of domestic relations that the Court -- the Court
21 discusses.

22 And, we would also note that there are federal laws
23 which do not adopt wholesale the state definition of marriage,
24 Social Security laws, tax laws, retirement laws. Those are
25 just some examples. But, again, we think that's why this is

1 probably a case that is better analyzed on the equal protection
2 context and, therefore, meriting (Inaudible).

3 **THE COURT:** Would you re-identify yourself.

4 **MR. DUGAN:** Your Honor, Connor Dugan, for BLAG.

5 **THE COURT:** Thank you. Welcome.

6 **MR. DUGAN:** If I could just pass out -- we have a lot
7 of cases, I realize, Your Honor, and I brought copies for --

8 **THE COURT:** Are these more than the ones that you
9 cited --

10 **MR. DUGAN:** No, these are the ones that went in
11 yesterday.

12 **THE COURT:** All right. I have copies of all of
13 those. I actually have a binder with each case.

14 (Off-the-Record discussion)

15 **THE COURT:** Certainly enough paper. We don't need to
16 add to that.

17 **MR. DUGAN:** Your Honor, we agree with Mr. West. We
18 have not been able to find any string of case law that would
19 subject this statute to more rigorous scrutiny because of --
20 because of what it says about marriage. We also would, with
21 all due respect, say that this is not a stark departure. As
22 Mr. West said, there are statutes on the books right now,
23 besides DOMA, that decide whether or not to recognize a state
24 marriage for immigration benefits, for tax benefits, for a
25 variety of things which we briefed. And, I'm not going to

1 reargue those here, Your Honor.

2 We also cited the *De Sylva* case, in which the Court
3 said that a state wouldn't be entitled to use the word "child"
4 or "children" any way it wanted, but rather, would -- if it was
5 strange to the familiar way of using it. And in that case, in
6 concurrence, Justices Douglas and Black made clear that whether
7 or not Congress had to -- was going to adopt the state law, was
8 -- was a question for Congress to make.

9 **THE COURT:** But there are certain -- there are other
10 statements in the majority opinion in that case, albeit --
11 dictum, that say if the Court were to begin to making fine
12 distinctions about what constitutes marriage and what doesn't,
13 that would have constitutional implications.

14 Do you agree with that? Did you find those cites as
15 well?

16 **MR. DUGAN:** I --

17 **THE COURT:** For example, Page 581.

18 **MR. DUGAN:** Yeah, no, just -- in terms of
19 specifically what -- what you are asking Your Honor, I just
20 want to make sure I understand the question.

21 **THE COURT:** Well, you understood the question
22 correctly, but you were citing concurrence. And I was saying
23 that there was -- although, again, I only had an opportunity to
24 review these matters briefly, these cases, there was language
25 in those cases about making -- that it's problematic from a

1 constitutional standpoint, where the state -- where the federal
2 government is making definitions with respect to what is
3 marriage, what is -- what is parenthood, et cetera.

4 And so I'm saying, those cases, you cited concurrence
5 in those cases. I'm not sure that they stand for the
6 proposition that you're citing them for.

7 **MR. DUGAN:** Well, the first quotation wasn't from the
8 concurrence. It was actually from the majority. And the
9 majority said states can't just define "children" any way they
10 want. If they went beyond sort of the common usage, Congress
11 could step in, and it could define.

12 Here, we already have Congress deciding which
13 marriages it will recognize for purposes of many different --
14 excuse me, several different laws. So this is not -- this
15 isn't an injection into domestic law, this is simply a question
16 of recognizing -- what Congress is going to recognize.

17 **THE COURT:** All right. All right.

18 Would you like to reply?

19 **MS. LIN:** Yes. And, I think this begins to take us
20 into the territory of Question 1.b, if that is okay with the
21 Court.

22 **THE COURT:** All right, then let's do that. And, I
23 appreciate that.

24 But before I get into that, to keep this on the same
25 track, Mr. West, is there anything would you like to say

1 further in response to what BLAG has stated?

2 **MR. WEST:** No, Your Honor.

3 **THE COURT:** All right.

4 **MS. LIN:** I'm sorry.

5 **THE COURT:** Let's go to Question 1.b, and I was going
6 to put that question, in the first instance, to BLAG.

7 **MS. BORELLI:** Sure. And, just to tack on to what was
8 discussed --

9 **THE COURT:** Yes.

10 **MS. BORELLI:** -- we agree with the Court's reading of
11 *De Sylva versus Ballentine*. In the majority opinion, the Court
12 says: There is no federal law of domestic relations; it is a
13 matter of state law. So we agree with the Court's reading on
14 that.

15 **THE COURT:** All right.

16 **MS. BORELLI:** To turn to Question b --

17 **THE COURT:** Actually, I actually wanted BLAG to
18 answer this in the first instance.

19 **MS. BORELLI:** I apologize.

20 **THE COURT:** I'll give you an opportunity, because I
21 think the questions, the way I framed the question was to
22 challenge one side or the other, and then give the other an
23 opportunity to say, you know, whatever they want to say.

24 So I'll start with BLAG, and then you will have an a
25 full opportunity.

1 Counsel?

2 **MR. DUGAN:** Your Honor, our research hasn't shown
3 that there are historical examples which Congress has
4 legislated on behalf of the federal government in the area of
5 domestic relations. We would, of course, go back to fact that
6 the federal government today does, and has in the past, drawn
7 lines about which particular relationships that states define
8 that they'll recognize.

9 **THE COURT:** All right.

10 Mr. West?

11 **MR. WEST:** But, what is not the case, we have not
12 seen historically, is the federal government picking and
13 choosing which set of legally married couples, similarly
14 situated, may receive benefits and be denied benefits simply on
15 the basis of sexual orientation or simply on the basis of
16 something that might be unpopular. And so, we've not seen that
17 historically, and that is why we think this case, which
18 presents that question squarely, is particularly a good one for
19 that analysis.

20 **THE COURT:** All right. Counsel?

21 **MS. BORELLI:** Your Honor, to the extent the Court is
22 not aware of it, there was an amicus brief submitted on behalf
23 of family law professors in the *Commonwealth* and *Gill* cases on
24 appeal before the First Circuit, and it addresses in great
25 detail this particular question. And that brief actually takes

1 upon itself the task of cataloging all of the examples of
2 federal statutes, and cases that have been cited by BLAG,
3 previously by DOJ, and by amici, supporting their position.

4 We did not submit that as additional authority
5 because it, of course, contains argument. But we have copies
6 today, and would be happy to file a copy electronically if the
7 Court would find that helpful.

8 What this brief explains -- and each and every one of
9 the supplemental authorities submitted yesterday by BLAG can
10 fit into these particular categories -- is that we have
11 categories of federal treatment of state marital status, but
12 absolutely none of them displace the requirement of a valid
13 state marriage.

14 So, for example, there is one category which is the
15 vast majority of federal statutes and regulations. They may
16 use terms such as "spouse," "marriage," or even "parent."
17 There is no federal definition. They implicitly and always
18 rely on state definitions of those terms.

19 There's a second category of some small number of
20 statutes that rely explicitly on state status. And they do so
21 by incorporating whether a marriage is valid according to place
22 of celebration or place of domicile.

23 There is a third category, and I think this is where
24 some of the controversy or argument has arisen by BLAG. But,
25 these are equal -- easily understood as cases that again do not

1 displace state marital status. This third category of statutes
2 where a valid state marriage is treated as necessary but not
3 sufficient, and these have to do with particular areas, like
4 immigration or Social Security, where the federal government
5 may have particular policy interest and applies additional
6 requirements for a person to qualify for particular benefits or
7 for particular immigration status.

8 So, for example, the Immigration and Nationality Act
9 imposes additional requirements on top of the requirement of
10 state marriage. That parties have been present for the
11 marriage and that they live together. Those are neutral
12 requirements. They apply equally to all spouses, and they
13 relate to particular policy reasons that the government has in
14 making sure people are not entering fraudulent marriages for
15 purposes of getting those benefits.

16 Again, each and every category does not begin to
17 displace state marriages. Instead, they all rely on it and
18 incorporate the requirement of valid marital status as
19 determined by the States.

20 **THE COURT:** So that's where you -- the Plaintiffs
21 would stick with those cases, where the federal -- federal
22 statutes and Congress purport to actually impose their own
23 requirements with respect to what they view as a valid marriage
24 for purposes of meeting those statutes such as Social Security
25 or immigration.

1 **MS. BORELLI:** That's precisely right. The Court --
2 rather, the federal government might have an interest in saying
3 a couple must not only have been married, they must have been
4 married for a particular period of time in order to receive a
5 certain Social Security benefit. That does not displace the
6 state marital status; it relies upon it, and imposes an
7 additional policy-specific neutral requirement for eligibility
8 for benefits.

9 **THE COURT:** All right, thank you.

10 Any reply?

11 **MR. DUGAN:** Yes, Your Honor.

12 **THE COURT:** Briefly, please.

13 **MR. DUGAN:** Yeah, briefly.

14 The idea that that -- that the Social Security
15 statute, for instance, isn't displacing something I think is
16 false. And, and DOMA -- if DOMA is displacing, in this case.
17 DOMA does not displace any state law. Congress can draw lines
18 about where it wants to give benefits and to give burdens.

19 **THE COURT:** How does it not displace it when,
20 basically, the State of California or other states say marriage
21 can be between a -- same-sex marriage is valid, and the federal
22 government says "That's is all well and good, but we're not
23 going to recognize that, for very important federal purposes"?
24 How is that not a displacement?

25 **MR. DUGAN:** Because, in this case, Ms. Golinski and

1 her wife are still married. It hasn't displaced their
2 marriage.

3 **THE COURT:** But it's displaced the benefits of their
4 marriage.

5 **MR. DUGAN:** Well, and Congress gets to draw the lines
6 of where benefits -- what benefits it wants to give. It
7 certainly can't be the case that Congress has to, basically,
8 rubber-stamp any definition that is given by a state. And I
9 think that was what I was alluding to with the *De Sylva* case.

10 **THE COURT:** All right. Mr. West, do you want
11 anything?

12 **MR. WEST:** No, Your Honor.

13 **THE COURT:** All right. Let's go to Question No. 2.
14 And this again will be, in the first instance, addressed to
15 BLAG:

16 Why should the Court not subject DOMA to heightened
17 scrutiny for impacting marriage, as a basic fundamental freedom
18 and an exercise of personal decision-making protected by the
19 right of privacy?

20 And I'm citing, for example, *Loving versus the*
21 *Commonwealth of Virginia; In re Levenson.*

22 **MR. DUGAN:** For a number of reasons, Your Honor. The
23 first being that these questions were specifically in the
24 jurisdictional statement of *Baker v. Nelson*. The question of
25 freedom, the question of privacy. This does not -- also, DOMA

1 does not implicate the concerns that Justice -- excuse me. The
2 joint opinion in Casey talked about that "At the heart of
3 liberty is the right to define one's own concept of existence
4 of meaning of the universe and the mystery of human life."
5 That's still allowed here. This is simply a question of what
6 Congress is going recognize for purposes of benefits.

7 And, and, it also is the case in *Harris versus McRae*,
8 which we cited yesterday, that it's established that the
9 government cannot infringe on a fundamental right just by
10 declining to subsidize that fundamental right. And I think
11 that's the distinction we would point to.

12 **THE COURT:** All right. Mr. West?

13 **MR. WEST:** Well, Your Honor, I think it is true that
14 no married couple, regardless of their sexual orientation,
15 enjoys a Constitutional right to federal benefits. Which is
16 why I think viewing this in a substantive due-process frame I
17 think may collapse the inquiry in such a way that -- that
18 complicates it, instead of making it more straightforward like
19 it's presented.

20 So, the question is not, you know, whether or not
21 someone has a right to benefits because of the way that --
22 because of -- of their marriage status. And the question is
23 not really one of sanctifying the particular relationship. I
24 think the question is squarely whether the federal government
25 can use this classification to make determinations amongst

1 otherwise similarly-situated legally married couples.

2 And that is also the reason why *Baker V. Nelson*,
3 which is cited by BLAG, is of no precedential value here in
4 this case because that's a case, a per curiam decision, a
5 one-sentence per curiam decision, which deals with a question
6 that's not at issue here. It deals with a question from a
7 Minnesota State Supreme Court about whether or not a same-sex
8 union was going to be recognized as marriage under the laws of
9 the State of Minnesota. That is nowhere at issue in this case.
10 Ms. Golinski and her wife are already married.

11 So, the only question is whether or not the federal
12 government has a good reason to be able to make these
13 distinctions, to draw these lines. And, we think the federal
14 government does not.

15 **THE COURT:** All right. Counsel?

16 **MS. BORELLI:** Your Honor, the Court cited in its
17 question, Footnote 5 in the *Levenson* decision. And we would
18 suggest to the Court that it could do what that decision did,
19 which is to say the only question before the Court is whether
20 the federal government has any adequate interest in denying,
21 for the first time in 230 years, federal recognition to a valid
22 state marriage just because of the sexual orientation of the
23 couples married.

24 We don't believe that the Court needs to reach the
25 question of whether this infringes the fundamental right to

1 marry. As the Court is aware, that's a question with broad
2 implications. It touches the marriage laws of 44 states. And
3 we think there are other grounds that are more than adequate to
4 hold the DOMA unconstitutional. Of course, the equal
5 protection grounds we have raised, but also impression to have
6 liberty interest identified in *Lawrence* and applied by the
7 Ninth Circuit in *Witt*, as well as the right to family autonomy.

8 To be clear, we do believe that the Constitution
9 equally protects the fundamental right of same-sex couples to
10 marry, just as it protect that right for different-sex couples.
11 But we don't believe that is presented by this case. And to
12 say a bit more specifically about why, we're not arguing about
13 the fundamental right to marry. We've not presented that claim
14 in this case, because she is married. Instead, we view this
15 law as having to do with penalizing her choice of the person
16 with whom she's built her family life.

17 So, the Court might think of this as among those who
18 are married, the government disapproves of and burdens those
19 who form that family life with a same-sex partner.

20 I concur with Mr. West's statements about *Baker*
21 *versus Nelson*, and I won't repeat our briefing. But if the
22 Court had additional questions about it, then we would be happy
23 to address them.

24 **THE COURT:** No, that's fine.

25 Do you want to say anything more on this, Counsel?

1 **MR. DUGAN:** Just briefly on the *Baker v. Nelson*
2 point, Your Honor. We put the jurisdictional statement in the
3 record -- or, excuse me, attached it to our motion to dismiss.
4 The question was squarely presented on whether or not Equal
5 Protection Clause requires a state to recognize a same-sex
6 union. We believe it is on all fours with the question here.
7 And, I would just urge you to look at that jurisdictional
8 statement.

9 **THE COURT:** All right. I understand Counsel's
10 argument on that. Let's move on to Question No. 3.

11 **MS. BORELLI:** Your Honor?

12 **THE COURT:** Yes.

13 **MS. BORELLI:** I apologize for interrupting the Court.
14 Would it be possible to address the *Harris v. McRae*?

15 **THE COURT:** Please.

16 **MS. BORELLI:** So, another case that's been cited for
17 the same proposition in the briefing already is *Regan versus*
18 *Taxation with Representation*. And that is a paradigmatic case
19 in which the Court distinguishes the arguments the plaintiffs
20 were making there as having to do with the subsidy because in
21 that case, for example, and in *Harris versus McRae*, the
22 plaintiffs were saying, "If the government provides me with a
23 particular subsidy, I can engage in more of this fundamental
24 right."

25 So *Regan*, in ruling on that, said this is quite

1 different from a case that involves a government-created
2 obstacle.

3 That is precisely what DOMA is. There is no question
4 that DOMA is a government-created obstacle. That is why this
5 is not merely a case about subsidizing a fundamental right;
6 this is about removing an obstacle that the government has
7 created without any adequate reason.

8 **THE COURT:** All right.

9 **MR. DUGAN:** Can I say one more word, Your Honor?

10 **THE COURT:** Probably more than one word.

11 **MR. DUGAN:** Probably one or two sentences.

12 **THE COURT:** You'd be the first lawyer that -- that
13 could do that.

14 **MR. DUGAN:** *Harris versus McRae* did involve a statute
15 which said that the government was not going to fund a
16 fundamental right. It was the Hyde Amendment. And so I don't
17 think the distinction that has just been put forward actually
18 gives a lot of daylight between that case and this.

19 **THE COURT:** Well, I'll read that, and Counsel's given
20 me what I need to decide that specific issue.

21 Question No. 3: In *Lawrence versus Texas*, the
22 Supreme Court, in overruling *Bowers v. Hardwick*,
23 H-A-R-D-W-I-C-K, noted that the *Bowers* court had
24 "misapprehended the claim of liberty presented to it," and had
25 failed "to appreciate the extent of the liberty at stake."

1 Here, BLAG advocates defining the right at issue as the right
2 to same-sex marriage.

3 And my question is, is that too narrow -- I'll read
4 all of the parts, and then you can respond to those, Counsel,
5 both sides -- is that too narrowly defining the right at issue?
6 What is the authority for the position that only the right to
7 opposite-sex marriage is fundamental, as opposed to the right
8 to marriage generally?

9 I'll start with you. Yes, please, Counsel. Thank
10 you.

11 **MR. DUGAN:** Your Honor, there are a couple of
12 responses to that. First --

13 **THE COURT:** I assume the first question, the answer
14 to the first question is no, it's not too narrowly --

15 **MR. DUGAN:** No, that's right, it's not too narrowly.
16 It's hard to understand how government could have a legitimate
17 state interest in preserving the traditional institution of
18 marriage, as Justice O'Connor said in her concurrence in
19 *Lawrence*, if there's a fundamental right to same-sex marriage.

20 In *Glucksberg*, the court -- which we cite in our
21 briefs, *Glucksberg* says that you look to the fundamental rights
22 and liberties which are objectively deep-rooted in this
23 nation's history and tradition, and implicit in the concept of
24 order of liberty, to discover whether or not something is a
25 fundamental right. But it added also that they required -- the

1 Court is required, in substantive due-process cases, a very
2 careful description of the right at issue.

3 So we would say that *Lawrence*, because of *Baker*, also
4 because of what Justice Kennedy said in terms of what this is
5 not reaching, and also what Justice O'Connor says in her
6 concurrence, does not indicate that we have defined the right
7 too narrowly here.

8 **THE COURT:** All right. Mr. West?

9 **MR. WEST:** Your Honor, I think *Lawrence* is
10 instructive here for a number of reasons, but I don't think it
11 is for the reasons of defining what the right at issue is in
12 this case. And so, with respect, I disagree certainly with
13 BLAG, that the right at issue is the right to same-sex
14 marriage.

15 But, we don't believe the right to marriage is at
16 issue in this case at all. Again, Ms. Golinski is already
17 married. There's no Constitutional right to federal benefits,
18 so that -- there's no issue there about whether or not there's
19 a fundamental right that's implicated there.

20 What is at issue is whether or not the federal
21 government can use sexual orientation as the basis to grant
22 health benefits to some legally married couples, yet deny them
23 to others.

24 **THE COURT:** All right. Counsel?

25 **MS. BORELLI:** Your Honor, so let me jump for a moment

1 to the concurrence of Justice O'Connor that was cited by
2 Mr. Dugan. That reference comes up in an entirely different
3 context, where she talks about, in the hypothetical, the
4 interest in preserving traditional marriage in an
5 equal-protection claim. And, Your Honor, what BLAG has not
6 explained in this case is what that has to do with excluding
7 same-sex couples from recognition at the federal level.

8 But, to answer the Court's question, obviously we
9 disagree with BLAG, and we think that some of the Court's
10 seminal freedom-to-marry cases address this. In *Loving*, it was
11 not about the right to interracial marriage. *Zablocki v.*
12 *Redhail* was not about the right to have a child-support --

13 **THE COURT:** What was that case you just cited?

14 **MS. BORELLI:** *Zablocki v. Redhail* was not about the
15 right to have a child-support debtor's marriage. *Turner versus*
16 *Safley* was not about the right to have a prisoner marriage.
17 These were cases about the right to marry. One does not define
18 the right by who was excluded. When women won the right to
19 vote, they did not win the right to female vote. They won the
20 right to vote.

21 To the extent that *Washington versus Glucksberg* is
22 something the Court might look to, I want to make a strong
23 distinction, a different argument about how the Court should
24 understand that decision, and its application here. *Glucksberg*
25 said there's not a right to assisted suicide that is

1 fundamental in nature. The court looked at the specific way in
2 which that right would apply in a particular context, but it
3 did not define that right by the characteristics of any
4 particular plaintiff who sought to exercise it.

5 And, that is exactly the mistake that BLAG makes in
6 their argument that there is no right to same-sex marriage
7 (Indicating quotation marks).

8 **THE COURT:** All right. Counsel, would you like to
9 reply?

10 **MR. DUGAN:** No, thank you.

11 **THE COURT:** All right. Mr. West?

12 **MR. WEST:** No, Your Honor.

13 **THE COURT:** All right. So, Question No. 4, and the
14 question is -- and then I'm going to have a comment based upon
15 the additional authority that the parties have given the Court.

16 Question 4: Are classifications based on religious
17 affiliation treated as suspect class and subject to heightened
18 scrutiny under an Equal Protection analysis? And the next
19 subpart of that is: How does BLAG distinguish the line of
20 authority treating classifications based on religious
21 affiliation as a suspect class from classification based on
22 sexual orientation?

23 Now, with respect to that question, let me add a
24 thought the Court had, in light of the Court's -- presentation
25 to the Court by counsel. With respect to Question 4, the Court

1 does not dispute and is not concerned with the line of
2 authority supporting the proposition that discrimination
3 against religious groups is subject to heightened scrutiny
4 based on the group's exercise of religion, which is
5 unquestionably a fundamental freedom. Rather, the Court is
6 concerned with the line of authority indicating that religious
7 groups are afforded heightened security where they are treated
8 as a suspect class under Equal Protection Clause. A number of
9 the additional authorities cited blur this distinction, and the
10 Court is concerned only with the treatment of
11 religiously-affiliated groups as a suspect class.

12 So I don't know if that helps BLAG, but I wanted to
13 elucidate a little bit more the Court's thinking, having read
14 your authorities.

15 **MR. DUGAN:** Would you like BLAG to go first again?

16 **THE COURT:** Absolutely, please.

17 **MR. DUGAN:** Okay. I have --

18 **THE COURT:** And if these are the same cases,

19 Counsel --

20 **MR. DUGAN:** That's right, I'm not giving you any.

21 **THE COURT:** Thank you.

22 **MR. DUGAN:** Your Honor, we're aware of no line of
23 authority in which -- in which religious affiliation or
24 religion is considered a suspect class. We could find no case
25 that goes through the -- the various factors that cases -- the

1 courts need to go through to determine whether or not a group
2 is a suspect class.

3 For instance, the analysis that is in *High Tech Gays*,
4 one of the cases we rely on in our briefs, goes through and
5 asks --

6 **THE COURT:** Which the Plaintiffs argue has been
7 severely undercut.

8 **MR. DUGAN:** Well, it's still binding precedent, Your
9 Honor. So, that's another reason that this isn't a suspect
10 class, though, because the Ninth Circuit has decided that
11 sexual orientation is not a suspect class.

12 But, going back to the question of religion. There
13 are no cases that we could find in which courts actually go
14 through that same analysis: Asking whether or not a group is
15 politically powerless, asking whether or not they have
16 immutable characteristics. And I think part of that is because
17 they have looked at it, as you were indicating earlier, as a
18 fundamental right. They've looked at it in that context. So
19 we don't think that there's this body of religious suspect
20 class case law that would be helpful here.

21 **THE COURT:** All right. Mr. West?

22 **MR. WEST:** Well, Your Honor, certainly, I think this
23 highlights the fact that the Supreme Court factors are an
24 important balance. No one factor is dispositive. And, it's
25 not like, if you add up three or four you get suspect class,

1 and if you only have two, you don't. I think there are clear
2 parallels between sexual orientation and religious affiliation.

3 I think the Court, when looking at religion and
4 treating it as a suspect classification for equal-protection
5 purposes, does so because of the very unique role that
6 religious affiliation plays throughout the history of this
7 country. It -- one of the reasons that this nation was founded
8 was because of religious persecution, and religious-freedom
9 concerns.

10 And we think something that -- that fundamental to
11 the United States, where it has been absolutely clear since the
12 founding of the country that discrimination based on religious
13 affiliation is something to be disfavored, I think puts it
14 squarely within the equal-protection analysis that the Court is
15 sort of -- has sort of articulated.

16 The point is, you know, what is the Court trying to
17 do when it is setting forth this equal-protection analysis?
18 So, we think sexual orientation has many parallels there, just
19 as it does with other quasi-suspect or suspect classes like
20 gender, race, national origin, lineage.

21 **THE COURT:** Counsel?

22 **MS. BORELLI:** Your Honor, of course, as a preliminary
23 note, we strongly disagree that *High Tech Gays* is still
24 binding. As the Court noted, it has been severely undercut.
25 If the Court were to have any questions about our arguments

1 about *High Tech Gays*, we would appreciate the chance to address
2 them.

3 But, as the Court noted, all of the sources that have
4 been submitted to the Court that have to do with religious as a
5 suspect classification fall into two categories. One set
6 recognizes it as a fundamental right, and that infringements on
7 that right are subject to strict scrutiny. But there is a
8 significant amount of, admittedly, dicta, and yet it is
9 repeated over a significant period of time by both the Supreme
10 Court and the Ninth Circuit, which treat as obvious the idea
11 that religion constitutes a suspect classification.

12 We think it is a particularly apt analogy here, Your
13 Honor. There are all kinds of reasons to think that the
14 arguments that BLAG has made about sexual orientation -- the
15 fact that some small minority can experience a change that's
16 not necessarily an obvious trait, that it's about conduct --
17 each and every one of these things can be said about religion,
18 as well. Some people convert their religion. Some people, you
19 can't identify their religion by looking at them. The only way
20 you might know is by conduct.

21 So, in the way that you might be able to surmise
22 sexual orientation of someone as holding the hand of a same-sex
23 partner, you might be able to able to infer religion possibly
24 by religious practices, if someone is wearing a cross or a
25 Yarmulke, or praying to Mecca.

1 You can tell what some people's religion is by their
2 conduct. And yet, some people have a religious identity, and
3 yet never engage in the practices of that particular religion,
4 in the same way that some people identify as gay or
5 heterosexual, and might be celibate.

6 But, if the Court found that this was a hard ground
7 to analogize to because of doubts in the case law -- and we
8 don't think that case law leaves any room for doubt -- alienage
9 is another apt example, and there's no question that alienage
10 is a suspect classification. People can change, they can
11 become citizens, they can renounce their citizenship. You
12 cannot tell whether someone is a citizen by looking at them.
13 Alienage is determined by conduct, conduct of coming to the
14 United States under certain circumstances. And, likewise,
15 citizenship is determined by the conduct of naturalizing.

16 The ultimate point with all of these criteria is that
17 this is the kind of core defining and fundamental trait that
18 the government does not have the right to judge or to require a
19 person to change as a condition of equal citizenship.

20 **THE COURT:** Thank you.

21 Do you want to say anything in rebuttal, Counsel?

22 **MR. DUGAN:** Yes, Your Honor. I don't know how *High*
23 *Tech Gays* isn't binding, but dicta; talking about religion as a
24 suspect class is. That makes no sense to me.

25 The other thing I would say, in response to something

1 Mr. West said is, the analysis for a suspect class is a
2 conjunctive analysis. If you look at *High Tech Gays*, look at
3 *Lenning*, which the Supreme Court decided, you need all the
4 factors or the factors that the Court decides to actually
5 review in that particular case.

6 But it would make no sense that someone would be
7 considered a suspect class if they have political power. You
8 wouldn't need the courts to step in to rectify problems.

9 **THE COURT:** All right. Mr. West?

10 **MR. WEST:** Yes, Your Honor. I think this underscores
11 exactly why *High Tech Gays* is just not viable authority. We
12 recognize its precedent. It's Ninth Circuit authority that
13 this Court is going to have to address in its opinion.

14 But frankly, it's on its last legs. And that is
15 because it is based -- the linchpin of that case is based on a
16 case, *Bowers*, that has been categorically overruled by the
17 Supreme Court. So to continue to think that its reasoning has
18 any viability, I think, is to engage in a fiction.

19 The other thing that this conversation is
20 highlighting, it seems that BLAG seems to be pressing -- again,
21 this is reasoning in *High Tech Gays*, as well -- this idea that
22 because homosexuality might be behavior -- these are the words
23 of *High Tech Gays* -- as opposed -- or conduct, that therefore,
24 it is not somehow deserving of a suspect classification.

25 And the Supreme Court has, when it comes to sexual

1 orientation, has declined to make this distinction between
2 conduct and status. *Christian Legal Society, Lawrence*, the
3 Court has declined to make that kind of distinction.

4 And if -- if the Court were to entertain that
5 distinction, perhaps this idea that a conjunctive analysis is
6 required in order to find suspect classifications, then maybe
7 that would be true. But we know from the Court's own analysis
8 in the way that it deals with classifications, that that is not
9 the case.

10 **THE COURT:** Anything further you want to say?

11 **MS. BORELLI:** We agree with those points, Your Honor.
12 And the very cases that BLAG cites for its argument that each
13 and every one of these considerations must be looked at by a
14 court, those very cases undercut BLAG's point. They all talk
15 about these considerations with the disjunctive word "or," not
16 the conjunctive word "and."

17 We can look at a body of cases that show us, for
18 example, with respect to immutability, out of the six
19 classifications that have been held to require some form of
20 heightened scrutiny, at least three of them -- religion,
21 legitimacy, and alienage -- are subject to change. That shows
22 us exactly how flexibly the court has looked at these factors.

23 **THE COURT:** All right. Let's move on to
24 Question No. 5. I'm going to read the question, and then I
25 want to make a comment about Question No. 5.

1 What is the statutory authority for an evidence of
2 compliance with the role that Bipartisan Legal Advisory Group
3 has assumed in this matter? Is this group actually bipartisan?
4 Does BLAG have the support -- and funding for the increasing
5 cost of defending DOMA -- from a majority of Congress, or just
6 from the House of Representatives? See *Immigration and*
7 *Naturalization Service versus Chadha*, C-H-A-D-H-A, holding that
8 Congress is the proper party to defend the validity of a
9 statute when an agency of the government charged with enforcing
10 the statute agrees that the statute is unconstitutional.

11 Now, the additional authority cited by BLAG regarding
12 the group's authority to support the statute in court are, for
13 the most part, frankly, not helpful. The Court is not
14 concerned about enforcement of the disciplinary rules of the
15 House of Representatives. Rather, the Court is concerned about
16 the authority of the House alone, rather than the majority of
17 both houses of Congress, to defend this statute in court. This
18 Court is also concerned whether the House followed correct
19 protocol in hiring and continuing to fund the group that
20 appears here.

21 And, I'll give you an opportunity to respond first.

22 **MR. DUGAN:** Thank you. Thank you, Your Honor. I
23 think that question is probably most centrally directed to us,
24 so I'll get to it.

25 There is no statutory authority. There's

1 constitutional authority, and that authority is the rule-making
2 clause that each house can make rules that determine its
3 proceedings. And, under those rules, the House has -- has
4 established an Office of General Counsel for the purpose of
5 providing legal assistance and representation to the House.
6 And the Office of General Counsel shall function pursuant to
7 the direction of the Speaker, who shall consult with the
8 Bipartisan Legal Advisory Group, which shall include the
9 majority and minority leaderships.

10 So, to answer your question, Your Honor, is it
11 bipartisan? Yes, it is. It is made up of five members. And,
12 in a three-to-two vote, BLAG decided to defend a law that the
13 Department of Justice decided it wasn't going to defend
14 anymore.

15 **THE COURT:** Let me ask you this. I'll let you finish
16 your argument --

17 **MR. DUGAN:** Sure.

18 **THE COURT:** But, I read the cases that you cites.
19 And, again, it is a little bit of an academic discussion,
20 because the Court has granted BLAG's motion to intervene. The
21 Court is going to consider the very eloquent arguments that
22 Counsel has made. It is very helpful to the Court.

23 But, we're dealing with the three branches of
24 government. And I think, as one of the coequal branches --
25 some might not always agree with that, but we are a coequal

1 branch -- I'm obliged to ask that.

2 And, I didn't see any case where -- that you've cited
3 that's right on point, where only the House which happens to
4 have a majority in its favor on this question brings the
5 action, and it is upheld on constitutional basis, that the
6 House is the appropriate party to defend a statute in the
7 absence of the Senate that is not supported by the executive
8 branch.

9 So, that's really where the question comes from.

10 **MR. DUGAN:** And, Your Honor, there are several
11 answers to that. First of all, the -- the statute that
12 requires notification from the Department of Justice when it's
13 not going to defend a law that it's constitutionally obligated
14 to defend contemplates that either the House or the Senate,
15 alone or jointly, will be able to defend laws.

16 The one case that we cited, and I -- Your Honor, I
17 think maybe it's because the question wasn't actually answered
18 there, but this *Coors* case, which the House went at it alone.
19 The Senate was not involved; the House was.

20 And another thing I would like to address is just
21 this idea of the bipartisanship. And, we can provide this to
22 the Court. But, we have gone searching through the House
23 briefs. We have discovered and we know of at least nine
24 separate occasions when there's been a split vote in the
25 BLAG -- usually three to two, one time four to one -- where the

1 House has still filed briefs.

2 **THE COURT:** All right. I don't know if the executive
3 branch has a dog in this race, but I'll certainly give you an
4 opportunity to respond.

5 **MR. WEST:** Your Honor, I just wanted to correct one
6 thing -- or probably several things, but I'll only take the
7 opportunity to correct one -- that BLAG made. And that is the
8 Department of Justice, the Executive, is not constitutionally
9 obligated to defend the statute that it believes is
10 unconstitutional. And, we can certainly imagine cases where it
11 would be important for both the House and the Senate to be of
12 one mind if they were to take up the defense of the
13 constitutionality of the statute.

14 We think, however, this is not a case where the Court
15 needs to resolve that issue because the United States, which is
16 the Defendant here, has taken steps to perfect the ability for
17 BLAG to come in and make these arguments for the benefit of the
18 Court, for the benefit of the Record. And certainly, no party
19 has objected to BLAG's participation for the specific purpose
20 of presenting arguments in defense of the Defense of Marriage
21 Act.

22 **THE COURT:** Do you wish to say anything at this
23 point?

24 **MS. BORELLI:** To be clear, Your Honor, BLAG does not
25 represent the House. They are a five-member committee

1 operating here by a vote of three of their members, and I think
2 it is important for that to be clarified.

3 **THE COURT:** Although, in fairness to them, the rules
4 provide that, in effect, they are representing the House when
5 they constitute this group, and there was a majority vote of
6 that group, correct?

7 They may not, sort of in a macro sense, represent the
8 entire House, each and every member. But that's the way
9 democracy works. Isn't that true?

10 **MS. BORELLI:** You know, I have counsel here who's
11 actually a bit more versed with the rules. And if the Court
12 wanted to hear more, he would be happy to address it.

13 **THE COURT:** Well, I would, actually. I would like to
14 complete the Record on this issue. Again, it's a little bit,
15 one would say, academic, but I don't think so, given the
16 important features implicated and the way this case has been
17 litigated.

18 Counsel, would you identify yourself, also.

19 **MR. DAVIDSON:** Sure. John Davidson.

20 The rule of the House that refers to BLAG, and it's
21 really the only thing that we've been able to find that
22 describes BLAG in any fashion, it's -- BLAG is not identified
23 in any statute or in anything other than the one roll of
24 Congress which was submitted by BLAG, refers to BLAG as an
25 advisory committee to the Speaker, and says that the Speaker

1 may direct the House counsel to take action.

2 But it does not give any authority to BLAG to take
3 any action, other than to advise the Speaker. So, I think that
4 does raise a question about BLAG's authority to do anything on
5 behalf of the House, itself.

6 But again, we, too, don't have much of a dog in this
7 race. That is, we -- we have not objected to BLAG intervening
8 in this, before this Court, and that's because we do believe
9 it's important to have a full-throated explanation of the
10 position of even some members of Congress, on this position, so
11 that the Court really considers all of the arguments that could
12 be considered on this very important issue.

13 **THE COURT:** All right, fair enough. Let's move on.
14 I have all I need on that question.

15 Let's move on to Question No. 6: How does BLAG
16 distinguish the ruling in *Gill versus Office of Personnel* --
17 that's G-I-L-L -- *versus Office of Personnel Management*, which
18 is obviously the District of Massachusetts case, which found
19 that DOMA does not pass constitutional muster under even
20 rational basis scrutiny?

21 Start with you, again.

22 **MR. DUGAN:** We get to start again, Your Honor, thank
23 you.

24 **THE COURT:** You're on the hot seat.

25 **MR. DUGAN:** Well, we don't distinguish, and we think

1 it's wrong, and here's why we think it's wrong. The court in
2 that case relied, to a great extent, on a very strange
3 conclusion: That Congress has no power to define the words it
4 uses in its own statutes. It said, quote (As read):

5 "The states alone have the authority to set
6 forth eligibility requirements as to familial
7 relationship..."

8 **THE COURT:** Slow down a little bit.

9 **MR. DUGAN:** Oh, sorry.

10 **THE COURT:** Thank you.

11 **MR. DUGAN:** "... to set forth eligibility
12 requirements as to familial relationships. And the federal
13 government cannot, therefore, have a legitimate interest in
14 disregarding those family status determinations." Close quote.

15 As I think we've said earlier in the argument,
16 Congress gets to draw the lines of which benefits it wants to
17 give. And, and has done this in other cases. We talked about
18 the Social Security context, we've talked about the immigration
19 context, and we've talked about, sort of, benefits context.

20 This is something Congress does all the time. So we
21 think that that part of *Gill*, which seems to be central to its
22 holding, is -- is simply flat-out wrong.

23 **THE COURT:** By the way, has the case been argued
24 before the First Circuit yet?

25 **MR. DUGAN:** No, it has not, Your Honor.

1 **THE COURT:** All right. Mr. West?

2 **MR. WEST:** Congress gets to draw the lines, but it
3 can't draw those lines in a way that is arbitrary or
4 discriminatory and disfavors a group which may be unpopular,
5 which is what's happening with here with the Defense of
6 Marriage Act.

7 With regard to the *Gill* case, we have -- it would --
8 it would be good to see -- and, in fact, we would invite this
9 Court to do this -- an opinion that actually engages the
10 Supreme Court's well-established factors in the
11 equal-protection analysis.

12 The Bankruptcy Court down in the Central District of
13 California, in *Balas*, has done that, finding that DOMA was
14 unconstitutional on both rational basis and alternative --

15 (Reporter interruption)

16 **MR. WEST:** The Bankruptcy Court in *Balas* did that,
17 finding that DOMA was unconstitutional on both rational basis
18 and, alternatively, heightened-scrutiny grounds.

19 Judge Reinhardt, in *Levenson*, noted that he believed
20 heightened scrutiny was applicable in finding DOMA
21 unconstitutional on rational-basis grounds.

22 Judge Walker, in an analogous case, of course, gave
23 both of those alternative bases.

24 **THE COURT:** Do you want me to cite Judge Reinhardt to
25 invite Supreme Court scrutiny?

1 (Laughter)

2 **THE COURT:** Do you have any other suggestions?

3 **MR. WEST:** My guess is that no matter what you do,
4 this case will invite Supreme Court scrutiny.

5 **THE COURT:** Thank you. All right.

6 **MR. WEST:** So, but we would actually add that we
7 think it would be helpful as this case moves as inevitably it
8 will through the appellate process, for the Court to lay out
9 the analysis, the equal-protection analysis, and why sexual
10 orientation merits heightened scrutiny.

11 **THE COURT:** Thank you.

12 Ms. Lin?

13 **MS. LIN:** Your Honor, Rita Lin. We would obviously
14 disagree with BLAG's characterization of the federal government
15 as having a long-standing role in defining marriage in any
16 fashion. It is true that sometimes in granting federal
17 benefits, as -- as has already been discussed, the federal
18 government layers requirements on top of marriage. So it's not
19 enough that you're married under state law; you also have to
20 have been married for a certain amount of time to qualify for
21 benefits. Or you have to show that your marriage isn't a sham
22 marriage in order to qualify for a particular right.

23 The reasons for those, though, are those are neutral
24 criteria that are targeted to the particular policies of the
25 particular federal statutes at issue. They are not, as in the

1 case of DOMA, an attempt to displace a state's determination of
2 who is and is not validly married.

3 DOMA is the first attempt to engage in a blunderbuss
4 legislation that changes over 1,000 federal rights all in one
5 fell swoop, without looking at the particular policy
6 implications as to each particular federal right or benefit at
7 issue. And in that sense, it's an unique attempt to displace
8 state law in defining what is or isn't marriage.

9 The other point I would like to make, Your Honor, is
10 that *Gill* is not a case that is based solely on that ground.
11 *Gill* systematically goes through each and every one of the
12 government interests that BLAG has identified in this case in
13 support of DOMA, and explains why each of them fails even
14 rational-basis scrutiny. So, it's not an opinion that's based
15 solely on the notion of federalism.

16 **THE COURT:** Anything you want to say in reply?

17 **MR. DUGAN:** Yeah, Your Honor. First of all, we were
18 not defending the law at that point. And we would disagree
19 with the contention that all the same bases were before the
20 Court, and rejected.

21 The other thing I would say is that this Court is
22 still bound in terms of that -- in terms of the
23 suspect-classification analysis that I think Mr. West would
24 like this Court to get into, by *High Tech Gays*. That Ninth
25 Circuit precedent is unequivocal on this.

1 And, and *Witt versus Air Force Department*,
2 reemphasizes the fact that, I think, *Bowers* and *Lawrence* had
3 not been -- had not undercut that analysis.

4 **THE COURT:** Yes, Mr. West.

5 **MR. WEST:** Your Honor, we think it's helpful for this
6 Court not only to engage the equal-protection analysis, but
7 also to say that *High Tech Gays* is no longer viable. We
8 recognize that it's precedent this Court has to deal with, but
9 it is no longer viable.

10 And with regard to *Witt*, what *Witt* has is a one --
11 the equal-protection analysis consists of a one-paragraph
12 citation to *Philips*. When you read *Philips*, *Philips* relies
13 entirely on *High Tech Gays*, on the -- on the discredited *Bowers*
14 rationale, as well as there's a lot of talk in there about
15 deference to the military.

16 But, with regard to the earlier point that BLAG made
17 in terms of the rationales or the reasons that Judge Tauro)
18 considered in *Gill*, Judge Tauro decided that there was no
19 rational basis that could sustain this statute. So, it really
20 didn't matter what arguments BLAG might be able to put forward
21 now because, at bottom, Judge Tauro decided that there was no
22 rational basis that could be imagined that could sustain the
23 constitutionality of the statute. Now, if this Court decides
24 that as well, this Court ought to strike it down.

25 **THE COURT:** Do you want to say anything else?

1 **MS. LIN:** Your Honor, just on the *Witt* point.
2 *Witt* -- in *Witt*, the equal-protection claim that was brought
3 was not the claim is brought before the Court today. In *Witt*,
4 the plaintiff was saying that the military draws an improper
5 distinction in the way it treats the discharge of gay soldiers,
6 versus the discharge of child molesters, for example.

7 It was not -- the plaintiff in that case did not
8 advance an equal-protection argument based on the distinction
9 in the treatment between heterosexual and homosexual soldiers.

10 **THE COURT:** Let's move on to Question No. 7. And
11 I'll read the entire question. It's a long question; there's
12 four parts to it. And then I have a comment to make about
13 Question 7, and the authorities cited by the parties.

14 What are BLAG's proffered bases for upholding the
15 constitutionality of DOMA?

16 Question 7.a: BLAG argues that DOMA provides
17 consistency in the definition of marriage. However,
18 traditionally, marriage has been defined by the states. Under
19 DOMA, for the first time, federal officials are now tasked with
20 determining the validity of particular marriages that have been
21 sanctioned under state law. How does treating some
22 state-sanctioned marriages different from others promote
23 consistency or maintain the status quo?

24 7.b: The fact that marriage traditionally has been
25 defined as between a man and a woman merely describe what has

1 been. How does codifying this description constitute a
2 justification, reason, or basis for restricting marriage?

3 And, see *Heller versus Doe*, holding that, quote,
4 "ancient lineage of a legal contract does not give it immunity
5 from attack for lacking a rational basis," unquote. Also
6 citing the concurrence in *Lawrence*.

7 Does BLAG have any authority for the proposition that
8 codification of a long-standing tradition independently
9 constitutes a rational basis?

10 7.c: In support of miscegenation laws, proponents
11 argue that the long-standing tradition of the separation of the
12 races provided justification for prohibiting interracial
13 marriage. How does BLAG's argument about the tradition of
14 heterosexual marriage differ from the miscegenation context?

15 7.d: How does the withholding of federal benefits to
16 children of families with same-sex parents encourage
17 responsible parenting and child rearing?

18 And what I want to say with respect to question 7.c,
19 the Court has received from BLAG in response to the question a
20 citation to a law review article authored by a professor from
21 Brigham Young University. This is not legal authority.

22 Further, the article reads more like a treatise on
23 the morality of homosexuality than a legal analysis of the
24 analogy of the Court's holding in *Loving versus Virginia* to the
25 issue of same-sex marriage. The Court is concerned that BLAG

1 cited this article for the proposition that homosexuality is,
2 as the author of the article explicitly contends, quote
3 "immoral," unquote. The article quotes Martin Luther King,
4 Jr., when he famously said, quote, "I have a dream that my four
5 children will one day live in a country where they will not be
6 judged by the color of their skin but by the content of their
7 character."

8 The conclusion of the article is that same-sex
9 marriage, quote, "is a character issue where we cannot tolerate
10 compromise... Marriage is a prime example of a moral
11 relationship, a relationship of conjugal, complimentarity" --
12 that's C-O-M-P-L-I-M-E-N-T-A-R-I-T-Y -- "that benefits all
13 society, and particularly the children and other dependent
14 members of a specific family. Same-sex relations come from a
15 different ethic and represent a different morality, manifest in
16 the infidelity and promiscuity that characterizes gay and
17 lesbian relationships much more than conjugal unions."

18 So I want to know, when BLAG responds, for what
19 purpose does BLAG submit this law review article? Does BLAG
20 have any legal authority in response to 7.c, i.e. that the
21 tradition of heterosexual marriage differs from the arguments
22 used in the miscegenation context?

23 So, I'll open the floor to you.

24 **MR. WEST:** Do you want me to start with 7.c, Your
25 Honor?

1 **THE COURT:** Why don't you start with 7.c, please,
2 because that's more recent, based upon what you said to the
3 Court.

4 **MR. WEST:** We cite that article for the simple
5 proposition -- not the proposition, the facts that it lays out
6 in terms of -- in terms of the laws dealing with mis- --

7 **THE COURT:** Miscegenation.

8 **MR. DUGAN:** Yeah, miscegenation law. That's why we
9 cite it. We're not citing it because of the conclusions the
10 author comes to. We don't -- we wouldn't say on the Record
11 that we agree with the author's conclusions. But it gives, in
12 the back, an appendix table that lays out the various laws, and
13 when they changed, and what states did. That's a simple reason
14 we used that citation.

15 **THE COURT:** All right. Would you please -- now,
16 would you mind --

17 **MR. DUGAN:** 7.a?

18 **THE COURT:** Well, let me, since you've just raised
19 that, and I want to keep it in context in my mind, is there
20 anything that the Executive Branch, Mr. West, you wish to say
21 on that, on 7.c?

22 **MR. WEST:** The only thing I would say, Your Honor, is
23 that your summary of that law review article did not sound
24 dissimilar to the House report and the justifications offered
25 for DOMA by the House. And while understandably, BLAG would

1 want to distance themselves from those arguments which are
2 based on animus, the fact is they are there, they are reasons,
3 justifications that Congress gave for passing this law. And we
4 think that this Court ought to entertain those and analyze
5 those justifications, and determine whether or not they are
6 valid as part of the equal-protection analysis.

7 **THE COURT:** Ms. Lin?

8 **MS. LIN:** The only thing we want to -- we would want
9 to say on 7.c, Your Honor, is that if one looks back on the
10 arguments that were made against interracial marriage back in
11 the forties, fifties, and sixties, those arguments in many ways
12 are remarkably similar to the arguments that are being made
13 today against same-sex marriage.

14 We submitted the opinion of *Perez v. Lippold* last
15 night, and the reason that we did that is, if you look to the
16 dissent in *Perez*, you can see that the interests advanced in
17 support of the anti-miscegenation statute there were that
18 interracial marriage is a divisive social issue, that it -- it
19 goes against a long history of prohibitions on -- on mixing of
20 the races dating back to, quote, the early colonial era
21 (Indicating quotation marks), that it's harmful to children,
22 and it's not an optimal environment for child-rearing. Those
23 are the same arguments that are advanced today against same-sex
24 marriage.

25 **THE COURT:** Is there anything you want to say --

1 **MR. DUGAN:** I don't think that either the Department
2 of Justice or the Plaintiff have ever alleged that the
3 reason -- or that traditional marriage, itself, was based on
4 animus. And I think that that's an important point. We're not
5 simply making a tradition-based argument here.

6 We would -- one of the ways we would differentiate
7 *Loving* from this case is, of course, you have binding Circuit
8 precedent and Supreme Court precedent that have said that equal
9 protection does not require same-sex marriage. So, that is a
10 clear distinction between the two.

11 Another point I would make on that is -- is a
12 response to Mr. West. That in the rational-basis analysis, you
13 don't have to look at the reasons Congress gave. It's any
14 conceivable basis. And they --

15 **THE COURT:** Are you backing off from the reasons
16 Congress gave, and disavowing those?

17 **MR. DUGAN:** Not disavowing all of them. But, those
18 were not the reasons we put forward in our briefing. And the
19 other thing is, not only does it need to be conceiv- -- can it
20 be conceivable, it has to be debatable. So, you and I may not
21 find the reasons put forward to be all that compelling. But if
22 there's a legitimate debate to be had, then, then that's a
23 rational basis.

24 **THE COURT:** All right. Would you -- why don't you
25 move on to Question 7.a, please.

1 **MR. DUGAN:** Okay. The first, the first part in 7.a
2 that we would take issue with is that we don't think this is a
3 new task. I think that there's a -- there is a fundamental
4 disagreement here between the parties in terms of what the
5 federal government does when it looks at -- and I'll move on,
6 Your Honor, but I -- but, when it looks at the lines it draws
7 for benefits. And so, it already does this.

8 **THE COURT:** All right.

9 **MR. DUGAN:** In terms of the consistency, there is a
10 larger point of consistency here, consistent with practice and
11 tradition. And, again, that is something Justice O'Connor said
12 was legitimate state interest in her concurrence in *Lawrence*.
13 So's it's not simply just is it consistent with what states are
14 doing today. It's a question of what are most states doing?
15 What have most states done?

16 And that, and that's simply not consistency for
17 consistency's sake. It's realizing and recognizing that this
18 institution has given us great benefits. And -- and having
19 caution as we proceed forward, opening it up to new
20 definitions.

21 **THE COURT:** All right. Mr. West?

22 **MR. WEST:** With regard to the consistency point, Your
23 Honor, we don't believe this is a justification that is
24 sufficient to save the statute because, as Your Honor points
25 out in the question, it actually creates inconsistency in the

1 distribution of benefits to couples whose unions are recognized
2 under state law.

3 With regard to the point about consistency with
4 tradition, I still -- it's hard to understand exactly how
5 that's not an argument, consistency for consistency's sake, or
6 consistency with tradition because that's the way things have
7 always been. We know from *Virginia Military Institute* that
8 tradition alone is not enough to sustain a statute, one that
9 discriminates.

10 And with regard to a marriage creating great
11 benefits, as BLAG has argued, we certainly don't disagree with
12 that. The question is, why can't those benefits be realized by
13 same-sex marriages just like heterosexual marriages in the
14 context of benefits being provided by the federal government?

15 And that's the distinction that we are still
16 contesting is -- is not a legitimate distinction in the
17 equal-protection context.

18 **THE COURT:** All right. Ms. Lin?

19 **MS. LIN:** Your Honor, the notion that there's
20 something new about the -- the inconsistency (indicating
21 quotation marks) between the states in whether or not they're
22 recognizing marriages between same-sex couples, it's not one
23 that makes sense.

24 There have been inconsistencies and there's been a
25 patchwork among the states for years about numerous marital

1 issues, and many of them hotly contested. Interracial marriage
2 is a great example of that. In 1948, when the laws started
3 falling that were banning interracial marriages, many states
4 had laws on the books that banned such marriages.

5 By 1967, when *Loving* was decided, there were still
6 16 states banning interracial marriages. It was a
7 hotly-contested, socially-divisive debate. The federal
8 government never stepped in to create consistency (indicating
9 quotation marks) between state definitions.

10 Same thing with no-fault divorce. Throughout the
11 sixties, seventies, and eighties, there was a shift of many
12 states to no-fault divorce. There was a concern that people
13 were moving to states in order to get divorced under more
14 lenient standards. Again, federal government never intervened,
15 even though those were hotly contested social issues.

16 The true inconsistency, as Mr. West points out, is
17 that DOMA creates a situation where, for the first time, people
18 are treated as being married under state law, but denied all
19 the benefits and protections of marriage under federal law.

20 To the point about the consistency with tradition,
21 it's -- that's simply another way, Your Honor, of saying that,
22 "Well, we've discriminated against same-sex couples for a long
23 time in this area, so we're just going to keep doing it."

24 That's not an answer to a citizen who comes to the
25 government and says, "Why is this classification being drawn

1 this way?"

2 It's not an answer for the government to say, "Well,
3 we've been discriminating against you for a very long time."

4 **THE COURT:** Do you want to say anything in reply,
5 Mr. Dugan?

6 **MR. DUGAN:** Well, that begs the question, of course,
7 whether or not this is a fundamental right or this is a suspect
8 class. So, the -- the other side assumes the answers to those
9 things.

10 The question is whether or not Congress has -- if
11 we're going to look at this under the rational-basis test, did
12 Congress have a rational basis, any conceivable rational basis,
13 for making this distinction?

14 **THE COURT:** Can you cite me a couple?

15 **MR. DUGAN:** Yeah, I'll cite you several. One is
16 to -- to rationally maintain bargains that were decided upon by
17 previous Congresses. Every Congress prior to 1996 had enacted
18 laws dealing with marriage, defining marriage against the
19 background assumption that marriage was between a man and a
20 woman.

21 There's also the concern of the public fisc. And,
22 that's attached to that previous reason. There were bargains
23 made, and there were calculus made in terms of how -- how are
24 we going to -- what benefits are we going to give, what burdens
25 are we going to put on people? And to maintain that

1 consistency over time is certainly a rational basis.

2 Another rational basis would be that -- I guess -- I
3 want to step back, because this an answer that can cause some
4 tension. But, when -- the other side has not said why a
5 redefinition of marriage that has never existed before wouldn't
6 change people's understanding, actions towards, and how they
7 enter in or deal with marriage. Congress could have said,
8 "Let's take break, let's give this some time."

9 In fact, that's what Senator Leahy has done. Senator
10 Leahy voted yes on DOMA. Now he's brought legislation to the
11 Senate to repeal DOMA. There's a rational basis in caution.
12 Not because this is going to be something that's going to do
13 something horrible; we just don't know what it's going to do.
14 And so that's certainly a rational basis when Congress is faced
15 with something new that had never existed before.

16 **THE COURT:** All right.

17 Do you want to say anything further?

18 **MR. WEST:** No, Your Honor.

19 **THE COURT:** Ms. Lin, do you want to say anything
20 further on this point?

21 **MS. LIN:** Just briefly on the points about the public
22 fisc and the consistency with -- that we just need to give this
23 some time.

24 On the public fisc point, the question here is why
25 same-sex married couples should be the one to bear the burden

1 of reducing the benefits that are coming out of the public
2 fisc. The question is: Why are we drawing this decision, why
3 do we draw the line here? When for, for generations, we, the
4 federal government has simply accepted state marital status as
5 the appropriate place to draw the line.

6 **THE COURT:** All right --

7 **MS. LIN:** The --

8 **THE COURT:** I'm sorry.

9 **MS. LIN:** Just --

10 **THE COURT:** I was going to say, just so counsel know,
11 after this subpart I'm going to take a short break, give people
12 a chance to stretch their legs. But, please continue.

13 **MS. LIN:** Just on the idea that we ought to just give
14 this some time. Your Honor, this is the same argument that was
15 advanced in *Romer v. Evans*. There, the State of Colorado said,
16 "We're going to withdraw anti-discrimination protections based
17 on sexual orientation. We're going to withdraw those, because
18 we want to focus on other forms of discrimination, and this
19 form of discrimination is just too socially divisive. We want
20 some time to handle this issue calmly."

21 The Supreme Court rejected that as a legitimate
22 rational basis for the federal government. There's no reason
23 to act with more caution here than there has been for any other
24 change in state marriage law over the years.

25 **THE COURT:** Anything further on this point?

1 **MR. WEST:** Not on the merits, Your Honor. Just as a
2 point of order, though, this Court can certainly take judicial
3 notice of the GAO report which, on this very question of
4 whether or not it would cost the federal government more money
5 to extend benefits to same-sex married couples as it does to
6 heterosexual couples, completely inconclusive.

7 **THE COURT:** All right. Let's take a ten-minute
8 break, and we will continue with the subparts of 7, and then we
9 will complete. Thank you, Counsel.

10 (Recess taken from 11:13 a.m. to 11:27 a.m.)

11 **THE COURT:** You may all be seated, and have counsel
12 come forward. And we are up to Question 7.b. And, I will ask
13 BLAG once more to, for consistency's sake, --

14 **MR. DUGAN:** Understood, Your Honor.

15 **THE COURT:** -- to start off.

16 **MR. DUGAN:** The first point I would make in regards
17 to 7.b is this: We have not argued in our briefs that
18 tradition alone is a rational basis. But I think it's also
19 important to look at the line in *Heller*, right after the line
20 that you quoted, Your Honor.

21 It reads (As read):

22 "That the law has long treated the classes as
23 distinct, however, suggests that there is a
24 common-sense distinction between the classes
25 that were there at issue."

1 Justice O'Connor, in her *Lawrence* concurrence, again,
2 said that there is a legitimate state interest in preserving
3 the traditional institution of marriage. But this is not
4 simply a question of lineage, that we've always done this.
5 We've done it, and great things have flowed from it.

6 And the common-sense distinction that I think we can
7 talk about here --

8 **THE COURT:** Great things have flowed from it? What?

9 **MR. DUGAN:** From marriage.

10 **THE COURT:** Oh, okay.

11 **MR. DUGAN:** Sorry. The institution of marriage.

12 **THE COURT:** Right.

13 **MR. DUGAN:** The common-sense distinction I think that
14 we can point to is the fact that heterosexual couples have
15 accidental pregnancies. They make babies without technological
16 means.

17 And, Congress could have had a rational basis to say,
18 "We think the understanding of what is important about marriage
19 will be undercut if we don't focus on these particular
20 couples."

21 **THE COURT:** Wait. Time out. I'm missing the point.

22 Are you saying accidental marriage is a rational
23 basis -- accidental -- I'm sorry -- accidental pregnancy is a
24 rational basis, and there's no technology involved. I have to
25 admit, I'm just sort of tongue-tied. I don't understand that

1 argument at all.

2 **MR. DUGAN:** No, this, in our briefs, comes under the
3 heading, I think, "Responsible Procreation." So that's where
4 I'll direct you.

5 **THE COURT:** Oh.

6 **MR. DUGAN:** The idea is this: That heterosexual
7 couples can make babies spontaneously -- not spontaneously, but
8 they can make babies. And, that Congress wants there to be a
9 linkage between those two. It doesn't have to be a perfect --

10 **THE COURT:** But, is that rational?

11 How can the Court avoid the fact that same-sex
12 couples can, based upon impulse or whatever, by virtue of the
13 science available, decide to have a child and do it relatively
14 quickly, maybe faster than the -- you know, shall we say, is
15 the Biblical way, if you will.

16 **MR. DUGAN:** Well, Your Honor, again, it has to be a
17 rational basis. It doesn't have to be a perfect fit. It
18 doesn't have to be something that you or I are compelled --

19 **THE COURT:** But, help the Court determine what is
20 rational -- just because the Congress says it is rational --

21 **MR. DUGAN:** No, not just because Congress has said
22 so, but because law has a pedagogical effect. And I think the
23 other side would concede that. That's one of the reasons the
24 Plaintiff wants her marriage to be recognized on the federal
25 level. And so, Congress could say that law has a pedagogical

1 effect. And we believe that if we open marriage to beyond
2 heterosexuals who have this capacity to have accidental
3 pregnancies, we're going to untether the connection between
4 marriage and children.

5 Now, it doesn't have to compel you, you and me. But
6 it certainly is a debatable thing that provides a rational
7 basis for the decision Congress made here.

8 **THE COURT:** All right. Mr. West?

9 **MR. WEST:** Of course, Your Honor, the United States
10 is no longer defending the statute on rational basis or on any
11 other basis. But we would note that, even when the United
12 States was most recently defending the statute, we disavowed
13 the procreation argument because it -- we didn't believe it was
14 viable under rational basis.

15 **THE COURT:** Ms. Lin?

16 **MS. LIN:** Your Honor, what it sounds like this boils
17 down to is an argument that -- that DOMA somehow connects
18 marriage and child-rearing in a new way. Or, maintains a
19 connection between marriage and childbearing.

20 But really what DOMA does is undermine that
21 connection, because it takes the 270,000 children that are
22 being raised by same-sex couples today, and it puts them
23 outside of federally-recognized wedlock. So it disconnects
24 marriage and child-rearing.

25 The other point, Your Honor, is that procreation and

1 the ability or intent to procreate has never been a condition
2 of marriage in this country. There's undisputed expert
3 testimony from Professor Contin (Phonetic) on this point.
4 That's never been a criterion for marriage in any state in this
5 union since -- and there's never been any suggestion that
6 different-sex couples that can't procreate or end up -- or end
7 up having children through adoption or assisted reproduction,
8 there's never been any suggestion that their marriages are
9 somehow lesser or diminished compared to heterosexual couples
10 who happen to have the ability to procreate biologically. In
11 fact, the federal government subsidizes adoption by giving
12 people tax credits for adoption expenses, for example.

13 It's important, yes. The fit between the ends and
14 the means doesn't have to be exact, if we were under
15 rational-basis scrutiny. But there has to be some connection,
16 some rational connection, some reason to distinguish between
17 heterosexual couples who do not or cannot procreate and
18 same-sex couples.

19 **THE COURT:** Go ahead.

20 **MS. LIN:** I would point the Court toward the Supreme
21 Court's decision in *Cleburne*. In *Cleburne*, the city said that
22 homes for the mentally retarded had to get a special-use permit
23 that other types of buildings didn't need to get. The city
24 justified that by saying, "Oh, this is really about
25 overcrowding."

1 And the court, applying rational-basis scrutiny,
2 rejected that. And the court said, "Well, if it's really about
3 overcrowding, you don't require a special-use permit for
4 nursing homes, you don't require a special-use permit for
5 hospitals. Why are you applying a different standard for --
6 for homes for the mentally retarded?"

7 There's not a fit between the ends and the means.
8 That is exactly the type of situation we have here.

9 **THE COURT:** I would like you to respond to that,
10 Mr. Dugan, which, let's assume the hypothetical or the basis --
11 one of the so-called rational bases for this statute is what
12 you said, how does denying benefits to same-sex couples further
13 this what you argue to be a rational basis?

14 **MR. DUGAN:** This is, I think this is what you asked
15 in 7.d, Your Honor?

16 **THE COURT:** It's covered, to some extent. Why don't
17 you do this: Why don't you begin responding to Question d,
18 about how withholding federal benefits to children of families
19 with same-sex parents encourage responsible parenting and
20 child-rearing, but also to the specific point that you made,
21 and responded to by Ms. Lin, with respect to how does DOMA
22 promote the specific so-called rational purpose that you
23 mentioned to the Court before.

24 **MR. DUGAN:** Sure, Your Honor.

25 With regard to 7.d, the first thing I would say is

1 the proper question that needs to be asked is whether there is
2 any legitimate --

3 **THE COURT:** Well, they're all proper.

4 (Laughter)

5 **THE COURT:** By definition.

6 **MR. DUGAN:** I'm not always proper, Your Honor.

7 **THE COURT:** All right.

8 **MR. DUGAN:** -- is whether or not there is any
9 legitimate state interest that will be furthered by recognizing
10 opposite-sex marriages, but not same-sex marriages.

11 Recognizing the opposite-sex marriages, what benefits them? It
12 looks to what the benefits of those who are within -- within
13 the actual extension of benefits have.

14 Now, one of the things we quoted in our briefing --
15 not briefing last night, but our notice last night, is that
16 classifications are valid where the inclusion of one group
17 promotes a legitimate government -- governmental purpose, and
18 the addition of other groups would not.

19 So the focus is on is this -- and that's in *Johnson*
20 *v. Robinson*, or *Robinson* (sic). The focus is on the group
21 within the benefits circle. And so, going to the question of
22 how -- how does this further the rational basis of procreation.
23 Well, one -- one point to make in response to Ms. Lin is that
24 the expert, Nancy Cott, who I deposed, did say that impotence
25 has -- has been a reason for not -- for annulling marriages and

1 divorcing marriages in some places.

2 So there is a sense in which marriage is still tied
3 up with children in the fact that that sort of requirement or
4 that sort of -- that reason could be a basis for annulling a
5 marriage.

6 The connection on the procreative side is this,
7 that -- again, I mean, the Court can take notice, and we all
8 know that children can be born of a --

9 **THE COURT:** Is there any conclusion by that -- I read
10 that report -- any conclusion that determining that what you
11 thought was your opposite-sex partner was same-sex, that that's
12 a ground for annulment?

13 **MR. DUGAN:** I don't think we got into that in the
14 report or in the --

15 **THE COURT:** Wouldn't that be the appropriate inquiry,
16 though? Whatever the so-called expert says, wouldn't that be
17 the inquiry?

18 **MR. DUGAN:** I don't think so, Your Honor. I must not
19 be following here.

20 **THE COURT:** Well, this expert says that impotence is
21 a ground for annulment and, therefore, somehow -- what, now?

22 **MR. DUGAN:** Well, that that ties this to the idea
23 that marriage is about children, and children that can be --
24 spontaneously be generated by a union between a man and woman.

25 **THE COURT:** I understand the argument. All right,

1 disregard what I said.

2 All right, Mr. West.

3 **MR. WEST:** Your own words with regard to -- actually,
4 just with regard to this issue, certainly, I don't know whether
5 impotence can be a ground for annulling a marriage, but it's
6 certainly not a requirement to be married. And the federal
7 government certainly does not typically make decisions on which
8 benefits it's going to give married couples on the basis of
9 whether or not they can procreate. It doesn't make that
10 distinction. It's one of the reasons why, why even when --

11 **THE COURT:** Can Congress rationally make that --

12 **MR. WEST:** Well, we disavowed that argument, under
13 rational basis, when we were defending the statute, because we
14 didn't think it was a viable argument. And certainly, for the
15 same reasons, obviously, under heightened scrutiny, it would --
16 it would fail that test as well, because of the overwhelming
17 evidence that same-sex parents are every bit as capable of
18 raising happy, healthy children as -- as heterosexual parents.

19 **THE COURT:** All right. Ms. Lin, anything further on
20 this point?

21 **MS. LIN:** Just to respond first to the -- the
22 impotence point. I think that that speaks to the notion that
23 sexual intimacy is a fundamental important part of marriage.
24 It doesn't say anything about procreation.

25 But to address BLAG's larger point about -- about the

1 way equal-protection analysis --

2 **THE COURT:** I see your point. I'm sorry. I'm a
3 little slow on the uptake here.

4 What you are saying -- and I wasn't being facetious
5 about your argument, but you are saying, basically, impotence
6 is different than infertility, and there's no argument that
7 infertility is a basis for annulment.

8 **MS. LIN:** Exactly.

9 **THE COURT:** Is that the Plaintiff's argument?

10 **MS. LIN:** Exactly.

11 **THE COURT:** All right.

12 **MS. LIN:** The other point, Your Honor, is that BLAG
13 pointed to this notion that equal-protection analysis should
14 just look at the favored group, and not consider why it is that
15 that disfavored group hasn't been included.

16 That's not how the Supreme Court has conducted
17 equal-protection analysis. I would point Your Honor to *Romer*
18 and *Moreno*. In *Romer*, the State wanted to focus resources on
19 combating certain forms of discrimination. They said, "Sex
20 discrimination and race discrimination are big problems. We
21 want to focus resources on that. We don't want to deal with
22 sexual-orientation discrimination."

23 The court said, "You have to have some purpose, you
24 have to have some basis for drawing the line between the forms
25 of discrimination that are included and those that are not."

1 And *Moreno* is the same thing. Households with
2 unrelated people were excluded from food stamp programs.
3 There, the court said Congress had to justify why it was that
4 households with related people should be included, while
5 households with unrelated people should be excluded. In other
6 words, Congress had to justify a reason for the exclusion.

7 The case that BLAG cites, *Johnson v. Robison*, really
8 just reinforces that analysis. That case involved
9 conscientious objectors who completed alternative service. The
10 question was, should people who do alternative service get the
11 same veterans benefits as those who complete active military
12 duty.

13 And the court said no, because active -- it is
14 rational for Congress to give different benefits to people who
15 complete active military duty, because active duty inherently
16 involves hazards and disruptions that alternative service does
17 not.

18 In reaching that conclusion the court said, and I
19 quote (As read):

20 "Of course, merely labeling the class of
21 beneficiaries under the act as those having
22 served under active duty cannot rationalize
23 statutory discrimination against
24 conscientious objectors who have performed
25 alternative civilian service if, in fact, the

1 lives of the latter were equally disrupted
2 and equally in need of readjustment."

3 That's the point. There has to be a reason, a goal
4 that is advanced by excluding a disfavored group.

5 **THE COURT:** Mr. Dugan, do you want to reply?

6 **MR. DUGAN:** No.

7 **THE COURT:** All right. Let's move on to Question
8 No. 8, which is: How does the sharing of benefits with another
9 group of lawfully married persons denigrate the importance of
10 the benefits already conferred upon the original group? In
11 other words, how are heterosexual lawfully married persons
12 affected by the sharing of benefits with lawfully married
13 homosexual persons?

14 And, I want to get a little more elucidation on this
15 question. The Court is inclined to refer to this proposition
16 as the -- what it would call the kindergarten principle. This
17 is -- that is, not sharing benefits with another group somehow
18 makes the benefits already conferred to the original group that
19 much better. The Court is concerned about how depriving rights
20 to a minority somehow improves the rights already bequeathed
21 upon or bestowed upon the majority.

22 So, Mr. Dugan, I'll give you a chance to respond.

23 **MR. DUGAN:** I'm not entirely sure I understand
24 everything that the Court is saying, but the first thing I
25 would say is that --

1 **THE COURT:** Well, that makes us even.

2 **MR. DUGAN:** Well, I don't understand myself most of
3 the time.

4 **THE COURT:** Right. Go ahead.

5 **MR. DUGAN:** What I would say is this: That we have
6 not made an argument that -- that allowing benefits to same-sex
7 couples would denigrate heterosexual couples. I'm not sure
8 where -- where the Court's concern is coming from. And so
9 that's why I'm having trouble understanding.

10 **THE COURT:** Maybe I'm just trying to find out -- if
11 you're not making that argument, then I think we can move on.

12 **MR. DUGAN:** Okay. We are not making the argument
13 that heterosexual couples' benefits or marriage as an
14 institution will be denigrated if the benefits are extended to
15 others.

16 **THE COURT:** All right. Do you want to saying say
17 anything about that?

18 **MR. WEST:** Well, importantly, that is the argument
19 that the House makes in passing DOMA.

20 **THE COURT:** That's why I asked it.

21 **MR. WEST:** And, in fact, it's one of the arguments,
22 this idea of defending the traditional notion of marriage, it's
23 one of the arguments that, again, when the United States was
24 defending most recently the statute, we also disavowed as not a
25 viable argument to make under rational basis.

1 But it does -- I think this conversation does
2 underscore, really, the central question in this case, which is
3 that what justifies the federal government denying this couple
4 of federal benefits as -- when they are similarly situated with
5 all other legally married couples.

6 **THE COURT:** Ms. Lin?

7 **MS. LIN:** I don't have anything to add.

8 **THE COURT:** All right. Very well.

9 Last question, Question No. 9: To the extent that
10 the Court decides the issues presented on the motion for
11 summary judgment, does BLAG contend the motion to strike
12 evidentiary materials is still applicable?

13 **MR. DUGAN:** Well, your Honor, obviously we think this
14 should be decided on a motion to dismiss, and we think the
15 motion for summary judgment should be denied. But we don't
16 contend that the evidence needs to be stricken, if you're going
17 to decide it on a motion for summary judgment.

18 **THE COURT:** All right. I assume the government --
19 you have no dog in that race.

20 **MR. WEST:** No dog in the fight.

21 **THE COURT:** And, do you agree?

22 **MS. LIN:** That's fine.

23 **THE COURT:** Okay. All right.

24 So, this is the point where the Court sort of asks
25 advisedly, just, with the vacuum approach being invoked here,

1 is there anything that we missed that the parties wish to
2 either sum up -- I don't need a Fourth-of-July speech about --
3 you know, I've already heard all the arguments. It's been very
4 helpful. But if there's anything that counsel feeds the need
5 to go forward with, to leave ringing in the Court's ears, I'll
6 be glad to hear.

7 And I'll start with Plaintiffs, because they are
8 Plaintiffs. So, who would like to speak for the Plaintiffs?

9 **MS. BORELLI:** Well, I have one housekeeping matter,
10 Your Honor. I had mentioned to the Court earlier an amicus
11 brief, and neglected to actually offer copies of it. It's also
12 available in PACER. It was filed in the *Commonwealth* and *Gill*
13 cases in the First Circuit. I believe it was filed on
14 November 3rd. I.

15 It is called the Brief of Amici Curiae Family Law
16 Professors in Support of Affirmance of the Judgment Below. And
17 if the Court would like paper copies, we would have that --

18 **THE COURT:** All right. I will allow you to lodge the
19 copies.

20 Do you have a position on that at this point?

21 **MR. DUGAN:** No, Your Honor.

22 **THE COURT:** So you don't object.

23 **MR. DUGAN:** No. I think that -- these are things
24 like legislative facts that we have -- we have said are
25 perfectly -- excuse me, perfectly allowed for the Court to

1 take --

2 **THE COURT:** Does the government have any objection?

3 **MR. WEST:** No objection.

4 **THE COURT:** All right. They will be admitted for
5 purposes of this hearing.

6 **MR. DUGAN:** Thank you.

7 **THE COURT:** And my clerk will talk to you about how
8 to do that, in the appropriate way. We will mark, as
9 Plaintiff's Exhibit 1 for the purpose of this hearing only, the
10 argument. It will be considered as part of the Record on
11 summary judgment.

12 (Plaintiff's Exhibit 1 marked for identification and
13 received)

14 **THE COURT:** So, anything further the Plaintiffs wish
15 to say?

16 **MS. LIN:** No, Your Honor.

17 **MR. DUGAN:** Your Honor, just briefly. Obviously,
18 we've briefed this, and we have told you what -- what standards
19 we think you need to decide this case on.

20 The final point I would make is, it seems that the
21 other side is saying that the only basis for this law is
22 animus. And I think this Court should think long and hard
23 before it decides that Senator Wellstone, Senator Biden,
24 Senator Mikulski, Senator Levin, Senator Dodd, and numerous
25 others voted for this law solely out of animus.

1 **THE COURT:** All right. I'm sure the government has
2 something to say about that.

3 **MR. WEST:** Very briefly, Your Honor. We've certainly
4 not contended that the only basis for this law is animus, but
5 we do think, under heightened scrutiny analysis, this Court
6 ought to consider the actual motivations of Congress as
7 expressed in the House report. And there's no shortage of
8 examples that animus was one of the motivations for this law,
9 we would even submit, a major motivation for this law.

10 But just briefly, Your Honor, it's clear that the
11 Court is grappling from the questions and from the conversation
12 with this issue of federalism, Congress legislating, and
13 domestic relations. And I would just offer the Court, if it's
14 helpful, to look at the briefs that we have filed in the *Gill*
15 case.

16 We agree with Plaintiffs in that case, on the
17 equal-protection claim. And, it's the same argument that I'm
18 making here. We do disagree with them on the Tenth Amendment
19 and spending-clause claims. And, you know, we think that
20 substantive due-process federalism claims, we think that those
21 unnecessarily complicate the inquiry here. That -- that, first
22 of all, that's not the way this case has been pled by
23 Ms. Golinski.

24 But, we think that this case actually presents the
25 equal protection -- the equal-protection inquiry in a fairly

1 straightforward way, and that it would be enormously helpful to
2 whatever court is reviewing this case and this Record for this
3 case -- for this Court to engage in the equal-protection
4 analysis, to engage in the factors analysis, because it will be
5 -- if the Court does that, it will be one of the only courts
6 that has done so in this circuit since *High Tech Gays*.

7 **THE COURT:** All right. Do you want to say anything
8 in response, Ms. Lin, or --

9 **MS. LIN:** I think Ms. Borelli wanted to briefly
10 address the --

11 **THE COURT:** Yes.

12 **MS. BORELLI:** On the point of animus, Your Honor, if
13 ever there were a picture of animus, we think that the
14 legislative record of DOMA is it. But I also think it's
15 important to note that when the Supreme Court has talked about
16 what animus is, it's been careful to say that it doesn't
17 require malice.

18 As Justice Kennedy said, concurring in *Alabama versus*
19 *Garrett*: "It can be insensitivity caused by simple want of
20 careful, rational reflection, or an instinctive mechanism to
21 guard against others who appear to be different." And *Cleburne*
22 defined it as "a view that others are less worthy or less
23 deserving." And, that's all we would add.

24 **THE COURT:** The Court is impressed that you knew that
25 by heart, but --

1 (Laughter)

2 **THE COURT:** -- that's -- it's not -- that has no
3 weight, but it's just impressive.

4 All right. The matter is submitted. Thank you,
5 Counsel, to all, for a very excellent argument and being
6 helpful to the Court. And thanks particularly the Justice
7 Department for sending its chief. Thank you.

8 **MR. WEST:** Thank you.

9 **THE COURT:** I'll state, I'm going to direct the
10 parties to order a transcript of these proceedings and equally
11 share the cost. All right, thank you.

12 **MR. WEST:** Thank you, Your Honor.

13 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 10-00257 JSW, Golinski v. US OPM, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____/s/ Belle Ball_____

Belle Ball, CSR 8785, RMR, CRR

Tuesday, January 17, 2012