Nos. 12-15388 and 12-15409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,

Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, Case No. 10-00257

# BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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KAREN GOLINSKI,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment on February 22, 2012. Excerpts of Record ("ER") 1. The United States filed a timely notice of appeal on February 28, 2012. ER 45; *see* Fed. R. App. P. 4(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.[1]

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[1] Contrary to the assertions of amicus curiae Eagle Forum Education & Legal Defense Fund, this Court does not lack jurisdiction over these appeals. Eagle Forum argues that the district court's jurisdiction over plaintiff's suit relied in part on the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and therefore that the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over these appeals, 28 U.S.C. § 1295(a)(2). *See* Eagle Forum Br. at 4-9. While plaintiff's complaint asserted jurisdiction in part under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), Supplemental Excerpts of Record ("SER") 953, the district court's jurisdiction was not based on the Act. *See Doe v. United States*, 372 F.3d 1308, 1315 (Fed. Cir. 2004) ("The fact that a party invokes the Little Tucker Act as a basis for district court jurisdiction does not mean that the court's jurisdiction is in fact based on that statute."); *see also United States v. Mottaz*, 476 U.S. 834 (1986). Plaintiff's

## STATEMENT OF THE ISSUE

Whether Section 3 of the Defense of Marriage Act is consistent with the equal protection component of the Fifth Amendment Due Process Clause.

## STATUTORY PROVISION

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7:

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

## STATEMENT OF THE CASE

This case involves the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA") as applied to plaintiff Karen Golinski. Plaintiff is a staff attorney employed by this Court and is enrolled in the Federal Employees Health Benefits Plan ("FEHBP"). She is married under the laws of California to a same-sex spouse, and sought to enroll her spouse as an additional beneficiary under her FEHBP plan. Plaintiff's efforts were ultimately unsuccessful, as the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901–8914, when read in light of Section 3 of DOMA, prohibits the extension of FEHBP coverage to same-sex spouses.

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Second Amended Complaint did not seek money damages. *See* SER 968 (requesting declaratory and injunctive relief). And plaintiff has not otherwise pursued money damages.

Plaintiff brought this action after completing an administrative hearing process under this Court's Employee Dispute Resolution ("EDR") Plan. On February 23, 2011, the Attorney General notified Congress of the President's and his determination that heightened scrutiny applies to classifications based on sexual orientation and, under that standard, Section 3 of DOMA is unconstitutional as applied to legally married same-sex couples. SER 1020. Based on that determination, the President and the Attorney General decided that "the Department will cease defense of Section 3." SER 1021.

The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened in the district court and moved to dismiss plaintiff's equal protection claim. The federal defendants moved to dismiss plaintiff's statutory claim but argued that Section 3 violates the Constitution's guarantee of equal protection.

On February 22, 2012, the district court rejected plaintiff's statutory claim but held that Section 3 violates the equal protection component of the Due Process Clause. These appeals followed. On April 11, 2012, this Court denied without prejudice BLAG's motion to dismiss the federal defendants' appeal and granted the federal defendants' motion to consolidate and expedite the two appeals. On May 22, 2012, the Court denied the federal defendants' petition for initial hearing en banc.[2]

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[2] On the date of the filing of this brief, the government is also filing a petition for writ of certiorari in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, Nos. 10-2204, 10-2207, 10-2214, 2012 WL 1948017 (1st Cir. May 31, 2012), raising the question of the constitutionality of Section 3 of DOMA under the equal protection

## STATEMENT OF THE FACTS

### I. Statutory Background.

The Defense of Marriage Act ("DOMA") was enacted by Congress in 1996. DOMA has two main provisions. Section 2 of DOMA provides that no state is required to give effect to any public act, record, or judicial proceeding of another state that treats a relationship between two persons of the same sex as a marriage under its laws. 28 U.S.C. § 1738C. Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law:

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

1 U.S.C. § 7. Section 3 thereby excludes same-sex relationships from the definition of "marriage" or "spouse" for purposes of federal law, even if that relationship is fully recognized under state law. Only Section 3 is at issue in this case.

### II. Facts and Prior Proceedings.

Plaintiff Karen Golinski, a staff attorney employed by this Court, is enrolled in the Federal Employees Health Benefits Plan ("FEHBP"). SER 954. Plaintiff is married under the laws of California to another woman. SER 954. After they married, plaintiff

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component of the Fifth Amendment, and a petition for a writ of certiorari before judgment in this case.

sought to enroll her spouse as an additional beneficiary under her FEHBP plan. SER 954–55. Plaintiff's efforts were ultimately unsuccessful, ER 3-5, as the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901–8914, when read in light of Section 3 of DOMA, prohibits the extension of FEHBP coverage to same-sex spouses.

**A.** Plaintiff brought this action on January 20, 2010, after completion of an administrative hearing process under this Court's Employee Dispute Resolution ("EDR") Plan. ER 108; SER 953–54, 1001–02. Plaintiff's first complaint, seeking mandamus relief against the Office of Personnel Management ("OPM") pursuant to this Court's EDR determination, was dismissed by the district court. ER 6; *see also* Order Granting Motion to Dismiss, D. Ct. Doc. 98. On April 14, 2011, plaintiff filed a second amended complaint asserting that Section 3 of DOMA is unconstitutional as applied to her, and that OPM incorrectly read FEHBA to deny her the benefits she sought for her spouse. SER 954, 966, 968.

**B.** On February 23, 2011, the Attorney General notified Congress of the President's and his determination that Section 3 of DOMA violates the equal protection component of the Fifth Amendment as applied to same-sex couples who are legally married under state law. The President and the Attorney General concluded that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation and that, consistent with that standard, Section 3 of DOMA may not

constitutionally be applied to same-sex couples whose marriages are legally recognized under state law. Based on this decision, the President and the Attorney General determined that "the Department will cease defense of Section 3," but explained that "Section 3 will continue to be enforced by the Executive Branch." SER 1020, 1021. The Attorney General noted that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." SER 1020. The Attorney General further stated that Department attorneys will "notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." SER 1021.

Pursuant to the Attorney General's direction, the Department of Justice, representing the federal defendants in this litigation, informed the district court that it would not defend against plaintiff's equal protection challenge to Section 3 of DOMA. *See* Gov't Response to Order to Show Cause, D. Ct. Doc. 96 (Feb. 28, 2011). The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened in the district court for the purpose of defending Section 3 against plaintiff's equal protection challenge. BLAG Motion to Intervene, D. Ct. Doc. 103 (May 4, 2011). BLAG moved to dismiss plaintiff's equal protection claim. ER 7. The federal defendants moved to dismiss plaintiff's statutory claim but argued that Section 3 violates the Constitution's guarantee of equal protection.[3] *Ibid.*

[3] While opposing dismissal, the federal defendants filed a motion to dismiss plaintiff's equal protection claim to ensure the existence of a justiciable case or

**C.** On February 22, 2012, the district court rejected plaintiff's statutory claim, ER 12 n.3, but held that Section 3 violates the equal protection component of the Due Process Clause, ER 44. In so holding, the district court first considered what level of scrutiny should apply to a law, like Section 3, that classifies on the basis of sexual orientation. ER 14-25. The court noted that this Court had determined in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), that rational basis review applies to classifications based on sexual orientation. ER 16. The district court nonetheless held that it was not bound by *High Tech Gays*, as "the foundations of [*High Tech Gays*] have sustained serious erosion by virtue of more recent decisions by the Supreme Court." *Ibid.* Those foundations, the district court explained, included *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), and "the mistaken assumption that sexual orientation is merely 'behavioral' rather than the sort of deeply rooted, immutable characteristic that warrants heightened protection from discrimination." ER 16-17. The district court noted that the Supreme Court's cases have since rejected such distinctions between "status" and "conduct" in this context. ER 17 (citing *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010)). The district court also determined that this Court's recent application of rational basis review to the equal protection challenge in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir.

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controversy for the district court to resolve. Def. Motion to Dismiss Pl's Second Am. Compl., D. Ct. Doc. 118 (June 3, 2011). This is consistent with past practice in cases where the Executive Branch ceased defending an act of Congress.

2008), "merely found, in the context of military policy where judicial deference 'is at its apogee,' that the military's policy of 'Don't Ask Don't Tell' would fail even rational basis review." ER 19.

The district court therefore held that the question of whether heightened scrutiny applies to classifications based on sexual orientation "is still open." ER 19. The court then analyzed the factors established by the Supreme Court for assessing the applicability of heightened scrutiny and found each of them met. ER 19-25. As a result, the court concluded that "gay men and lesbians are a group deserving of heightened protection," and that "the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny." ER 25.

The district court then applied heightened scrutiny to Section 3, and held that Section 3 fails such review. ER 25-32. The court found that the legislative history of Section 3 "is replete with expressed animus toward gay men and lesbians," ER 25, and that none of the justifications for Section 3 offered by Congress in the House Report on DOMA, H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, satisfies heightened scrutiny, ER 27-32. Finally, considering both the rationales in the House Report and additional rationales offered by BLAG, the district court held, alternatively, that Section 3 fails rational basis review. ER 33-43. The district court entered judgment for plaintiff, ER 1, and enjoined the federal defendants "from interfering with the enrollment of Ms. Golinski's wife in her family health benefits plan," ER 44.

**D.** BLAG filed a notice of appeal on February 24, 2012. ER 47. The federal defendants ultimately agree with the district court's holding and judgment, but filed a notice of appeal on February 28, 2012, ER 45, to ensure that the requirements of *Diamond v. Charles*, 476 U.S. 54, 63–64 (1986), are satisfied and that a party with a constitutional stake in the litigation has appealed. On April 11, 2012, this Court denied without prejudice BLAG's motion to dismiss the federal defendants' appeal. Doc. No. 22 at 2. In the same order the Court granted the federal defendants' motion to consolidate and expedite the two appeals. *Id.* at 2-3. On May 22, 2012, the Court denied the federal defendants' petition for initial hearing en banc. Doc. No. 34.

## SUMMARY OF ARGUMENT

Section 3 of DOMA unconstitutionally discriminates. Section 3 treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under the well-established factors set forth by the Supreme Court to guide the determination whether heightened scrutiny applies to a classification that singles out a particular group, discrimination based on sexual orientation merits heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.

1. a. This Court has previously held that classifications based on sexual orientation are subject to rational basis review. *See High Tech Gays v. Defense Indus. Sec.*

*Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). We respectfully submit that *High Tech Gays* does not withstand scrutiny, as we explain *infra*. The reasoning of *High Tech Gays* has been undermined by subsequent decisions of this Court and the Supreme Court. The *High Tech Gays* decision also fails to adequately account for the relevant factors identified by the Supreme Court, and the Supreme Court has yet to rule on the appropriate level of scrutiny. While recognizing existing circuit precedent, we respectfully submit that this precedent is incorrect and should be remedied at the appropriate stage in this litigation as this Court deems appropriate.

b. The Supreme Court has identified the following factors to guide whether heightened scrutiny applies to a specific group: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–42 (1985). Careful application of these factors to gay and lesbian people demonstrates that sexual orientation classifications should be subject to heightened scrutiny.

2. Applying heightened scrutiny to Section 3 of DOMA, the statute is unconstitutional. The rationales Congress articulated in enacting Section 3 do not support a determination that denying federal benefits to legally married same-sex couples substantially furthers any important governmental interest. And the legislative record contains numerous expressions of the type of stereotype-based thinking that the Constitution's equal protection guarantee is designed to guard against.

In sum, this Court's precedent applying rational basis review to classifications based on sexual orientation is incorrect and should be reconsidered in light of subsequent Supreme Court decisions. The district court correctly concluded that Section 3 of DOMA is subject to heightened scrutiny and, under that standard, is unconstitutional as applied to same-sex couples married under state law.

## STANDARD OF REVIEW

This Court reviews de novo challenges to the constitutionality of a federal statute. *United States v. Zakharov*, 468 F.3d 1171, 1176 (9th Cir. 2006).

## ARGUMENT

## SECTION 3 OF DOMA VIOLATES EQUAL PROTECTION

The Constitution's guarantee of equal protection of the laws, applicable to the federal government through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), embodies a fundamental requirement that "all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*,

473 U.S. 432, 439 (1985). DOMA Section 3 is inconsistent with that principle of equality, as it denies legally married same-sex couples federal benefits that are available to similarly situated opposite-sex couples.

For the reasons set forth below, heightened scrutiny, rather than rational basis review, is the appropriate standard of review for classifications based on sexual orientation. Under heightened scrutiny, Section 3 of DOMA cannot pass constitutional muster.

## I. Plaintiff's Equal Protection Challenge to DOMA Is Subject to Heightened Scrutiny under Supreme Court Precedent.

As a general rule, legislation challenged under equal protection principles is presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441–42. Where, however, legislation classifies on the basis of a factor that "generally provides no sensible ground for differential treatment," such as race or gender, the law demands more searching review and imposes a greater burden on the government to justify the classification. *Id.* at 440–41.

Such suspect or quasi-suspect classifications are reviewed under a standard of heightened scrutiny, under which the government must show, at a minimum, that a law

is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This more searching review enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and serves to prevent implementation of classifications that are the product of impermissible prejudice or stereotypes. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 533 (1996).

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation.[4] It has, however, established and repeatedly

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[4] In both *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court invalidated sexual orientation classifications under a more permissive level of scrutiny. In neither case did the Court have occasion to decide whether heightened equal protection scrutiny applied. *Romer* found that the legislation failed rational basis review, 517 U.S. at 634–35, while *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574–75.

Nor did the Court decide the question in its one-line summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple, *id.* at 810. A Supreme Court summary dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Baker* did not concern the constitutionality of a federal law, like DOMA Section 3, that distinguishes among couples who are already legally married in their own states and that targets gay and lesbian people for adverse treatment. *See infra* Part II.A. Moreover, neither the Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs' jurisdictional statement raised whether classifications based on sexual orientation are subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup. Ct.), at 2; *see also id.* at 13 (repeatedly describing equal protection challenge as based on the "arbitrary" nature of the state law). There is no indication in the Court's order that the Court nevertheless considered, much less resolved, that question. *See Massachusetts v. HHS*, slip op. at 12 (concluding that *Baker* does not resolve an equal protection challenge to DOMA Section 3).

confirmed a set of factors that guide the determination of whether heightened scrutiny applies to a classification that singles out a particular group. These include: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *see also Cleburne*, 473 U.S. at 439–42.

### A. Circuit Precedent Applying Rational Basis Review to Classifications Based on Sexual Orientation Is Incorrect and Warrants Reconsideration.

In its 1990 decision in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), this Court held that classifications based on sexual orientation are subject to rational basis review. *High Tech Gays*, however, has been undermined by subsequent decisions of this Court and the Supreme Court. Indeed, the reasoning of *High Tech Gays* and similar circuit authority traces directly back to *Bowers v. Hardwick*, 478 U.S. 186 (1986).[5] The Supreme Court subsequently overruled *Bowers* in *Lawrence v. Texas*,

[5] The decisions of the other courts of appeals that have concluded that rational basis review applies to sexual orientation classifications are flawed for many of the same reasons as *High Tech Gays*. Many of those courts, like the Court in *High Tech Gays*, relied in part or in whole on *Bowers*. *See Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266–67 & n.2 (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *see also Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996)

539 U.S. 558 (2003), and the reasoning of these circuit decisions thus no longer withstands scrutiny.

In *High Tech Gays*, this Court considered a constitutional challenge to the Department of Defense's practice of conducting mandatory investigations of security clearance applicants known or suspected to be gay. 895 F.2d at 571. Without expressly relying on the deference due to military judgments, *cf. Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), the Court concluded that the challenged classification was subject only to rational basis review.[6] In so holding, this Court relied in part on *Bowers*, and referred favorably to the holdings of other circuits that "because homosexual conduct can thus be

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(citing reasoning of prior appellate decisions based on *Bowers*); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (same). Other courts relied on the fact that the Supreme Court has not recognized that gay and lesbian people constitute a suspect or quasi-suspect class. *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006). Although these courts are correct that the Supreme Court has not yet recognized that gay and lesbian people constitute a suspect class, the Supreme Court does not decide a question by failing to opine on it in dicta unnecessary to the resolution of a case. Finally, the remaining courts to have addressed the issue offered no pertinent reasoning. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984).

[6] *High Tech Gays* and a number of cases in other circuits involved challenges to military policies on homosexual conduct. *See, e.g., High Tech Gays*, 895 F.2d at 565; *see also Cook v. Gates*, 528 F.3d 42, 45 (1st Cir. 2008); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 456 (7th Cir. 1989). Classifications in the military context, however, may present different questions from classifications in the civilian context, *see, e.g., Rostker v. Goldberg*, 453 U.S. 57, 66 (1981), and the military is not involved here.

criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes." *High Tech Gays*, 895 F.2d at 571. Moreover, although the Court "agree[d] that homosexuals have suffered a history of discrimination," it determined that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." *Id.* at 573. Finally, the Court noted that, because several states and local governments had banned employment discrimination on the basis of sexual orientation, "homosexuals are not without political power." *Id.* at 574.

As the district court's decision explains, the continuing viability of the reasoning in *High Tech Gays* has been called into question by subsequent decisions. ER 17-18. To the extent *High Tech Gays* rested on inferences drawn from *Bowers*, its foundation does not survive the Supreme Court's overruling of *Bowers* in *Lawrence*. *See Lawrence*, 539 U.S. at 578 ("Justice Steven's analysis [in his dissent], in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today."). And to the extent *High Tech Gays* relied on the proposition that sexual orientation is not an immutable characteristic, that proposition conflicts with this Court's later conclusion that "[s]exual orientation and sexual identity are immutable." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). *High Tech Gays*'

conclusion that sexual orientation is "behavioral" has also been undermined by subsequent Supreme Court decisions that "have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (citing, *inter alia*, *Lawrence*, 539 U.S. at 575). And to the extent *High Tech Gays* considered the political powerlessness of gay and lesbian people, *see High Tech Gays*, 895 F.2d at 573–74, we respectfully submit that its consideration was incomplete and ultimately incorrect for the reasons explained below. *See infra* Part I.B.1.iii.

We acknowledge that in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), this Court concluded that its previous holding "that [the military's Don't Ask, Don't Tell policy] does not violate equal protection under rational basis review" was "not disturbed by *Lawrence*" because the Supreme Court's decision in that case rested on due process, rather than equal protection principles. *Id.* (citing *Philips v. Perry*, 106 F.3d 1420, 1424–25 (9th Cir. 1997), which relied on *High Tech Gays*). While the holding in *Witt* is binding on a panel of this Court, the Court's brief equal protection discussion failed to examine the extent to which *High Tech Gays* relied on inferences from the Supreme Court's now-overruled decision in *Bowers*, and also failed to consider the inconsistency between the reasoning of *High Tech Gays* and that of *Hernandez-Montiel*. *See* 527 F.3d at 821.[7] In sum, this Court's rational basis precedent has been seriously

[7] *Witt* also involved a challenge to a classification in the military context. *See* n. 6, *supra*. The panel did not expressly limit its equal protection reasoning to the military context in which the case arose, but it did rely on *Philips*, which expressly invoked

undermined by intervening decisions and fails to grapple fully with the factors that, as discussed below, necessarily lead to the conclusion that sexual orientation classifications must be subject to heightened scrutiny.[8]

### B. Classifications Based on Sexual Orientation Should Be Subject to Heightened Scrutiny.

As the district court properly concluded, careful consideration of the Supreme Court factors that guide the determination of whether heightened scrutiny applies to a

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military deference principles in holding that Don't Ask, Don't Tell satisfied rational basis review. *See Philips*, 106 F.3d at 1425.

[8] Contrary to BLAG's assertions, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), does not bind this Court's examination of plaintiff's equal protection challenge to DOMA Section 3. In *Adams*, a U.S. citizen and an alien of the same gender claimed that they were married under Colorado law and that the alien spouse therefore was entitled to immigration benefits under the Immigration and Nationality Act ("INA"). Assuming arguendo that the couple's marriage was valid under state law, the Court held that a same-sex marriage does not qualify as a marriage under the INA. *Id.* at 1039-41. The Court went on to apply rational basis review and uphold the constitutionality of this interpretation of the INA against plaintiffs' equal protection challenge. *Id.* at 1041-43.

Subsequent events have undermined *Adams*. Decided nearly thirty years ago, *Adams*' interpretation of the INA relied heavily on 8 U.S.C. § 1182(a)(4), an INA provision repealed in 1990 that rendered gay and lesbian aliens inadmissible. 673 F.2d at 1040-41. And in upholding the constitutionality of its interpretation of the INA, the Court determined that strict scrutiny could not apply because of Congress's "almost plenary power to admit or exclude aliens." *See id.* at 1042. Unlike the immigration and nationality statute challenged in *Adams* and other immigration statutes where equal protection review is highly deferential, *see, e.g., Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (involving a challenge to INA provisions), this case has nothing to do with immigration and DOMA is a general statute that was not enacted as an exercise of Congress's plenary power to regulate immigration and naturalization. *Adams* does not control this case.

classification that singles out a particular group demonstrate that classifications based on sexual orientation should be subject to heightened scrutiny. *See* ER 25.

The First Circuit recently declared Section 3 of DOMA unconstitutional under the equal protection component of the Fifth Amendment. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, Nos. 10-2204, 10-2207, 10-2214, slip op. at 28 (1st Cir. May 31, 2012). The court held that it was foreclosed from applying the heightened scrutiny applicable to suspect classifications by its prior precedent, *see Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), but nevertheless found that DOMA Section 3 warranted a "closer than usual review." *Id.* at 11, 14-15. The court stated that where a statute imposes a "substantial" burden on a "historically disadvantaged or unpopular group," courts should "undertake[ ] a more careful assessment of the justifications [for the statute] than the light scrutiny offered by conventional rational basis review." *Id.* at 16, 18, 19. The Court determined that Section 3 warranted this "closer scrutiny" and held that the "rationales offered do not provide adequate support for section 3 of DOMA." *Id.* at 19, 28, 30.

Although the First Circuit's analysis of Section 3 was "without resort to suspect classifications," *id.* at 28, the court nonetheless relied on some of the same factors that are addressed in the Supreme Court's heightened scrutiny framework. Those factors should be considered through this established framework, and the application of this framework demonstrates that heightened scrutiny is the appropriate standard to review an equal protection challenge to DOMA Section 3.

### 1. Gay and Lesbian People Are a Suspect or Quasi-Suspect Class under the Relevant Factors Identified by the Supreme Court.

#### i. Gay and Lesbian People Have Been Subject to a History of Discrimination.

First, as this Court has previously recognized, gay and lesbian individuals have suffered a long and significant history of purposeful discrimination. *See High Tech Gays*, 895 F.2d at 573 ("[W]e do agree that homosexuals have suffered a history of discrimination . . . ."); *see also Massachusetts v. HHS*, slip op. at 18 ("[G]ays and lesbians have long been the subject of discrimination."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (noting that "[h]omosexuals have suffered a history of discrimination and still do, though possibly now in less degree"). So far as we are aware, no court to consider this question has ever ruled otherwise.

Discrimination against gay and lesbian individuals has a long history in this country, *Bowers*, 478 U.S. at 192, from colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind," *see, e.g.*, Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294–95 & n.1 (enacted Dec. 1, 1642; revised 1750), to state laws that, until very recently, have "demean[ed] the[] existence" of gay and lesbian people "by making their private sexual conduct a crime," *Lawrence*, 539 U.S. at 578. In addition to the discrimination reflected in DOMA itself, as explained

below, the federal government, state and local governments, and private parties all have contributed to this long history of discrimination.[9]

a. Discrimination by the Federal Government

The federal government has played a significant and regrettable role in the history of discrimination against gay and lesbian individuals.

For years, the federal government deemed gay and lesbian people unfit for employment, barring them from federal jobs on the basis of their sexual orientation. *See Employment of Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Congress), December 15, 1950, ("Interim Report"), at 9. In 1950, Senate Resolution 280 directed a Senate subcommittee "to make an investigation in the employment by the Government of homosexuals and other sex perverts." Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 , 1565–66 (1993). The Committee found that from 1947 to 1950, "approximately 1,700 applicants for federal positions

[9] We do not understand the Supreme Court to have called into question this well-documented history when it said in *Lawrence* that "[i]t was not until the 1970's that any State singled out same-sex relations for criminal prosecution," 539 U.S. at 570, and that only nine States had done so by the time of *Lawrence*. The question before the Court in *Lawrence* was whether, as *Bowers* had asserted, same-sex sodomy prohibitions were so deeply rooted in history that they could not be understood to contravene the Due Process Clause. That the Court rejected that argument and invalidated Texas's sodomy law on due process grounds casts no doubt on the duration and scope of discrimination against gay and lesbian people writ large.

were denied employment because they had a record of homosexuality or other sex perversion." Interim Report at 9.

In April 1953, in the wake of the Senate investigation, President Eisenhower issued Executive Order 10450, which officially added "sexual perversion" as a ground for investigation and possible dismissal from federal service. Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953); *see also* 18 Fed. Reg. 2489 (Apr. 27, 1953). The Order expanded the investigations of civilian employees for "sexual perversion" to include every agency and department of the federal government, and thus had the effect of requiring the termination of all gay people from federal employment. *See* General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process*, at 2 (Mar. 1995).

The federal government enforced Executive Order 10450 zealously, engaging various agencies in intrusive investigatory techniques to purge gay and lesbian people from the federal civilian workforce. The State Department, for example, charged "[s]killed investigators" with "interrogating every potential male applicant to discover if they had any effeminate tendencies or mannerisms," used polygraphs on individuals accused of homosexuality who denied it, and sent inspectors "to every embassy, consulate, and mission" to uncover homosexuality. Edward L. Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602 (2006). In order to identify gay and lesbian people in the civil service, the FBI "sought out state and local police officers to supply arrest records on

morals charges, regardless of whether there were convictions; data on gay bars; lists of other places frequented by homosexuals; and press articles on the largely subterranean gay world." Williams Institute, "Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment," ch. 5 at 7, *available at* http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/ ("Williams Report"). In the 1950s and early 1960s, the Post Office Department (the predecessor to the Postal Service), for its part, aided the FBI by "establish[ing] a watch on the recipients of physique magazines, [those who] subscribed to pen pal clubs, and [those who] initiated correspondence with men whom they believed might be homosexual." *Ibid.* If "their suspicions were confirmed, they then placed tracers on victims' mail in order to locate other homosexuals." *Ibid.*

The end result was thousands of men and women forced from their federal jobs based on the suspicion that they were gay or lesbian. It was not until 1975 that the Civil Service Commission prohibited discrimination on the basis of sexual orientation in federal civilian hiring. *See* General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process* (1995) (describing the federal government's restrictions on the employment of gay and lesbian individuals).[10]

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[10] Open military service by gay and lesbian people was prohibited, first by regulation and then by statute, 10 U.S.C. § 654 (2007), until the Don't Ask, Don't Tell Repeal Act, enacted last year, 111 Pub. L. No. 321, 124 Stat. 3515 (2010). Pursuant to

The history of the federal government's discrimination against gay and lesbian people extends beyond the employment context. For decades, gay and lesbian noncitizens were categorically barred from entering the United States, on grounds that they were "persons of constitutional psychopathic inferiority," "mentally . . . defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571–72 (N.D. Cal. 1982) (quoting Ch. 29, § 3, 39 Stat. 874 (1917)), *aff'd sub nom. Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). As the Supreme Court held in *Boutilier v. INS*, 387 U.S. 118 (1967), "[t]he legislative history of [the Immigration and Nationality Act of 1952] indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals." *Id.* at 120. This exclusion remained in effect until Congress repealed it in 1990. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

b. Discrimination by State and Local Governments

Like the federal government, state and local governments have long discriminated against gay and lesbian people in public employment. By the 1950s, many state and local governments had banned gay and lesbian employees, as well as gay and lesbian "employees of state funded schools and colleges, and private individuals in professions requiring state licenses." Williams Report, ch. 5 at 18. Many states and localities began

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the Repeal Act, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certified the repeal on July 22, 2011, and repeal was effective 60 days from that date, on September 20, 2011.

aggressive campaigns to purge gay and lesbian employees from government services as early as the 1940s. *Id.* at 18–34.

This employment discrimination was interrelated with longstanding state law prohibitions on sodomy; the discrimination was frequently justified by the assumption that gay and lesbian people had engaged in criminalized and immoral sexual conduct. *See, e.g.*, *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 138, 147–48 (N.D. Tex. 1981) (holding that police could refuse to hire gay people), *aff'd without opinion*, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1342, 1347 (Wash. 1977) (upholding the dismissal of an openly gay school teacher who was fired based on a local school board policy that allowed removal for "immorality"); *Burton v. Cascade Sch. Dist. Union High Sch., No. 5*, 512 F.2d 850, 851 (9th Cir. 1975) (upholding the dismissal of a lesbian teacher in Oregon, after adopting a resolution stating that she was being terminated "because of her immorality of being a practicing homosexual"); *Bd. of Educ. v. Calderon*, 110 Cal. Rptr. 916, 919 (1973) (holding that state sodomy statute was a valid ground for discrimination against gays as teachers); *see also Baker v. Wade*, 553 F. Supp. 1121, 1128 n.9 (N.D. Tex. 1982) ("A school board member testified that [the defendant] would have been fired [from his teaching position] if there had even been a suspicion that he had violated [the Texas sodomy statute]."), *rev'd,* 769 F.2d 289 (5th Cir. 1985) (holding that challenged Texas homosexual sodomy law was constitutional). Some of these discriminatory employment policies continued into the 1990s. *See Shahar v. Bowers*,

114 F.3d 1097, 1105 & n.17, 1107–10 (11th Cir. 1997) (en banc) (upholding Georgia Attorney General's Office's rescission of a job offer to plaintiff after she mentioned to co-workers her upcoming wedding to her same-sex partner); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding unconstitutional Dallas Police Department policy denying gay and lesbian people employment).

Based on similar assumptions regarding the criminal sexual conduct of gay and lesbian people, states and localities also denied child custody and visitation rights to gay and lesbian parents. *See, e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "[h]omosexual conduct is . . . abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God . . . [and] an inherent evil against which children must be protected."); *Pulliam v. Smith*, 501 S.E.2d 898, 903–04 (N.C. 1998) (upholding denial of custody to a gay man who had a same-sex partner; emphasizing that father engaged in sexual acts while unmarried and refused to "counsel the children against such conduct"); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that a trial court did not err in granting a father custody of his son on the basis that people in town had rumored that the son's mother was involved in a lesbian relationship); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that, although the Court had previously held "that a lesbian mother is not per se an unfit parent," the "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the

Commonwealth" and therefore "that conduct is another important consideration in determining custody"); *Roe v. Roe*, 324 S.E.2d 691, 692, 694 (Va. 1985) (holding that father, who was in a same-sex relationship, was "an unfit and improper custodian as a matter of law" because of his "continuous exposure of the child to his immoral and illicit relationship").

State and local law also has been used to prevent gay and lesbian people from associating freely. Liquor licensing laws, both on their face and through discriminatory enforcement, were long used to harass and shut down establishments patronized by gay and lesbian people. *See* William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, 1946–1961, 24 Fla. St. U. L. Rev. 703, 762–66 (1997) (describing such efforts in New York, New Jersey, Michigan, California, and Florida); *see also Irvis v. Scott*, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970) (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass gay and lesbian people, often when gay and lesbian people congregated in public. *See, e.g.*, *Pryor v. Mun. Court*, 599 P.2d 636, 644 (Cal. 1979) ("Three studies of law enforcement in Los Angeles County indicate[d] that the overwhelming majority of arrests for violation of [the 'lewd or dissolute' conduct statute] involved male homosexuals."); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City*, 1960–1980, 12 Colum. Hum. Rts. L. Rev. 159, 162–64 (1982); Florida State Legislative Investigation Committee (Johns Committee), *Report: Homosexuality and*

*Citizenship in Florida*, at 16 (1964) ("Many homosexuals are picked up and prosecuted on vagrancy or similar non-specific charges, fined a moderate amount, and then released."). Similar practices persist to this day. *See, e.g.*, *Calhoun v. Pennington*, No. 09-3286 (N.D. Ga.) (involving September 2009 raid on Atlanta gay bar and police harassment of patrons); *Settlement in gay bar raid*, N.Y. Times (Mar. 22, 2011) (involving injuries sustained by gay bar patron during raid by Fort Worth police officers and the Texas Alcoholic Beverage Commission).

Efforts to combat discrimination against gay and lesbian people also have led to significant political backlash, as evidenced by the long history of successful state and local initiatives repealing laws that protected gay and lesbian people from discrimination. *See also infra* Part I.B.1.iii. A rash of such initiatives succeeded in the late 1970s. *See, e.g.*, Christopher R. Leslie, *The Evolution of Academic Discourse on Sexual Orientation and the Law*, 84 Chi. Kent L. Rev. 345, 359 (2009) (Boulder, Colorado in 1974); Rebecca Mae Salokar, Note, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 Fla. Int'l. U. L. Rev. 473, 477 (2009) (Dade County, Florida in 1977); *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (St. Paul, Minnesota in 1978); *Gay rights referendum in Oregon*, Washington Post (May 11, 1978), at A14 (Wichita, Kansas in 1978); *Why tide is turning against homosexuals*, U.S. News & World Report (June 5, 1978), at 29 (Eugene, Oregon in 1978). The laws at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th

Cir. 1995), are just two of a number of more recent examples from the 1990s. Even more recently, in May 2011, the Tennessee legislature enacted a law stripping counties and municipalities of their ability to pass local non-discrimination ordinances that would prohibit discrimination on the basis of sexual orientation, and repealing the ordinances that had recently been passed by Nashville and other localities. *See* State of Tennessee, Public Chapter No. 278, *available at* http://state.tn.us/sos/acts/107/pub/pc0278.pdf. Similarly, on multiple occasions since the 1970s, the City Council in Anchorage, Alaska, has passed measures adding sexual orientation to the city's non-discrimination ordinance, only to have the provision vetoed by the city's mayor. In April 2012, voters rejected a ballot initiative that would have prohibited discrimination on the basis of sexual orientation. Yereth Rosen, *Anchorage Voters Reject Gay Rights Ballot Measure*, Reuters (Apr. 4, 2012), available at http://www.reuters.com/article/2012/04/05/us-usa-gays-alaska-idUSBRE83401Q20120405.

c. Discrimination by Private Parties

Finally, private discrimination against gay and lesbian people in employment and other areas has been pervasive and continues to this day.[11] *See, e.g.*, Williams Report, ch. 5 at 8–9 (explaining that private companies and organizations independently adopted

[11] Private discrimination, as well as official discrimination, is relevant to whether a group has suffered a history of discrimination for purposes of the heightened scrutiny inquiry. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]omen still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.").

discriminatory employment policies modeled after the federal government's, and as federal employers shared police and military records on gay and lesbian individuals with private employers, these same persons who were barred from federal employment on the basis of their sexual orientation were simultaneously blacklisted from employment by many private companies). The pervasiveness of private animus against gay and lesbian people is underscored by statistics showing that gay and lesbian people continue to be among the most frequent victims of all reported hate crimes. *See* H.R. Rep. No. 111-86, at 9–10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's sexual orientation—gay, lesbian, or bisexual—constituted the third highest category reported—1,265 incidents, or one-sixth of all reported hate crimes."); Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1464 (1992).

In sum, gay and lesbian people have suffered a long history of discrimination based on prejudice and stereotypes. That history counsels strongly in favor of heightened scrutiny, giving courts ample reason to question whether sexual orientation classifications are the product of hostility rather than a legitimate government purpose.

**ii. Gay and Lesbian People Exhibit Immutable Characteristics that Distinguish Them as a Group.**

Over ten years ago, in considering whether gay and lesbian people constituted a "particular social group" for asylum purposes, this Court recognized that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply

ingrained as heterosexuality." *Hernandez-Montiel*, 225 F.3d at 1093 (quotation omitted). *But see High Tech Gays*, 895 F.2d at 573 (stating that sexual orientation is not immutable because "it is behavioral"). Sexual orientation, this Court explained, is "fundamental to one's identity" and gay and lesbian individuals "should not be required to abandon" it. *Hernandez-Montiel*, 225 F.3d at 1093.

That conclusion is consistent with the overwhelming consensus in the scientific community that sexual orientation is an immutable characteristic. *See e.g.*, G.M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, Sexuality Res. & Soc. Pol'y 7:176–200 (2010), *available at* http://www.springerlink.com/content/k186244647272924/fulltext.pdf (noting that in a national survey conducted with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95 percent of the gay men and 83 percent of lesbian women reported that they experienced "no choice at all" or "small amount of choice" about their sexual orientation). There is also a consensus among the established medical community that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being.[12] *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate*

[12] In fact, every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gay and lesbian people. These policy statements are reproduced in a 2008 publication of the American Psychological Association, available at http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

*Therapeutic Responses to Sexual Orientation*, at v (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); *see also* Richard A. Posner, Sex and Reason 101 n.35 (1992) (describing "failure of treatment strategies . . . to alter homosexual orientation"); Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

Furthermore, sexual orientation need not be a "visible badge" that distinguishes gay and lesbian people as a discrete group for the classification to warrant heightened scrutiny. As the Supreme Court has made clear, a classification may be "constitutionally suspect" even if it rests on a characteristic that is not readily visible, such as illegitimacy. *Mathews v. Lucas*, 427 U.S. 495, 504 (1976); *see id.* at 506 (noting that "illegitimacy does not carry an obvious badge, as race or sex do," but nonetheless applying heightened scrutiny). Whether or not gay and lesbian people could hide their identities in order to avoid discrimination, they are not required to do so. As the Supreme Court has recognized, sexual orientation is a core aspect of identity, and its expression is an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 576–77.

### iii. Gay and Lesbian People Are Minorities with Limited Political Power.

Gay and lesbian people are a minority group,[13] *Able v. United States*, 968 F. Supp. 850, 863 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998), that has historically lacked political power. To be sure, many of the forms of historical discrimination described above have subsided or been repealed. But efforts to combat discrimination have frequently led to successful initiatives to scale back protections afforded to gay and lesbian individuals. *See also supra* Part I.B.1.i.b. As described above, the adoption of ballot initiatives specifically repealing laws protecting gay and lesbian people from discrimination (including the laws at issue in *Romer* and *Equality Foundation v. City of Cincinnati*) are examples of such responses. In fact, "[f]rom 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive order prohibiting sexual orientation discrimination should be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order." Robert Wintemute, Sexual Orientation and Human Rights 56 (1995).

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[13] It is difficult to offer a definitive estimate for the size of the gay and lesbian community in the United States. According to an analysis of various data sources published in April 2011 by the Williams Institute, there appear to be 9 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population. *See* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* (April 2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. Ascertaining the precise percentage of gay and lesbian people in the population, however, is not relevant to the analysis, as it is clear that whatever the data reveal, there is no dispute that gay and lesbian people constitute a minority in the country.

Recent developments concerning same-sex marriage reinforce that gay and lesbian people continue to lack the consistent "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. In 1996, at the time DOMA was enacted, only three states had statutes restricting marriage to opposite-sex couples. *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 Loy. U. Chi. L. J. 265, 265–66 (2007). Today, thirty-nine states have such laws, including thirty states that have constitutional amendments explicitly restricting marriage to opposite-sex couples. National Conference of State Legislatures, *State Laws Limiting Marriage to Opposite-Sex Couples*, *available at* http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx (last updated May 15, 2012). Indeed, North Carolina became the thirtieth state to amend its constitution to prohibit same-sex marriages on May 8, 2012, during the pendency of this appeal.

Developments in California and Iowa provide recent examples. In May 2008, the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage. *In re Marriage Cases*, 183 P.3d 384, 419–20 (Cal. 2008). In November 2008, California's voters passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex couples. *See Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009). In November 2010, when three Iowa state supreme court justices who had been part of a unanimous decision legalizing same-sex marriage were up for reelection, Iowa

voters recalled all of them. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times (Nov. 3, 2010).

Beyond these state ballot initiatives, the relatively recent passages of anti-sodomy laws singling out same-sex conduct, such as the Texas law the Supreme Court ultimately invalidated in *Lawrence*, indicate that gay and lesbian people continue to lack political power.

This is not to say that the political process is closed entirely to gay and lesbian people. But complete foreclosure from meaningful political participation is not the standard by which the Supreme Court has judged "political powerlessness." When the Court ruled in 1973 that gender-based classifications were subject to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677 (1973), women already had won major political victories, including a constitutional amendment granting the right to vote and protection against employment discrimination under Title VII. As *Frontiero* makes clear, the "political power" factor does not require a complete absence of political protection, and its application is not intended to change with every political success.[14]

[14] In determining that gender classifications warranted heightened scrutiny, the plurality in *Frontiero* noted that "in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." 411 U.S. at 686 n.17 (plurality opinion).

### iv. Sexual Orientation Bears No Relation to Legitimate Policy Objectives or Ability to Perform or Contribute to Society.

Even where other factors might point toward heightened scrutiny, the Court has declined to treat as suspect those classifications that generally bear on "ability to perform or contribute to society." *See Cleburne*, 473 U.S. at 441 (holding that mental disability is not a suspect classification) (quotation omitted); *see also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–15 (1976) (holding that age is not a suspect classification).

Sexual orientation is not such a classification. As the history described above makes clear, prior discrimination against gay and lesbian people has been rested not on their ability to contribute to society, but on the basis of invidious and long-discredited views that gay and lesbian people are, for example, sexual deviants or mentally ill. *See also supra* Part I.B.1.i. As the American Psychiatric Association stated more than 35 years ago, "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the Am. Psychiatric Ass'n (Dec. 15, 1973); *see also Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975) (reflecting a similar American Psychological Association statement).

Just as a person's gender, race, or religion does not bear an inherent relation to a person's ability or capacity to contribute to society, a person's sexual orientation bears no inherent relation to ability to perform or contribute. President Obama elaborated on

this principle in the context of the military when he signed the Don't Ask, Don't Tell Repeal Act of 2010:

> [V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed. . . . There will never be a full accounting of the heroism demonstrated by gay Americans in service to this country; their service has been obscured in history. It's been lost to prejudices that have waned in our own lifetimes. But at every turn, every crossroads in our past, we know gay Americans fought just as hard, gave just as much to protect this nation and the ideals for which it stands.

White House, Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

Opposition to homosexuality, though it may reflect deeply held personal religious and moral views, is not a legitimate policy objective that justifies unequal treatment of gay and lesbian people. *See Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quotation omitted)); *Romer*, 517 U.S. at 635 (noting that a law cannot broadly disfavor gay and lesbian people because of "personal or religious objections to homosexuality"). Whether premised on pernicious stereotypes or simple moral disapproval, laws classifying on the basis of sexual orientation rest on a "factor [that] generally provides no sensible ground for differential treatment," *see Cleburne*, 473 U.S. at 440, and thus such laws merit heightened scrutiny.

## II. DOMA Fails Heightened Scrutiny.

For the reasons described above, heightened scrutiny is the appropriate standard by which to review classifications based on sexual orientation, including DOMA Section 3.[15] In reviewing a legislative classification under heightened scrutiny, the government must establish, at a minimum, that the classification is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. Moreover, under any form of heightened scrutiny, a statute must be defended by reference to the "actual [governmental] purposes" behind it, not different "rationalizations." *VMI*, 518 U.S. at 535–36. Section 3 fails this analysis.[16]

**A.** The legislative history demonstrates that the statute was motivated in significant part by disapproval of gay and lesbian people and their intimate and family

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[15] The government takes no position on whether sexual orientation classifications should be considered suspect, as opposed to quasi-suspect, and therefore whether DOMA should be subject to strict or intermediate scrutiny.

[16] Though the government believes that heightened scrutiny is the appropriate standard of review for Section 3 of DOMA, if this Court holds that rational basis is the appropriate standard, as the government has previously stated, a reasonable argument for the constitutionality of DOMA Section 3 can be made under that permissive standard. SER 1021 ("If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard.").

relationships.[17] Section 3 classifies gay and lesbian individuals "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635.

Among the interests expressly identified by Congress in enacting DOMA was "the government's interest in defending traditional notions of morality." H.R. Rep. No. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("H.R. Rep."). The House Report repeatedly claims that DOMA upholds "traditional notions of morality" by condemning homosexuality and by expressing disapproval of gay and lesbian people and their intimate relationships. *See, e.g.*, H.R. Rep. at 15–16 (favorably invoking purpose of "honor[ing] a collective moral judgment about human sexuality," "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (referring to "a union that many people . . . think is immoral"); *see also id.* at 33 (noting the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable" (quotation omitted)).

The House Report also explicitly stated an interest in extending legal preferences to heterosexual couples in various ways to "promote heterosexuality" and discourage

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[17] We note that some members of the majority in Congress that enacted DOMA have changed their views on the law, and the legitimacy of its rationales, since 1996. *See, e.g.*, Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), *available at* http://www.latimes.com/news/politics/newsletter/la-oe-barr5-2009jan05,0,2810156.story?track=newslettertext. In reviewing the statute under heightened scrutiny, however, what is relevant are the views of Congress at the time of enactment, as evidenced by the legislative record.

homosexuality. H.R. Rep. at 15 n.53 ("Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality. . . . Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . . ."). Thus, one of the goals of DOMA was to provide gay and lesbian people with an incentive to abandon or at least to hide from view a core aspect of their identities, which legislators regarded as immoral and inferior.

Under the Constitution's equal protection guarantee, "a bare . . . desire to harm a politically unpopular group" is not "a legitimate state interest." *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *see also ibid.* ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("[The Supreme Court] ha[s] consistently held . . . that some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests." (quotation and alteration omitted)). Even if Section 3 could be understood as reflecting moral or religious objections to homosexuality or to gay and lesbian relationships, such objections do not justify the unequal treatment of legally married individuals on the basis of their sexual orientation. *See supra* Part I.B.1.iv. Discouraging homosexuality, in other words, is not a governmental interest that justifies sexual orientation discrimination. *See also*

*Massachusetts v. HHS*, slip op. at 27 (holding that "*Lawrence* ruled that moral disapproval alone cannot justify legislation discrimination on [the] basis [of sexual orientation]").

**B.** Nor is there some other important governmental interest identified by Congress and substantially advanced by Section 3 of DOMA, as required under heightened scrutiny. In addition to expressing moral disapproval of gay and lesbian people and their relationships, the House Report articulated an interest in "defending and nurturing the institution of traditional, heterosexual marriage." H.R. Rep. at 12. That interest does not support Section 3. As an initial matter, reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. *VMI*, 518 U.S. at 535–36 (invalidating longstanding tradition of single-sex education at Virginia Military Institute). But even if it were possible to identify a substantive interest in protecting "traditional" marriage on this record, there would remain a gap between means and end that would invalidate Section 3 under heightened scrutiny. Section 3 of DOMA has no effect on recognition of the same-sex marriages Congress viewed as threatening to "traditional" marriage; it does not purport to defend "traditional, heterosexual marriage" by preventing same-sex marriage or by denying legal recognition to such marriages. Instead, Section 3 denies benefits to couples who are already legally married in their own states, on the basis of their sexual orientation and not their marital status. Thus, there is not the "substantial relationship" required under heightened scrutiny between an end of defending "traditional" marriage and the means

employed by Section 3. As the First Circuit concluded, "[t]his is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts v. HHS*, slip op. at 26-27 (internal citation omitted).

**C.** The same is true of Congress's interest in promoting "responsible procreation and child-rearing," which the House Report identified not as a separate rationale for DOMA Section 3, but as the basis for its larger interest in defending "the institution of traditional heterosexual marriage." *See, e.g.*, H.R. Rep. at 12–13 ("At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."); *id.* at 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, *society would have no particular interest* in encouraging citizens to come together in a committed relationship.") (emphasis added). Again, even assuming that Congress legislated on the basis of an interest in promoting responsible procreation and child-rearing independent of disapproval of gay and lesbian parenting, that interest is not materially advanced by Section 3 of DOMA and so cannot justify that provision under heightened scrutiny.

First, there is no sound basis for concluding that same-sex couples who have committed to marriages recognized by state law are anything other than fully capable of

responsible parenting and child-rearing. To the contrary, many leading medical, psychological, and social welfare organizations have issued policies opposing restrictions on gay and lesbian parenting based on their conclusions, supported by numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. *See, e.g.*, American Academy of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; American Psychological Association, Sexual Orientation, Parents, & Children (July 2004), *available at* http://www.apa.org/about/governance/council/policy/parenting.aspx; American Academy of Child and Adolescent Psychiatry, Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement (2009), *available at* http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, AMA Policy Regarding Sexual Orientation, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, *available at* http://www.cwla.org/programs/culture/glbtqposition.htm. There is thus no adequate basis to conclude that any penalty on same-sex marriage is "substantially" related to an interest in promoting responsible child-rearing.

Second, there is no evidence in the legislative record that denying federal benefits to same-sex couples legally married under state law operates in any way to encourage responsible child-rearing, whether by opposite-sex or same-sex couples, and it is hard to imagine what such evidence would look like. In enacting DOMA, Congress expressed the view that marriage plays an "irreplaceable role" in child-rearing. H.R. Rep. at 14. But Section 3 does nothing to affect the stability of heterosexual marriages or the child-rearing practices of heterosexual married couples. Instead, it denies the children of same-sex couples what Congress sees as the benefits of the stable home life produced by legally recognized marriage, and therefore, on Congress's own account, undermines rather than advances an interest in promoting child welfare.

Finally, as to "responsible procreation," even assuming an important governmental interest in providing benefits only to couples who procreate, Section 3 is not sufficiently tailored to that interest to survive heightened scrutiny. Many state-recognized same-sex marriages involve families with children; many opposite-sex marriages do not. And ability to procreate has never been a requirement of marriage or of eligibility for federal marriage benefits; opposite-sex couples who cannot procreate for reasons related to age or other physical characteristics are permitted to marry and to receive federal marriage benefits. *Cf.* H.R. Rep. at 14 (noting "that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children" but describing this objection to DOMA as "not a serious argument"). On the

other hand, same-sex couples frequently form families and raise children. As is true of Congress's asserted interest in "defending and nurturing the institution of traditional, heterosexual marriage" more generally, there is no "demonstrated connection" between encouraging responsible procreation and Section 3's differential treatment of same-sex and opposite-sex marriages. *Massachusetts v. HHS*, slip op. at 26-27.

**D.** The House Report also identifies preservation of scarce government resources as an interest underlying Section 3's denial of government benefits to same-sex couples married under state law. *See* H.R. Rep. at 18. In fact, many of the rights and obligations affected by Section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds, and in other cases, exclusion of state-recognized same-sex marriages costs the government money by preserving eligibility for certain federal benefits. But regardless of whether an interest in preserving resources could justify Section 3 under rational basis review, it is clear that it will not suffice under heightened scrutiny. The government may not single out a suspect class for exclusion from a benefits program solely in the interest of saving money. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (holding that state may not advance its "valid interest in preserving the fiscal integrity of its programs" through alienage-based exclusions); *Massachusetts v. HHS*, slip op. at 25 (rejecting the preservation of scare government resources as a basis for DOMA because "where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court

precedent marks this as a reason undermining rather than bolstering the distinction") (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Romer*, 517 U.S. at 635)).

* * *

In sum, the official legislative record makes plain that DOMA Section 3 was motivated in substantial part by disapproval of gay and lesbian people, and identifies no governmental interest that justifies Section 3's differential treatment of same-sex couples who are legally married under the laws of their states. Section 3 of DOMA is therefore unconstitutional. The judgment of the district court should be affirmed.

## CONCLUSION

For the foregoing reasons, this Court's precedents applying rational basis review to sexual orientation classifications should be reconsidered, and Section 3 of DOMA should be held unconstitutional under heightened scrutiny.

Respectfully submitted,

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JULY 2012

## STATEMENT OF RELATED CASES

*Dragovich* v. *U.S. Department of the Treasury*, No. 12-16461, is the only related case, as defined in Circuit Rule 28-2.6, of which counsel is aware. This case also involves the constitutionality of Section 3 of the Defense of Marriage Act.

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced using Garamond 14-point font, and contains 11,987 words.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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