UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

JOANNE PEDERSEN & ANN MEITZEN, GERALD V. PASSARO II, LYNDA DEFORGE & RAQUEL ARDIN, JANET GELLER & JOANNE MARQUIS, SUZANNE & GERALDINE ARTIS, BRADLEY KLEINERMAN & JAMES GEHRE, and DAMON SAVOY & JOHN WEISS,	)	
Plaintiffs,	)	
v.	)	
OFFICE OF PERSONNEL MANAGEMENT, TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the Treasury, and HILDA L. SOLIS, in her official capacity as the Secretary of Labor, MICHAEL J. ASTRUE, in his official capacity as the Commissioner of the Social Security Administration, UNITED STATES POSTAL SERVICE, JOHN E. POTTER, in his official capacity as The Postmaster General of the United States of America, DOUGLAS H. SHULMAN, in his official capacity as the Commissioner of Internal Revenue, ERIC H. HOLDER, JR., in his official capacity as the United States Attorney General, JOHN WALSH, in his official capacity as Acting Comptroller of the Currency, and THE UNITED STATES OF AMERICA,	)	**CIVIL ACTION No. 3:10 CV 1750 (VLB)**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiffs respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment.

INTRODUCTION

Plaintiffs are gay men or lesbians who married a person of the same sex under the laws of the States of Connecticut, Vermont, and New Hampshire. Once legally married, the Plaintiffs would ordinarily expect to exercise all of the rights and discharge all of the responsibilities of married people. However, Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *codified at* 1 U.S.C. § 7 ("DOMA"), defines the terms "marriage" and "spouse" so as to exclude the lawful marriages of same-sex couples from federal recognition.[1] As applied to Plaintiffs, DOMA takes the unitary class of couples married in their home states and divides it in two: those who are "married" under federal law, and those whose marriages do not exist for any federal purpose.

This sundering of the class of married people violates the Equal Protection guarantee of the Fifth Amendment. DOMA merits heightened equal protection scrutiny because, as both the Department of Justice and the United States House of Representatives ("the House") have affirmed, it discriminates on its face on the basis of sexual orientation, which bears all the traditionally recognized hallmarks of a suspect classification. Heightened scrutiny also is warranted because DOMA burdens Plaintiffs' fundamental interest in the integrity of their existing familial

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[1]The Defense of Marriage Act also contains a distinct provision, Section 2, authorizing States to disregard marriages of same-sex couples performed and recognized by other States. *See* 28 U.S.C. § 1738C. Plaintiffs do not challenge Section 2 here; the shorthand reference to "DOMA" in this brief is intended exclusively as a reference to Section 3 of the Act and not to Section 2.

relationships. If heightened scrutiny is applied, DOMA cannot possibly survive review.

Even if DOMA is examined without heightened scrutiny, it fails. Under our constitutional scheme, it is the prerogative of the States to say who is "married," as Connecticut, Vermont, and New Hampshire have done here. There is no legitimate or plausible *federal* interest that is served by the creation of a freestanding federal definition of marriage that excludes same-sex couples. DOMA's break with longstanding federalist tradition merits viewing the interests advanced by the House to defend DOMA with particular skepticism.

No interest advanced to defend DOMA can in fact withstand any level of scrutiny. The reasons offered by Congress at the time of DOMA's passage are either nonsensical or just another way of saying that Congress wanted to denounce and harm those gay men and lesbians who form long-term relationships and seek to have those relationships recognized and respected through civil marriage. For example, it is absurd to suggest that barring federal recognition of marriages of same-sex couples will somehow promote responsible procreation or children's welfare; DOMA has no effect on the children of heterosexual couples, and it actively *harms* the children of same-sex couples, including the nine children being raised by Plaintiffs. Nor can DOMA's single-minded targeting of same-sex couples be justified as an effort to bolster "traditional" marriages – given that it has no effect on different-sex marriages whatsoever. And the government itself has determined that DOMA, while excluding Plaintiffs and others like them from important federal programs

designed to support couples and families, has a net cost to the federal purse rather than a net savings.

As for the House's apparent efforts in other litigation to conjure up new and more defensible post hoc justifications for DOMA, they are equally incoherent. The House's invocation of the "historic" definition of marriage, for instance, is just an appeal to tradition for its own sake, which is not a valid justification for discrimination. Nor can DOMA plausibly be justified as an effort to promote nationwide "consistency" for the sake of fairness or administrative convenience, given the federal government's own longstanding history of deferring to state marital eligibility determinations despite wide and deep variations in state law, some of which persist to this day.

In the final analysis, DOMA makes sense only as an attempt by Congress to express moral disapproval for same-sex couples. Congress made perfectly clear that it was doing so. This is simply discrimination for its own sake, and is not a legitimate purpose for any governmental classification. Plaintiffs should not have to bear the burden of Congress's desire to score political points by refusing to recognize Plaintiffs' marriages and treat them equally.

For these reasons, Plaintiffs are entitled to summary judgment in their favor. The material facts are not in dispute. Each Plaintiff is suffering harm traceable directly to the Defendants' refusal to recognize their State-sanctioned marriages. Each Defendant's refusal to do so is the direct and proximate result of DOMA. Each Plaintiff has brought an as-applied challenge to DOMA because these refusals deny them legal rights and protections to which they would

otherwise be entitled. There are no factual issues to resolve on any of these points, only a pure question of law: whether DOMA is unconstitutional as applied to these Plaintiffs.

The answer to that question is clear. There are no legitimate or remotely plausible justifications for the federal government's continued refusal to recognize the Plaintiffs' actual marital status. Thus, the Court should grant Plaintiffs' Motion for Summary Judgment.[2]

STATEMENT OF FACTS

A. Federal Marriage-Based Laws, Programs, Rights, and Responsibilities.

Federal law presently uses marital status in determining eligibility for federal rights, responsibilities, and opportunities in approximately 1,138 different federal laws. *See* Report of the U.S. Government Accountability Office, Office of General Counsel, January 23, 2004 (GAO-04-353R) (Affidavit of Gary D. Buseck ("Buseck Aff."), Ex. A) (hereinafter "2004 GAO Report"). Federal law often affords more favorable treatment, or greater rights, to married persons than it does to single persons. At the same time, it is the States that marry people and not the federal government. Therefore, until DOMA, the federal government had relied on state determinations of marital status in determining eligibility for federal marital

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[2]This is not a case seeking the right to marry. Plaintiffs are *already* married. *Compare Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (seeking right of unmarried same-sex couples to marry). This case instead concerns the different and more burdensome treatment of Plaintiffs, married couples of the same sex, as compared to married couples of different sexes, notwithstanding the formal recognition of Plaintiffs' marital and family relationships by the States of Connecticut, Vermont, and New Hampshire.

rights and responsibilities.[3] *See* Separate Statement of Non-Adjudicative Facts ("SN-AF"), No. 8.

B. Plaintiffs Have Been Harmed Because DOMA Compels the Government to Deny for All Federal Purposes that They are Married.

Each Plaintiff is married to, or a surviving spouse of, another person of the same sex. And each Plaintiff has been concretely harmed because DOMA forbids the federal government, including the Defendants in this case, from acknowledging that reality. Neither the harms suffered by each Plaintiff, nor the fact that such harms have been or are being caused by Defendants' treatment of Plaintiffs as unmarried, can reasonably be disputed.

Three of the Plaintiff couples seek spousal protections based on their (or their spouse's) employment with the United States government. Plaintiff Joanne Pedersen, after more than 30 years of service as a civilian employee of the Department of the Navy, Office of Naval Intelligence, has been unable to add her spouse, Plaintiff Ann Meitzen, to the health insurance coverage she receives

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[3]Federal law looks to marital status across a vast range of laws and programs in which being married can be advantageous or disadvantageous, involving nonpecuniary as well as pecuniary rights and responsibilities. For instance, married persons enjoy the right under federal law to invoke the marital confidences and spousal privileges in federal court, *see* Fed. R. Evid. 501, the right to sponsor a non-citizen spouse for naturalization, *see* 8 U.S.C. § 1430, and to obtain conditional permanent residence for that spouse, *id.* § 1186b(a)(2)(A). Married persons are also subject to a number of legal obligations, such as conflict-of-interest rules governing federal employment and participation in federally funded programs, *e.g.*, 5 U.S.C. § 3110, restrictions on employment with or appointment to the judiciary, *see* 28 U.S.C. § 458, and various ownership limitations and certifications related to telecommunications and broadcast licensing, *see e.g.*, *In re Applications of Algreg Cellular Engineering*, 12 F.C.C.R. 8148, 8181-82 ¶83 (1997). In the well-known case of the so-called "marriage penalty," some married persons receive less favorable treatment under the tax code than similarly situated unmarried persons.

under the Federal Employees Health Benefits Program ("FEHB").[4] Despite FEHB's stated purpose of providing support and security for federal wage-earners and their families,[5] DOMA operates to preclude Plaintiff Pedersen from obtaining insurance for Plaintiff Meitzen, her lawfully married spouse. As a consequence, Plaintiff Meitzen has had to continue full-time employment in order to maintain health insurance, even though part-time work would be much better for her overall health and for her ability to manage chronic health conditions. Plaintiffs' Local Rule 56(a)1 Statement in Support of Plaintiffs' Motion for Summary Judgment ("SUF"), Nos. 5-11; Joint Affidavit of Joanne Pedersen & Ann Meitzen ("Pedersen-Meitzen Aff."), ¶¶ 1, 4, 6, 9-14.

Similarly, Plaintiff Damon Savoy, a federal government attorney with the Office of the Comptroller of the Currency, has been denied the right to add his

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[4]FEHB is a comprehensive program of health insurance for federal civilian employees, annuitants, former spouses of employees and annuitants and their family members. 5 U.S.C. § 8905. Through the Defendant Office of Personnel Management, an FEHB enrollee can choose whether to enroll for individual ("Self Only") coverage or for "Self and Family" coverage. *Id*. §§ 8902-8903, 8906, 8913 (OPM regulation); 8905, 8906 (types of coverage). Under OPM's regulations, "[a]n enrollment for self and family includes all family members who are eligible to be covered by the enrollment," 5 C.F.R. § 890.302(a)(1); and an enrolled employee can change from individual to "self and family" coverage during an "open season" or within 60 days after a change in family status, "including a change in marital status." *See* 5 U.S.C. § 8905(f); 5 C.F.R. § 890.301(f), (g). A "member of family" is defined to include "the spouse of an employee." 5 U.S.C. § 8901(5).

[5]The purposes of FEHB are (1) to make federal employment competitive with benefits offered in the private sector, and (2) to provide support and security for federal wage-earners and their families. *See* H.R. Rep. No. 86-957 at 1-2 (1959) ("FEHB H. Rep.") (goal was to "close the gap" and improve the "competitive position" of the government vis-à-vis private enterprise "in the recruitment and retention of competent civilian personnel," and recognizing "urgent need" for an employee health benefits program as "essential to protect wage-earners and their families"); *Nat'l Fed'n of Fed. Emps. v. Devine*, 679 F.2d 907, 913 n.9 (D.C. Cir. 1982) (noting both purposes); *Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 270-71 (5th Cir. 2007) (same).

spouse, Plaintiff John Weiss, to his health insurance coverage. SUF Nos. 65, 69-70. Since Plaintiff Weiss gave up his career to focus full-time on raising the couple's three adopted children (now ages 12, 10, and 2), the couple has been forced into the private insurance market for his coverage. SUF Nos. 66-68. That process was both difficult and expensive because Plaintiff Weiss had a pre-existing condition, diabetes. SUF No. 68, 71; *see also* Joint Affidavit of Damon Savoy & John Weiss ("Savoy-Weiss Aff."), ¶¶ 2-6, 8, 10, 12-17.

Plaintiffs Raquel Ardin and Lynda DeForge are both Navy veterans. Lynda is a current U.S. Postal Service ("USPS") employee with more than 25 years of service, and Raquel is a retired USPS employee, having served for 25 years. SUF Nos. 21-22. Both have "Self Only" FEHB coverage and would prefer to have Plaintiff DeForge simply enroll in a "Self and Family" plan for the two of them. However, DOMA precludes that option. SUF Nos. 32-36; *see also* Joint Affidavit of Raquel Ardin & Lynda DeForge ("Ardin-DeForge Aff."), ¶¶ 3-7, 29-36. Plaintiff DeForge has also been denied FMLA leave to care for Plaintiff Ardin, who suffers from a serious medical condition that requires DeForge to take off a day of work every three months to transport her and care for her.[6] DOMA precludes Plaintiffs DeForge and Ardin from enjoying the stability and security that FMLA is intended

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[6]Under the Family and Medical Leave Act ("FMLA"), eligible employees are entitled to 12 workweeks of unpaid leave annually to, among other things, "care for the spouse … if such spouse … has a serious health condition." 29 U.S.C. § 2612(a)(1)(C). Insofar as relevant to this case, it is administered by the Department of Labor, which, by regulation, defines "spouse" to mean "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides …." *Id.* § 2654, 29 C.F.R. §§ 825.113(a), 825.122(a).

to provide to families.[7] H.R. Rep. No. 103-8(II), at 17 (1993) (noting that married couples pledge to care for each other, and the FMLA "allows spouses to fulfill this obligation. . . ."). This lack of FMLA leave has limited Plaintiff DeForge's options to deal with her own and her spouse's medical needs; caused her to delay surgery she needs; and created unnecessary stress and worry. SUF Nos. 20, 23-31; Ardin–DeForge Aff. ¶¶ 1-2, 14-26.

Two Plaintiff couples have suffered adverse income tax consequences from being treated as single for purposes of the Internal Revenue Code.[8] Plaintiffs Geraldine Artis (a former employee of the Connecticut Department of Developmental Services and current student) and Plaintiff Suzanne Artis (a librarian), together the parents of three children, have been forced to file federal income tax returns as "head of household" and "single," notwithstanding that

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[7]Congress's express purposes for FMLA included balancing "the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1). For Congress, this new "minimum labor standard" was "cost effective" "because when families fail it is often the public sector that picks up the tab." S. Rep. No. 103-3, at 4-5, 18 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6-7, 20.

[8]Under the Internal Revenue Code, the income tax imposed depends on the taxpayer's filing status. 26 U.S.C. § 1. A "married individual . . . who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household." 26 U.S.C. § 1(a), (b), (c). Federal tax law has long permitted married couples to pool their income and deductions on a joint return and compute tax on their combined income as an economic unit. *See, e.g.*, *Helvering v. Janney*, 311 U.S. 189, 192, 194-95 (1940) (approving the principle expressed in an opinion of the Solicitor of Internal Revenue, Sol. Op. 90, 4 C.B. 236, 238 (1921), that a joint return "is treated as the return of a taxable unit" and acknowledging Congressional "policy set forth in substantially the same terms for many years . . . to provide for a tax on [a married couple's] aggregate net income"); H.R. Rep. No. 67-350, at 13 (1921), *as reprinted in* 1939-1 C.B. (Pt. 2) 168, 178 (referencing a married couple's right "in all cases to make a joint return and have the tax computed on [their] combined income").

they have been married since 2009. They have borne a higher aggregate tax burden as a result. SUF Nos. 47-49, 53; Joint Affidavit of Geraldine Artis & Suzanne Artis ("Artis Aff."), ¶¶ 1-3, 8, 13-14, 16. Plaintiffs Bradley Kleinerman and James ("Flint") Gehre, respectively a human resources director and stay-at-home parent of the couple's three sons, have similarly faced higher income taxes because of their inability to file jointly. SUF Nos. 55-61; Joint Affidavit of Bradley Kleinerman & James Flint Gehre ("Kleinerman-Gehre Aff."), ¶¶ 1-4, 8-11.

One of the Plaintiffs, widower Gerald Passaro – although he and his spouse, Thomas Buckholz, had paid into the Social Security system and otherwise met all the eligibility conditions – was denied the "One-Time Lump-Sum Death Benefit" of $255 that would have been available if his now-deceased spouse had been a wife rather than a husband.[9] SUF Nos. 18-19; Affidavit of Gerald V. Passaro II ("Passaro Aff."), ¶¶ 27-32. Because of DOMA, Plaintiff Passaro, who previously worked as a hairdresser but now depends upon Social Security disability benefits, also has been denied the Qualified Preretirement Survivor Annuity ("QPSA") that is guaranteed to a surviving spouse under a defined benefit pension plan such as the plan of the Bayer Corporation under which his husband, Thomas Buckholz, a senior chemist, had been a vested

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[9]The Social Security Act provides, in part, survivors' benefits for eligible persons, including the Lump-Sum Death Benefit that is available to the surviving widow or widower of an individual who has an adequate level of earnings. 42 U.S.C. §§ 402(*l*), 413(a), 414(a), (b) and 415(a). Benefits under the Social Security program are provided to married and widowed individuals as an economic safety net. Workers earn benefits through their paid labor and contributions to the economy so that they can later rely on that economy to care for them and their dependents in old age and during periods of disability. *See Califano v. Goldfarb*, 430 U.S. 199, 208 (1977) (Social Security protects beneficiaries "against the economic consequences of old age, disability, and death").

participant at the time of his death.[10] As a result, Plaintiff Passaro cannot enjoy the protection of a stream of income that a QPSA is intended to provide to surviving spouses.[11] SUF Nos. 13-16; Passaro Aff. ¶¶ 3, 6, 11, 13-17, 20-21, 23.

Finally, Plaintiffs Joanne Marquis and Janet Geller are both retired New Hampshire school teachers who taught in private and public schools for over 68 years combined. Both are qualified retirees, receiving pensions from the N.H. Retirement System ("NHRS"). Because Plaintiff Marquis has more than 30 years of service to the State, her NHRS benefits, unlike Plaintiff Geller's, include a medical cost supplement that helps pay for her Medicare Part B supplemental insurance. That medical cost supplement also extends to a retiree's spouse.[12] But as a result of DOMA, the NHRS medical cost supplement does not extend to

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[10]A private, defined benefit pension plan is subject to both the Employee Retirement Income Security Act ("ERISA") as well as the Internal Revenue Code and is required under both statutes to provide a Qualified Preretirement Survivor Annuity ("QPSA") to the surviving spouse of any "vested participant who dies before the annuity starting date and who has a surviving spouse. . . ." 29 U.S.C. § 1055(a)(2); 26 U.S.C. § 401(a)(11)(A)(ii) (same); *see also id.* § 417(c).

[11]The object of the requirement under 29 U.S.C. § 1055 of ERISA that the surviving spouse be provided a QPSA "is to ensure a stream of income to surviving spouses. Section 1055 mandates a survivor's annuity not only where a participant dies after the annuity starting date but also . . . if the participant dies before then." *Boggs v. Boggs*, 520 U.S. 833, 843 (1997). More broadly, the "principal object of [ERISA] is to protect plan participants and beneficiaries." *Id.* at 845.

[12]A pension plan can provide a medical cost subsidy as a benefit to its retirees. In order for the pension plan to remain tax qualified under the Internal Revenue Code, the health benefit can only be extended to the retired employees, their spouses, and their dependents. 26 U.S.C. § 420(a), (b)(3), (c)(1), and (e)(1)(A) and (e)(1)(C); *see also* 26 U.S.C. § 401(h).

Plaintiff Marquis's spouse.[13] SUF Nos. 39-45; Joint Affidavit of Joanne Marquis & Janet Geller ("Marquis-Geller Aff."), ¶¶ 2-11.

Apart from these concrete financial losses, many Plaintiffs have also faced additional harm from the confusion and uncertainty that arise from having their marriages not "count" for many purposes, causing anxiety in everyday situations and inviting discrimination. SUF Nos. 30, 37, 62.

C. The 1996 Defense of Marriage Act.

Normally, each Plaintiff would be entitled to the legal benefits and protections afforded to married (or widowed) persons under each of the various federal or state programs or private plans at issue – and would be treated the same as any other married person. But they are denied those rights and benefits because of Section 3 of the 1996 Defense of Marriage Act, in which Congress excluded same-sex couples from any marriage-based rights or benefits arising under federal law:

> **CHAPTER 1--RULES OF CONSTRUCTION**
>
> **§ 7. Definition of "marriage" and "spouse"**
>
> **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.**

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[13]The Congressional purposes for allowing state and private pension plans to fund health insurance premiums for retirees under certain conditions pursuant to 26 U.S.C. §§ 401(h) and 420 would be no different from the purposes offered for the provision of health insurance under the FEHB Program. *Supra* note 4.

Prior to DOMA's enactment, the Hawaii Supreme Court had indicated that same-sex couples might be entitled to marry under the State's constitution, raising the possibility that same-sex couples would begin marrying in the near future. *See Baehr v. Lewin*, 852 P.2d 44, 59-67 (Haw. 1993). The House Judiciary Committee's Report on DOMA cited *Baehr* as part of an "orchestrated legal assault being waged against traditional heterosexual marriage," and stated that this development "threatens to have very real consequences . . . on federal law." H.R. Rep. No. 104-664, at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.") (Buseck Aff. Ex. B). Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." *Id*. at 10.[14]

The House Report acknowledged that federalism constrained Congress's power, and that "[t]he determination of who may marry in the United States is uniquely a function of state law." *Id*. at 3. Nonetheless, the Report stated that Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage'," *id*. at 12, and embraced DOMA as furthering Congress's interests in, *inter alia*, "defend[ing] the institution of traditional heterosexual marriage," *id*. The Report also claimed interests in "encouraging responsible procreation and child-rearing," and conserving scarce resources. *Id*. at 13, 18.

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[14]*Baehr* never took effect in Hawaii, as the State ultimately amended its Constitution to allow the State legislature to limit marriage to different-sex couples. *See* Haw. Const. art. I, § 23. However, six States now extend full marriage rights to same-sex couples (Iowa, New Hampshire, Connecticut, Vermont, Massachusetts, and New York (effective July 24, 2011)).

Another purpose of the Act, as stated by the House Report, was to reflect Congress's "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* at 16 (footnote omitted). The remarks of Rep. Henry Hyde, then-Chairman of the House Judiciary Committee, were blunt but typical: "Most people do not approve of homosexual conduct . . . and they express their disapprobation through the law. . . . It is . . . the only way possible to express this disapprobation." 142 Cong. Rec. H7480, H7501 (daily ed. July 12, 1996). In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion," and "an attack upon God's principles."[15] They argued that marriage by gay men and lesbians would "demean" and "trivialize" heterosexual marriage[16] and might indeed be "the final blow to the American family."[17]

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[15]142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith).

[16]*Id.* at H7494 (statement of Rep. Smith); *see also* 142 Cong. Rec. S10, 110 (daily ed. Sept. 10, 1996) (statement of Sen. Helms) ("[Those opposed to DOMA] are demanding that homosexuality be considered as just another lifestyle – these are the people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle . . . . Homosexuals and lesbians boast that they are close to realizing their goal – legitimizing their behavior . . . . At the heart of this debate is the moral and spiritual survival of this Nation."); 142 Cong. Rec. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by the homosexual extremists all across this country").

[17]*Id.* at H7276 (statement of Rep. Largent); *see also* 142 Cong. Rec. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.").

Although DOMA amended the eligibility criteria for a vast number of different benefits, rights, and privileges dependent upon marital status either directly under federal law or controlled in some fashion by federal law, the relevant committees did not engage in any meaningful examination of the scope or effect of the law, much less the way in which federal interests in the relevant programs would be affected. Congress did not, for instance, hear any testimony from agency heads regarding how DOMA would affect federal programs, nor from historians, economists, or specialists in child welfare. Instead, the House Report simply observed that the terms "marriage" and "spouse" appeared hundreds of times in various federal laws and regulations, and that those terms were generally "not defined." H. Rep. at 10. The vast reach of the Act did not become fully clear until January 1997, months after its passage, when the General Accounting Office issued a report stating that DOMA implicated more than 1000 federal laws, touching on everything from entitlement programs like Social Security to employee issues to taxation. *See* Report of the U.S. General Accounting Office, Office of General Counsel, January 31, 1997 (GAO/OGC-97-16) (Buseck Aff. Ex. C).

ARGUMENT

Summary judgment is appropriate when the pleadings, the discovery materials, and any affidavits show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Beard v. Banks*, 548 U.S. 521, 529, 534 (2006); *Pucino v. Verizon Wireless Comm'ns, Inc.*, 618 F.3d 112, 117 (2d Cir. 2010). Here, the material facts are undisputed: each Plaintiff has been harmed by DOMA's

requirement that people married to a person of the same sex must be treated for federal purposes as though they were unmarried. This discriminatory treatment violates the constitutional guarantee of equal protection.

As shown below, the constitutionality of DOMA should be given heightened scrutiny for two independent reasons. First, DOMA unfairly discriminates on the basis of sexual orientation, which bears all the hallmarks of a suspect classification, as other courts, including the Connecticut Supreme Court, and now the President and Attorney General of the United States, have found. Second, DOMA disparately burdens the core liberty interest in the integrity of one's family.

DOMA cannot survive such heightened review. Nor can it survive even rational basis review. The reasons Congress articulated when it enacted DOMA (all of which the Department of Justice has now wisely disavowed) and the new justifications that the House has conjured up for litigation are all nonsensical, counter-factual, or reflective of outright animus against gays and lesbians. Moreover, many of these justifications, coming from Congress, are inconsistent with our federalist traditions. Under any of the justifications proffered to defend DOMA, it violates the Equal Protection guarantee of the Fifth Amendment and cannot constitutionally be applied to Plaintiffs.

I. PLAINTIFFS' EQUAL PROTECTION CLAIMS REQUIRE HEIGHTENED SCRUTINY

DOMA's discrimination against Plaintiffs cannot be justified by reference to any legitimate or rational interest. *See* Part III, *infra*. But the required showing should be even higher. Laws that discriminate on the basis of sexual orientation,

such as DOMA, should be subject to heightened scrutiny. Other federal and state courts, the supreme court of this state, and now the President and Department of Justice, have all recently reached this conclusion, and this Court should as well. DOMA also disparately burdens Plaintiffs' fundamental interests in their family relationships, and independently triggers heightened scrutiny on that basis.

A. DOMA Requires Heightened Scrutiny Because It Discriminates on the Basis of Sexual Orientation.

The Equal Protection guarantee "is essentially a direction that all persons similarly situated should be treated alike," and when laws draw distinctions between persons based on certain characteristics, the presumption of constitutional validity "gives way." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). Because those characteristics "are so seldom relevant to the achievement of any legitimate state interest[,] laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Id.* at 440. "Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

DOMA on its face discriminates on the basis of sexual orientation, as the House has conceded. *See* Memorandum of Points and Authorities filed by the Bipartisan Legal Advisory Group in Support of Motion to Dismiss, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-257 (N.D. Cal. June 3, 2011), ECF No. 119-1, at 20 (hereinafter "*Golinski MTD*") ("[I]t is reasonable to regard DOMA as drawing a

line based on sexual orientation.") (Buseck Aff. Ex. D). Same-sex married couples are singled out for disparate treatment in a multitude of ways that do not apply to other married couples. Such a law requires heightened scrutiny.

A classification triggers heightened scrutiny when (1) the target group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to perform or contribute to society. *See Cleburne*, 473 U.S. at 440-41; *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). These two factors are the most important. *See, e.g.*, *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 427-28 (Conn. 2008). Courts also have sometimes considered the group's minority status and/or relative lack of political power, *see Plyler*, 457 U.S. at 216 n.14; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("minority *or* politically powerless") (emphasis added), as well as whether group members have "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

All four factors weigh heavily in favor of subjecting DOMA to heightened scrutiny.[18] This is a question of first impression in the Second Circuit as well as at the Supreme Court, which has struck down on Equal Protection grounds wholly irrational laws that distinguish on the basis of sexual orientation, but without specifying the level of review. *See Romer v. Evans*, 517 U.S. 620, 632

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[18]The term "heightened scrutiny" is used here to refer to both intermediate and strict scrutiny, i.e., to both "suspect" and "quasi-suspect" classes. Courts use the same factors to test for both strict and intermediate scrutiny. *Plyler*, 457 U.S. at 216-17; *Kerrigan*, 957 A.2d at 429-30. Plaintiffs' position is that strict scrutiny is warranted here, but in the alternative intermediate scrutiny is warranted as well.

(1996) (invalidating state constitutional amendment without deciding level of scrutiny); *see also Lawrence v. Texas*, 539 U.S. 558, 574-75, 578 (2003) (invalidating anti-sodomy statute on due process grounds but noting viability of equal protection claim); *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998) (declining to decide appropriate level of scrutiny because plaintiffs explicitly sought only rational basis review). Although other courts have in the past reached different conclusions,[19] recent cases increasingly recognize that "gays and lesbians are the type of minority strict scrutiny was designed to protect." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *In re Balas*, No. 2:11-bk-1783, 2011 Bankr. LEXIS 2157 (C.D. Cal. Bankr. June 13, 2011); *accord Kerrigan*, 957 A.2d at 431-32 ("sexual orientation meets all of the requirements of a quasi-suspect classification");[20] *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa

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[19]The Circuits that have held that classifications based on sexual orientation are not subject to heightened scrutiny virtually all did so before *Lawrence* and in many cases before *Romer*, and their reasoning has been superseded by those cases. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (citing *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), as basis for denying heightened scrutiny for sexual orientation classifications); *see also Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 n.16 (11th Cir. 2004) (en banc) (citing cases from several Circuits all decided in 1997 or earlier). In the few recent decisions asserting the applicability of rational basis review, the courts were neither presented with nor considered the factors relevant to heightened review. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006).

[20]*Kerrigan* struck down marriage discrimination laws under Connecticut's state constitution. However, the court explicitly applied the federal constitutional test due to its "evident correlation" with Connecticut's state equal protection guarantee. 957 A.2d at 426-27. *Kerrigan* has since been codified by the Connecticut legislature. *See* Conn. Gen. Stat. § 46b-20(4) (defining "marriage" under Connecticut State law as "the legal union of two persons").

2009) ("The [four] factors . . . all point to an elevated level of scrutiny.").[21] The Department of Justice has reached the same conclusion, triggering its withdrawal from defending DOMA in this case and others. *See* Dkt. 39-2 at 2 ("Holder Letter") ("Each of these [four] factors counsel in favor of being suspicious of classifications based on sexual orientation."); *see id. generally* at 2-4.

1. Gay Men and Lesbians Have Experienced A History of Discrimination.

It is beyond dispute that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," *Lawrence*, 539 U.S. at 571, and that "state-sponsored condemnation" of homosexuality has led to "discrimination both in the public and in the private spheres." *Id*. at 575. As described in the Expert Affidavit of George Chauncey, Ph.D ("Chauncey Aff."), lesbians and gay men have suffered a long history of discrimination and condemnation, *see* SN-AF Nos. 22-29; Chauncey Aff. ¶¶ 17-55, and recent advances by gay men and lesbians in reversing some forms of *de jure* discrimination have been met with fierce and continuing backlash. SN-AF 30-32; Chauncey Aff. ¶¶ 56-98. To this day, lesbians and gay men are subjected to continued public opprobrium from leading political and religious figures, face the ever-present threat of anti-gay violence, and remain vulnerable in most states to discrimination in employment, housing, and public accommodations with no legal protections. SN-AF Nos. 33-35. Even those who dispute that sexual orientation warrants heightened scrutiny do not deny that this factor is satisfied, nor has any court found to the contrary.

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[21]As in *Kerrigan*, the Iowa Supreme Court in *Varnum* used the federal constitutional framework to guide its analysis under the state constitution. *See* 736 N.W.2d at 885-86.

See Varnum, 763 N.W.2d at 889 ("The [government] does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation."); _Kerrigan_, 957 A.2d at 432; Holder Letter at 2.

2. Sexual Orientation is Unrelated to the Ability to Contribute to Society.

Likewise, there can be no credible dispute about whether sexual orientation bears a relation to one's "ability to perform or contribute to society." _Frontiero v. Richardson_, 411 U.S. 677, 686 (1973). The psychological and medical community has long confirmed that "'homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities,'" Expert Affidavit of Letitia Anne Peplau, Ph.D ¶ 30 ("Peplau Aff.") (quoting 1973 Resolution of the American Psychological Association). The House admits that gay men and lesbians serve in Congress, in the federal judiciary, and in the Executive Branch as well. SN-AF No. 39. Moreover, empirical evidence and scientifically rigorous studies have consistently found that lesbians and gay men are as able as heterosexuals to form loving, committed relationships. SN-AF No. 42. The Plaintiffs here amply illustrate this: they include public servants like a postal worker, a librarian, a nurse, a social worker, teachers, stay-at-home parents, a human resources professional, U.S. Navy veterans, a retired civilian Navy intelligence officer, and a government attorney. They have made the commitment to form families and, like millions of their fellow gay men and lesbians, are similarly woven into the fabric of everyday America, leading productive lives as spouses, family members, friends, neighbors,

coworkers, and citizens. *See generally* SN-AF Nos. 42-43, 54; Peplau Aff. ¶ 31.

3. Gay Men and Lesbians Face Significant Obstacles to Achieving Protection from Discrimination Through the Political Process.

Courts may also examine whether a group is a "minority or politically powerless," *Lyng*, 477 U.S. at 638, although the Supreme Court has held classifications subject to heightened scrutiny absent such a showing. *See Frontiero*, 411 U.S. at 685-86 (noting that "when viewed in the abstract, women do not constitute a small and powerless minority," but nonetheless holding that sex-based classifications should be subject to heightened scrutiny); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (discrimination against *majority* racial groups subject to strict scrutiny). Political power can be defined as "a person's or group's demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system." Expert Affidavit of Gary M. Segura Ph.D ¶ 13 ("Segura Aff."). "Gay men and lesbians do not possess a meaningful degree of political power, and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests." *Id.* ¶ 8; SN-AF Nos. 58-59, 63-64.

The obstacles to political power for gay men and lesbians are manifold. Gay men and lesbians are both nationally and locally a minority; a recent study estimates the population at approximately 3.5%. SN-AF Nos. 55-56; Segura Aff. 45. In addition, they are geographically dispersed, and, unlike many minorities, may go unidentified out of fear of ostracism and even violence, further eroding the potential for political mobilization. *Id.* ¶¶ 49, 56-64. Public hostility and

prejudice, as measured by objective political science survey tools, is markedly more pronounced than toward any other minority group but atheists and undocumented aliens, and is openly exploited by politicians for political support. *Id.* ¶¶ 69, 72-74. And political opposition to legal protections and benefits for gay men and lesbians is powerful, mobilized, and well-funded, as illustrated by the coast-to-coast campaigns those opponents are able to wage and win, including ballot measure repeals of marriage rights in California and Maine. *Id.* ¶¶ 79-80.

Evidence also abounds that the political process alone provides gay men and lesbians with inadequate protections. For example, there is no federal prohibition against discrimination based on sexual orientation in employment, housing, public accommodations, or education, *id*., nor any such protection in 29 states. SN-AF Nos. 67, 70. Anti-marriage statutes or constitutional amendments have been passed by 41 states. SN-AF No. 71. Gay men and lesbians cannot adopt children in five states. Segura Aff. ¶ 39. Openly gay officials are seriously underrepresented in political office in proportion to the gay and lesbian population. SN-AF No. 74; Segura Aff. ¶¶ 45-47. And the relentless use of ballot initiatives (more than used against any other group in history) continually circumscribes rights gained or imposes new restrictions on gay and lesbian people around the country. SN-AF Nos. 64-65; Segura Aff. ¶¶ 40-44.

That there have been some modest or even important political initiatives in recent years that have helped mitigate the discrimination against lesbians and gay men does not alter this analysis. SN-AF No. 61; Segura Aff. ¶¶ 15-17. Many were won through the courts. *See, e.g., Lawrence*, 539 U.S. 558; *Romer*, 517 U.S.

620; *Kerrigan*, 957 A.2d 407; *Varnum*, 763 N.W.2d 862. Until 2009, when sexual orientation was added to federal anti-hate crime legislation, no federal legislation had ever existed to protect individuals on the basis of sexual orientation. Segura Aff. ¶ 31. The new protection passed only as a rider to the Defense Appropriations Bill, and even then garnered substantial opposition. *Id.* Additional progress recently – including repeal of the military's ban on lesbian and gay service members by a lame-duck congress following two judicial findings of unconstitutionality, *see Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010); *Witt v. U.S. Dep't of Air Force*, 739 F. Sup. 2d 1038 (W.D. Wash. 2010), while important, hardly demonstrates meaningful political capital – particularly as there was overwhelming popular support for repeal long before any legislative progress was made. SN-AF No. 69; Segura Aff. ¶ 32. Moreover, eliminating express, *de jure* discrimination, such as "Don't Ask, Don't Tell," hardly constitutes evidence of affirmative political power. SN-AF No. 61; Segura Aff. ¶ 25.

Taken as a whole, these facts show a pervasive and intractable pattern of political obstacles. At a minimum, gay men and lesbians "presently have no greater political power – in fact, they undoubtedly have a good deal less such influence – than women did in 1973, when the United States Supreme Court, in *Frontiero*, held that women are entitled to heightened judicial protection." *Kerrigan*, 957 A.2d at 452 (citing *Frontiero*, 411 U.S. at 688); Holder Letter at 3 (same); *Varnum*, 763 N.W.2d at 894; *see also* SN-AF No. 66.

4. Sexual Orientation Is an Enduring and Defining Characteristic of a Person's Identity.

Although not necessary to trigger heightened scrutiny, *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are suspect class notwithstanding ability to opt out of class voluntarily), courts are particularly suspicious of laws that discriminate based on "obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group." *Bowen*, 483 U.S. at 602. This stems from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686 (quotation marks omitted). A law therefore warrants heightened scrutiny if it imposes a disability based on a characteristic that a person cannot, or should not be asked to, change.

Courts have increasingly acknowledged that sexual orientation is just such a defining characteristic, forming an integral part of one's identity. *See Lawrence*, 539 U.S. at 576-77 ("the protected right of homosexual adults to engage in intimate, consensual contact . . . [represents] an integral part of human freedom"); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("[O]ur decisions have declined to distinguish between status and conduct in this context."). Given that (1) the purpose of the immutability inquiry is to assess whether a person can reasonably change the characteristic to avoid discrimination, and (2) the acknowledged centrality of sexual orientation to a person's identity, a variety of courts agree that even *absent* a showing that sexual orientation is absolutely immutable, it would work a fundamental injustice to ask gay men and lesbians to chose between retaining their identity and somehow

changing to gain parity with their heterosexual brethren. *E.g.*, *Varnum*, 763 N.W.2d at 893; *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); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008); *cf. also* Holder Letter at 3 ("[I]t is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination."); *Christian Legal Society*, 130 S. Ct. at 2990; *see also* SN-AF Nos. 76, 87. In sum, "[t]his prong of the suspectness inquiry surely is satisfied when, as in the present case, the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Kerrigan*, 957 A.2d at 438.

Moreover, there is a widespread scientific consensus, increasingly adopted by courts, that sexual orientation *is* immutable under any reasonable interpretation of that term. *See id.* at 436-37 (while courts reach a variety of conclusions, "many, if not most, scholarly commentators" find sexual orientation immutable); SN-AF No. 77. Although there is not yet scientific agreement on what factors *cause* sexual orientation, studies consistently show that most adults report having sexual attractions to and experiences with members of *only* one sex. SN-AF Nos. 78-79. The prevalence of long-term relationships among both heterosexuals and gay men and lesbians provides further evidence of the stability of sexual orientation over time. SN-AF No. 43;. Peplau Aff. ¶¶ 21-23. Studies also reveal that "the vast majority" of gay men and lesbians report to researchers that "they experienced no choice or very little choice about their sexual orientation." *Id.* ¶ 25. And, as one judge has observed, "[s]cientific proof

aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation." *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment).

Those who disagree with this scientific consensus often cite anecdotal evidence of religious or therapeutic "cures" to homosexuality, but these do not withstand scientific scrutiny. A recent American Psychological Association ("APA") task force concluded that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm." Peplau Aff. ¶ 26; SN-AF No. 83. Participants in studies continued to experience same-sex attractions and did not report verifiable, significant change to other-sex attractions. Peplau Aff. ¶ 26 n.14. Critically, the APA task force found evidence that many who unsuccessfully attempt to change their sexual orientation experience considerable psychological distress. Peplau Aff. ¶ 26. It is little surprise then that no major mental health professional organization has approved interventions to change sexual orientation, and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments. SN-AF No. 84; Peplau Aff. ¶ 27.

Given this unified chorus from the scientific community and the absence of any substantial evidence to the contrary, there can be little doubt that sexual orientation is entirely or largely immutable. *Kerrigan*, 957 A.2d at 437 ("we do not doubt that sexual orientation—heterosexual or homosexual—is highly resistant to change"); *Varnum*, 763 N.W.2d at 893; Holder Letter at 3 ("a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable").

Whether it is impossible to change one's sexual orientation, or "only" extraordinarily rare and likely very psychologically harmful, Peplau Aff. ¶ 26 & n. 14, laws that discriminate on that basis warrant heightened scrutiny.

B. DOMA Disparately Burdens the Fundamental Interest in Maintaining Existing Family Relationships.

Heightened scrutiny is also warranted on a separate, independent ground. All of the Plaintiffs are (or were until widowed) legally married. DOMA selectively burdens the integrity of those most intimate family relationships and disadvantages them relative to others. First, by its sweeping reclassification of the Plaintiffs as "single" for any and all federal purposes, DOMA erases their marriages under federal law. Second, by throwing Plaintiffs' marriages into a confusing legal status in which their marriages "count" for some purposes but not others, DOMA erases much of the meaning their marriages would otherwise have – in both public and private settings – and relegates them to second-class status. SUF Nos. 12, 37, 46, 54, 63, 72. DOMA should thus face heightened scrutiny for the additional reason that it disparately burdens Plaintiffs' constitutionally protected interest in the integrity of their families.

Classifications that disparately burden fundamental rights – such as family integrity – demand heightened Equal Protection scrutiny regardless of whether those disadvantaged (in this case, married same-sex couples) constitute a class that would otherwise trigger heightened review. *See, e.g.*, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (discrimination among veterans depending on whether they entered service from New York requires strict scrutiny due to effect on right to travel); *Harper v. Virginia State Bd. of Elections*,

383 U.S. 663, 672 (1966) (poll tax subject to strict scrutiny due to effect on right to vote); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659-60 (1994) (law discriminating between different types of media subject to intermediate scrutiny due to impairment of First Amendment rights); *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (restriction on minors' right to free movement subject to intermediate scrutiny).

The right to maintain family relationships free from undue government restrictions is a long-established and fundamental liberty interest. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (acknowledging "freedom of personal choice in matters of marriage and family life") (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)); *Stanley v. Illinois*, 405 U.S. 645, 651-52, 658 (1972) (denying non-marital father an opportunity to resume custody on mother's death results in "dismemberment of his family"); *Lawrence*, 539 U.S. at 574 (confirming that "persons in a homosexual relationship may [also] seek autonomy" for "personal decisions relating to marriage, procreation, . . . family relationships, child rearing, and education"); *Riviera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir. 1982) (half-sister and foster parent to half-brother and -sister had due process liberty interest in "preserving the integrity and stability of their extended family").

Indeed, even if the familial interests at stake for Plaintiffs were somehow not considered "fundamental," they are clearly of great importance, which under existing law must inform the level of review. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) (holding that despite the absence of fundamental right to vote for

President, voters were entitled to "equal dignity," and disparate recount standards violated the Equal Protection Clause); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 127 (1996) (holding that although there is no fundamental right to appeal state judicial determinations, barriers to appeal by an indigent appellant in parental termination proceeding violated the Equal Protection Clause); *Plyler*, 457 U.S. at 219-21 (holding that although illegal aliens are not a suspect class and public education is not fundamental right, the importance of the interest in education warrants striking down measure restricting access to public school); *Witt*, 527 F.3d at 816 (applying intermediate scrutiny in challenge to military's "Don't Ask, Don't Tell" policy because it impinged on liberty interest recognized in *Lawrence*).

Plaintiffs have married and formed families. Yet those family relationships are burdened by Defendants' wholesale refusal to afford their marriages any legal recognition; Plaintiffs are unable to enjoy many of the benefits of marriage that "constitute ordinary civic life in a free society" and that are taken for granted by different-sex married couples. *Romer*, 517 U.S. at 631. DOMA does not merely deprive Plaintiffs of discrete selected federal "benefits" (although it does), it sweeps so broadly and indiscriminately as to effect a change of their legal status – sundering the whole and converting them from "married" to "single" for all federal purposes. In so doing, it strips Plaintiffs' closest familial relationships of much of their legal meaning, depriving them not only of the multitude of rights and benefits that accrue to marriage under federal law, but also of the unique public validation, social recognition, respect, support, and private and personal

value that come with marriage. Peplau Aff. ¶¶ 34-37. Section 3 even conscripts Plaintiffs into denying the existence of their own marriages through civil and criminal statutes that prohibit them from acknowledging those marriages in dealings with the federal government, such as on federal forms. SUF Nos. 54, 63.

This enforced reclassification of Plaintiffs' closest and most intimate family relationships by the federal government interferes with Plaintiffs' relationships beyond the federal programs specifically at issue by signaling that their marriages lack full legal effect, thereby causing confusion among third parties and inviting private disrespect for Plaintiffs' relationships. In short, by complicating what should be perfectly simple, imposing confusion and stigma, and undermining the legal effect of State-sanctioned marriages, DOMA substantially burdens Plaintiffs' fundamental interest in their existing family relationships. This wholesale undermining of their State-sanctioned family relationships necessitates heightened scrutiny.

II. DOMA FAILS HEIGHTENED SCRUTINY

For a classification to survive heightened scrutiny (whether "strict" or "intermediate"), it must be "tailored to serve a compelling state interest," or in the very least be "substantially related" to an "important government objective." *Cleburne*, 473 U.S. at 440-41. The Court must undertake a "searching analysis," and uphold the challenged classification only on the basis of an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. at 537; *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). Classifications based on "overbroad generalizations," stereotypes and "knee jerk reactions" will not be upheld. *United States v. Virginia*, 518 U.S. at 532-33; *Ramos*, 353 F.3d at 187

(striking down town ordinance imposing curfew on juveniles as insufficiently tied to town's policy objectives).

Finally, any objective proffered by the government must be the *actual*, contemporaneous reason for a law, and not one invented by the government's counsel afterwards. *See United States v. Virginia*, 518 U.S. at 533 (rationale "must be genuine, not hypothesized or invented *post hoc* in response to litigation").

As explained in Part III.C, *infra*, none of the justifications that Congress offered at the time it enacted DOMA satisfies even rational basis review. They are certainly not sufficient to withstand the "searching analysis" required for heightened scrutiny. As for purported justifications offered more recently during litigation, these are plainly invented after-the-fact, and so are *per se* insufficient to uphold the statute. *See United States v. Virginia*, 518 U.S. at 535-36. For these reasons, DOMA is unconstitutional as applied to Plaintiffs.

III. DOMA FAILS EVEN RATIONAL BASIS REVIEW

DOMA also cannot be sustained under rational basis review. That test requires that classifications be "rationally related" to a "legitimate" government interest. *Cleburne*, 473 U.S. at 446; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). Courts must ensure that disadvantages are not imposed arbitrarily or for improper reasons. *Romer*, 517 U.S. at 634-35 (striking down measure based on "bare desire to harm" gay and lesbian persons); *Soto-Lopez v. New York City Civil Service Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985) (civil service provision improperly favored long-term residents over new ones), *aff'd*, 476 U.S. 898 (1986). DOMA does precisely that, and in the process utterly disregards 200 years of federalist tradition. It cannot withstand any level of review.

A. A Uniform Federal Definition of Marriage Contrary to State Law Is Contrary to the Federalist System of Dual Sovereignty.

At the outset, any claims that the federal government has an interest in a federal definition of marriage – whether to promote some preferred family law policy, to advance "traditional" marriage and biological procreation, or to further some newly-discovered interest in "consistency," *see infra* (discussing each individually) – share a common characteristic: encroachment by the *federal* government into an area traditionally reserved entirely to the states. The federal government has no business making family law directly, and has never before tried to do so indirectly by adopting a uniquely "federal" definition of marriage contradicting state law.

Under rational basis review, this matters for two reasons, involving the legitimacy of the House's asserted rationales, and the extent of the review engaged in by the Court. First, as described in Part III.B *infra*, one of the requirements of rational basis review is that an interest must be "properly cognizable" by the level of government asserting it, and "relevant to interests" it "has the authority to implement." *Bd. Of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 366 (2001) (quoting *Cleburne*, 473 U.S. at 441). Because of the constitutional allocation of authority over marriage to the States, Congress's mere desire to countermand State family law policies with which it disagrees fails to satisfy this requirement. Second, under rational basis review, anomalous and unprecedented legislation receives less deference; the "absence of precedent for" an invidious classification "is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether

they are obnoxious to the constitutional [equal protection] provision.'" *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). DOMA represents precisely such a radical break demanding thorough consideration.

As to federal interest, regulation of marriage, of course, has "long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The power to establish criteria for marriage, and to issue determinations of marital status, lies at the very core of the States' sovereign authority.[22] The Supreme Court has made this point repeatedly and emphatically. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("[t]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (regulation of marriage touches on the police power, "which the Founders denied the National Government and reposed in the States…."); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id*. at 716 (Blackmun, J., concurring) ("declarations of status, *e.g.* marriage, annulment, divorce, custody, and paternity" lie at the "core" of domestic relations law reserved to States); *Sosna*, 419 U.S. at 404; *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (State has the "absolute right to prescribe the

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[22]State power over marital relations is, to be sure, itself bounded by the Constitution. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987) (holding unconstitutional State marriage law limiting ability of prisoners to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional State marriage law limiting access to marriage based on financial status); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional State marriage law limiting access to marriage based on race).

conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"), *overruled on other grounds, Shaffer v. Heitner*, 433 U.S. 186 (1977). Even when the Supreme Court has been divided on the scope of federal power vis-à-vis the States, it has unanimously reaffirmed that regulation of familial relations, including marriage, remains beyond the scope of federal power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting reading of Commerce Clause that could lead to federal regulation of "family law (including marriage, divorce, and child custody)," an area "where States historically have been sovereign"); *accord id.* at 585 (Thomas, J., concurring); *id.* at 624 (Breyer, J., dissenting). Our federal system divests the federal government of the power to establish marital eligibility criteria. Accordingly, the federal government's mere desire to advance its preferred criteria *indirectly* cannot form a "valid" or "legitimate" justification for equal protection purposes.

DOMA uniquely breaks from our federalist tradition with respect to family law by rewriting wholesale the U.S. Code, the Code of Federal Regulations, and various other rules to disadvantage married same-sex couples.[23] Through its sheer breadth, DOMA, as a practical matter, arrogates to the federal government a substantial portion of the power – previously exercised only by the States – to say who is married and who is not. Moreover, it does so in a manner that

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[23]Prior to DOMA, there had been only six other such "Rules of Construction" sweeping across the entire federal code – defining "[w]ords denoting number, gender, and so forth"; "county"; "vessel"; "vehicle"; "company"; and "products of American Fisheries" – and the section had not been amended since 1951. U.S.C.A., T.1, Ch.1.

repudiates the family law of certain States while vindicating the law of others, which raises additional constitutional concerns. *Cf. Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (law that "differentiates between the States" must be justified by a showing the difference is "sufficiently related to the problem it targets" given the "historic tradition that all States enjoy equal sovereignty") (internal citation omitted).

Moreover, a "federal" definition of marriage for all purposes is unprecedented in our history. SN-AF Nos. 18-19; Expert Aff. of Nancy F. Cott., Ph.D ("Cott Aff."), ¶¶ 9-10, 88. Despite the often dramatically different family law policies the States have pursued over time, federal reliance on State determinations of marital status is a longstanding tradition – implemented in federal common law, countless federal statutes, and federal regulations. This includes programs directly affecting Plaintiffs, for example: federal income taxation, *see, e.g.*, *Dunn v. Comm'r,* 70 T.C. 361, 366 (1978) (referencing number of decisions "recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile")[24]; federal employee benefits, *see* 5 C.F.R. § 843.102 (defining "spouse" by reference to State law); and Social Security lump sum death benefits, *see* 42 U.S.C. § 416(h)(1)(A)(i) ("[a]n applicant is the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would

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[24]*See also Lee v. Comm'r,* 64 T.C. 552, 556 (1975) ("existence and dissolution [of marriage] is defined by State rather than Federal law"), *aff'd*, 550 F.2d 1201 (9th Cir. 1977); *Von Tersch v. Comm'r*, 47 T.C. 415 (1967) (same for joint filing).

find such applicant and such insured individual were validly married").[25] Indeed, even in the absence of such express incorporation, the well-established rule has been that federal law affords recognition to familial status determinations as governed by the law of the relevant State. As the Supreme Court recognized in *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956), "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id.; see also, e.g.*, *Spearman v. Spearman*, 482 F.2d 1203, 1204-05 (5th Cir. 1973) (Federal Employees' Group Life Insurance Act); *United States v. Sacco*, 428 F.2d 264, 266 & n.1 (9th Cir. 1970) (1855 immigration statute conferring citizenship on women "married to a citizen of the United States"). Federal law governing eligibility for marriage, on the other hand, has been limited to exceptional narrow situations in which the federal government *itself* has exercised the police power, such as the administration of the District of Columbia or of the territories, *see e.g. Reynolds v. United States*, 98 U.S. 145, 166 (1878), or the Freedmen's Bureau, which briefly regulated marriage when southern states had not yet reconstituted their

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[25]Examples are endless. *See, e.g.*, 20 C.F.R. § 404.345 (Social Security) ("If you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met."); 38 U.S.C. § 103(c) (Veterans' benefits); 20 C.F.R. § 10.415 (Workers' Compensation); 45 C.F.R. § 237.50(b)(3) (Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans' Pension and Compensation).

governments. *See* SN-AF No. 14; Cott Aff. ¶¶ 74-80.[26]

The scope of federal programs is ultimately a question of federal law. But the historic federal practice of looking to and incorporating State law to determine marital status reflects a reality of the federal system of dual sovereignty: States, not the federal government, have responsibility over family law, and the federal government rarely if ever has a valid interest in disregarding determinations of family status made by the States, even within the scope of federal rights or federal programs. DOMA may pay lip service to federalist concerns by limiting its application to federal law, but there is no mistaking the reality of what it does: leverage the vast size and reach of the federal government in order to implement an all-purpose, "national" family law. As a practical matter, DOMA eviscerates the historic power of the States to say who is "married." The concerns that such an exercise of federal power raises for the system of dual sovereignty, and its departure from centuries of federalist tradition, require close scrutiny of the interests advanced by Defendants to overcome an equal protection challenge.[27]

B. Rational Basis Review is Not "Toothless"

None of the interests asserted on behalf of DOMA are capable of satisfying

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[26]Congress has contemplated regulating marriage in the past, but when it has done so, it has not been by legislation but by proposing constitutional amendments – tacitly acknowledging that regulating marriage is beyond the scope of its legislative powers. *See* Cott Aff. ¶¶ 29-30; *see also* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 Wash. U. L.Q. 611 (2004).

[27]In the very least, for all of these reasons, the challenged portion of DOMA in no way promotes "state sovereignty," another interest proffered by Congress. *See* H. Rep. at 16-18. The Court need not decide whether this interest would be sufficient to justify Section 2 of DOMA, which is not at issue in this litigation.

the requirements of rational basis review: legitimacy, logic, and plausibility. Although less exacting than heightened scrutiny, rational basis review is not "toothless." *Matthews v. de Castro*, 429 U.S. 181, 185 (1976). First, although such review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *FCC v. Beach Communication, Inc.*, 508 U.S. 307, 313 (1993), the interest claimed must still be "legitimate." As discussed with respect to the federal government's lack of a cognizable interest in regulating marriage in Part III.A *supra*, that means that a governmental interest must be more than a proper basis for government action in the abstract. It also means "properly cognizable" by the governmental body asserting the interest, *Cleburne*, 473 U.S. at 448, and "relevant to interests" the classifying body "has the authority to implement." *Garrett*, 531 U.S. at 366 (2001) (quoting *Cleburne*, 473 U.S. at 441); *see also Plyler*, 457 U.S. at 225 (overturning State law discriminating against aliens and noting that although it is a "routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status . . . only rarely are such matters relevant to legislation by a State") (internal quotation marks omitted); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("[I]ndividuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest."); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976) (Civil Service Commission could not justify rule barring employment of aliens because asserted interests in encouraging nationalization were "not matters which are properly the business of the Commission"). As demonstrated above, this concern is particularly acute here,

where the federal government has legislated regarding determination of marital status, a quintessential State, rather than federal, concern. *See* Part III.A, *supra.*

Second, the classification must be "narrow enough in scope and grounded in sufficient factual context … to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33. While the classification need not be perfect, it still "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe*, 509 U.S. 312, 321 (1993), and the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446; *Garrett*, 531 U.S. at 366 n.4 (measure will fail rational basis review where the "purported justifications . . . ma[k]e no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects"). As the Supreme Court made clear in *Romer*, rational basis review will invalidate a measure whose "sheer breadth" is "discontinuous with the reasons offered for it . . . ." 517 U.S. at 632; *see also, e.g.*, *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) (striking down Marine Corps' policy of discharging all pregnant women as both over- and under-inclusive).

Third, although the government may not bear the same burden of proving facts supporting a measure as under heightened scrutiny, the requirement of a "reasonably conceivable state of facts" still demands that the claimed factual basis for a categorization be plausible. A measure will fail rational basis review "when all the proffered rationales for a law are clearly and manifestly implausible." *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275,

1280 (11th Cir. 2004) (Birch, J., concurring); *accord Romer*, 517 U.S at 635 (rejecting justifications where "[t]he breadth of the [measure] is so far removed from these particular justifications that we find it impossible to credit them"); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (law discriminating between married and unmarried persons in access to contraceptives "so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim"); *Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001) (invalidating law where government's proffered rationale "surely approached" "the limits of rational speculation") (internal quotation marks and citations omitted).

As previously explained, when Congress enacted DOMA, it made clear that it was doing so in order to: "encourage[e] responsible procreation and child-rearing," "defend[] and nurture the institution of traditional heterosexual marriage," "preserve[] scarce government resources," and "reflect[] and honor a collective moral judgment about human sexuality." *Supra* at Statement of Facts, Part C. During litigation, the House has also purported to discover new interests in continuing federal use of the "historic" definition of marriage and in "consistent" treatment of all same-sex couples nationwide. *See Golinski MTD* at 23-25.[28] As shown below, none of these justifications is remotely sufficient to survive rational basis review.

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[28]Plaintiffs requested the House to identify during discovery in this case the bases that it contends support DOMA, but it has categorically refused to even identify what its contentions are. *See* Buseck Ex. G (House's Responses to Plaintiffs' Interrogatories) at Responses No. 1 and 2. Therefore, Plaintiffs respond herein to arguments the House has raised in other litigation challenging the constitutionality of DOMA.

C. No Contemporaneous Interest Mentioned by Congress Is Sufficient to Uphold DOMA.

None of Congress's actual, contemporaneous rationales can rationally support DOMA's invidious classification against married same-sex couples.

1. DOMA Does Not Promote "Responsible Procreation and Child-Rearing."

Congress's purported interest in encouraging "responsible procreation and child-rearing" as a justification for DOMA does not withstand any level of review. Long before DOJ determined that DOMA was subject to heightened scrutiny, it disavowed this justification as a basis to uphold the statute, in light of the overwhelming consensus "among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388-89 (D. Mass. 2010); *id.* at n.106 (noting DOJ agreement on this point); SN-AF Nos. 48-49; *accord* Expert Affidavit of Michael Lamb, Ph.D ("Lamb Aff."), ¶¶ 28-31. This consensus has been recognized and adopted by the states in which the Plaintiffs live, each of which has determined that including same-sex couples in marriage *promotes* child welfare. *See, e.g., Kerrigan*, 957 A.2d at 475. DOMA represents an attempt by Congress to replace these determinations with its own policy judgments regarding which married parents are most suitable and provide optimal child-rearing arrangements. But Congress's bare desire to countermand state family

law does not give rise to any cognizable *federal* interest to justify discrimination. *See* Part III.A, *supra*.[29]

Moreover, even if Congress did have a legitimate interest in countermanding state marriage laws, DOMA does not promote the child welfare goals that Congress purported to adopt. Refusing to recognize Plaintiffs' lawful marriages "does nothing to promote stability in heterosexual parenting," *Gill*, 699 F. Supp. 2d at 389, and according Plaintiffs' marriages equal weight under federal law would not "deprive opposite sex couples of any rights," *Kerrigan*, 957 A.2d at 473, or "affect the number of opposite sex couples who marry, divorce, cohabit [or] have children outside of marriage. . . ." *Perry*, 704 F. Supp. 2d at 971; *see also* Part III.C.2, *infra* (discouraging same-sex couples from marrying will not lead them to enter into healthy heterosexual marriages).

Nor does DOMA prevent same-sex couples from having children. Indeed, like many same-sex married couples, a number of the Plaintiff couples have children – three in the Artis, Kleinerman-Gehre, and Savoy-Weiss families each – that they either bore or adopted. All that DOMA does is harm these families in

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[29]This is not to say that the federal government has no cognizable interest in promoting child welfare. For example, it plays a vital role in protecting children who cross state lines, notably through the Parental Kidnapping Prevention Act (PKPA), which requires states to enforce each other's lawful child custody decrees and thereby prevents children from being caught in "jurisdictional deadlocks" between competing states. *See* 28 U.S.C. § 1738A; *Thompson v. Thompson*, 484 U.S. 174, 178 (1988). But the PKPA, unlike DOMA, does not take sides in any ongoing policy debate in the states about what is an "optimal" family structure, instead offering evenhanded protection to *all* families. DOMA and the PKPA are in fact at cross purposes – where the PKPA promotes certainty and stability, DOMA sows confusion, by casting doubt on the integrity of existing families based on the federal government's disagreement with state policy choices regarding marriage and family formation. *See* Part I.B, *supra*.

two ways: first, by depriving these children, and the other children that same-sex couples *already have*, of "the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law." *Gill*, 699 F. Supp. 2d at 388 (quotation omitted). And second, by depriving these children of the financial benefits that would accrue to their families – for example as a result of the more favorable tax treatment that many married couples receive. *See, e.g.* Artis Aff. ¶ 21 (family could use tax savings for household expenses and children's extracurricular activities); Kleinerman-Gehre Aff. ¶ 16 (family could save money for sons' education); Lamb Aff. ¶ 41 (explaining that children of same-sex married couples would benefit materially from recognition of their parents' marriages); *see also* SN-AF No. 53. DOMA's discrimination against these families "works a real and appreciable harm" on their children in both dignitary and material ways – *without* benefiting the children of heterosexual couples. *See Kerrigan*, 957 A.2d at 474.

Meanwhile, even as it excludes married same-sex couples with children from all federal marriage-related rights and benefits, the federal government continues to recognize and afford these same rights and benefits to different-sex couples who, for whatever reason, are childless. In fact, "the ability to procreate [or raise children] is not now, nor has it ever been, a precondition to marriage in any state in the country." *Gill*, 699 F. Supp. 2d at 389 (quoting *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting)).[30] On the contrary, the Constitution affirmatively

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[30]Justice Scalia's assertion accords with the conclusion of historians. *See, e.g.*, SN-AF No. 10; Cott Aff., ¶ 14-23 (states have had many purposes in regulating marriage); *id.* at 21 ("The notion that the main purpose of marriage is to provide

protects the right of married heterosexual couples *not* to procreate. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law banning use of contraceptives by married couples). Moreover, DOMA does nothing to prevent recognition of the marriages of different-sex couples who want children but are infertile – and either choose to adopt or procreate in the same way that same-sex couples do, through assisted reproduction technologies.

Thus, DOMA has no rational relationship or plausible connection to the welfare of children. It is "at once too narrow and too broad." *Romer*, 517 U.S. at 621. It deprives the children of same-sex married couples of the dignity and material benefits of recognizing their families, while at the same time extending marital benefits to millions of childless or infertile different-sex couples. *Cf. Cushman*, 531 F.2d at 1123 (Marine Corps policy of discharging all pregnant marines was not rationally related to legitimate goals of "mobility and readiness," given that many of those discharged were still capable of serving, while non-pregnant marines with comparable temporary disabilities were not discharged).

DOMA's only imaginable connection to the welfare of children is the extent to which it was intended actively to discourage same-sex couples from having children, based on their perceived unfitness, as a class, to be parents. Congress cited no medical, scientific, or social scientific evidence to support this conclusion – indeed, a consensus has formed that precisely the opposite is true. *See* Lamb Aff. ¶¶ 28-31. Congress acted, at best, on nothing more than bare

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an ideal or optimal context for raising children was never the prime mover in states' structuring of the marriage institution in the United States, and it cannot be isolated as the main reason for the state's interest in marriage today.").

"unsubstantiated generalizations" about gay and lesbian parents, driven by moral disapproval for homosexuality. Such generalizations are not a rational basis for any discriminatory classification. *See Cushman*, 531 F.2d at 1124. And, in any event, if DOMA truly does represent an effort to prevent gay and lesbian couples from becoming parents, it must be subjected to heightened scrutiny because it disparately burdens the fundamental right to decide "whether to bear or beget a child." *See, e.g., Eisenstadt*, 405 U.S. at 453 (overturning ban on sale of contraceptives to unmarried but not married individuals); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (overturning law requiring sterilization of certain types of criminals but not others in the same class). As explained above, DOMA cannot possibly survive this level of review.

2. <u>DOMA Cannot Be Justified as Preserving "Tradition" For Its Own Sake.</u>

Equally incoherent is the argument that DOMA somehow serves the goal of "defending and nurturing the institution of traditional, heterosexual marriage." H. Rep. at 12. This platitude is so vague as to be close to meaningless, but suggests either (1) that Congress was worried that marriage would become less desirable to different-sex couples unless same-sex couples were excluded, or (2) that Congress simply wanted to maintain the existing exclusion of same-sex couples from marriage rights. The first formulation bears no rational relationship to what DOMA actually does; the second is invalid on its face. And neither, in any event, is a proper federal interest.

The first formulation of the "traditional marriage" justification – preserving the value and desirability of marriage to heterosexual couples – lacks any

reasonable connection to what DOMA actually does. Not only is there no reason to believe that excluding same-sex couples from marital rights will have any effect on different-sex marriages, but DOMA is a step even further removed. It does not place *any* limitations on who can marry, it merely penalizes same-sex couples like Plaintiffs who have *already married*. There is no reason to believe that discriminating against such couples will cause more heterosexual couples to marry or strengthen existing heterosexual marriages. As the court found in *Gill*, such discrimination does not bear any "reasonable relation to any interest the government might have in making heterosexual marriages more secure." 699 F. Supp. 2d at 389.[31] Nor is there any conceivable "means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex." *Id.* Far from "strengthening" marriage as an institution, such marriages often have profound negative consequences for the couple and their children. Peplau Aff. ¶ 24.

In short, this "traditional marriage" formulation is not "narrow enough in scope and grounded in sufficient factual context … to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33.

Without some independent benefit, what remains is tradition for its own sake. But preserving the exclusion of same-sex couples from federal marital

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[31]Even if some different-sex couples might value their own actual or potential marriages more if same-sex marriages were treated as inferior under federal law, it would reflect nothing more than a bare desire to exclude same-sex couples. Accommodating such desires is not a legitimate basis for government action. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

benefits because they have "traditionally" been excluded in the past is not a constitutionally cognizable "interest." As the Supreme Court cautioned in *Romer*, discriminatory classifications must serve some "independent and legitimate legislative end." 517 U.S. at 633. Simply asserting a desire to maintain a "tradition" tautologically circles back to the challenged classification without justifying it. That is not a sufficient rational basis. *See Kerrigan*, 957 A.2d at 478; *Perry*, 704 F. Supp. 2d at 998; *see generally Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack").

Finally, even if preserving "traditional" marriage could be called an "interest," it would not be a valid *federal* interest. Although the federal government may validly pursue *federal* policies through the many federal laws and programs that the federal government bases on marriage, the bare desire to regulate and define marriage itself in accordance with Congress's own preferences, and contrary to the laws of the States, is a quintessential question of *state* concern. *See* Part III.A *supra*.

3. <u>DOMA Does Not "Preserve Scarce Resources," Which Is Not In any Event a Justification for Denying Rights Indiscriminately and Inequitably.</u>

Nor can DOMA be supported by any interest in "preserving scare resources." *See* H. Rep. at 18 (noting that Congress has "not undertaken an exhaustive examination" of financial protections related to marriage, even while asserting that "t[o] deny federal recognition to same-sex 'marriages' will thus preserve scarce government resources, surely a legitimate government

purpose"). DOMA is utterly disconnected from any goal of resource preservation. In fact, in 2004, the Congressional Budget Office concluded that federal recognition of marriages of same-sex couples by all fifty States would result in a net *increase* in federal revenue.[32] *See also* SN-AF No. 21. So DOMA costs money rather than saves it. In any event, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis by the General Accounting Office. *See* 142 Cong. Rec. H7503-05 (daily ed. July 12, 1996). And DOMA sweeps in non-pecuniary as well as pecuniary benefits. *See* Note 3, *supra*. In short, financial considerations plainly were not an actual consideration in the passage of DOMA.

Even if that were not true, while "conserving the public fisc can be a legitimate government interest, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Gill*, 699 F. Supp. 2d at 390 (internal quotations marks omitted; footnote omitted). *Any* denial of benefits to *any* group will *always* save resources, so the government must do more than state a desire to cut costs; it must justify why it chose a particular group to bear the burdens of cost-cutting, and "do more than justify its classification with a concise expression of intent to discriminate." *Plyler*, 457 U.S. at 227; *see also id.* at 229 (cost-cutting could not

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[32] *See* Congressional Budget Office, "The Potential Budgetary Impact of Recognizing Same-Sex Marriages," Jan. 21, 2004, at 1 (Buseck Aff. Ex. E) ("In some cases, recognizing same-sex marriages would increase outlays and revenues; in other cases, it would have the opposite effect. The Congressional Budget Office (CBO) estimates that on net, those impacts would improve the budget's bottom line to a small extent; by less than $ 1 billion in each of the next 10 years (CBO's usual estimating period).")

justify denying free public education to children of undocumented immigrants who "[i]n terms of educational cost and need . . . are basically indistinguishable from legally resident alien children") (internal quotation marks omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[a state] must do more than show that denying welfare benefits to new residents saves money"), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974). Here, there is "no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress['s] desire to express its disapprobation of same-sex marriage." *Gill*, 699 F. Supp. 2d at 390. This too is not rational.

4. Moral Disapproval of Homosexuality is Not a Valid Interest.

In the final analysis, DOMA makes sense only as an attempt to express disapproval of gay people and same-sex couples. In fact, Congress said as much, namely that DOMA was passed to "reflect and honor a collective moral judgment about human sexuality" that "entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H. Rep. at 15-16. This "interest" can be readily discarded as inconsistent with equal protection law.

Discrimination for its own sake, based on bare disapproval for a particular group of citizens, is not a legitimate purpose on which a classification can be based: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534; *Gill*, 699 F. Supp. 2d at 389; *In re Levenson,* 587 F.3d 925, 932 (9th Cir. 2009); *Kerrigan*, 957 A.2d at 479. "Mere negative

attitudes, or fear, unsubstantiated by factors which are properly cognizable …, are not permissible bases" for governmental discrimination. *Cleburne*, 473 U.S. at 448.

The Supreme Court has already applied these principles to invalidate other laws predicated on moral disapproval of homosexuality. *Lawrence v. Texas* explicitly repudiated the notion that the government may uniquely disadvantage gay men and lesbians because of moral disapproval for same-sex intimate conduct. *See* 539 U.S. at 577. The majority quoted and adopted Justice Stevens' dissent from *Bowers v. Hardwick* as the controlling analysis: "[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 that practice." *Id.* (quotation marks omitted). Justice O'Connor elaborated in her concurrence: "Moral disapproval of a group cannot be a legitimate government interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.'" *Id.* at 583 (O'Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633).

In short, there is no "morality" exception to the equal protection of the laws, whether applicable to gay men and lesbians or to anyone else. Otherwise invidious classifications do not become constitutional simply because they further some notion of morality.[33] Such claims amount to saying that the animus

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[33]Classifications motivated by animus are typically formulated as expressions of moral disapproval. For example, laws against interracial relationships and women working outside the home were both defended on religious and moral grounds. *See Loving*, 388 U.S. at 3 (trial judge, who sentenced couple to 25 years for interracial marriage, based decision on God's separation of the races);

that motivated a law also serves as its justification. That does not work as a constitutional matter.

D. No Post-Hoc Interest Asserted by the House In Litigation Is Sufficient to Uphold DOMA.

As Congress's actual contemporaneous rationales for DOMA lack merit, the House has in other cases discovered two *post-hoc* justifications for the law: continuing the "historic" definition of marriage, and ensuring "consistency" in federal rights and benefits. Neither passes the basic threshold of plausibility.

1. <u>Continuing the "Historic" Limitation of Federal Marital Rights, Benefits, and Responsibilities to Opposite-Sex Couples is Not a Cognizable Interest.</u>

DOMA cannot be justified by an interest in "adhering to the historic definition" of marriage at the federal level by "us[ing] the definition of marriage universally accepted in American law until just a few years ago." *See Golinski MTD* at 23. This is little more than a watered-down formulation of the "tradition" argument, and fails for the same reasons.

First, as detailed *supra*, there is no "historic" federal definition of marriage – federal law has traditionally tracked state law, and there is no independent federal interest in having a "federal" family law separate and apart from that of the states. DOMA changed historic federal practice rather than preserving it. *See*

***Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., joined by Field and Swayne, JJ., concurring) (upholding refusal to admit women to practice law based on "divine ordinance"). The moral basis for such restrictions has since been recognized as illegitimate. *See United States v. Virginia*, 518 U.S. at 550; *Palmore*, 466 U.S. at 431-32. This is not to say that moral views are *per se* impermissible as a basis for legislation but rather that moral disapproval, standing alone, cannot function as a justification for imposing disadvantages on classes of persons. *See Moreno*, 413 U.S. at 534-35; *Romer*, 517 U.S. at 634; *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring).**

Parts III.A and III.C.2, *supra*. Second, this "interest" is tautological. Even if the federal government were adopting a restriction on marital eligibility mirroring restrictions previously used by the States, that is not a *reason* to impose such a restriction after the relevant States (i.e. those where married same-sex couples reside) have changed their marriage laws. At best, it is a description of what DOMA does without a reason. As the court recognized in *Gill*, in rejecting the Justice Department's similar assertion of an interest in preserving the "status quo" in the face of changes to state marriage laws, "even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it." *Gill*, 699 F. Supp. 2d at 393. Treating married same-sex married couples as unmarried simply because they could not have married in the past is not an independent or legitimate government interest.

2. <u>DOMA Cannot Be Justified as Promoting "Consistency" In The Federal Treatment of Same-Sex Couples, Irrespective of Marital Status.</u>

DOMA also cannot be justified by the House's *ex post facto* assertion that a hypothetical Congress might have wanted to "avoid arbitrariness and inconsistency" in the eligibility criteria for federal marriage-based rights and benefits by making sure that married same-sex couples do not qualify for benefits unavailable to unmarried same-sex couples.[34] The court in *Gill* rightly rejected

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[34]The House has asserted this interest in other cases, and has claimed that this rationale was contemporaneous, based on a stray comment by then-Senator Ashcroft. *See Golinski MTD* at 5, 25. The rationale appears nowhere in the official Committee Report, however. In any event, because this rationale does not

this argument, recognizing that any "claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny." *See* 699 F. Supp. 2d at 395; *accord Levenson*, 587 F.3d at 933.

This rationale is so far divorced from both our federalist history and the federal government's current practice as to deprive it of all credibility. There has always been substantial variation in state marital eligibility criteria for different-sex couples. SN-AF Nos. 4-8. The federal government neither treats married and unmarried different-sex couples alike irrespective of marital status, nor denies federal rights and benefits to married different-sex couples if they would have been unable to satisfy marital eligibility criteria in states other than the one in which they reside. For instance, the federal government does not treat couples in lawful common-law marriages, or couples too young or too closely related to marry in other states, as unmarried if they are lawfully married in the state in which they reside. SN-AF No. 18. And yet DOMA creates such a rule for same-sex couples and same-sex couples only. Because the "consistency" rationale elevates like treatment of parties who are *not* similarly situated (married and unmarried same-sex couples living in different states) over like treatment of couples who are (married same-sex and different-sex couples), it is antithetical to the basic premises of equal protection law. *See Harlen Associates v. Incorporated Village of Mineola,* 273 F.3d 494, 499 (2d Cir. 2001) ("[t]he Equal Protection Clause requires that the government treat all similarly situated people

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even survive rational basis review, it is irrelevant whether it was contemporaneous or not.

alike") (citing *Cleburne*, 473 U.S. at 439); *Garrett*, 531 U.S. at 366 n.4 ("purported justifications . . . ma[k]e no sense in light of how the [government] treated other groups similarly situated in relevant respects").[35] And even if there *were* some interest in treating same-sex couples "consistently" irrespective of marital status, that would *still* not justify treating them as inferior to different-sex couples, as DOMA does.

The absence of a valid federal interest in having a "federal" marriage policy is borne out by history. Although some states presently extend marital rights to same-sex couples and others do not, such differences are a normal part of our system of dual sovereignty.[36] In accordance with their sovereign power over family law in the federalist system, and their right to "experiment[] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise," *Lopez*, 514 U.S. at 580-83 (Kennedy, J., concurring), the States have changed marital eligibility requirements in many ways over time. SN-AF Nos. 6-7; Cott Aff. ¶ 8 ("Despite the extent and frequency of states' variation in definitions of marriage, prior to 1996 the federal government never stipulated a uniform

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[35]This is not to say that there are never cases in which the federal government may have an interest in remedying "inequalities" in federal law created by differing state laws. *See, e.g.*, *Ricards v. United States*, 683 F.2d 1219, 1225 & n.17 (9th Cir. 1981) (approving estate tax treatment of community property to remedy "inequalities in the effect of the estate and gift taxes" that would otherwise arise between community property and non-community property states) (quoting S. Rep. No. 80-1013, at 26 (1948)). But DOMA *amplifies*, rather than ameliorates, the effect of state-to-state inequalities in marital eligibility criteria.

[36]The six States that currently extend marriage eligibility to same-sex couples represent a minority. However, "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

definition of marriage for purposes of federal law, and instead relied on states' determinations."); *id.* at ¶ 24.

Historically and to the present, "there have been many nontrivial differences in states' laws on who was permitted to marry, what steps composed a valid marriage, what spousal roles should be, and what conditions permitted divorce." Cott Aff. ¶ 25; SN-AF Nos. 5-7. State marriage laws arose and responded to local political and economic conditions, changes in the composition of the state's residents, moral or religious reasons, and to economically compete with or distinguish themselves from other states. SN-AF No. 4; Cott Aff. ¶¶ 25-28. For instance, States have long had varying rules regarding the validity of marriage without a ceremony, that is, common-law marriages. While such marriages were common in early America, unwillingness to accept marriage without government oversight increased throughout the 19th century, particularly as concern about divorce rates motivated greater state regulation. Cott Aff. ¶¶ 32-36. Thirteen states continue to recognize common law marriage for some or all purposes today (as does the federal government). Cott Aff. ¶¶ 37-38.

Marriage across the color line is a major example of state variation. Some states strengthened bans at the end of the Civil War whereas later, other states added new "racial" designations or penalties. Cott Aff. ¶¶ 45-49. In 1948, in the wake of World War II's emphasis on cultural and religious pluralism as national values, California's Supreme Court struck down a state law that had prohibited marriages between whites and either blacks or Asians for nearly a century, and

other states followed. Cott Aff. ¶¶ 55-56. This was an area of significant state variation until *Loving v. Virginia*, 388 U.S. 1 (1967). Cott Aff. ¶ 56.

Age is another example. In early America, States generally followed the English common law regarding the age for marriage (12 for women and 14 for men). Nineteenth-century reformers succeeded in raising the age in some states to an average of 16 for women and 18 for men. Cott Aff. ¶ 39. States still differ as to the minimum age for marriage. Cott Aff. ¶ 39-40. Other contested variations in state marriage laws arose from concerns about "fitness" to marry with new restrictions based on "eugenic" concerns about physical and mental health. Cott Aff. ¶ 42. There are also longstanding divisions between States about the permissibility of first cousin marriages, with the first ban appearing in 1858 and now 31 states banning it or imposing conditions on its validation. Cott Aff. ¶ 43.

This history illustrates that differences among the States in their policies regarding who can marry, contentious State-by-State social and cultural debates about shifting eligibility requirements, and a fluid and changing legal landscape as different States adopt different (and even conflicting) policies, are nothing new. State-to-State differences in marital eligibility are precisely what one would expect, and what has always happened in the past, in our system of dual sovereignty in which marriage policy is made at the State and not at the federal level. The longstanding incorporation of state marital status into federal law notwithstanding these many differences throughout our nation's history demonstrates the absence of any real and sudden new federal interest in "consistency" in marital eligibility when it comes to gay men and lesbians, but no

one else. SN-AF Nos. 18-19; *see also* Cott Aff. ¶¶ 38, 44, 57, 64, 88.

In other cases, the House has grasped for straws trying to find a federal interest in such uniformity, arguing that married same-sex couples are not similarly situated to married different-sex couples because their marital status can cause federal administrative "confusion." *See Golinski MTD* at 25. This explanation defies credibility. There is no reason to believe that the federal government lacks the ability to distinguish legally married same-sex couples from unmarried ones. As the court in *Gill* held, "distribut[ing] federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses . . . . does not become more administratively complex simply because some of those couples are of the same sex." 699 F. Supp. 2d at 395. DOMA's creation of distinct "federal" and "state" marital statuses in fact *creates* confusion rather than remedies it. Given that the federal government already implements many rules regarding common-law marriages, *see, e.g.,* 5 C.F.R. §§ 211.103, 831.613(e), 842.605, 1651.5; 20 C.F.R. §§ 10.415, 219.32, 222.13, 404.726; 28 C.F.R. § 32.3, it plainly is capable of the much less-complicated task of maintaining a list of the states that recognize marriages between same-sex couples and those that do not.[37] And even if there were uncertainty about these

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[37]The federal government must routinely make determinations of state residency in administering federal programs. *See, e.g.,* 29 C.F.R. § 825.113 (marriage for FMLA purposes turns on law of state in which employee resides); 20 C.F.R. § 404.345 (marriage for Social Security benefit eligibility turns on location of permanent home at time of benefits application); 38 C.F.R. § 3.1(j) (veterans' benefits); 20 C.F.R. § 222.11 (Railroad Retirement Act). To the extent the residency of same-sex couples may be relevant in assessing whether same-sex couples who report themselves as married are in fact legally wed, that is no

issues, that is nothing that could not be easily cured with administrable guidelines for the relevant agencies. Any argument that the federal government has an interest in discriminating against married same-sex couples in order to ease its administrative burdens rings hollow.[38]

CONCLUSION

As described above, Plaintiffs have each suffered harm because DOMA forbids the federal government to extend to them the same federal rights and benefits to which similarly-situated different-sex married couples are entitled. DOMA's singling out lawfully married same-sex couples for disadvantageous treatment cannot survive any level of review under the Equal Protection guarantee, much less the heightened review that should be required here. For the reasons stated herein, Plaintiffs respectfully request that the Court GRANT the Motion.

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different from any other residency determination routinely made in the administration of federal programs.

[38]Any suggestion that the result here is controlled by the Supreme Court's summary ruling in *Baker v. Nelson*, 409 U.S. 810 (1972), is erroneous. *Baker* summarily affirmed a ruling by the Minnesota Supreme Court that a *State's* marital eligibility law did not unconstitutionally discriminate on the basis of *sex* or violate the plaintiffs due process or privacy rights. *See* 191 N.W.2d 185 (Minn. 1972). *Baker*'s precedential value extends, at the very most, to 'the precise issues presented and necessarily decided" by the Court in its summary ruling. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979). Here, both the facts and the Plaintiffs' legal theory are far different, making *Baker* irrelevant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, a copy of the foregoing Memorandum of Law in Support of Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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