**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

MARY BISHOP, SHARON BALDWIN, SUSAN G. BARTON, and GAY E. PHILLIPS, Plaintiffs, v. UNITED STATES OF AMERICA, *ex rel.*, ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States of America; and SALLY HOWE-SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma, Defendants, and BIPARTISAN LEGAL ADVISORY GROUP, Defendant-Intervenor.	)	No. 04-CV-848-TCK-TLW

MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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September 28, 2011

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
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INTRODUCTION

Plaintiffs are two Oklahoma couples, American citizens, being denied both due process and the right to equality under the United States Constitution because of their sex and sexual orientation. The arguments that follow will demonstrate how, because of an amendment made to the Oklahoma Constitution (the "Oklahoma Amendment") by popular vote on the 2004 election ballot, Plaintiffs Mary Bishop and Sharon Baldwin are being denied the fundamental right to marry the person of their choice and being discriminated against based on their sex and sexual orientation, in violation of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause. Part A of the Oklahoma Amendment defines "marriage" as *only* a legal union between "one man and one woman," thereby denying the issuance of a marriage license to a same-sex couple.

Plaintiffs Susan Barton and Gay Phillips, a same-sex couple legally married under the laws of the State of California, challenge Section 3 of the so-called Defense of Marriage Act ("DOMA") as unjustifiably burdening the exercise of their fundamental marital rights and - as several federal decisions and the Obama Administration have already concluded[1] - violating core constitutional principles of equal protection. DOMA's Section 3 defines "marriage" as between one man and one woman; and Section 2 provides that no State shall be required to recognize a same-sex marriage celebrated in another State. Plaintiffs Barton and Phillips also challenge the non-recognition provisions found in Part B of the Oklahoma Amendment and Section 2 of DOMA. Both impermissibly burden the full exercise of the liberties inherent in their constitutional right to marry.

As addressed herein, both the Oklahoma Amendment and DOMA unconstitutionally create two classes of persons for purposes of marital rights, and both exclude persons such as Plaintiffs from the fundamental guarantees of the United States Constitution, according such liberties instead only to similarly situated heterosexuals.

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[1] *Gill v. Office of Pers. Mgmt*, 699 F. Supp 2d 374 (D. Mass. 2010); *In Re Balas*, 449 B.R. 567 (C.D. Cal. Bankr. 2011); *In Re Levenson*, 587 F.3d 925 (9th Cir. 2009); Letter from Attorney General Eric H. Holder to Congress (Feb. 23, 2011, Ex. 7 hereto).

Neither the Oklahoma Amendment nor DOMA can meet any standard of constitutional review, particularly the strict scrutiny test required here.

STATEMENT OF UNDISPUTED FACTS

DOMA

1. The Defense of Marriage Act, ("DOMA") was enacted in 1996. Section 3, codified at 1 U.S.C. § 7, excludes same-sex couples from the definition of marriage for all federal purposes:

> 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.

2. Section 2 of DOMA, codified at 28 U.S.C. § 1738C, entitled "Powers Reserved to the States," relieves a State from recognizing any same-sex marriage validly performed under the laws of another State:

> [No State] shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state.

3. DOMA creates two classes of marital citizens for purposes of all federal benefits. 1 U.S.C. § 7.

4. DOMA was passed in response to concerns that the State of Hawaii would soon be recognizing same-sex marriages. H.R. Rep. 104-664 at 5 (1996); *see also Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010). Congress

conducted virtually no fact-finding as to the scope or effect of the law. "Congress did not hear testimony from agency heads as to how DOMA would affect federal programs." *Gill*, 699 F. Supp. 2d at 379.

5. DOMA's legislative history shows the enactment was born out of strong disapproval on moral and religious grounds of homosexuality and same-sex marriage, and was intended to defend "traditional notions" of heterosexual marriages. It was meant to demonstrate a moral conviction held by the citizenship majority that heterosexuality, rooted in Judeo-Christianity, better comports with traditional morality. H.R. Rep. No. 104-664 at 16 (1996); *Gill*, 699 F. Supp. 2d at 378; Letter from Attorney General Eric Holder to Congress (Feb. 23, 2011) (Ex. 7).

6. In the floor debate, legislators referred to homosexuality as "immoral," "unnatural" and "an attack upon God's principles" and asserted that marriage by lesbians and gay men would "demean" marriage for heterosexuals. 142 CONG. REC. H7444, H7486 (1996).

7. Originally, in this lawsuit, the Executive Branch relied on two governmental interests, responsible procreation and child rearing, to justify DOMA. (Brief in Support of United States' Motion to Dismiss [Doc. 138] at 7 n. 4).

8. DOMA's provisions say nothing as to who can become a parent; neither does DOMA say anything to encourage heterosexuals to procreate within marriage. DOMA applies only to couples already married. 1 U.S.C. § 7.

9. Section 3 of DOMA impacted and re-wrote over 1,000 federal laws dealing with those federal benefits potentially available to a "married" individual. (U.S General

Accounting Office, Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Washington, D.C.: Jan. 23, 2004) (Ex. 6).

10. During this lawsuit, the Executive Branch abandoned those legislative justifications for DOMA tied to rationales of responsible procreation and child rearing. (Brief in Support of United States' Motion to Dismiss [Doc. 138] at 7 n. 4).

The Oklahoma Constitutional Amendment

11. On November 2, 2004, Oklahoma voters approved and adopted Legislative Referendum No. 334, State Question No. 711, which was implemented as Article 2, §35 of the Oklahoma Constitution and states:

> "Marriage Defined-Marriage Between Persons of Same Gender Not Valid or Recognized
>
> a. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that the marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
> b. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
> c. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Bishop v. State of Oklahoma, 447 F. Supp. 2d 1239, 1253 (N.D. Okla. 2006).

12. The referendum for submitting State Question No. 711 to a vote of the people passed the Oklahoma House of Representatives by a vote of 92-4 and the Oklahoma Senate by a vote of 38-7. (Joint Aff. of Mary Bishop and Sharon Baldwin, ¶ 12) (Ex. 1).

13. The legislative history of State Question 711 reflects its passage was marked by legislative animus toward homosexuality and same-gender marriage, and was justified on religious and moral grounds. The then-House Minority Leader stated "To recognize something other than what God has ordained as traditional marriage obviously detracts or deteriorates the importance of the traditional marriage." (Marie Price, *Republican Legislators Wary of Same-Sex Ruling*, TULSA WORLD, Feb. 6, 2004, Ex. 5). The State Senate sponsor stated "It is one thing to tolerate the homosexual lifestyle and another to legitimize it through marriage." (Brian Barber, *Ban on Gay Marriage Debated*, TULSA WORLD, Oct. 13, 2004, Ex. 5).

14. At a pre-vote rally, Tulsa's mayor urged passage of State Question No. 711 stating "If you believe in Christ, if you believe in this country, and if you believe in this city, you believe that marriage is a covenant between God, a man and a woman." At the same rally, the Senate's primary sponsoring legislator of State Question No. 711 stated: "As Christians, we are called to love homosexuals…But I hope everyone at this rally knows the Scriptures prohibit homosexual acts." (Robert Evatt, *Local 'Pro-Marriage Rally' Takes Aim at Same-Sex Unions*, TULSA WORLD, Feb. 29, 2004, Ex. 5).

15. Other legislators tied their votes for passage as a means to support their views of God's desires ("marriage is not just created by government but by God") and as necessary to uphold their view of morality ("Gay people might call it discrimination, but I call it upholding morality…..This is a Bible Belt state…Most people don't want that sort of thing here."). (David Harper, *Gay-Marriage Clamor Grows Louder and Louder*, TULSA WORLD, Mar. 22, 2004, Ex. 5).

Plaintiffs Barton and Phillips

16. Susan G. Barton, age 57, and Gay E. Phillips, age 55, are consultants and adjunct professors and have resided in Oklahoma virtually all of their lives (Susan 51 years and Gay 45 years). (Joint Aff. of Susan Barton and Gay Phillips, ¶¶ 4-7, Exhibit 4).

17. Ms. Barton and Ms. Phillips have been in a continuous committed relationship since November 1, 1984. They were united in a civil union ceremony conducted in Vermont in 2001. Subsequently, they were married in Canada in 2005. When marriage became available under California law, they traveled to California and were issued a marriage license by the State of California, and then married under California law on November 1, 2008, during the pendency of this lawsuit. (*Id.*, ¶¶ 5-6).

18. Between the years of their civil union (2001) and through 2010, Ms. Barton and Ms. Phillips have been required to file federal and state income tax returns using a "single" person status. Internal Revenue Service (IRS) regulations, based on DOMA, make them as a married couple ineligible for filing federal income taxes jointly with a same sex spouse. IRS Publication 501 at p. 5 (Dec. 18, 2009) instructs that "[f]or federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife." (Aff. of Gay Phillips, ¶ 4 (Ex. 2); Aff. of Susan G. Barton, ¶ 4 (Exhibit 3), submitted pursuant to Order of Aug. 2, 2010).

19. Oklahoma regulations for the filing of tax returns mandatorily require taxpayers to use the same filing status on their state returns as used on their federal returns. (Barton and Phillips Joint Aff., ¶ 10, Ex. 4).

20. Ms. Barton and Ms. Phillips believe that being required to file as a "single" taxpayer when in fact they were married creates an aura of dishonesty, signaling to them as married taxpayers that the federal government believes their lawful marriage has no validity. (Phillips Aff., ¶ 7 (Ex. 2); Barton Aff., ¶ 7 (Ex. 3)).

21. If Ms. Barton and Ms. Phillips had been entitled to the same federal benefits available to similarly situated heterosexual couples (i.e., the filing of a joint return with one's spouse), they would have paid less federal and Oklahoma state income taxes. (Phillips Aff., ¶ 5 (Ex. 2); Barton Aff., ¶ 5 (Ex. 3); Barton and Phillips Joint Aff., ¶ 11). Further, they would have saved the extra expense of filing separate returns which are not incurred by similarly situated heterosexual couples. (Phillips Aff., ¶ 7 (Ex. 2); Barton Aff., ¶ 7 (Ex. 3)).

22. The Social Security Administration has advised Gay Phillips that as of January 15, 2010, over $90,000.00 in Social Security taxes had been paid by her and her employers into her Social Security account, and that she had earned enough "credits" to qualify her spouse to receive survivor's benefits of $1,726.00 monthly at her full retirement, in the event Ms. Phillips died. (Phillips Aff., ¶¶ 7-8 (Ex. 2)). Susan Barton has likewise earned enough Social Security credits to qualify her spouse for survivor's benefits in the event Ms. Barton dies. (Barton Aff., ¶¶ 7-8 (Ex. 3)).

23. Because of DOMA, neither Ms. Barton nor Ms. Phillips is eligible to be recognized as a surviving spouse. Consequently, if either were to die, unlike similarly situated heterosexual couples in identical situations, the "surviving spouse" benefit will

not be available at age 60 (the age at which reduced benefits would otherwise be available) to the surviving spouse. (Barton Aff., ¶ 9 (Ex. 3)).

24. In the event of her death, Ms. Phillips has already earned enough "credits" for her spouse to receive a one-time death benefit of $255.00 if her spouse were of the opposite sex. Because of DOMA, Susan G. Barton, as the spouse of Ms. Phillips, will not qualify for this federal entitlement at the death of Ms. Phillips. Likewise, Susan G. Barton has already earned enough "credits" for her spouse to receive a one-time death benefit of $255.00 Because of DOMA, Gay Phillips, as the spouse of Ms. Barton, will not qualify for this federal entitlement at the death of Ms. Barton. (Phillips Aff., ¶ 9, (Ex. 2); Barton Aff., ¶ 9 (Ex. 3)).

25. On August 18, 2010, the federal government in this lawsuit conceded that Plaintiffs Barton and Phillips had suffered cognizable injury from the standpoint of having "standing" to address the constitutionality of Section 3 of DOMA. (Resp. of United States to Plaintiffs' Notice to Court [Doc. 169] at 1).

26. Despite Plaintiffs Barton and Phillips being in a continuous committed relationship for nearly half of their entire lives - approximately 27 years - and being legally married under the laws of the State of California, Sections 2 of DOMA and Part B of the Oklahoma Constitution Amendment cause non-recognition of their marriage. Specifically, DOMA's Section 2 affirmatively permits Oklahoma's mandatory prohibition against recognition of same-sex marriages. (Barton and Phillips Joint Aff., ¶ 13, Ex. 4). If either Barton or Phillips would have been a man, their marriage would have been entitled to recognition.

27. Their sexual orientation is a fundamental part of their identity as persons. They have never considered their sexual orientation to be a matter of choice, and know that it was not. (Barton and Phillips Joint Aff., ¶ 13) (Ex. 4).

28. Plaintiffs Barton and Phillips have no interest in forcing a house of worship or any religious body to recognize their marriage. They seek not recognition by a religious body, but by the state and federal governments. (*Id.* ¶ 13).

29. They see their marriage as healthy and know of no rational basis for saying it threatens the marriages of opposite sex couples. They want their relationship to be treated equally and with the same respect as the marriages of opposite-sex couples. (*Id.* ¶¶ 14-15).

30. Their sexual orientation as lesbians bears no inherent relation to their ability to perform in, contribute to or participate in society. (*Id.* ¶ 16).

Plaintiffs Bishop and Baldwin

31. Mary Bishop and Sharon Baldwin have resided in Oklahoma for nearly their entire lives. Ms. Bishop is 50 years of age. Ms. Baldwin is nearly 43 years of age. They reside in their home in Broken Arrow. (Joint Aff. of Mary Bishop and Sharon Baldwin, ¶¶ 1 and 3-5, Ex. 1).

32. Both are employed at the Tulsa World, the second largest metropolitan newspaper in Oklahoma. Ms. Bishop is an assistant editor, and Ms. Baldwin is the city slot editor. (*Id.* ¶¶ 3-4).

33. Mary Bishop and Sharon Baldwin are lesbians. They followed the debate and passage of State Question 711 in the Legislature. The articles attached as Exhibit 5

were published in the Tulsa World during the time that both were editors there, and reflect some of the accounts and statements made in connection with the passage. The anti-gay and anti-lesbian statements reflect the atmosphere of discrimination in which they live. They consider themselves members of a distinct minority due solely to their sexual orientation. To their knowledge, no one has ever disputed the fact that gays and lesbians occupy a minority of the population. Despite that minority status, they are unaware of any Oklahoma law, including Oklahoma's "hate crimes" statute, that offers protection based on sexual orientation. (Bishop and Baldwin Joint Aff., ¶ 11, Ex. 1).

34. Mary Bishop and Sharon Baldwin are in a long-term committed relationship. On March 26, 2000, they exchanged vows in a church-recognized Holy Union commitment ceremony at Alligator Point, Florida. (*Id.* ¶ 5).

35. Mary Bishop and Sharon Baldwin desire to be civilly married under Oklahoma law, but are precluded from doing so by Part A of the Oklahoma Amendment (Art. 2 § 35), which defines marriage as the union of "one man and one woman." (*Id.* ¶ 7).

36. On February 13, 2009, Ms. Bishop and Ms. Baldwin sought the issuance of a marriage license from Sally Howe Smith, the court clerk for Tulsa County, Oklahoma. They were refused a license (although they otherwise qualified) because they were a same-gender couple and thus prohibited from marrying under Oklahoma's Constitution. (Bishop and Baldwin Joint Aff., ¶ 9, Ex. 1).

37. Ms. Howe Smith is named as a defendant in her official capacity only.

38. "Marriage" is how Ms. Bishop and Ms. Baldwin want the commitment and permanence of their relationship to be recognized by the State of Oklahoma. It is the only status that will signify the equality of their relationship. (Bishop and Baldwin Joint Aff., ¶ 7, Ex. 1).

39. As a consequence of Part A of the Oklahoma Constitutional Amendment, Ms. Bishop and Ms. Baldwin believe the most important relation in their lives has been relegated to an inferior level. (*Id.* ¶¶ 10-11).

40. Ms. Bishop and Ms. Baldwin hold themselves out as a couple in the community in which they live, work and do volunteer activities, but are unable to call themselves "married" in the same sense as married opposite-sex couples. (*Id.* ¶ 15).

41. Ms. Bishop and Ms. Baldwin's sexual orientation is a fundamental part of who they are and their identities as individuals. There was no particular time or place when either of them made some type of decision, i.e. choice, to become a lesbian, any more than heterosexual persons "choose" to become heterosexual. (*Id.* ¶ 14).

42. There has never been an instance in their lives when their sexual orientation as lesbians prevented or hindered their ability to perform in, contribute to, or participate in society. (*Id.* ¶ 15).

43. They consider their relationship to be healthy and see no rational basis for saying it threatens the marriages of opposite sex couples. Given their sexual orientation, marrying a person of a different sex would never be a realistic option for either of them. (*Id.* ¶¶ 13-14).

44. Ms. Bishop and Ms. Baldwin do not seek to interfere with any other person's religious beliefs, nor the religious qualifications for being married in any particular house of worship ceremony. They seek a civil right in a civil ceremony that will result in marriage and recognition by the State of Oklahoma of that marriage. (Bishop and Baldwin Joint Aff., ¶ 13).

45. Oklahoma's ban on same-sex marriage has caused Ms. Bishop and Ms. Baldwin harm in other ways. They have incurred extra expense in the form of legal fees that would not have been necessary as a married couple. They are also unable to report an accurate marital status on legally binding forms, such as hospital forms, privacy forms, banking forms, medical disclosure forms, and workplace forms. (*Id.* ¶¶ 16-17).

46. Oklahoma's constitutional ban on same-sex marriage has caused Ms. Bisop and Ms. Baldwin emotional anguish, demeaned their relationship in the eyes of others, and made them to feel inferior to other married couples. They consider their relationship to be the most important relationship in their respective lives, and want the permanence of the relationship to be recognized as "marriage" under Oklahoma law in the same manner as those relationships of similarly situated couples who are allowed under Oklahoma law to be "married." (*Id.* ¶ 14).

STANDARD

Summary judgment is appropriate where the pleadings, the discovery materials, and affidavits show there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)[2]. A fact is "material" if it might affect the outcome of the suit under the governing law, and a dispute is "genuine" only if the evidence is such that the trier of fact could find for the non-movant. *Thomas v. IBM*, 48 F.3d 478, 486 (10th Cir. 1995). Thus, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original).

Once the movant has demonstrated the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden shifts to the non-movant to go beyond the pleadings and set forth specific, admissible facts from which a rational trier of fact could find in its favor. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). The non-movant "must do more than show that there is some metaphysical doubt as to the material facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted). Accordingly, unsubstantiated, conclusory allegations are insufficient to create a genuine dispute. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995). Also, "[t]he mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient" to defeat a properly supported motion for summary judgment. *Herrick v. Garvey*, 298

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[2] In this regard, courts may take judicial notice of "legislative facts," such as legislative history and committee reports, when interpreting a statute or considering whether Congress has acted within its constitutional authority. *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 227 (1959) (federal courts may take judicial notice of the legislative history of a bill); Fed. R. Evid. 201, Advisory Committee Notes. Similar considerations govern judicial use of non-adjudicative facts, which have been described as a part of the judicial reasoning process. *Id.*

F.3d 1184, 1189 (10th Cir. 2002). When the record, taken as a whole, could not lead a trier of fact to find for the nonmovant, no genuine issue exists and summary judgment is proper. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

ARGUMENT AND AUTHORITIES

In many respects, the arguments presented by both Plaintiff couples overlap. In the interest of economy and to avoid duplication, where appropriate, arguments made on behalf of one couple will be incorporated by reference when feasible.

This brief addresses first the challenge of Mary Bishop and Sharon Baldwin to Part A of the Oklahoma Amendment. Following thereafter is the challenge of Susan Barton and Gay Phillips to Section 3 of DOMA. The brief concludes with the challenge of Plaintiffs Barton and Phillips to the non-recognition provisions of Part B of the Oklahoma Amendment and Section 2 of DOMA.

I. PART A OF THE OKLAHOMA AMENDMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT PREVENTS PLAINTIFFS BISHOP AND BALDWIN FROM EXERCISING THE FUNDAMENTAL RIGHT TO MARRY THE PERSON OF THEIR CHOICE[3]

A. The Fundamental Right of Marriage

The Supreme Court has repeatedly acknowledged the freedom sought here by Plaintiffs Bishop and Baldwin, recognizing it as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"). It is a right of liberty and of "fundamental importance *for all individuals*." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added). "Marriage" has been called one of the "basic civil rights of man, fundamental to our very existence and survival. *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). "The right to marry is part of the fundamental 'right of privacy'

[3] To the extent defendant Howe Smith asserts the nearly 40-year old decision of *Baker v. Nelson*, 409 U.S. 810 (1972) precludes Plaintiffs from challenging the Oklahoma Amendment on federal constitutional grounds, such contention must fail. *Baker* dismissed, without opinion, an appeal from the Minnesota Supreme Court rejecting federal equal protection and due process challenges to the refusal to issue a marriage license to a same-sex couple. However, the Supreme Court's summary dismissals are binding only "on the precise issues presented and necessarily decided" (*Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)) and only to the extent that they have not been undermined by subsequent "doctrinal developments" in the Supreme Court's case law. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks omitted). Here, *Baker* has no determinative force for, among other reasons, it has been conclusively undermined by the Supreme Court's subsequent equal protection and due process precedent, most notably in *Lawrence v. Texas*, which invalidated a state prohibition on same-sex intimate conduct on due process grounds and *Romer v. Evans*, which struck down on equal protection grounds a state constitutional amendment prohibiting governmental action to protect gay and lesbian individuals against discrimination.

implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. at 383-84; *see also Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

In short, marriage is an expression of public commitment, unity and fulfillment that confers substantial private and social benefit.[4] In *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), the Supreme Court stated:

> We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486. *See also Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003) ("Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.... Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.") (citing *Griswold*). It is, therefore, "clear that among the decisions that an individual may make without unjustified government interference

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[4] The governmental benefits given to marriages between men and women are substantial. Currently, at least 1,138 statutory provisions are available to opposite sex couples that are unavailable to same sex couples. *See* U.S General Accounting Office, Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Washington, D.C.: Jan. 23, 2004) (Ex. 6).

are personal decisions 'relating to marriage.'" *Zablocki*, 434 U.S. at 385 (quoting *Carey v. Population Services Int'l*, 431 U.S. 678 (1977)).

This right to marry and to exercise the right in the same manner as afforded to opposite-gender couples, enjoying the same benefits, advantages, responsibilities, obligations and recognition is what Plaintiffs Bishop and Baldwin seek.[5] It is a fundamental right granted to the elderly, the infertile, the incarcerated, as well as those with no intent of procreating or raising children - yet by popular vote in Oklahoma this fundamental right has been denied to gays and lesbians - primarily, if not solely, on religious and moral grounds.

B. Since the Oklahoma Amendment Infringes Upon a Fundamental Right, Strict Scrutiny Should Apply

Because Plaintiffs Bishop and Baldwin seek to exercise their fundamental right to marry, the Oklahoma Amendment must be reviewed under a *strict scrutiny* standard. *Zablocki*, 434 U.S. at 388. It is well established that whenever a challenged classification burdens the exercise of a *fundamental* right, the strict scrutiny standard will be applied. *Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998) (laws that abridge fundamental rights are subject to strict scrutiny, and "must be precisely tailored to further a compelling governmental interest."); *Okla. Educ. Ass'n v. Alcoholic Bev. Laws Enforce. Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989) ("We will apply strict scrutiny ... if the state law impinges upon fundamental rights protected by the Constitution."). That a majority of

[5] Plaintiffs do not seek to create some new constitutional right to same-sex marriage, as some confusingly suggest. Rather, they seek enforcement of their existing fundamental right to marry the person of their choice -- the same right afforded opposite-sex couples.

Oklahoma voters supported State Question No. 711 is irrelevant, as "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Under strict scrutiny, the State bears the burden of showing the Oklahoma Amendment is narrowly tailored to a compelling interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2008). If it is unable to do so, the challenged law must fail.

C. The Oklahoma Amendment Serves No Compelling State Interest, Except Those Deemed Invalid by the United States Supreme Court

Even the most generous analysis of the reasons given for State Question No. 711 show the Oklahoma Amendment was not narrowly tailored to a legitimate compelling interest. The only interests that proponents of the Oklahoma Amendment advanced as reasons for its adoption were of the type previously stricken down by the Supreme Court.

The legislative history of the Oklahoma Amendment shows the underlying referendum was driven and motivated almost exclusively by religious and moral views, and legislative animus toward homosexuality. Its strongest supporters urged passage to protect what "God has ordained as traditional marriage" and because "the Scriptures prohibit homosexual acts." The State Senate's primary sponsor urged adoption, stating "It is one thing to tolerate the homosexual lifestyle and another to legitimize it through marriage." (Undisputed Facts, ¶¶ 13-15). The Supreme Court has made clear that these types of objectives do not create an adequate reason for withstanding constitutional scrutiny. The justification that the Oklahoma Amendment was necessary to preserve "traditional notions of morality" had already been foreclosed before State Question No. 711 was even adopted. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)("[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."). "[M]oral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women ... is not a proper basis on which to legislate." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them."). Indeed, "[l]egislation 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).

The justification that marriage has "traditionally" been between "a man and a woman" is not enough to protect some perceived compelling interest. The traditional way of doing things has never been a barrier to constitutional scrutiny.[6] "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it

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[6] It should be observed that substantial cultural and societal changes since the filing of this lawsuit have taken place. Full same-gender marriage rights are now accorded in Massachusetts, New York, Connecticut, Iowa, New Hampshire, Vermont, and the District of Columbia. The military's "Don't Ask, Don't Tell" policy has been recently repealed. Importantly, the Executive Branch has recently reexamined the lawfulness of Section 3 of DOMA and concluded it cannot withstand constitutional scrutiny. (Ex. 7).

through the centuries insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970). *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Loving v. Virginia*, 388 U.S. 1, 7 (1967);[7] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Brown v. Bd. of Education*, 347 U.S. 483, 492-93 (1954).

Lawrence noted with approval the observation of Justice Stevens in his dissent in *Bowers v. Hardwick*, which stated "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 560 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Certainly, the view that same-sex couples are inferior to opposite-sex couples should never constitute an acceptable compelling reason![8] Even if a fundamental right was not implicated, any careful, searching review for a *rational* basis comes up exceedingly short. It defies rationality that denial of marriage to same-sex couples in a permanent committed relationship will encourage homosexual persons to marry members of the opposite sex. Nor is there any nexus between denial of same-sex marriage and some purported goal of making heterosexual marriages more secure. Indeed, if there was some fathomed

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[7] *Loving* also noted that a State's traditional power to regulate marriage is not unlimited and is restricted by the Fourteenth Amendment. *Id.* at 8.

[8] Oklahoma does not recognize "domestic partnerships" or "civil unions." Thus, the frail argument of available alternatives to satisfy the fundamental right of marriage is not an issue here.

connection, the Oklahoma Legislature has achieved it only by punishing same-sex couples - a punishment that cannot survive any level of constitutional scrutiny.

Here, the plain truth is a majority of Oklahoma voters have used the power of the State to enforce, through the regulation of marriage licenses, profound and deep religious and moral views. *This they cannot do without a showing of some compelling State interest.*

II. PART A OF THE OKLAHOMA AMENDMENT VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT DISCRIMINATES AGAINST GAYS AND LESBIANS BY DENYING THEM THE RIGHT TO MARRY THE PERSON OF THEIR CHOICE AND BECAUSE IT DISCRIMINATES ON THE BASIS OF SEX

The Oklahoma Amendment creates two classes of similarly situated citizens for purposes of marriage. If a couple seeking "marriage" is one man and one woman, the threshold eligibility requirement under the Oklahoma Amendment is met. If the couple is of the same gender, they are automatically disqualified from eligibility. The Oklahoma Amendment eliminates the right to marry for gays and lesbians (and the non-recognition of same-sex marriages validly performed elsewhere), but does not affect any substantive right of heterosexual individuals.

A. Equal Protection Review Based on Strict Scrutiny

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S.CONST. AMEND. XIV, § 1. The Constitution's guarantee of equal protection of the laws rests on the mandate that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Because Part A implicates a fundamental right (i.e., the right to marry, including the freedom to marry the person of one's choice), it is subject to strict scrutiny. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2008) ("We subject governmental classifications to *strict scrutiny* under the Equal Protection Clause only if they target a suspect class *or involve a fundamental right*.") (emphasis added).

Laws that abridge fundamental rights, in addition to being subject to strict scrutiny, "must be precisely tailored to further a compelling governmental interest." *Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir. 1998). "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government *is itself a denial of equal protection of the laws in the most literal sense*." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (emphasis added). Beyond that, the "tradition" of restricting marriage does not further any articulated compelling state interest. Rather, it harms the state's strong constitutional interest in equal protection because it mandates that men and women be treated differently based solely on notions of gender (the Oklahoma Constitution at Art. 2 § 7 embodies equal protection rights. *Nelson v. Nelson*, 1998 OK 10, ¶ 11, 954 P.2d 1219, 1223). Tradition has its importance, but it cannot be used to deny constitutional rights to selected individuals. As set forth under Paragraph I.(C) above, the legislative history of the Oklahoma Amendment reflects its sole justifications were reasons which are invalid under current law.

B. *The Oklahoma Amendment is Based on Sex, Therefore Requiring a Heightened Scrutiny Review*

The inescapable reality is that if either Ms. Bishop or Ms. Baldwin were a man, they as a couple would be entitled to marry under Oklahoma law, and Part A of the Oklahoma Amendment would not stand in their way.

The Equal Protection Clause prohibits sex-based classifications unless they are substantially related to an "important governmental" objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Sex-based classifications require heightened scrutiny. *Id.* at 555 ("all gender-based classifications today warrant heightened scrutiny."). In this regard, the Supreme Court "underscored that a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *Id.* at 524 (citation omitted). The interests identified in the legislative history of the Oklahoma Amendment are not "governmental" interests-much less important interests substantially related to Part A's discriminatory and irrational sex-based classification.

Clearly, sex and sexual orientation are necessarily related, to the extent that, in certain circumstances "[s]exual orientation discrimination can take the form of sex discrimination." *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010). While plaintiffs recognize the Tenth Circuit has avoided "suspect" classification based solely on sexual orientation, *Walmer v. Dept. of Defense,* 52 F.3d 851, 854 (10th Cir. 1995), such a holding does not reach the situation presented here. Part A targets gays and lesbians in a manner specific to their sexual orientation, and because of the relationship addressed by Part A, targets them specifically due to sex. *Perry,* 704 F. Supp. 2d at 996. Stated another way, Part A is a law centered on a person and her same-sex partner which constitutes "discrimination based on sex." *Id.*

Plaintiffs Bishop and Baldwin anticipate Defendant Howe Smith will argue that because Part A allows a man or woman to marry a person of the opposite sex, the provision is not infirm from an equality analysis. In *Loving, supra,* the State of Virginia argued the prohibition on miscegenation punished members of both races equally. 388 U.S. at 8. However, the Court rejected this approach to equal protection, explaining that the mere fact of equal application does not immunize a statute from the heavy burden of justification - which the Fourteenth Amendment requires of state statutes drawn according to race. *Id.* at 9. Here, there is no difference between "race" and "sex" from the standpoint of judging Part A's constitutional infirmity.

C. Even if a Lesser Test of "Intermediate Scrutiny" or "Rational Basis" is Employed, the Oklahoma Amendment Remains Unconstitutional

As recognized above, the Tenth Circuit has declined for equal protection purposes, in other situations, to find a classification based on sexual orientation to be a "suspect" class. For the reasons already stated, Plaintiffs submit such holdings are not relevant here because fundamental rights are implicated (i.e, the right to marry), and because discrimination based on sex underlies the Oklahoma Amendment. Nevertheless, Plaintiffs submit the Oklahoma Amendment fails scrutiny under even lesser examinations. Under intermediate scrutiny, the State must articulate an important state interest, and the court must determine whether the law is narrowly tailored to serve the important state interest. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Under rational-basis review, courts will sustain a law if it is rationally related to a legitimate state interest. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771-72 (10th Cir. 2008). However, the court must "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632.

The presumption against constitutionality falls away when a law is born out of "a bare congressional desire to harm a politically unpopular group." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Lawrence v. Texas*, 539 U.S. 558, 580 (O'Connor, J., concurring); *see also Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."). Such an interest cannot possibly constitute a legitimate governmental interest and is deemed to "reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440.

Likewise, negative attitudes, fears or moral objections are not permissible bases for discriminatory classifications. *Id.* "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); *Lawrence*, 539 U.S. at 571 & 583 (moral disapproval of a group cannot be a legitimate governmental interest because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law.") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992); *Romer*, 517 U.S. at 633). Stated *supra*, "[l]egislation 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).

Accordingly, the Supreme Court has repeatedly struck down statutes which were aimed at and adversely affected a particular group, notwithstanding rational basis review. *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 537; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause"). The instant case falls within this line of cases in that the Oklahoma Amendment has unlawfully singled out same-sex couples for purposes of denying them the fundamental right to marry.

As set forth above, Part A of the Oklahoma Amendment violates the fundamental due process and equal protection rights of Plaintiffs Bishop and Baldwin. There is no legitimate relationship between Part A and a lawful government objective. It fails all levels of scrutiny.

III. SECTION 3 OF DOMA IS UNCONSTITUTIONAL

The claims of Plaintiffs Barton and Phillips as to Section 3 of DOMA straightforwardly ask: for purposes of federal benefits, should the federal government be permitted to disregard marriages that are valid under state law if the marriage is not between one man and one woman, or does doing so violate the due process rights and equal protection of the laws guaranteed by the Fifth Amendment of the Constitution?

Plaintiffs Susan Barton and Gay Phillips have spent nearly one half of their lives - 27 years - in a continuous committed union. After 17 years of holding themselves out as a couple, who dreamed of one day being able to enter into a marital union, they seized the opportunity in 2001 to be united in a civil ceremony conducted in Vermont. Because "marriage" was how they wanted to describe the permanence of their commitment to each other, they traveled to Canada in 2005 and were married under Canadian law. But the dream of being married in America, as United States citizens, never left them. When marriage became available to them under California law, they obtained a marriage license, issued by the State of California, and were married on November 1, 2008 (during the pendency of this lawsuit). (Undisputed Facts, ¶ 17). Despite their valid California marriage, the federal government refuses to recognize their marriage because of Section 3 of DOMA (which treats married couple Barton and Phillips as legal strangers when it comes to federal benefits otherwise available to similarly situated opposite-sex "married" couples).

After initially defending Section 3's discriminatory application, the Attorney General informed Congress that the President of the United States had made the determination that Section 3, as applied to same-sex couples who are legally married under State law, violates the equal protection component of the Fifth Amendment. Consequently, the Executive Branch decided to stop defending Section 3 in this lawsuit, as well as in other cases currently pending in other jurisdictions. Thereafter, the

Bipartisan Legal Advisory Group was instructed by the Speaker of the House of Representatives to defend the constitutionality of Section 3.

Because of DOMA, Ms. Phillips and Ms. Barton are ineligible for filing federal income taxes jointly as a married couple. If they had been eligible for the same benefit available to similarly situated heterosexual couples (i.e, the filing of a joint return with one's spouse), they would have paid $744.00 less in federal taxes for tax years 2003, 2005, 2006, 2007 and 2008. For the tax year 2008, if permitted to have filed a joint tax return as a married couple, the federal benefit would have been $324.00, in the form of reduced taxes. (Phillips Aff., ¶ 5, (Ex. 2); Barton Aff., ¶ 5 (Ex. 3); Undisputed Facts, ¶ 21). For tax year 2009, they would have paid $605.00 less, if permitted to file jointly as a married couple (Barton and Phillips Joint Aff., ¶ 11 (Ex. 4)). Instead, DOMA required each to fictionally state they were "single" and dishonestly represent that they are "single" taxpayers for purposes of their federal income taxes. Since 2001, they have undergone the expense of preparing separate returns at the federal and state level while the vast majority of persons similarly situated have not been required to do so. (Phillips Aff., ¶ 7, (Ex. 2); Barton Aff., ¶ 7 (Ex. 3); Undisputed Facts, ¶ 21).

Through their employment taxes over the applicable years, they have now earned enough "credits" to qualify for each spouse to receive reduced survivors benefits monthly at age 60 or unreduced at her full retirement age, in the event of death. Because of DOMA, each as a spouse is not eligible for recognition as a surviving spouse, in the event of the other's death. Heterosexual couples in identical situations are entitled to surviving spouse benefits. At death, both Plaintiffs have already earned enough "credits" for the spouse to receive a one-time death benefit of $255.00. (Phillips Aff. ¶¶ 7-10, Ex. 2); Barton Aff. ¶¶ 7-10, Ex. 3); Undisputed Facts, ¶¶ 22-24)). Because of DOMA, both are unqualified for federal entitlement.

A. DOMA Unconstitutionally Burdens Plaintiffs Barton's and Phillips' Exercise of Liberties Inherent in the Fundamental Right to Marry, a Right Protected by the Due Process Clause of the Fifth Amendment[9]

Susan Barton and Gay Phillips are legally married under the laws of California. Such marriage to the person of their choice was the outcome of exercising a freedom guaranteed by the Constitution. Now, having invoked their constitutional right to marry, DOMA impermissibly burdens the exercise of the right by disallowing Ms. Barton and Ms. Phillips the same benefits and advantages otherwise available to similarly situated opposite-sex couples. It is as if their marriage is void in the eyes of the federal government. As analogized by constitutional scholar Lawrence Tribe in another context:

> Imagine what we would say if, after *Loving v. Virginia*, a state were grudgingly to permit African Americans and whites to marry – but were to stamp the marriage licenses of such couples with an insignia designating official disapproval of their unions, or were to place signs in government offices dispensing marriage licenses voicing such disapproval. Who would defend the government's prerogative to engage in such demeaning labeling?
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> * * *
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> When that fateful day finally arrives, adherence to constitutional principle and respect for the fundamental dignity of all persons dictate a clear result. As Chief Justice Earl Warren wrote in *Loving*, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Those words ring at least as true today as they rang in 1967. If our Constitution's promises of liberty,

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[9] Plaintiffs Barton and Phillips incorporate by reference those authorities, *supra*, at 15-17, addressing the fundamental right to marry and its accompanying freedoms.

> equality, and dignity are to be realized for the millions of Americans whose most intimate lives are degraded by laws that set their love, their enduring commitments to one another, and their very sense of personhood apart as little more than second-class, then in the end the Court must do its duty and recognize a right to same-sex marriage. There is no other way.

Lawrence H. Tribe, *The Constitutional Inevitability of Same-sex Marriage* (Aug. 26, 2011) *available at* http://www.scotusblog.com/2011/08/the-constitutional-inevitability-of-same-sex-marriage/.

B. DOMA is Subject to Strict Scrutiny

Because the challenged government action implicates a fundamental right[10], strict scrutiny is required. *Supra*, at 16-19. Likewise strict scrutiny/heightened scrutiny is required for the reason that discrimination against gay and lesbian people because they marry a person of the same sex constitutes *sex* discrimination. As argued, *supra*, at pp. 24-25, sex-based classifications require "heightened scrutiny." [11] *United States v. Virginia*, 518 U.S. 515, 555 (1996).

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[10] "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976); *United States v. McHorse*, 179 F.3d 889, 897 n. 1 (10th Cir. 1999) ("While the Fifth Amendment contains no equal protection clause, the equal protection standards of the Fourteenth Amendment are incorporated into the Fifth Amendment's promise of due process") (citation omitted). Thus, courts approach Fifth Amendment equal protection claims the same as equal protection claims under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

[11] Plaintiffs Barton and Phillips urge a strict scrutiny/heightened scrutiny review of Section 3 of DOMA based upon the implication of both a fundamental right and sex discrimination. On different but overlapping grounds, the Obama administration has concluded a "heightened scrutiny" test is applicable to Section 3 because classifications due to sexual orientation are suspect in the circumstances here. The Executive Branch's determination was made after examining a traditional set of four factors recognized by some courts for equal protection classifications. (*See* Ex. 7 hereto). The Tenth Circuit has declined to view sexual

orientation standing alone as a suspect classification. *Price-Cornelison v. Brooks,* 524 F.3d 1103, 1113 n. 9 (10th Cir. 2008). The Supreme Court has not explicitly addressed the sexual orientation/classification issue.

Given the necessary interrelatedness between sexual orientation discrimination and sex discrimination within the context of the same-sex marriage issue, Plaintiffs submit the Tenth Circuit could be expected to reach a different result than the one in *Price-Cornelison, supra,* and earlier holdings. That aside, however, the Attorney General's factual analysis has clear relevance here, as it pertains to the discriminatory setting within which anti-homosexual legislation has been passed; the lack of permissible rationale for treating gays and lesbians differently as members of society; their status as a minority group; and the connection between sexual orientation and gender. Plaintiffs urge a particular and careful consideration of the Attorney General's findings.

The four factors identified by the Attorney General's Letter to Congress are set forth below, and as to each, Plaintiffs herein tailor each factor to their case:

(1) History of discrimination

It is undisputed, as well as a historical reality, that gays and lesbians have long been victims of purposeful and invidious discrimination because of their sexual orientation. The history of discrimination against gays and lesbians was epitomized by the criminalization of homosexual conduct in many parts of this country until very recently. *Lawrence*, 539 U.S. at 578-79. Until recently, gays and lesbians were dismissed from military service regardless of past dedication, valor, and courage in harm's way. Public employees identified as gay or lesbian were thought to pose security risks. Children identified as gay or lesbian have been severely bullied at school. Gays and lesbians continue to be frequent victims of hate crimes. Criminal Justice Information Servs. Div., FBI, *Hate Crime Statistics 2007*, at www.fbi.gov/ucr/hc2007/victims.html.

This history of discrimination suggests any legislative burdens placed on lesbian and gay people as a class "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n. 14 (1982). This observation, clearly identical to the denied relationship under Part A, favors heightened scrutiny.

(2) Sexual orientation and the ability to contribute to society

A classification unrelated to a person's ability to perform or contribute to society typically reflects "prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others" or "reflect[s] outmoded notions of the relative capabilities of persons with the characteristic." *Cleburne*, 473 U.S. at 440-41. In the absence of credible authority that persons in a same-sex relationship lack an ability to contribute to society, a law based on prejudice and stereotype is incompatible with the constitutional understanding that persons are to be judged individually and are entitled to equal justice under the law. *Plyler*, 457 U.S. at 217 n. 14.

(3) Immutability of sexual orientation

Courts have held the immutability "prong of the suspectness inquiry surely is satisfied when ... 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 v. Comm'r of Public Health*, 957 A.2d 407, 438 (Conn. 2008) (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989); *see also In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because a person's

(1) DOMA Was Motivated By Invidious Discrimination

"A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Hence, the presumption of constitutionality falls away when a law is borne out of "a bare congressional desire to harm a politically unpopular group." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer*, 517 U.S. at 634; *Lawrence v. Texas*, 539 U.S.

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sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."). Plaintiffs' sexual orientation is an inherent part of their identity, and they do not experience their orientation as a matter of choice. To suggest that Plaintiffs could repudiate their fundamental identity and hold themselves out to the public in a false image – in order to obtain the benefit of a fundamental liberty – is abhorrent and irrational. (Undisputed Facts, ¶¶ 27, 41).

(4) Minority status or political powerlessness of lesbian and gay people

"There can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society." *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996); *see also Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003); Undisputed Facts, ¶ 33. It therefore follows that gay and lesbian couples in committed relationships are likewise a minority group. In addition, absolute political powerlessness is not necessary to subject legislative burdens on a certain class to heightened scrutiny. For example, women enjoyed some political power when the Supreme Court first heightened its scrutiny of gender classifications. *Frontiero v. Richardson*, 411 U.S. 677, 685-88 & n. 17 (1973). Moreover, a group's *current* political powerlessness is not a prerequisite to enhanced judicial protection/scrutiny. Race continues to be a suspect classification, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), despite racial minorities enjoying growing political power. Likewise, gender classifications receive heightened scrutiny, even though women continue to gain political power. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

Accordingly, the political powerlessness factor of the level-of-scrutiny inquiry does not require a showing of absolute political powerlessness. Rather, the touchstone of the analysis should be "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means." *Kerrigan*, 957 A.2d at 444. The overwhelming passage of the Oklahoma Amendment in the legislature and by popular vote stands as testimony to the lack of real political power of the gay and lesbian community in Oklahoma. Indeed, despite passage of the Matthew Shepard Act at the federal level, Plaintiffs and their counsel are not aware of a single Oklahoma protective statute mentioning the phrase "sexual orientation." (Undisputed Facts, ¶ 33).

558, 580 (O'Connor, J., concurring); *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."). Such an interest cannot possibly constitute a legitimate governmental interest and is deemed to "reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440.

Likewise, negative attitudes, fears or moral objections are not permissible bases for discriminatory classifications. *Id.* "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); *Lawrence*, 539 U.S. at 571 & 583 ("this Court's obligation is to define the liberty of all, not to mandate its own moral code . . . Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992); *Romer*, 517 U.S. at 633).

Accordingly, the Supreme Court has repeatedly struck down statutes which were aimed at and adversely affected a particular group, notwithstanding rational basis review. *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 537; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause"). The instant case falls within this line of cases in that Congress has unlawfully singled out same-sex couples for purposes of denying them recognition of their legally performed marriages and the attendant federal benefits.

DOMA's legislative history shows it was born out of animosity toward same-sex couples, a preference for heterosexuality, and an intent to discourage same-sex marriage. The House Report devotes substantial discussion to its purported interests in defending "traditional notions" of heterosexual marriages and morality against a "legal assault" being waged by gay rights groups and their lawyers. The Committee stated DOMA should reflect moral judgments, held by the citizenship majority, which are rooted in Judeo-Christian traditions, and DOMA would preserve the State's legitimate interest in the freedom for people to refuse "to employ, rent an apartment to, or otherwise associate with homosexuals." H.R. Rep. 104-664 at 31. It presented other purported interests of (1) defending the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving government resources (*Id.* at 33). These interests, as shown below, are illusory as well.

Federal statutes must serve some legitimate purpose. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. Thus, to recast the foregoing principle, applied here, "[a] purpose to discriminate against [lesbians and gay persons] cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify [DOMA]." *Id.* at 534-35. Laws like DOMA "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. DOMA has one purpose and one purpose only - discriminating against same-sex marriages. This unduly subjects lesbians and gays to discrimination. *Lawrence*, 539 U.S. at 575 (noting stigma associated with statute criminalizing homosexual conduct).

(2) DOMA's Substantive Provisions Are Unconstitutionally Discriminatory

In connection with the exercise of the fundamental right to marry, "marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)." *Turner v. Safley*, 482 U.S. 78, 95 (1987). The right to marry encompasses a core set of basic substantive legal rights and attributes traditionally and intrinsically associated with marriage (i.e., receipt of benefits) that are so integral to an individual's personal autonomy they may not be eliminated by Congress. *Id*. If *Turner* held prohibitions against the fundamental right to marry cannot be arbitrarily established by the Government, how can the Government (as here) place irrational barriers which significantly interfere with the exercise of that fundamental right? "It would belabor the obvious to expound at any great length on the illegitimacy of a state policy that interferes with the exercise of fundamental rights through the selective bestowal of governmental favors." *Harris v. McRae*, 448 U.S. 297, 334 (1980) (Brennan, J., dissenting). Indeed, the Supreme Court has "never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice." *Id.*

As an example, *Harris* cited *Sherbert v. Verner*, 374 U.S. 398 (1963) in which the Court invalidated a South Carolina unemployment insurance statute that required recipients to accept suitable employment when offered, even if the grounds for refusal stemmed from religious convictions. Although recipients possessed no entitlement to compensation, the Court held the State could not cancel the benefits of a Seventh-Day Adventist who had refused a job requiring her to work on Saturdays: "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. Likewise, here, the Government "withholds financial benefits in a manner that discourages exercise of a due process liberty." *Harris*, 448 U.S. at 336.

Section 3 of DOMA has deprived Plaintiffs Barton and Phillips of substantive due process by burdening the exercise of their right to marry with a penalty because the exercise was not done in a government-favored heterosexual manner.

C. DOMA Violates Plaintiffs Barton's and Phillips' Equal Protection Rights[12]

Because of DOMA, unlawful restrictions have been placed on one of the most fundamental rights afforded to individuals. The situation here is comparable to that in

[12] The U.S. Constitution's guarantee of equal protection is embodied in the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The equal protection right is made applicable to the States by the Fourteenth Amendment. Equal protection asks whether the classification drawn by a statute constitutes arbitrary and invidious discrimination. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

Romer; DOMA effectively creates two classes of citizens for marital purposes. Its provisions adversely affect married same-sex couples but no other people. It unlawfully singles them out and tells them their relationships and their love for each other are unequal to heterosexual marriages and not worthy of the same treatment. Its purported interests, discussed below, are illusory, and reflect nothing more than an intent to relegate certain persons to second-class status.

Denial of benefits to legally married couples based on gender has no rational basis. In fact, the denial of marriage-based benefits to same-sex couples has been found to violate equal protection by several state supreme courts. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 481 (Conn. 2008); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). A flat refusal to accord these benefits to same-sex couples denies associated fundamental rights. It reflects the kind of "broad and undifferentiated disability on a single named group" *Romer* held to be unconstitutional.

D. Section 3 of DOMA Discriminates on the Basis of Sex

Section 3 discriminates against Plaintiffs Barton and Phillips based on their sex, and in so doing denies each equal protection based on sex in relation to each's spouse. Applying Judge Reinhardt's analysis in *Levenson*, Ms. Barton's inability to secure federal benefits is due solely to her spouse's sex. If Ms. Barton were a male, her entitlements to federal benefits would be guaranteed. Vice versa, if Ms. Phillips were a male, her entitlement to federal benefits would be guaranteed. Thus, the denial of benefits at issue here are "sex-based." *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009).

This is a much different issue than simply whether sexual orientation itself is a suspect classification. Instead, this is a law centered on a person and her spouse of the same sex. It is the equivalent of discrimination based on sex. *See supra* at 24-25. Plaintiffs Barton and Phillips are each being penalized solely because of sex in the choice of a spouse. Heterosexuals, similarly situated, are not. The only choice given to Ms. Barton and Ms. Phillips by the government is to marry a man. While a person may have no "right" to a government benefit and a denial of benefits can be for a number of reasons, there are some reasons upon which the government cannot rely. "It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

E. DOMA Does Not Rationally Further A Legitimate Governmental Interest

The House Report noted several governmental interests justifying DOMA's passage: (1) defending the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving government resources. H.R. Rep. No. 104-664 at 33. However, each of these purported interests is illusory. The first, defending traditional marriage, is unfounded because thousands of same-sex couples have already been married. As Judge Reinhardt noted in the dispute resolution case of *In re Levenson*, 560 F.3d 1145, 1150 (9th Cir. 2009), "[g]ay people will not be encouraged to enter into marriages with members of the opposite sex by the government's denial of benefits to same-sex spouses, and the denial will not discourage same-sex couples from entering into same-sex marriages; so, the denial cannot be said to 'nurture' or 'defend' the institution of heterosexual marriage." Moreover, Justice Scalia noted in *Lawrence* that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (emphasis in original).

Lawrence determined the second purpose, moral justification, was an unconstitutional basis for discrimination against gay persons. *Id.* at 571-72. Denying same-sex couples federal benefits can hardly be considered to further this interest. As to the third, no substantiated reason has been given to show how recognizing same-sex marriages or affording federal benefits to those in same-sex marriages threatens the States' rights to govern themselves. Regarding the fourth, preserving governmental resources, Justice Douglass noted in his concurrence in *Moreno* that "[p]roblems of the fisc . . . are legitimate concerns of government. But government 'may not accomplish such a purpose by invidious distinctions between classes of its citizens.'" *Moreno*, 413 U.S. at 543 (Douglass, J., concurring) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *see also Levenson*, 560 F.3d at 1150-51 ("that a government policy incidentally saves the government an insignificant amount of money does not provide a rational basis for that policy if the policy is, as a cost-saving measure, drastically underinclusive, let alone founded upon a prohibited or arbitrary ground.") (citing *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-91 (9th Cir. 2008)).

There is no rational relationship between the sex of an employee's spouse and the government's desire to preserve financial resources. As Judge Reinhardt noted, the government could save far more money by simply eliminating coverage for all spouses and in some cases, DOMA saves the government no money at all. *Id.* at 1151 & n. 5.

Any attempt to downgrade what is a blatant act of discrimination to a preservation of traditional notions or protect democratic self-governance is constitutional mockery. The same canard could have conceivably been said about segregation, access to higher education, interracial marriages, and policies against the disabled. However, the courts stepped in, saw the legislation for what it really was, and ended the practice. The unlawful classification created by DOMA cannot be sustained by reference to these purported congressional interests. In sum, DOMA classifies lesbian couples "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635. Such actions, violative of the freedom to marry the person of one's choice, cannot evade constitutional scrutiny.

IV. PART B OF THE OKLAHOMA CONSTITUTION AND SECTION 2 OF DOMA ARE UNCONSTITUTIONAL AS THEY BURDEN PLAINTIFFS BARTON'S AND PHILLIPS' FUNDAMENTAL DUE PROCESS LIBERTIES AND EQUAL PROTECTION RIGHTS

To ban recognition of civil marriage to couples based on gender denies them full access to their constitutional civil rights and liberties. If Plaintiffs Barton and Phillips are determined in this lawsuit to have access to the same constitutional marital rights and privileges enjoyed by opposite-sex "married" citizens, then recognition of those rights should not be curtailed in a way different from that of opposite-sex married couples. DOMA and the Oklahoma Amendment cannot operate in tandem to disregard full recognition of established liberties. This would be akin to the State of Virginia simply ignoring the mandate in *Loving*, *supra*. Again, in the analogy of Professor Tribe, "Imagine what we would say if, after *Loving v. Virginia*, a state were grudgingly to permit African Americans and whites to marry - but were to stamp the marriage licenses of such couples with an insignia designating official disapproval of their unions[?]" *Supra* at 30. Burdening a constitutional liberty by governmentally refusing to "recognize" the liberty is a plain infringement on the exercise of one's constitutional rights. Part B places a "disapproval" stamp on the marriage of Ms. Phillips and Ms. Barton and DOMA's Section 2 constitutes the federal government's acquiescence in such disapproval. If, as the Executive Branch now concludes, Section 3 unconstitutionally infringes, how can it approve a curtailment imposed through state action which reinforces the infirmity?

Presumably, the Executive Branch may argue that Section 2 has not caused Plaintiffs Barton and Phillips actual injury (Section 2 essentially states, "the federal government authorizes the State of Oklahoma not to recognize your marriage, if it chooses to do so."). The flaw of such an argument, from an equality perspective, is that Section 2 has no counter-provision stating that each State is free to deny the validity of heterosexual marriages performed elsewhere. This absence results in unequal protection and relegates one type of marriage to second class status.

Part B of the Oklahoma Amendment and DOMA's Section 2 cannot do indirectly what Part A and Section 3 have attempted to do directly. Accordingly, if Susan Barton and Gay Phillips have a fundamental right of marriage, both Part B and Section 2 must fail as constitutionally impermissible.

CONCLUSION

Regardless of the constitutional scrutiny standard utilized, DOMA and the Oklahoma Amendment were passed with the intent to deprive a minority of American citizens - who Congress and the Oklahoma Legislature view as inferior - of fundamental rights under the U.S. Constitution. The Oklahoma Amendment and DOMA proclaim that non-heterosexuals and their relationships are lesser valued than those of the majority. These enactments derive from nothing more than deep seated moral prejudice, and religious beliefs which the majority want to impose on all citizens as laws. This should not be permitted. A civilized society's justice system must be the protector of the minority. Laws based on a particular hostility toward a group of people do not (and should not) last long under judicial review. The promise of the Constitution guarantees that all citizens - lesbians, gays, bisexuals, and heterosexuals - enjoy the benefits of American citizenship without irrationally compromising the rights of any one group.

When the veil is lifted, the purpose and intent behind the Oklahoma Amendment and DOMA is apparent: to relegate same-sex couples, whose sexual orientation differs from that of the majority, to second class citizenship. It lacks legal credibility to claim that equal protection of the laws, and the Constitution's protection of fundamental liberty interests, were fulfilled in the enactments of the Oklahoma Amendment and DOMA.

Accordingly, upon the above authorities and arguments, Plaintiffs request that their Motion for Summary Judgment be granted.

Respectfully submitted,

s/Don G. Holladay
Don G. Holladay, OBA No. 4294
James E. Warner III, OBA No. 19593
HOLLADAY & CHILTON PLLC
204 North Robinson, Suite 1550
Oklahoma City, Oklahoma 73102
Telephone: (405) 236-2343
Facsimile: (405) 236-2349
dholladay@holladaychilton.com
jwarner@holladaychilton.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on September 28, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the current parties of record.

s/Don G. Holladay

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 04-CV-848-TCK-TLW
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	

JOINT AFFIDAVIT OF PLAINTIFFS
MARY BISHOP AND SHARON BALDWIN

COUNTY OF TULSA)
) ss.
STATE OF OKLAHOMA)

EXHIBIT
tabbies
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Mary Bishop and Sharon Baldwin, being duly sworn, hereby depose and state as follows:

1. I, Mary Bishop, and I, Sharon Baldwin, (at left and right, respectively, in the above photograph) are two of the plaintiffs in this lawsuit.

2. Mary was born Sept. 12, 1961, and is 50 years of age. Sharon was born Sept. 29, 1968, and will be 43 years of age tomorrow.

3. Mary is a sixth-generation Oklahoman with great-great-great grandparents who lived here before statehood. Oklahoma is where she was raised and where she has chosen to reside. She attended Hayes Elementary School in Ada, Oklahoma; and McLish Grade School and McLish High School near Fittstown, Oklahoma. She received her bachelor's degree from East Central University in Ada and, after earning her master's degree, completed her doctoral coursework at Oklahoma State University in Stillwater. She worked as a journalist at the *Bristow News-Record* in Bristow, Oklahoma, and at *The Daily Oklahoman* in Oklahoma City before joining the East Central University faculty as a journalism instructor in 1986. She was an assistant professor when she left East Central in 1995. For the past 16 years she has been employed at the *Tulsa World*, the second-largest metropolitan newspaper in Oklahoma. Her current position is assistant editor.

4. Sharon is at least a fourth-generation Oklahoman whose paternal grandmother came as a young girl with her parents to this new state in a covered wagon. Oklahoma is where Sharon was raised and where she has chosen to reside. She attended Mark Twain Elementary School, Madison Middle School and Central High School, all in

Tulsa. She received two associate degrees from then-Tulsa Junior College and a bachelor's degree from the University of Oklahoma in Norman. She worked for one year after graduation in the Student Publications Department at OU before joining the staff of the *Tulsa World* as a copy editor in August 1993. She has worked there for the past 18 years. For the last nine years and nine months, she has been the city slot editor – in a mid-level management role.

5. We are in a long-term, committed relationship. On March 26, 2000, we exchanged vows in a church-recognized Holy Union commitment ceremony at Alligator Point, Florida. (A copy of the document evidencing this ceremony is attached hereto as an Exhibit.) We live in Broken Arrow, in Tulsa County, Oklahoma, in a home Mary bought before she and Sharon met. Sharon's name has since been added to the property deed. In January 2011, we together purchased a 1.3-acre wooded lot in Osage County, Oklahoma, where we intend to build our dream home someday. In the meantime, we're spending many of our most special moments together there, from hikes and holiday picnics to meteor-shower watching.

6. Before our formal commitment ceremony, we lived together for three years and four months. In five weeks, we will celebrate our 15th anniversary of sharing a home and our lives together. We have a tradition of exchanging cards and enjoying a special meal together on our anniversaries, Valentine's Day and other special occasions and have at various times also included flowers and other gifts, such as jewelry and trips. We have one tradition – which even predates our living together – of a Valentine's Day picnic, no

matter what the weather. The place and menu change from year to year, but a time of reflection on our relationship and appreciation for one another is a constant feature. Neither of us has ever been married to any other person.

7. During the entirety of our permanent relationship, we have been legally precluded by the laws of the state of Oklahoma from marrying each other, which we deeply desire to do. "Marriage" is an institution to be respected. It is how we want the commitment and permanence of our relationship to be recognized. It is, indeed, how we see our relationship, and it is the only status that will signify the equality of our relationship. No other categorization, such as "domestic partnership" or "civil union," conveys the same level of commitment or respect. As an example, when we announced to one of our work supervisors that we were having a commitment ceremony, the supervisor, not knowing how to respond, said, "How cute!" She would not have responded in like fashion to an employee who told her of an upcoming marriage.

8. Indeed, during our lifetimes, the majority of society has historically treated gay men and lesbians with discrimination. It is only within this century that we have seen the overturning of a law that criminalized homosexual acts. Within our lifetimes, the news has reported gay men and lesbians beaten to death, driven to addiction and even to suicide simply for being who they are. We personally have been subject to harassment from fellow students, co-workers and others. We have been assumed to be "twins," "sisters," "cousins," "mother and daughter" and just "good friends" by people who could not fathom why two women would be together otherwise. We have been estranged from

family members, churches and friends. We have publicly been called unworthy in the eyes of God. We have been blamed for the ills of a nation and state by those who cite homosexuality for God's wrath, and we have been ridiculed for desiring to legally marry each other by people who say such an action would bring about the downfall of Western civilization. Nationwide and locally, gay men and lesbians continually even today face denunciation by elected officials.

9. On Feb. 13, 2009, we sought the issuance of a marriage license from Sally Howe Smith, the court clerk for Tulsa County, Oklahoma. She refused to grant us a license because we are both female and Oklahoma's constitution prohibits marriage between people of the same gender.

10. In our view, the Oklahoma Amendment tells our fellow Oklahoma citizens – including our friends, co-workers, neighbors and family members – that the personal commitment between us has no value and is inferior to other permanent commitments. In a very real sense, and in a demeaning way, this Oklahoma law signals to others that they should not respect our relationship.

11. When it comes to our inability to report our marital status accurately on legally binding forms, Oklahoma's prohibition against marriage for same-gender couples stigmatizes us and shows us that our state looks upon us as inferior to other Oklahomans. When we must declare our marital status on our income tax forms, health insurance forms and other such documents, we face the dilemma of lying under the letter of the law and declaring that we are married or denying our love for and commitment to each other and

saying we are single. Oklahoma's ban on marriage for same-gender couples also serves to institutionalize bigotry and prejudice toward gay people in such a way as to make it seem acceptable to persecute and demonize us. Oklahoma's ban against the marriage we seek codifies the subjugation of, prejudice against and disapproval of gay people in general and does so from the lowest levels of society to the very lawmakers who are supposed to represent us. While opinions differ as to what percentage of the population is composed of gay men and lesbians, it is indisputable that we are members of a distinct minority. In Oklahoma, we live and work knowing we are members of that minority class. Yet, despite our obvious minority status, even Oklahoma's "hate crimes" statute offers no protection based on sexual orientation.

12. We followed the debate and passage of Referendum No. 334, which sent the proposed Oklahoma constitutional ban on same-gender marriage and nonrecognition of same-gender marriages to a popular vote of the people. That debate, in and out of the legislature assembly, was but one more example of giving legislators a bully pulpit for anti-gay remarks and the opportunity to pass anti-gay legislation. The referendum passed the Oklahoma House of Representatives by a vote of 92-4 and the Oklahoma Senate by a vote of 38-7. Exhibit E is a sampling of the news articles published in the *Tulsa World* at the time of passage of Referendum No. 334 and then the vote on State Question 711. The constitutional amendment was overwhelmingly approved.

13. During the debate on State Question 711, some confused our desire for civil marriage with a desire to interfere with their own religious beliefs and rites and thought

we wanted to force houses of worship to marry same-gender couples. Some also said allowing same-gender couples to marry would degrade the marriages of heterosexual couples and lead to the destruction of families. None of these assertions has any basis in fact. We seek a civil right in a civil ceremony that will force the state of Oklahoma to recognize our permanent commitment to each other as a marriage. Our permanent commitment to each other or the state's recognition thereof couldn't possibly inflict harm on other people or interfere with the marriages of opposite-sex couples any more than their relationships affect ours.

14. Oklahoma's ban has caused each of us substantial emotional anguish. We find it demeaning and irrational to be told that we already have the right to marry – as long as we each marry someone of the opposite sex instead of the person we love, the companion we have chosen. Our sexual orientation is an inherent part of our identity, and we do not experience our orientation as a matter of choice. There was not a certain day in our lives when either of us decided to "become" a lesbian, any more than individuals who are heterosexual decided at a particular moment to be heterosexual. For us, our sexual orientation is just who we are. Our relationship is healthy and non-threatening to others. The suggestion that if we want to get married, we should just change our sexual orientation and find someone of the opposite sex is perverse. To do so would be emotionally unhealthy and mentally damaging.

15. We are active in our community. We have participated in the construction of two Habitat for Humanity houses sponsored by the *Tulsa World*; we are blood donors

with the Oklahoma Blood Institute; we have edited publications and other written materials for our church and other organizations with which we are involved on a volunteer basis; we have read to children's groups through the Tulsa City-County Library's Summer Reading Program; we are active members of Oklahomans for Equality, which honored us and our co-plaintiffs in 2010 as Community Heroes of the Year; we are working toward certification as wildlife rehabilitators and are raising five infant and juvenile raccoons for release; and we donate regularly to more than a dozen nonprofit organizations, including the Tulsa Community Foundation. Our sexual orientation has no bearing on our ability to be productive members of society, yet despite our commitment to our community, our inability to hold out our relationship as a marriage has relegated its status to an inferior level. Marriage is the most important relation in one's life, and we are being denied this right.

16. Oklahoma's ban on same-gender marriage has also caused us substantial harm in other ways. Simply taking legal steps that would not have been necessary for a married couple has made us incur extra expense. For example, we each must maintain current durable powers of attorney, living wills and health-care proxies and have together established a living trust, prepared by a licensed attorney. The preparation of these documents initially caused us to spend about $1,300 – an expense that would have been unnecessary if both of us had had spousal rights. Even with this planning, it is our understanding that powers of attorney stop at death – meaning our blood family members, not the surviving life partner, have the right to make our final arrangements and plan our

funerals. It seems that no amount of planning can prevent these continued surprises. A marriage license offers the full array of protection that we are forced to seek through piecemeal efforts to provide for each other.

17. Oklahoma's prohibition hurts us monetarily in other ways and also because of the uncertainty of how our relationship will be treated by companies with which we do business and for which we work. For example, Mary is a member of an automobile club, yet in previous years she was told that she could not add Sharon to her policy as a family member because we were not legally married. Additionally, we both work for the same company. Although our employer's nondiscrimination policy now includes sexual orientation (it didn't for most of the years we have worked there), the company has not explicitly said it provides domestic-partner benefits. Therefore, we are left in the limbo of not knowing whether Mary could provide insurance coverage for Sharon through Mary's *Tulsa World* policy if Sharon left the employment of the *Tulsa World* – or vice versa. It is our intention to take care of each other in sickness and in health, yet we cannot be assured that medical facilities and other institutions will recognize our relationship and treat us as family. Because of that uncertainty, we carry copies of our living wills and powers of attorney in our car's glove compartment at all times and in our luggage when we travel so that we will be able to prove our right to make medical and other decisions for each other in the event that one of us is incapacitated.

18. As Oklahoma citizens we are suffering unequal treatment caused by Oklahoma's constitutional provisions toward same-gender marriage. We have been

stripped of one of our fundamental rights by popular vote, and we have become second-class citizens by being denied the right to marry. The rights of the minority should never be determined by a vote of the majority.

19. As professional journalists, we know that we are supposed to report the news – not make it. One tenet of journalistic ethics is that journalists will not become involved in any political or other activity that could present a conflict of interest or the perception of a conflict of interest. We entered this lawsuit with the knowledge that doing so could cost us our careers, but we felt that we had to do it anyway. We saw too many other gay couples who had even more to lose – children and homes, for example – to risk filing such an action. Because we believe so strongly that our state should treat us the same as all other Oklahoma residents, we knew that we needed to pursue this action in court. Equal treatment under the law is all that we are asking. It is a goal that is worth any price.

FURTHER AFFIANT SAYETH NOT.

Mary J. Bishop
MARY BISHOP

NOTARY

Subscribed and sworn to before me this 19th day of September, 2011.

My Commission Expires:

March, 11, 2014

Commission # 02004359

Kathryn Cooper
NOTARY PUBLIC

KATHRYN COOPER
Notary Public in and for
STATE OF OKLAHOMA
Commission # 02004359
Expires: March 11, 2014

FURTHER AFFIANT SAYETH NOT.

Sharon J. Baldwin
SHARON BALDWIN

NOTARY

Subscribed and sworn to before me this 19th day of September, 2011.

My Commission Expires:

March 11, 2014

Commission # 02004359

Kathryn Cooper
NOTARY PUBLIC

KATHRYN COOPER
Notary Public in and for
STATE OF OKLAHOMA
Commission # 02004359
Expires: March 11, 2014

Certificate of Holy Union

What greater thing is there
for two human souls
than to be joined together.

Let it be known that

on the 26th day of March

in the year of 2000

Mary Fern Bishop

and

Sharon Sue Baldwin

were by me joined in Holy Union

at Alligator Point, Florida

Witnesses: James C Stanton

Janet M Baldwin

James W. Joyce

Minister of Unitarian Universalist Association

EXHIBIT

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tabbies

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 04-CV-848-TCK-TLW
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	

AFFIDAVIT OF GAY E. PHILLIPS SUBMITTED PURSUANT TO COURT ORDER OF AUGUST 2, 2010

STATE OF OKLAHOMA)
) ss.
COUNTY OF OSAGE)

Gay E. Phillips, being duly sworn, hereby deposes and states as follows:

1. I was born April 7, 1955, and am 55 years of age.

2. I am one of the plaintiffs in this lawsuit. This affidavit is submitted pursuant to the Court's Order of August 2, 2010.

3. Susan G. Barton, another plaintiff herein, and I have been in a continuous committed relationship since November 1, 1984. We were united in a civil union conducted by Justice Justine, in Vermont on August 4, 2001; we were subsequently married in Vancouver, British Columbia, Canada, on May 16, 2005. We were issued a marriage license by the State of California and married under California law on November 1, 2008.

Loss of Federal Tax Benefits

4. Between the years of our civil union (2001) and through 2008, Susan and I

EXHIBIT
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have been required to file our federal and state income tax returns using a single person status. Internal Revenue Service (IRS) regulations, based on the Defense of Marriage Act (DOMA), make us ineligible for filing federal income taxes jointly with a same sex spouse. IRS Publication 501 (2009) instructs that "for federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife." (Exhibit No. 3 hereto).

5. In conjunction with the preparation of these affidavits, Susan and I engaged a certified public accountant to compare the federal marriage-based tax benefit we would have received if we had been able to use the status of "married filing jointly." Due to time constraints, the accountant compared only five years (tax years 2003, 2005, 2006, 2007 and 2008) and did not compare earlier years. The filing dates for our 2009 returns have been extended and those returns have not yet been filed.[1] As reflected on Exhibit 1 hereto, if Susan and I had been eligible for the same benefit available to similarly-situated heterosexual couples (i.e., the filing of a joint return with one's spouse), for the tax years examined, we would have paid $744.00 less in federal taxes than we did by being forced to file separately

[1]We were unable to locate and obtain copies of our 2004 returns. It is our current understanding that if an individual has filed a separate return for a year in which a joint return could have been made with a spouse, the couple may only file a joint return within three years after the filing of the original return. 26 C.F.R. § 301.6402-2(a)(1). If DOMA is ultimately found unconstitutional, we would seek to file amended returns to the extent permitted. Even then, we would not be able to recoup all losses suffered. Under the tax scheme utilized by the federal government, a married individual who files jointly with a spouse is generally subject to a lower tax than an unmarried individual. 26 U.S.C. § 1(a), (b), & (c). *Gill v. Office of Personnel Management*, No. 09-10309-JLT, 2010 WL 269565, at *5 (D. Mass. July 8, 2010).

as single individuals. For the tax year 2008, if permitted to have filed a joint tax return, our federal benefit would have been $324.00, in the form of reduced taxes. DOMA has increased the amount of federal income tax we have paid, and we have been denied the federal benefit of a tax rate available to heterosexual married couples.

6. For these returns, we were ready and would have elected in each tax year the more beneficial filing status, if the federal law had permitted us to do so. Because of DOMA, we were ineligible, and it would have violated federal tax law to claim the status of "married filing jointly." We are also currently ineligible to file amended returns for tax years 2006 and 2008, for purposes of seeking a refund for overpayment of taxes.

7. Since 2001, we had undergone the extra expense of preparing separate returns at the federal and state level while the vast majority of heterosexual married couples in similar circumstances have not been required to do so. It is a stigmatizing aspect of our marriage that we are required to report our taxes to the federal government as single persons when we are legally married under the laws of the State of California. It is as if the federal government is saying our marriage has no value in the eyes of our country.

Social Security Survivors Benefits
(Exhibit No. 2)

8. The Social Security Administration has advised me that, as of January 15, 2010, over $90,000 in social security taxes have been paid by myself and my employers into my social security account. This amount excludes my 2009 earnings and social security taxes. I have now earned enough "credits" to qualify for my spouse to receive survivors

benefits of $1,726.00 monthly at her full retirement, in the event of my death.

9. In the event of my death, because of DOMA, my spouse Susan G. Barton is not eligible for recognition as a surviving spouse. Susan is currently 56 years of age. If I were to die, unlike heterosexual couples in identical situations, the "surviving spouse" benefit will not be available to Susan at age 60 (reduced benefits available) because the federal government recognizes this benefit only for spouses of the opposite sex.

Death Benefits

10. In the event of my death, I have also already earned enough "credits" for my spouse to receive a one-time death benefit of $255.00. Because of DOMA, my spouse Susan G. Barton is denied the right to this federal entitlement at my death.

Retirement Planning

11. Because of DOMA, both my spouse and I are facing our senior years without the full support of our nation's social security laws. The impact of DOMA has severely impacted our ability to plan for retirement. Neither of us can afford to make the decision to quit working in reliance upon an entitlement to the survivors benefits of the other. For heterosexual couples, one spouse may choose to retire, knowing that while this will decrease the retiring person's own social security benefits, in the event of death of the working spouse, the retired spouse will be given the option of stepping up to survivors benefits flowing from the one who worked longer and earned more credits. Here, we cannot utilize the social security laws in our current senior years retirement planning in the manner the federal laws

allow for other married couples who are senior citizens. The sole reason we are disallowed this financial planning is that neither of us married a man, and consequently under DOMA, no benefits will flow from one spouse to the other.

DOMA'S Stigmatization

12. Our legal status as a married couple is an important aspect of who we are. The federal government to which we pay taxes officially refuses to recognize our marriage, and this stigmatizes us as individuals and as a married couple. Because of DOMA, we are unfairly forced to explain to people that even though we are legally married, our marriage is not recognized by the federal government.

FURTHER AFFIANT SAYETH NOT.

Gay E. Phillips

GAY E. PHILLIPS

NOTARY

Subscribed and sworn to before me this 11 day of August, 2010.

NOTARY PUBLIC

PAUL J. KASNIC
NOTARY PUBLIC
MONTGOMERY COUNTY
MARYLAND
MY COMMISSION EXPIRES AUG. 21, 2011

Commission No. ________________

My commission expires: 8/21/11

Kelly Kirby, CPA, PC

Certified Public Accountant
a professional corporation
4815 South Harvard, Suite 424
Tulsa, Oklahoma 74135-3068
(918) 747-5466 Voice
(918) 747-5499 Facsimile
Email Kelly@KKirby.com

August 5, 2010

Sue Barton & Gay Phillips
2201 W Reading Pl
Tulsa, OK 74127-2238

Dear Sue & Gay:

In accordance with your request, I have prepared income tax returns using the married filing jointly filing status for 2003, 2005, 2006, 2007 and 2008. I have then compared the total tax on federal and Oklahoma returns for each year to the total tax on the corresponding returns which you previously filed using the single filing status. I have appended a table of the result of these comparisons.

Of the 10 returns prepared (five years federal and five years state), in 8 instances you paid more tax on using the single status than if you had been able to file married jointly filed returns, in 1 instance you paid less tax, and in 1 instance the tax was exactly the same. I have appended a table of the result of these comparisons.

As a reminder, we were unable to do a similar comparison for 2004 since you were unable to locate your file copies, and we were unable to do a similar comparison for 2009 since your original returns are currently on extension of time to file and have not yet been prepared.

Please let me know if I can be of further assistance in this matter.

Sincerely,
KELLY KIRBY, CPA, PC

Kelly W. Kirby, CPA
Managing Shareholder

EXHIBIT
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tabbies

	Federal tax				Oklahoma tax			
Year	Sue	Gay	Joint	Injury	Sue	Gay	Joint	Injury
2003	2,420	889	3,137	172	64	1	43	22
2004				-				-
2005	583	846	1,393	36	196	317	595	(82)
2006	164	1,471	1,423	212	49	609	619	39
2007	-	-	-	-	-	73	15	58
2008	4,588	-	4,264	324	1,714	19	1,692	41

SOCIAL SECURITY ADMINISTRATION 75 YEARS
Benefits America!

Prevent identity theft—protect your Social Security number

Your Social Security Statement

www.socialsecurity.gov

Prepared especially for Gay E. Phillips

January 15, 2010

See inside for your personal information

000034795 01 AT 0.357 A1 R 0124
GAY E. PHILLIPS
2201 W READING PL
TULSA OK 74127-2238

What's inside...

What Social Security Means To You

This *Social Security Statement* can help you plan for your financial future. It provides estimates of your Social Security benefits under current law and updates your latest reported earnings.

Please read this *Statement* carefully. If you see a mistake, please let us know. That's important because your benefits will be based on our record of your lifetime earnings. We recommend you keep a copy of your *Statement* with your financial records.

Social Security is for people of all ages...
We're more than a retirement program. Social Security also can provide benefits if you become disabled and help support your family after you die.

Work to build a secure future...
Social Security is the largest source of income for most elderly Americans today, but Social Security was never intended to be your only source of income when you retire. You also will need other savings, investments, pensions or retirement accounts to make sure you have enough money to live comfortably when you retire.

Saving and investing wisely are important not only for you and your family, but for the entire country. If you want to learn more about how and why to save, you should visit ***www.mymoney.gov***, a federal government website dedicated to teaching all Americans the basics of financial management.

About Social Security's future...
Social Security is a compact between generations. Since 1935, America has kept the promise of security for its workers and their families. Now, however, the Social Security system is facing serious financial problems, and action is needed soon to make sure the system will be sound when today's younger workers are ready for retirement.

In 2016 we will begin paying more in benefits than we collect in taxes. Without changes, by 2037 the Social Security Trust Fund will be exhausted* and there will be enough money to pay only about 76 cents for each dollar of scheduled benefits. We need to resolve these issues soon to make sure Social Security continues to provide a foundation of protection for future generations.

Social Security on the Net...
Visit ***www.socialsecurity.gov*** on the Internet to learn more about Social Security. You can read publications, including *When To Start Receiving Retirement Benefits*; use our Retirement Estimator to obtain immediate and personalized estimates of future benefits; and when you're ready to apply for benefits, use our improved online application—It's so easy!

Michael J. Astrue
Commissioner

* These estimates are based on the intermediate assumptions from the Social Secu[rity Trustees'] Annual Report to the Congress.

EXHIBIT
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011510R 02A1 34795T

Your Estimated Benefits

***Retirement** You have earned enough credits to qualify for benefits. At your current earnings rate, if you continue working until...

your full retirement age (66 and 2 months), your payment would be about	$	1,539	a month
age 70, your payment would be about	$	2,011	a month

If you stop working and start receiving benefits at...

age 62, your payment would be about	$	1,148	a month

***Disability** You have earned enough credits to qualify for benefits. If you become disabled right now...

Your payment would be about	$	1,726	a month

***Family** If you get retirement or disability benefits, your spouse and children also may qualify for benefits.

***Survivors** You have earned enough credits for your family to receive survivors benefits. If you die this year, certain members of your family **may** qualify for the following benefits:

Your child	$	1,294	a month
Your spouse who is caring for your child	$	1,294	a month
Your spouse who reaches full retirement age	$	1,726	a month
Total family benefits cannot be more than	$	3,063	a month

Your spouse or minor child may be eligible for a special one-time death benefit of $255.

Medicare You have earned enough credits to qualify for Medicare at age 65. Even if you do not retire at age 65, be sure to contact Social Security three months before your 65th birthday to enroll in Medicare.

***Your estimated benefits are based on current law. Congress has made changes to the law in the past and can do so at any time. The law governing benefit amounts may change because, by 2037, the payroll taxes collected will be enough to pay only about 76 percent of scheduled benefits.**

We based your benefit estimates on these facts:

Your date of birth (please verify your name on page 1 and this date of birth)	April 7, 1955
Your estimated taxable earnings per year after 2009	$12,476
Your Social Security number (only the last four digits are shown to help prevent identity theft)	XXX-XX-5430

How Your Benefits Are Estimated

To qualify for benefits, you earn "credits" through your work — up to four each year. This year, for example, you earn one credit for each $1,120 of wages or self-employment income. When you've earned $4,480, you've earned your four credits for the year. Most people need 40 credits, earned over their working lifetime, to receive retirement benefits. For disability and survivors benefits, young people need fewer credits to be eligible.

We checked your records to see whether you have earned enough credits to qualify for benefits. If you haven't earned enough yet to qualify for any type of benefit, we can't give you a benefit estimate now. If you continue to work, we'll give you an estimate when you do qualify.

What we assumed — If you have enough work credits, we estimated your benefit amounts using your average earnings over your working lifetime. For 2010 and later (up to retirement age), we assumed you'll continue to work and make about the same as you did in 2008 or 2009. We also included credits we assumed you earned last year and this year.

Generally, the older you are and the closer you are to retirement, the more accurate the retirement estimates will be because they are based on a longer work history with fewer uncertainties such as earnings fluctuations and future law changes. We encourage you to use our online Retirement Estimator at ***www.socialsecurity.gov/estimator*** to obtain immediate and personalized benefit estimates.

We can't provide your actual benefit amount until you apply for benefits. **And that amount may differ from the estimates stated above because:**

(1) Your earnings may increase or decrease in the future.
(2) After you start receiving benefits, they will be adjusted for cost-of-living increases.
(3) Your estimated benefits are based on current law. **The law governing benefit amounts may change.**
(4) Your benefit amount may be affected by **military service, railroad employment or pensions earned through work on which you did not pay Social Security tax.** Visit ***www.socialsecurity.gov/mystatement*** to learn more.

Windfall Elimination Provision (WEP) — If you receive a pension from employment in which you did not pay Social Security taxes and you also qualify for your own Social Security retirement or disability benefit, your Social Security benefit may be reduced, but not eliminated, by WEP. The amount of the reduction, if any, depends on your earnings and number of years in jobs in which you paid Social Security taxes, and the year you are age 62 or become disabled. To estimate WEP's effect on your Social Security benefit, visit ***www.socialsecurity.gov/WEP-CHART***. In 2010, the maximum monthly reduction is $381. For more information, please see *Windfall Elimination Provision* (Publication No. 05-10045) at ***www.socialsecurity.gov/WEP***.

Government Pension Offset (GPO) — If you receive a pension based on federal, state or local government work in which you did not pay Social Security taxes and you qualify, now or in the future, for Social Security benefits as a current or former spouse, widow or widower, you are likely to be affected by GPO. If GPO applies, your Social Security benefit will be reduced by an amount equal to two-thirds of your government pension, and could be reduced to zero. Even if your benefit is reduced to zero, you will be eligible for Medicare at age 65 on your spouse's record. To learn more, please see *Government Pension Offset* (Publication No. 05-10007) at ***www.socialsecurity.gov/GPO***.

Your Earnings Record

Years You Worked	Your Taxed Social Security Earnings	Your Taxed Medicare Earnings
1976	$ 866	$ 866
1977	4,140	4,140
1978	9,069	9,069
1979	9,783	9,783
1980	11,780	11,780
1981	14,177	14,177
1982	16,259	16,259
1983	18,000	18,000
1984	20,666	20,666
1985	22,880	22,880
1986	23,760	23,760
1987	25,110	25,110
1988	28,591	28,591
1989	30,556	30,556

Years You Worked	Your Taxed Social Security Earnings	Your Taxed Medicare Earnings
1990	$ 32,647	$ 32,647
1991	34,154	34,154
1992	34,847	34,847
1993	35,194	35,194
1994	36,229	36,229
1995	37,431	37,431
1996	38,243	38,243
1997	40,162	40,162
1998	44,298	44,298
1999	34,764	34,764
2000	22,333	22,333
2001	19,397	19,397
2002	15,415	15,415
2003	9,707	9,707
2004	18,768	18,768
2005	17,040	17,040
2006	28,613	28,613
2007	11,354	11,354
2008	12,476	12,476
2009	Not yet recorded	

Total Social Security and Medicare taxes paid over your working career through the last year reported on the chart above:

Estimated taxes paid for Social Security:		Estimated taxes paid for Medicare:	
You paid:	$45,613	You paid:	$10,705
Your employers paid:	$45,613	Your employers paid:	$10,705

Note: You currently pay 6.2 percent of your salary, up to $106,800, in Social Security taxes and 1.45 percent in Medicare taxes on your entire salary. Your employer also pays 6.2 percent in Social Security taxes and 1.45 percent in Medicare taxes for you. If you are self-employed, you pay the combined employee and employer amount of 12.4 percent in Social Security taxes and 2.9 percent in Medicare taxes on your net earnings.

Help Us Keep Your Earnings Record Accurate

You, your employer and Social Security share responsibility for the accuracy of your earnings record. Since you began working, we recorded your reported earnings under your name and Social Security number. We have updated your record each time your employer (or you, if you're self-employed) reported your earnings.

Remember, it's your earnings, not the amount of taxes you paid or the number of credits you've earned, that determine your benefit amount. When we figure that amount, we base it on your average earnings over your lifetime. If our records are wrong, you may not receive all the benefits to which you're entitled.

Review this chart carefully using your own records to make sure our information is correct and that we've recorded each year you worked. You're the only person who can look at the earnings chart and know whether it is complete and correct.

Some or all of your earnings from **last year** may not be shown on your *Statement*. It could be that we still were processing last year's earnings reports when your *Statement* was prepared. Your complete earnings for last year will be shown on next year's *Statement*. **Note:** If you worked for more than one employer during any year, or if you had both earnings and self-employment income, we combined your earnings for the year.

There's a limit on the amount of earnings on which you pay Social Security taxes each year. The limit increases yearly. Earnings above the limit will not appear on your earnings chart as Social Security earnings. (For Medicare taxes, the maximum earnings amount began rising in 1991. Since 1994, **all** of your earnings are taxed for Medicare.)

Call us right away at 1-800-772-1213 (7 a.m.–7 p.m. your local time) if any earnings for years **before last year** are shown incorrectly. Please have your W-2 or tax return for those years available. (If you live outside the U.S., follow the directions at the bottom of page 4.)

Some Facts About Social Security

About Social Security and Medicare...

Social Security pays retirement, disability, family and survivors benefits. Medicare, a separate program run by the Centers for Medicare & Medicaid Services, helps pay for inpatient hospital care, nursing care, doctors' fees, drugs and other medical services and supplies to people age 65 and older, as well as to people who have been receiving Social Security disability benefits for two years or more. Medicare does not pay for long-term care, so you may want to consider options for private insurance. Your Social Security covered earnings qualify you for both programs. For more information about Medicare, visit ***www.medicare.gov*** or call **1-800-633-4227** (TTY **1-877-486-2048** if you are deaf or hard of hearing).

Retirement — If you were born before 1938, your full retirement age is 65. Because of a 1983 change in the law, the full retirement age will increase gradually to 67 for people born in 1960 and later.

Some people retire before their full retirement age. You can retire as early as 62 and take benefits at a reduced rate. If you work after your full retirement age, you can receive higher benefits because of additional earnings and credits for delayed retirement.

Disability — If you become disabled before full retirement age, you can receive disability benefits after six months if you have:

— enough credits from earnings (depending on your age, you must have earned six to 20 of your credits in the three to 10 years before you became disabled); and

— a physical or mental impairment that's expected to prevent you from doing "substantial" work for a year or more *or* result in death.

If you are filing for disability benefits, please let us know if you are on active military duty or are a recently discharged veteran, so that we can handle your claim more quickly.

Family — If you're eligible for disability or retirement benefits, your current or divorced spouse, minor children or adult children disabled before age 22 also may receive benefits. Each may qualify for up to about 50 percent of your benefit amount.

Survivors — When you die, certain members of your family may be eligible for benefits:

— your spouse age 60 or older (50 or older if disabled, or any age if caring for your children younger than age 16); and

— your children if unmarried and younger than age 18, still in school and younger than 19 years old, or adult children disabled before age 22.

If you are divorced, your ex-spouse could be eligible for a widow's or widower's benefit on your record when you die.

Extra Help with Medicare — If you know someone who is on Medicare and has limited income and resources, extra help is available for prescription drug costs. The extra help can help pay the monthly premiums, annual deductibles and prescription co-payments. To learn more or to apply, visit ***www.socialsecurity.gov*** or call **1-800-772-1213** (TTY **1-800-325-0778**).

Receive benefits and still work...

You can work and still get retirement or survivors benefits. If you're younger than your full retirement age, there are limits on how much you can earn without affecting your benefit amount. When you apply for benefits, we'll tell you what the limits are and whether work would affect your monthly benefits. When you reach full retirement age, the earnings limits no longer apply.

Before you decide to retire...

Carefully consider the advantages and disadvantages of early retirement. If you choose to receive benefits before you reach full retirement age, your monthly benefits will be reduced.

To help you decide the best time to retire, we offer a free publication, *When To Start Receiving Retirement Benefits* (Publication No. 05-10147), that identifies the many factors you should consider before applying. Most people can receive an estimate of their benefit based on their actual Social Security earnings record by going to ***www.socialsecurity.gov/estimator***. You also can calculate future retirement benefits by using the Social Security Benefit Calculators at ***www.socialsecurity.gov***.

Other helpful free publications include:

— *Retirement Benefits* (No. 05-10035)
— *Understanding The Benefits* (No. 05-10024)
— *Your Retirement Benefit: How It Is Figured* (No. 05-10070)
— *Windfall Elimination Provision* (No. 05-10045)
— *Government Pension Offset* (No. 05-10007)
— *Identity Theft And Your Social Security Number* (No. 05-10064)

We also have other leaflets and fact sheets with information about specific topics such as military service, self-employment or foreign employment. You can request Social Security publications at our website, ***www.socialsecurity.gov***, or by calling us at **1-800-772-1213**. Our website has a list of frequently asked questions that may answer questions you have. We have easy-to-use online applications for benefits that can save you a telephone call or a trip to a field office.

You may also qualify for government benefits outside of Social Security. For more information on these benefits, visit ***www.govbenefits.gov***.

If you need more information— Visit ***www.socialsecurity.gov/mystatement*** on the Internet, contact any Social Security office, call **1-800-772-1213** or write to Social Security Administration, Office of Earnings Operations, P.O. Box 33026, Baltimore, MD 21290-3026. If you're deaf or hard of hearing, call TTY **1-800-325-0778.** If you have questions about your personal information, you must provide your complete Social Security number. If your address is incorrect on this *Statement*, ask the Internal Revenue Service to send you a Form 8822. We don't keep your address if you're not receiving Social Security benefits.

Para solicitar una *Declaración* en español, llame al 1-800-772-1213

Definition of survivors benefits

When a person who has worked and paid Social Security taxes dies, certain members of the family may be eligible for survivors benefits.

Up to ten years of work is needed to be eligible for benefits, depending on the person's age at the time of death.

If you apply, please be ready to supply the information we need to approve your application for these benefits:

- Lump Sum Death Payment
- Widow's, Widower's, or Surviving Divorced Spouse
- Child's
- Mother's or Father's
- Parent's

Who is eligible for survivors benefits

Social Security survivors benefits can be paid to:

- A widow or widower -- full benefits at full retirement age, or reduced benefits as early as age 60
- A disabled widow or widower -- as early as age 50
- A widow or widower at any age if he or she takes care of the deceased's child who is under age 16 or disabled, and receiving Social Security benefits
- Unmarried children under 18, or up to age 19 if they are attending high school full time. Under certain circumstances, benefits can be paid to stepchildren, grandchildren, or adopted children.
- Children at any age who were disabled before age 22 and remain disabled.
- Dependent parents age 62 or older

Note: If you are divorced, you may still qualify for survivors benefits.

Our Benefit Calculators can help you figure how much your benefits will be.

How work affects survivors benefits

You can receive Social Security survivors benefits and work at the same time. However, depending on your age, your benefits could be reduced if you earn more than certain amounts.

For more information, we recommend our leaflet, *How Work Affects Your Benefits*, publication number 05-10069.

5. You qualify for the additional child tax credit. See the instructions in your tax forms package for more information on this credit.

6. You qualify for the refundable American opportunity education credit. See Form 8863, Education Credits.

7. You qualify for the health coverage tax credit. For information about this credit, see Form 8885, Health Coverage Tax Credit.

8. You qualify for the refundable credit for prior year minimum tax. See Form 8801, Credit for Prior Year Minimum Tax — Individuals, Estates, and Trusts.

9. You qualify for the first-time homebuyer credit. See Form 5405, First-Time Homebuyer Credit.

Filing Status

You must determine your filing status before you can determine your filing requirements, standard deduction (discussed later), and correct tax. You figure your correct tax by using the section of the Tax Computation Worksheet or the column in the Tax Table that applies to your filing status.

You also use your filing status in determining whether you are eligible to claim certain other deductions and credits.

There are five filing statuses:

- Single,
- Married Filing Jointly,
- Married Filing Separately,
- Head of Household, and
- Qualifying Widow(er) With Dependent Child.

If more than one filing status applies to you, choose the one that will give you the lowest tax.

Marital Status

In general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.

Unmarried persons. You are considered unmarried for the whole year if, on the last day of your tax year, you are unmarried or legally separated from your spouse under a divorce or separate maintenance decree.

State law governs whether you are married or legally separated under a divorce or separate maintenance decree.

Divorced persons. If you are divorced under a final decree by the last day of the year, you are considered unmarried for the whole year.

Divorce and remarriage. If you obtain a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce you intended to and did remarry each other in the next tax year, you and your spouse must file as married individuals.

Annulled marriages. If you obtain a court decree of annulment, which holds that no valid marriage ever existed, you are considered unmarried even if you filed joint returns for earlier years. You must file amended returns (Form 1040X) claiming single or head of household status for all tax years affected by the annulment that are not closed by the statute of limitations for filing a tax return. The statute of limitations generally does not end until 3 years after your original return was filed.

Head of household or qualifying widow(er) with dependent child. If you are considered unmarried, you may be able to file as a head of household or as a qualifying widow(er) with a dependent child. See <u>Head of Household</u> and <u>Qualifying Widow(er) With Dependent Child</u> to see if you qualify.

Married persons. If you are considered married for the whole year, you and your spouse can file a joint return, or you can file separate returns.

Considered married. You are considered married for the whole year if on the last day of your tax year you and your spouse meet any one of the following tests.

1. You are married and living together as husband and wife.

2. You are living together in a common law marriage that is recognized in the state where you now live or in the state where the common law marriage began.

3. You are married and living apart, but not legally separated under a decree of divorce or separate maintenance.

4. You are separated under an interlocutory (not final) decree of divorce. For purposes of filing a joint return, you are not considered divorced.

Spouse died during the year. If your spouse died during the year, you are considered married for the whole year for filing status purposes.

If you did not remarry before the end of the tax year, you can file a joint return for yourself and your deceased spouse. For the next 2 years, you may be entitled to the special benefits described later under <u>Qualifying Widow(er) With Dependent Child</u>.

If you remarried before the end of the tax year, you can file a joint return with your new spouse. Your deceased spouse's filing status is married filing separately for that year.

Married persons living apart. If you live apart from your spouse and meet certain tests, you may be considered unmarried. If this applies to you, you can file as head of household even though you are not divorced or legally separated. If you qualify to file as head of household instead of as married filing separately, your standard deduction will be higher. Also, your tax may be lower, and you may be able to claim the earned income credit. See <u>Head of Household</u>, later.

Single

EXHIBIT
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, *et al.*, Plaintiffs,	)	
v.	)	No. 04-CV-848-TCK-TLW
UNITED STATES OF AMERICA, *et al.*, Defendants.	)	

AFFIDAVIT OF SUSAN G. BARTON SUBMITTED PURSUANT TO <u>COURT ORDER OF AUGUST 2, 2010</u>

STATE OF OKLAHOMA)
) ss.
COUNTY OF OSAGE)

Susan G. Barton, being duly sworn, hereby deposes and states as follows:

1. I was born May 20, 1954, and am 56 years of age.

2. I am one of the plaintiffs in this lawsuit. This affidavit is submitted pursuant to the Court's Order of August 2, 2010.

3. I have read the affidavit of Gay E. Phillips and affirm the statements she has made on our behalf. Gay and I have been in a continuous committed relationship since November 1, 1984. We were united in a civil union conducted by Justice Justine, in Vermont on August 4, 2001; then we were married in Vancouver, British Columbia, Canada, on May 16, 2005; and then we were issued a marriage license by the State of California and married under California law on November 1, 2008.

EXHIBIT
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Loss of Federal Tax Benefits

4. As reflected in the affidavit of my spouse, Gay E. Phillips, between the years of our civil union (2001) and through 2008, Gay and I have been required to file single individual federal and state income tax returns. The IRS regulations, based on the Defense of Marriage Act (DOMA) make us ineligible for filing federal income taxes jointly with a same sex spouse. IRS Publication 501 (2009) instructs that "for federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife." (Exhibit No. 3 to Phillips Affidavit).

5. In conjunction with the preparation of these affidavits, Gay and I engaged a certified public accountant to compare the federal marriage-based tax benefit we would have received if we had been able to use the status of "married filing jointly." Due to time constraints, the accountant compared only five years (tax years 2003, 2005, 2006, 2007 and 2008) and did not compare earlier years. The filing dates for our 2009 returns have been extended and those returns have not yet been filed.[1] As reflected on Exhibit 1 to Gay's

---

[1]We were unable to locate and obtain copies of our 2004 returns. It is our current understanding that if an individual has filed a separate return for a year in which a joint return could have been made with a spouse, the couple may only file a joint return within three years after the filing of the original return. 26 C.F.R. § 301.6402-2(a)(1). If DOMA is ultimately found unconstitutional, we would seek to file amended returns to the extent permitted. Even then, we would not be able to recoup all losses suffered. Under the tax scheme utilized by the federal government, a married individual who files jointly with a spouse is generally subject to a lower tax than an unmarried individual. 26 U.S.C. § 1(a), (b), & (c). *Gill v. Office of Personnel Management*, No. 09-10309-JLT, 2010 WL 269565, at *5 (D. Mass. July 8, 2010).

Affidavit, if Gay and I had been eligible for the same benefit available to similarly-situated heterosexual couples (i.e., the filing of a joint return with one's spouse), for the tax years examined, we would have paid $744.00 less in federal taxes than we did by being forced to file separately as single individuals. For the tax year 2008, if permitted to have filed a joint tax return, our federal benefit would have been $324.00, in the form of reduced taxes. DOMA has increased the amount of federal income tax we have paid, and we have been denied the federal benefit of a tax rate available to heterosexual married couples.

6. For all of these returns, we were ready and would have elected the more beneficial filing status, if the federal law had permitted us to do so, but we were ineligible because of DOMA, and we would have violated federal tax law by claiming the status of "married filing jointly." We are also currently ineligible because of DOMA to file amended returns for the years 2006 and 2008 for the purpose of seeking refunds for overpayment of taxes.

7. Since 2001, we had undergone the extra expense of preparing separate returns at the federal and state level while the vast majority of persons similarly situated have not been required to do so. It is a dishonest representation required by DOMA that we are required to report our taxes to the federal government as single persons when we are married. It is as if the federal government is saying our marriage has no value in the eyes of our country. It is a stigmatizing aspect of our marriage.

Social Security Survivors Benefits
(Exhibit No. 2 to Phillips Affidavit)

8. Through my employment taxes over the applicable years, I have now earned enough "credits" to qualify for my spouse to receive reduced survivors benefits monthly at age 60 or unreduced at her full retirement age, in the event of my death.

9. Because of DOMA, my spouse Gay E. Phillips is not eligible for recognition as a surviving spouse, in the event of my death. Gay is currently 55 years of age. If I were to die, unlike heterosexual couples in identical situations, my surviving spouse benefits would be removed because the federal government recognizes only spouses of the opposite sex.

Death Benefits

10. In the event of my death, I have already earned enough "credits" for my spouse to receive a one-time death benefit of $255.00. Because of DOMA, my spouse Gay E. Phillips is denied the right to this federal entitlement at my death.

Retirement Planning

11. My spouse Gay and I are facing our senior years without the full support of our nation's social security laws. The impact of DOMA has severely impacted our ability to plan for retirement. Neither of us can afford to make the decision to quit working in reliance upon an entitlement to the survivors benefits of the other. For heterosexual couples, one spouse can choose to retire, knowing that this will decrease the retiring person's own social security benefits but, in the event of death of the spouse continuing to work, the retired spouse will

be given the option of stepping up to survivors benefits flowing from the one who worked longer and earned more credits. Here, we do not have the financial security provided to other married couples, the sole reason being that neither of us married a man, and consequently under DOMA, no benefits will flow from one spouse to the other. DOMA has limited our choices.

DOMA'S Stigmatization

12. I agree and support my spouse Gay E. Phillips's statements that our legal status as a married couple is an important aspect of who we are. The federal government to which we pay taxes officially refuses to recognize our marriage, and this stigmatizes us as individuals and as a married couple. Because of DOMA, we are unfairly forced to explain to people that even though we are legally married, our marriage is not recognized by the federal government.

FURTHER AFFIANT SAYETH NOT.

SUSAN G. BARTON

NOTARY

Subscribed and sworn to before me this 11 day of August, 2010.

NOTARY PUBLIC

TONY M. BROWN
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2015

Commission No. 12139413 (Brown)
My commission expires: April 14, 2015

TONY M. BROWN NOTARY PUBLIC DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and sworn to before me, in my presence, this 11 day of August, 2010

Notary Public, D.C.
My commission expires April 14, 2015

Kelly Kirby, CPA, PC

Certified Public Accountant
a professional corporation
4815 South Harvard, Suite 424
Tulsa, Oklahoma 74135-3068
(918) 747-5466 Voice
(918) 747-5499 Facsimile
Email Kelly@KKirby.com

August 5, 2010

Sue Barton & Gay Phillips
2201 W Reading Pl
Tulsa, OK 74127-2238

Dear Sue & Gay:

In accordance with your request, I have prepared income tax returns using the married filing jointly filing status for 2003, 2005, 2006, 2007 and 2008. I have then compared the total tax on federal and Oklahoma returns for each year to the total tax on the corresponding returns which you previously filed using the single filing status. I have appended a table of the result of these comparisons.

Of the 10 returns prepared (five years federal and five years state), in 8 instances you paid more tax on using the single status than if you had been able to file married jointly filed returns, in 1 instance you paid less tax, and in 1 instance the tax was exactly the same. I have appended a table of the result of these comparisons.

As a reminder, we were unable to do a similar comparison for 2004 since you were unable to locate your file copies, and we were unable to do a similar comparison for 2009 since your original returns are currently on extension of time to file and have not yet been prepared.

Please let me know if I can be of further assistance in this matter.

Sincerely,
KELLY KIRBY, CPA, PC

Kelly W. Kirby, CPA
Managing Shareholder

EXHIBIT
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1

	Federal tax				Oklahoma tax			
Year	Sue	Gay	Joint	Injury	Sue	Gay	Joint	Injury
2003	2,420	889	3,137	172	64	1	43	22
2004				-				-
2005	583	846	1,393	36	196	317	595	(82)
2006	164	1,471	1,423	212	49	609	619	39
2007	-	-	-	-	-	73	15	58
2008	4,588	-	4,264	324	1,714	19	1,692	41

Prevent identity theft—protect your Social Security number

75 YEARS SOCIAL SECURITY ADMINISTRATION
Benefits America!

Your Social Security Statement

www.socialsecurity.gov

Prepared especially for Gay E. Phillips

January 15, 2010

See inside for your personal information →

000034795 01 AT 0.357 A1 R 0124
GAY E. PHILLIPS
2201 W READING PL
TULSA OK 74127-2238

What's inside...

What Social Security Means To You

This *Social Security Statement* can help you plan for your financial future. It provides estimates of your Social Security benefits under current law and updates your latest reported earnings.

Please read this *Statement* carefully. If you see a mistake, please let us know. That's important because your benefits will be based on our record of your lifetime earnings. We recommend you keep a copy of your *Statement* with your financial records.

Social Security is for people of all ages...
We're more than a retirement program. Social Security also can provide benefits if you become disabled and help support your family after you die.

Work to build a secure future...
Social Security is the largest source of income for most elderly Americans today, but Social Security was never intended to be your only source of income when you retire. You also will need other savings, investments, pensions or retirement accounts to make sure you have enough money to live comfortably when you retire.

Saving and investing wisely are important not only for you and your family, but for the entire country. If you want to learn more about how and why to save, you should visit ***www.mymoney.gov***, a federal government website dedicated to teaching all Americans the basics of financial management.

About Social Security's future...
Social Security is a compact between generations. Since 1935, America has kept the promise of security for its workers and their families. Now, however, the Social Security system is facing serious financial problems, and action is needed soon to make sure the system will be sound when today's younger workers are ready for retirement.

In 2016 we will begin paying more in benefits than we collect in taxes. Without changes, by 2037 the Social Security Trust Fund will be exhausted* and there will be enough money to pay only about 76 cents for each dollar of scheduled benefits. We need to resolve these issues soon to make sure Social Security continues to provide a foundation of protection for future generations.

Social Security on the Net...
Visit ***www.socialsecurity.gov*** on the Internet to learn more about Social Security. You can read publications, including *When To Start Receiving Retirement Benefits*; use our Retirement Estimator to obtain immediate and personalized estimates of future benefits; and when you're ready to apply for benefits, use our improved online application—It's so easy!

Michael J. Astrue
Commissioner

* These estimates are based on the intermediate assumptions from the Social Sec[urity Trustees']
Annual Report to the Congress.

EXHIBIT
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Your Estimated Benefits

*Retirement	You have earned enough credits to qualify for benefits. At your current earnings rate, if you continue working until...
	your full retirement age (66 and 2 months), your payment would be about ..... $ 1,539 a month
	age 70, your payment would be about ..... $ 2,011 a month
	If you stop working and start receiving benefits at...
	age 62, your payment would be about ..... $ 1,148 a month
*Disability	You have earned enough credits to qualify for benefits. If you become disabled right now...
	Your payment would be about ..... $ 1,726 a month
*Family	If you get retirement or disability benefits, your spouse and children also may qualify for benefits.
*Survivors	You have earned enough credits for your family to receive survivors benefits. If you die this year, certain members of your family may qualify for the following benefits:
	Your child ..... $ 1,294 a month
	Your spouse who is caring for your child ..... $ 1,294 a month
	Your spouse who reaches full retirement age ..... $ 1,726 a month
	Total family benefits cannot be more than ..... $ 3,063 a month
	Your spouse or minor child may be eligible for a special one-time death benefit of $255.
Medicare	You have earned enough credits to qualify for Medicare at age 65. Even if you do not retire at age 65, be sure to contact Social Security three months before your 65th birthday to enroll in Medicare.

***Your estimated benefits are based on current law. Congress has made changes to the law in the past and can do so at any time. The law governing benefit amounts may change because, by 2037, the payroll taxes collected will be enough to pay only about 76 percent of scheduled benefits.**

We based your benefit estimates on these facts:

Your date of birth (please verify your name on page 1 and this date of birth) ..... April 7, 1955
Your estimated taxable earnings per year after 2009 ..... $12,476
Your Social Security number (only the last four digits are shown to help prevent identity theft) XXX-XX-5430

How Your Benefits Are Estimated

To qualify for benefits, you earn "credits" through your work — up to four each year. This year, for example, you earn one credit for each $1,120 of wages or self-employment income. When you've earned $4,480, you've earned your four credits for the year. Most people need 40 credits, earned over their working lifetime, to receive retirement benefits. For disability and survivors benefits, young people need fewer credits to be eligible.

We checked your records to see whether you have earned enough credits to qualify for benefits. If you haven't earned enough yet to qualify for any type of benefit, we can't give you a benefit estimate now. If you continue to work, we'll give you an estimate when you do qualify.

What we assumed — If you have enough work credits, we estimated your benefit amounts using your average earnings over your working lifetime. For 2010 and later (up to retirement age), we assumed you'll continue to work and make about the same as you did in 2008 or 2009. We also included credits we assumed you earned last year and this year.

Generally, the older you are and the closer you are to retirement, the more accurate the retirement estimates will be because they are based on a longer work history with fewer uncertainties such as earnings fluctuations and future law changes. We encourage you to use our online Retirement Estimator at *www.socialsecurity.gov/estimator* to obtain immediate and personalized benefit estimates.

We can't provide your actual benefit amount until you apply for benefits. **And that amount may differ from the estimates stated above because:**

(1) Your earnings may increase or decrease in the future.
(2) After you start receiving benefits, they will be adjusted for cost-of-living increases.
(3) Your estimated benefits are based on current law. **The law governing benefit amounts may change.**
(4) Your benefit amount may be affected by **military service, railroad employment or pensions earned through work on which you did not pay Social Security tax.** Visit *www.socialsecurity.gov/mystatement* to learn more.

Windfall Elimination Provision (WEP) — If you receive a pension from employment in which you did not pay Social Security taxes and you also qualify for your own Social Security retirement or disability benefit, your Social Security benefit may be reduced, but not eliminated, by WEP. The amount of the reduction, if any, depends on your earnings and number of years in jobs in which you paid Social Security taxes, and the year you are age 62 or become disabled. To estimate WEP's effect on your Social Security benefit, visit *www.socialsecurity.gov/WEP-CHART*. In 2010, the maximum monthly reduction is $381. For more information, please see *Windfall Elimination Provision* (Publication No. 05-10045) at *www.socialsecurity.gov/WEP*.

Government Pension Offset (GPO) — If you receive a pension based on federal, state or local government work in which you did not pay Social Security taxes and you qualify, now or in the future, for Social Security benefits as a current or former spouse, widow or widower, you are likely to be affected by GPO. If GPO applies, your Social Security benefit will be reduced by an amount equal to two-thirds of your government pension, and could be reduced to zero. Even if your benefit is reduced to zero, you will be eligible for Medicare at age 65 on your spouse's record. To learn more, please see *Government Pension Offset* (Publication No. 05-10007) at *www.socialsecurity.gov/GPO*.

Your Earnings Record

Years You Worked	Your Taxed Social Security Earnings	Your Taxed Medicare Earnings
1976	$ 866	$ 866
1977	4,140	4,140
1978	9,069	9,069
1979	9,783	9,783
1980	11,780	11,780
1981	14,177	14,177
1982	16,259	16,259
1983	18,000	18,000
1984	20,666	20,666
1985	22,880	22,880
1986	23,760	23,760
1987	25,110	25,110
1988	28,591	28,591
1989	30,556	30,556

Years You Worked	Your Taxed Social Security Earnings	Your Taxed Medicare Earnings
1990	$ 32,647	$ 32,647
1991	34,154	34,154
1992	34,847	34,847
1993	35,194	35,194
1994	36,229	36,229
1995	37,431	37,431
1996	38,243	38,243
1997	40,162	40,162
1998	44,298	44,298
1999	34,764	34,764
2000	22,333	22,333
2001	19,397	19,397
2002	15,415	15,415
2003	9,707	9,707
2004	18,768	18,768
2005	17,040	17,040
2006	28,613	28,613
2007	11,354	11,354
2008	12,476	12,476
2009	Not yet recorded	

Total Social Security and Medicare taxes paid over your working career through the last year reported on the chart above:

Estimated taxes paid for Social Security:		Estimated taxes paid for Medicare:	
You paid:	$45,613	You paid:	$10,705
Your employers paid:	$45,613	Your employers paid:	$10,705

Note: You currently pay 6.2 percent of your salary, up to $106,800, in Social Security taxes and 1.45 percent in Medicare taxes on your entire salary. Your employer also pays 6.2 percent in Social Security taxes and 1.45 percent in Medicare taxes for you. If you are self-employed, you pay the combined employee and employer amount of 12.4 percent in Social Security taxes and 2.9 percent in Medicare taxes on your net earnings.

Help Us Keep Your Earnings Record Accurate

You, your employer and Social Security share responsibility for the accuracy of your earnings record. Since you began working, we recorded your reported earnings under your name and Social Security number. We have updated your record each time your employer (or you, if you're self-employed) reported your earnings.

Remember, it's your earnings, not the amount of taxes you paid or the number of credits you've earned, that determine your benefit amount. When we figure that amount, we base it on your average earnings over your lifetime. If our records are wrong, you may not receive all the benefits to which you're entitled.

Review this chart carefully using your own records to make sure our information is correct and that we've recorded each year you worked. You're the only person who can look at the earnings chart and know whether it is complete and correct.

Some or all of your earnings from **last year** may not be shown on your *Statement*. It could be that we still were processing last year's earnings reports when your *Statement* was prepared. Your complete earnings for last year will be shown on next year's *Statement*. **Note:** If you worked for more than one employer during any year, or if you had both earnings and self-employment income, we combined your earnings for the year.

There's a limit on the amount of earnings on which you pay Social Security taxes each year. The limit increases yearly. Earnings above the limit will not appear on your earnings chart as Social Security earnings. (For Medicare taxes, the maximum earnings amount began rising in 1991. Since 1994, all of your earnings are taxed for Medicare.)

Call us right away at 1-800-772-1213 (7 a.m.–7 p.m. your local time) if any earnings for years **before last year** are shown incorrectly. Please have your W-2 or tax return for those years available. (If you live outside the U.S., follow the directions at the bottom of page 4.)

Some Facts About Social Security

About Social Security and Medicare...

Social Security pays retirement, disability, family and survivors benefits. Medicare, a separate program run by the Centers for Medicare & Medicaid Services, helps pay for inpatient hospital care, nursing care, doctors' fees, drugs and other medical services and supplies to people age 65 and older, as well as to people who have been receiving Social Security disability benefits for two years or more. Medicare does not pay for long-term care, so you may want to consider options for private insurance. Your Social Security covered earnings qualify you for both programs. For more information about Medicare, visit ***www.medicare.gov*** or call **1-800-633-4227** (TTY **1-877-486-2048** if you are deaf or hard of hearing).

Retirement — If you were born before 1938, your full retirement age is 65. Because of a 1983 change in the law, the full retirement age will increase gradually to 67 for people born in 1960 and later.

Some people retire before their full retirement age. You can retire as early as 62 and take benefits at a reduced rate. If you work after your full retirement age, you can receive higher benefits because of additional earnings and credits for delayed retirement.

Disability — If you become disabled before full retirement age, you can receive disability benefits after six months if you have:

— enough credits from earnings (depending on your age, you must have earned six to 20 of your credits in the three to 10 years before you became disabled); and
— a physical or mental impairment that's expected to prevent you from doing "substantial" work for a year or more *or* result in death.

If you are filing for disability benefits, please let us know if you are on active military duty or are a recently discharged veteran, so that we can handle your claim more quickly.

Family — If you're eligible for disability or retirement benefits, your current or divorced spouse, minor children or adult children disabled before age 22 also may receive benefits. Each may qualify for up to about 50 percent of your benefit amount.

Survivors — When you die, certain members of your family may be eligible for benefits:

— your spouse age 60 or older (50 or older if disabled, or any age if caring for your children younger than age 16); and
— your children if unmarried and younger than age 18, still in school and younger than 19 years old, or adult children disabled before age 22.

If you are divorced, your ex-spouse could be eligible for a widow's or widower's benefit on your record when you die.

Extra Help with Medicare — If you know someone who is on Medicare and has limited income and resources, extra help is available for prescription drug costs. The extra help can help pay the monthly premiums, annual deductibles and prescription co-payments. To learn more or to apply, visit ***www.socialsecurity.gov*** or call **1-800-772-1213** (TTY **1-800-325-0778**).

Receive benefits and still work...

You can work and still get retirement or survivors benefits. If you're younger than your full retirement age, there are limits on how much you can earn without affecting your benefit amount. When you apply for benefits, we'll tell you what the limits are and whether work would affect your monthly benefits. When you reach full retirement age, the earnings limits no longer apply.

Before you decide to retire...

Carefully consider the advantages and disadvantages of early retirement. If you choose to receive benefits before you reach full retirement age, your monthly benefits will be reduced.

To help you decide the best time to retire, we offer a free publication, *When To Start Receiving Retirement Benefits* (Publication No. 05-10147), that identifies the many factors you should consider before applying. Most people can receive an estimate of their benefit based on their actual Social Security earnings record by going to ***www.socialsecurity.gov/estimator.*** You also can calculate future retirement benefits by using the Social Security Benefit Calculators at ***www.socialsecurity.gov.***

Other helpful free publications include:

— *Retirement Benefits* (No. 05-10035)
— *Understanding The Benefits* (No. 05-10024)
— *Your Retirement Benefit: How It Is Figured* (No. 05-10070)
— *Windfall Elimination Provision* (No. 05-10045)
— *Government Pension Offset* (No. 05-10007)
— *Identity Theft And Your Social Security Number* (No. 05-10064)

We also have other leaflets and fact sheets with information about specific topics such as military service, self-employment or foreign employment. You can request Social Security publications at our website, ***www.socialsecurity.gov***, or by calling us at **1-800-772-1213.** Our website has a list of frequently asked questions that may answer questions you have. We have easy-to-use online applications for benefits that can save you a telephone call or a trip to a field office.

You may also qualify for government benefits outside of Social Security. For more information on these benefits, visit *www.govbenefits.gov.*

If you need more information— Visit ***www.socialsecurity.gov/mystatement*** on the Internet, contact any Social Security office, call **1-800-772-1213** or write to Social Security Administration, Office of Earnings Operations, P.O. Box 33026, Baltimore, MD 21290-3026. If you're deaf or hard of hearing, call TTY **1-800-325-0778.** If you have questions about your personal information, you must provide your complete Social Security number. If your address is incorrect on this *Statement*, ask the Internal Revenue Service to send you a Form 8822. We don't keep your address if you're not receiving Social Security benefits.

Para solicitar una *Declaración* en español, llame al 1-800-772-1213

Definition of survivors benefits

When a person who has worked and paid Social Security taxes dies, certain members of the family may be eligible for survivors benefits.

Up to ten years of work is needed to be eligible for benefits, depending on the person's age at the time of death.

If you apply, please be ready to supply the information we need to approve your application for these benefits:

- Lump Sum Death Payment
- Widow's, Widower's, or Surviving Divorced Spouse
- Child's
- Mother's or Father's
- Parent's

Who is eligible for survivors benefits

Social Security survivors benefits can be paid to:

- A widow or widower -- full benefits at full retirement age, or reduced benefits as early as age 60
- A disabled widow or widower -- as early as age 50
- A widow or widower at any age if he or she takes care of the deceased's child who is under age 16 or disabled, and receiving Social Security benefits
- Unmarried children under 18, or up to age 19 if they are attending high school full time. Under certain circumstances, benefits can be paid to stepchildren, grandchildren, or adopted children.
- Children at any age who were disabled before age 22 and remain disabled.
- Dependent parents age 62 or older

Note: If you are divorced, you may still qualify for survivors benefits.

Our Benefit Calculators can help you figure how much your benefits will be.

How work affects survivors benefits

You can receive Social Security survivors benefits and work at the same time. However, depending on your age, your benefits could be reduced if you earn more than certain amounts.

For more information, we recommend our leaflet, *How Work Affects Your Benefits*, publication number 05-10069.

5. You qualify for the additional child tax credit. See the instructions in your tax forms package for more information on this credit.

6. You qualify for the refundable American opportunity education credit. See Form 8863, Education Credits.

7. You qualify for the health coverage tax credit. For information about this credit, see Form 8885, Health Coverage Tax Credit.

8. You qualify for the refundable credit for prior year minimum tax. See Form 8801, Credit for Prior Year Minimum Tax — Individuals, Estates, and Trusts.

9. You qualify for the first-time homebuyer credit. See Form 5405, First-Time Homebuyer Credit.

Filing Status

You must determine your filing status before you can determine your filing requirements, standard deduction (discussed later), and correct tax. You figure your correct tax by using the section of the Tax Computation Worksheet or the column in the Tax Table that applies to your filing status.

You also use your filing status in determining whether you are eligible to claim certain other deductions and credits.

There are five filing statuses:

- Single,
- Married Filing Jointly,
- Married Filing Separately,
- Head of Household, and
- Qualifying Widow(er) With Dependent Child.

If more than one filing status applies to you, choose the one that will give you the lowest tax.

Marital Status

In general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.

Unmarried persons. You are considered unmarried for the whole year if, on the last day of your tax year, you are unmarried or legally separated from your spouse under a divorce or separate maintenance decree.

State law governs whether you are married or legally separated under a divorce or separate maintenance decree.

Divorced persons. If you are divorced under a final decree by the last day of the year, you are considered unmarried for the whole year.

Divorce and remarriage. If you obtain a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce you intended to and did remarry each other in the next tax year, you and your spouse must file as married individuals.

Annulled marriages. If you obtain a court decree of annulment, which holds that no valid marriage ever existed, you are considered unmarried even if you filed joint returns for earlier years. You must file amended returns (Form 1040X) claiming single or head of household status for all tax years affected by the annulment that are not closed by the statute of limitations for filing a tax return. The statute of limitations generally does not end until 3 years after your original return was filed.

Head of household or qualifying widow(er) with dependent child. If you are considered unmarried, you may be able to file as a head of household or as a qualifying widow(er) with a dependent child. See Head of Household and Qualifying Widow(er) With Dependent Child to see if you qualify.

Married persons. If you are considered married for the whole year, you and your spouse can file a joint return, or you can file separate returns.

Considered married. You are considered married for the whole year if on the last day of your tax year you and your spouse meet any one of the following tests.

1. You are married and living together as husband and wife.

2. You are living together in a common law marriage that is recognized in the state where you now live or in the state where the common law marriage began.

3. You are married and living apart, but not legally separated under a decree of divorce or separate maintenance.

4. You are separated under an interlocutory (not final) decree of divorce. For purposes of filing a joint return, you are not considered divorced.

Spouse died during the year. If your spouse died during the year, you are considered married for the whole year for filing status purposes.

If you did not remarry before the end of the tax year, you can file a joint return for yourself and your deceased spouse. For the next 2 years, you may be entitled to the special benefits described later under Qualifying Widow(er) With Dependent Child.

If you remarried before the end of the tax year, you can file a joint return with your new spouse. Your deceased spouse's filing status is married filing separately for that year.

Married persons living apart. If you live apart from your spouse and meet certain tests, you may be considered unmarried. If this applies to you, you can file as head of household even though you are not divorced or legally separated. If you qualify to file as head of household instead of as married filing separately, your standard deduction will be higher. Also, your tax may be lower, and you may be able to claim the earned income credit. See Head of Household, later.

Single

EXHIBIT 3
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BISHOP, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 04-CV-848-TCK-TLW
	)	
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	

<u>SUPPLEMENTAL JOINT AFFIDAVIT OF PLAINTIFFS SUSAN G. BARTON AND GAY E. PHILLIPS</u>

EXHIBIT
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4

COUNTY OF CREEK)
) ss.
STATE OF OKLAHOMA)

Susan G. Barton and Gay E. Phillips (at right and left, respectively, in the above photograph), each being duly sworn, hereby depose and state as follows:

1. We each previously gave limited affidavits in this lawsuit in response to the Court Order of August 2, 2010.

2. We reaffirm the content of our earlier affidavits submitted pursuant to the August 2, 2010, court order, and which are Exhibits B and C to the motion on our behalf.

3. This joint supplemental affidavit is submitted in conjunction with the motion for summary judgment being presented on our behalf.

4. We have resided in Oklahoma for 51 years. We own our own home in Tulsa, Oklahoma.

5. We have been in a continuous committed relationship for over half of our adult lives.

6. We were legally married in the State of California under California law on November 1, 2008, during the pendency of this lawsuit. Before that marriage, we were united in a civil union ceremony conducted in Vermont on August 4, 2001 and married in Vancouver, British Columbia, pursuant to Canadian law on May 16, 2005.

7. We own Barton, Phillips and Associates, Inc, a company that provides training and technical assistance to agencies and organizations (particularly non-profit) that serve youth in "out of home" care. Gay has a PhD in the field of sociology. Our company trains foster parents for the Department of Human Services. We travel nationwide to train youth serving agency staffs, assist administrators in complying with federal grants, assist in formulating grants, and advise on board development matters. Additionally, Sue teaches courses as an adjunct professor at Tulsa Community College. Sue is currently teaching an eight-week online course titled "Building Relationships" and is scheduled to do another class this semester titled "Teaching Discipline."

8. In a broad sense, our occupational field deals with runaway, homeless and street youth, and those youth services involving youth in out of home care situations.

9. Because of Part B of the Oklahoma Constitutional Amendment, our California marriage cannot be recognized in Oklahoma.

10. Because of Section 3 of DOMA, despite our "married" status, we are unable to file a joint federal tax return or a joint Oklahoma tax return as a married couple since Oklahoma law requires taxpayers to use the same filing status as used on the federal return. See Oklahoma Form 511 at p. 7 attached hereto.

11. In our earlier affidavits of August, 2010, we detailed the financial benefits we were forced to forego as a result of being unable to use the status of "married filing jointly," in the filings of our federal and state tax returns. Since

the filing of the August, 2010 affidavit, we have prepared federal tax returns for the tax years of 2009 and 2010. We were assisted in the preparation by a certified public accountant. We also, with the accountant's assistance, have computed the tax benefits we would have received if we would have been able to claim the status of "married filing jointly." Our inability to do so resulted in a loss of federal tax benefits for the year 2009 in the amount of $605.00 and a combined loss of federal and state tax benefits of $426.00 for the 2009 tax year. For the 2010 tax year, we would not have realized tax savings by a "married filing jointly" status. See correspondence from CPA Kelly Kirby, attached hereto.

12. The total lost tax benefits since our 2008 California wedding is $750.00 (see paragraph of our August, 2010 affidavits), because we were prohibited from using the filing status of "married filing jointly" in 2008 and 2009.

13. For 27 years we have longed for the same rights, responsibilities and respect accorded a loving committed adult couple in regard to marriage. Both the federal government and the State of Oklahoma have withheld recognizing our relationship as one of "marriage" for the sole reason that we are of the same gender. Our sexual orientation is part of our sexual identity. We have never considered our orientation to be a matter of choice, and it is not.

14. We have no interest in challenging others religious beliefs regarding marriage between persons of the same gender. We have no interest in forcing a minister, priest or rabbi to perform a marriage ceremony that a church or congregation opposes. We do not seek recognition of our marriage from any

religious body. We seek recognition by the governments, both state and federal, for purposes of enjoying the rights, protections and guarantees afforded opposite sex couples.

15. We do not see how our married relationship is harming the marriages of others. In our opinion, our relationship is healthy and non-threatening to others.

16. Our sexual orientation has never been an impediment to our ability to work under governmental contracts, participate in, contribute to or participate in society.

17. As lesbians, we watched the debate and overwhelming passage of State Question 711 banning same-sex marriages and banning the recognition of same-sex marriages. The debate that accompanied passage of the Oklahoma Constitutional Amendment subjected couples such as us to public scorn and ridicule. Our relationship of over two decades was equated to something of a type which threatened the nation; and against God's will. Exh. E (Article dated 4/16/04)

18. We know and recognize we are members of a minority because of our sexual orientation. We have never had any legal protections in Oklahoma in the workplace, for housing, or criminal hate speech. In fact, the passage of the Oklahoma Amendment banning recognition of same sex marriage demonstrates the opposite, i.e. legislative approval of discrimination against a minority group.

19. Being able to call our long-term relationship a "marriage" and hold ourselves out as married should have been a dream come true. But because we reside in Oklahoma, our valid marriage is expressly banned from recognition by the State of Oklahoma, and consequently we are subjected to unequal protection. In all respects, it is as if the State of Oklahoma has said ours is not a real marriage, but something inferior to the relationships of married opposite sex couples.

FURTHER AFFIANT SAYETH NOT.

SUSAN G. BARTON

NOTARY

Subscribed and sworn to before me this 16th day of September, 2011.

My Commission Expires:

12/12/2011

Commission # 07011730

NOTARY PUBLIC

Notary Public
State of Oklahoma
TESSA REYNOLDS
CREEK COUNTY
COMMISSION #07011730
Comm. Exp. 12-12-2011

FURTHER AFFIANT SAYETH NOT.

GAY E. PHILLIPS

NOTARY

Subscribed and sworn to before me this 16th day of September, 2011.

My Commission Expires:

12/12/2011

Commission # 07011730

NOTARY PUBLIC

Notary Public
State of Oklahoma
TESSA REYNOLDS
CREEK COUNTY
COMMISSION #07011730
Comm. Exp. 12-12-2011

Kelly Kirby, CPA, PC

Certified Public Accountant
a professional corporation
4815 South Harvard, Suite 424
Tulsa, Oklahoma 74135-3068
(918) 747-5466 Voice
(918) 747-5499 Facsimile
Email Kelly@KKirby.com

September 12, 2011

Sue Barton & Gay Phillips
3312 E 3rd St
Tulsa, OK 74112-2604

Dear Sue & Gay:

In accordance with your request, I have prepared income tax returns using the married filing jointly filing status for 2009 and 2010. I have then compared the total tax on federal and Oklahoma returns for each year to the total tax on the corresponding returns which you previously filed using the single filing status. The results are as follows:

	Federal tax				Oklahoma tax			
Year	Sue	Gay	Joint	Injury	Sue	Gay	Joint	Injury
2009	5,631	-	5,026	605	1,991	-	2,170	(179)
2010	288	760	1,118	(70)	29	204	222	11

Considering these two years of returns together, had you been able to file jointly you would have saved $367.

Please let me know if I can be of further assistance in this matter.

Sincerely,
KELLY KIRBY, CPA, PC

Kelly W. Kirby, CPA
Managing Shareholder

Subscribed and sworn to this 12th day of September, 2011.

Notary public

1/21/2014
My commission expires

SHELBY COATS
Notary Public, State of Oklahoma
Commission # 10000442
My Commission Expires January 21, 2014

• INCLUDES FORM 511 AND FORM 538-S
(Oklahoma Resident Income Tax Return
and Sales Tax Relief Credit Form)

GREAT SEAL OF THE STATE OF OKLAHOMA 1907

2010 OKLAHOMA RESIDENT INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS

This packet contains:
- Instructions for completing the Form 511: Oklahoma resident income tax return
- Two Form 511 income tax forms
- Two Form 538-S: Sales Tax Relief Credit
- Instructions for the direct deposit option
- 2010 income tax tables
- One return envelope

Filing date:
- Generally, your return must be postmarked by April 15, 2011. For further information, see the "Due Date" section on page 4.

Need assistance or a tax form?
- Check out page 19 for contact methods for the Oklahoma Tax Commission.

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To e-file your state return free, you must prepare & e-file both the Federal and Oklahoma returns at the same time.

What's New in the 2010 Oklahoma Tax Booklet?

- The Oklahoma Standard Deduction now equals the basic Federal Standard Deduction. See instructions for line 10 on page 8 or for Schedule 511-D on page 19.
- The percentage for federal Civil Service Retirement in Lieu of Social Security exclusion has increased. See Schedule 511-A, line A3 instructions on page 13.
- The Other Retirement exclusion is no longer subject to the modified Oklahoma Adjusted Gross Income limit. See Schedule 511-A, line A6 instructions on page 13.
- Payments received as a result of a Military member being killed in a combat zone may be exempt. See the instructions for Schedule 511-A, line A13, #5 on page 15.
- If your Military spouse was killed in a combat zone, you may be entitled to exclude your income. See the instructions for Schedule 511-A, line A13, #6 on page 15.
- Members of a pass-through entity which is a captive real estate investment trust should be aware of a possible add-back. See the instructions for Schedule 511-B, line B8, #4 on page 16.
- Income from discharge of indebtedness which has been deferred and not included in Federal income must be added back. See instructions for Schedule 511-B, line B8, #5 on page 16.
- The Partial Military Pay Exclusion has increased; see the instructions for Schedule 511-C, line C1 on page 17.
- The EMT Death Benefit exclusion is now the Emergency Medical Personnel Death Benefit exclusion. The $5,000 exclusion has been expanded to include the death benefit paid to the beneficiary of a registered emergency medical responder who died in the line of duty. See the instructions for Schedule 511-C, line C7, #10 on page 18.

Table of Contents

- If you have a Federal Schedule C or Schedule F, you may be subject to the Oklahoma Business Activity Tax. For more information see the instructions for line 21 on page 11 and the Form 511-BAT.
- You have the opportunity to donate from your refund to three new organizations: the Support of Folds of Honor Scholarship Program, the Y.M.C.A. Youth and Government Program and the Multiple Sclerosis Society Fund. For further information, see the instructions on Form 511, Schedule 511-G, page 6.
- There are three new credits on the Form 511CR: Wire Transfer Fee Credit, Credit for Manufacturers of Electric Vehicles and Business Activity Tax Credit. Form 511CR may be downloaded from our website at www.tax.ok.gov.
- A moratorium has been placed on many Oklahoma credits. For more information see Form 511CR and, when applicable, the specific form for a particular credit.

Helpful Hints

- File your return by April 18, 2011. See page 4 for information regarding extended due date for electronically filed returns.
- If you need to file for an extension, use Form 504 and then later file a Form 511.
- Be sure to enclose copies of your Form(s) W-2, 1099 or other withholding statement with your return. Enclose all Federal schedules as required.

> Important: If you fill out any portion of the Schedules 511-A through 511-G or Form 538-S, you are required to enclose those pages with your return. Failure to include the pages will result in a delay of your refund.

- Be sure to sign and date the return. If you are filing a joint return, both you and your spouse need to sign.
- After filing, if you have questions regarding the status of your refund, please call (405) 521-3160. The in-state toll-free number is (800) 522-8165.
- Do not enclose any correspondence other than those documents and schedules required for your return.
- Regarding direct deposit of your refund, the Oklahoma Tax Commission will only issue one payment per bank account number. Therefore, if more than one refund is requested for direct deposit to the same bank account, the second and subsequent payments will be issued by paper check to the address shown on the tax return(s).

Before You Begin

You must complete your Federal income tax return before beginning your Oklahoma income tax return. You will use the information entered on your Federal return to complete your Oklahoma return.

Remember, when completing your Oklahoma return, round all amounts to the nearest dollar.

Example:
$2.01 to $2.49 - round down to $2.00
$2.50 to $2.99 - round up to $3.00

Determining Your Filing Requirement

If you do not meet the Federal filing requirements as shown in either Chart A or Chart B on this page, you are not required to file an Oklahoma tax return. However, if you have withholding or made estimated tax payments that you would like to have refunded, please follow the instructions on page 5, "Not Required to File".

Chart A: Federal Filing Requirements for Most People

To use this chart, first find your filing status. Then read across to find your age at the end of 2010. You must file a return if your gross income was at least the amount shown in the last column.

If your Filing Status Is...	And your Age Is*...	And if your Gross Income Is...**
Single	Under 65	$ 9,350
	65 or older	$10,750
Married Filing Joint***	Both under 65	$18,700
	One 65 or older	$19,800
	Both 65 or older	$20,900
Married Filing Separate	Any age	$ 3,650
Head of Household	Under 65	$12,050
	65 or older	$13,450
Qualifying Widow(er) with a Dependent Child	Under 65	$15,050
	65 or older	$16,150

*If you turned age 65 on January 1, 2011, you are considered to be 65 at the end of 2010.

**Gross income means all the income you received in the form of money, goods, property, and services that is not exempt from Federal tax. Do not include any social security benefits unless (a) you are married filing separate and you lived with your spouse at any time in 2010 or (b) one-half of your social security benefits plus your other gross income is more than $25,000 ($32,000 is married filing jointly). If (a) or (b) applies, see the instructions for Federal Form 1040 or 1040A to figure the taxable part of social security benefits you must include in gross income..

***If you did not live with your spouse at the end of 2010 (or on the date your spouse died) and your gross income was at least $3,650, you must file a return regardless of your age.

Chart B: Federal Filing Requirements for Children and Other Dependents

If your parent (or someone else) can claim you as a dependent, use this chart to see if you must file a Federal return. In these charts, unearned income includes taxable interest and dividends. Earned income includes wages, tips, and taxable scholarships and fellowships.

SINGLE DEPENDENTS

Were you either age 65 or older or blind?

☐ **No.** You must file a return if **any** of the following apply...

- Your unearned income was over $950.
- Your earned income was over $5,700.
- The total of your unearned and earned income was more than the **larger** of:

This amount		This amount
$950	**OR**	Your earned income (up to $5,400) plus $300

☐ **Yes.** You must file a return if **any** of the following apply...

- Your unearned income was over $2,350 ($3,750 if 65 or older **and** blind).
- Your earned income was over $7,100 ($8,500 if 65 or older **and** blind).
- Your gross income was more than the **larger** of:
  - $2,350 ($3,750 if 65 or older **and** blind), or
  - Your earned income (up to $5,400) plus $1,700 ($3,100 if 65 or older **and** blind).

MARRIED DEPENDENTS

Were you either age 65 or older or blind?

☐ **No.** You must file a return if **any** of the following apply...

- Your gross income was at least $5 and your spouse files a separate return and itemizes deductions.
- Your unearned income was over $950.
- Your earned income was over $5,700.
- The total of your unearned and earned income was more than the **larger** of:

This amount		This amount
$950	**OR**	Your earned income (up to $5,400) plus $300

☐ **Yes.** You must file a return if **any** of the following apply...

- Your gross income was at least $5 and your spouse files a separate return and itemizes deductions.
- Your unearned income was over $2,050 ($3,150 if 65 or older **and** blind).
- Your earned income was over $6,800 ($7,900 if 65 or older **and** blind).
- Your gross income was more than the **larger** of:
  - $2,050 ($3,150 if 65 or older **and** blind), or
  - Your earned income (up to $5,400) plus $1,400 ($2,500 if 65 or older **and** blind).

Top of Form Instructions

D Filing Status

The filing status for Oklahoma purposes is the same as on the Federal income tax return, with one exception. This exception applies to married taxpayers who file a joint Federal return where one spouse is a full-year Oklahoma resident (either civilian or military), and the other is a full-year nonresident civilian (non-military). In this case, the taxpayers must either:

1. File as Oklahoma married filing separate. The Oklahoma resident, filing a joint Federal return with a nonresident civilian spouse, may file his/her Oklahoma return as married filing separate. The resident will file on Form 511 using the married filing separate rates and reporting only his/her income and deductions. If the nonresident civilian also has an Oklahoma filing requirement, he/she will file on Form 511NR, using married filing separate rates and reporting his/her income and deductions. Form 574 "Allocation of Income and Deductions" must be filed with the return(s). You can obtain this form from our website at www.tax.ok.gov.

-OR-

2. File, as if both the resident and the nonresident civilian were Oklahoma residents, on Form 511. Use the "married filing joint" filing status, and report <u>all</u> income. A tax credit (Form 511TX) may be used to claim credit for taxes paid to another state, if applicable. A statement should be attached to the return stating the nonresident is filing as a resident for tax purposes only.

If an Oklahoma resident (either civilian or military) files a joint Federal return with a nonresident **military** spouse, they shall use the same filing status as on the Federal return. If they file a joint Federal return, they shall complete Form 511NR and include in the Oklahoma amount column, all Oklahoma source income of both the resident and the nonresident.

E Sixty-Five or Over

Check the box(es) if your, or your spouse's, age is 65 on or before December 31, 2010. If you turned age 65 on January 1, 2011, you are considered to be age 65 at the end of 2010.

F Not Required to File

Check the box, if you do not have sufficient gross income to require you to file a Federal return, and you had Oklahoma tax withheld, made estimated tax payments or qualify for Oklahoma earned income credit or Tornado Tax credit.

Finish the top portion of the return by completing the "Exemptions" section (part G on the diagram on page 6).

Complete line 1. Enter the amount of your gross income subject to the Federal filing requirement. In most cases this will be the same as your Federal Adjusted Gross Income. (Do not complete lines 2-19.)

F Not Required to File, Continued

Complete lines 20 through 39 that are applicable to you.

If you qualify for the Federal earned income credit, you qualify for the Oklahoma earned income credit. Enter 5% of the Federal earned income credit on Form 511, line 29 (do not complete schedule 511-F).

Sign and mail the return. Be sure to include your W-2, 1099 or other withholding statement to substantiate any Oklahoma withholding.

Note: If you do not have sufficient gross income to require you to file a Federal return and you did not have Oklahoma tax withheld, make estimated tax payments or qualify for Oklahoma earned income credit or Tornado Tax credit, <u>do not file an Oklahoma income tax return (Form 511).</u>

G Exemptions

To the right of the word "Yourself" place a number "1" in all the boxes that apply to you. Next total the boxes. Then do the same for your spouse if applicable.

<u>Exemption Terms</u>

Regular*: The same exemptions as claimed on your Federal return.

Special: An additional exemption may be claimed for each taxpayer or spouse who meets the qualifications based on filing status and Federal adjusted gross income limits** below <u>**and**</u> who is 65 years of age or over at the close of the tax year:

(1) Single return with line 1 equal to $15,000 or less.

(2) Joint return with line 1 equal to $25,000 or less.

(3) Married filing separate return with line 1 equal to $12,500 or less.

(4) Head of household return with line 1 equal to $19,000 or less.

*****Note:** If your Federal adjusted gross income includes income from the conversion of a traditional individual retirement account to a Roth individual retirement account this income shall be excluded in determining the Federal adjusted gross income limits. Enclose a copy of your Federal return and Form 8606.*

Blind: An additional exemption may be claimed for each taxpayer or spouse who is legally blind.

Dependents: If claiming dependents, please enter the same number as on your Federal return. However, if the nonresident spouse also has an Oklahoma filing requirement and is filing separately on Form 511NR, the dependency exemptions will be allocated between the resident's and nonresident's returns.

* Please note that if you may be claimed as a dependent on another return, enter zero for your regular exemption. You still qualify for the Oklahoma standard deduction.

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EXHIBIT
tabbles
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Republican legislators wary of same-sex ruling

by: MARIE PRICE World Capitol Bureau
Friday, February 06, 2004
7/16/2008 12:09:49 AM

State GOP lawmakers are urging constitutional approaches to strengthen laws regarding marriage.

OKLAHOMA CITY -- Legislative Republicans said Thursday that this week's Massachusetts Supreme Court ruling outlining constitutional protection for same-sex marriages puts Oklahoma in jeopardy of a similar decision.

Senate Minority Floor Leader James Williamson of Tulsa also took Gov. Brad Henry to task for what he termed the governor's silence in defense of traditional, heterosexual marriage.

"His reluctance to protect traditional marriage could put Oklahoma at risk that a court will force same-sex unions on us here," Williamson said.

But Henry said he supports a traditional marriage concept and "will do everything I can to protect it."

"We already have laws protecting traditional marriage in Oklahoma, but if there are ways to strengthen those protections, I am certainly willing to explore them," the governor said.

Williamson also aimed criticism at Senate President Pro Tem Cal Hobson, D-Lexington, for assigning a constitutional proposal backing traditional marriage to an unfriendly committee.

The measure has been assigned to the Senate Human Resources Committee, led by Sen. Bernest Cain, D-Oklahoma City.

Williamson said the assignment indicates that Senate Democratic leaders want to block efforts to protect traditional marriage.

He called on Henry to support the proposal and another calling on Congress to place similar language in the U.S. Constitution.

Williamson said the measures will protect Oklahomans from activist judges.

"This is probably the most important social issue facing America today," he said. "Hopefully, the governor will work as hard to protect marriage in Oklahoma as he has to expand gambling in Oklahoma."

House Minority Floor Leader Todd Hiett, R-Kellyville, agreed with Williamson's take on the Massachusetts court ruling.

The Massachusetts decision "just further emphasizes the need in the state of Oklahoma for us to address the issue constitutionally," Hiett said.

He said he has not found support for banning same-sex unions among Democratic leaders and added that it is important for state leaders to uphold the sanctity of traditional marriage.

"To recognize something other than what God has ordained as traditional marriage obviously detracts or deteriorates the importance of the traditional marriage," Hiett said.

Hobson said a Massachusetts court's ruling does not make gay marriage one of the most pressing issues facing Oklahoma.

"Oklahoma is not like Massachusetts," he said. "Our courts are not like their courts. Our judges are not like their judges. Suggesting that the Oklahoma Supreme Court would follow their example is an insult to our justices."

The Senate leader also said Cain's committee is the appropriate assignment for such legislation.

Oklahoma's law defining marriage as occurring only between a man and a woman has not been challenged, Hobson added.

"If he (Williamson) doesn't have faith in the historically conservative Oklahoma Supreme Court, maybe he should file a lawsuit and let our court rule on this issue," Hobson said. "If the court rules our law unconstitutional, which I don't believe they will, then this will be an issue in our state and we can move forward with the debate."

Hobson said Williamson's focus on gay marriage borders on hysteria.

"There's a mathematical probability that a comet will someday hit the Earth and wipe out life as we know it," he said. "Senator Williamson's logic would suggest that we start evacuating the planet now, just in case."

At least 10 measures have been filed in the House and Senate that would either strengthen Oklahoma law defining marriage as only between a man and a woman or specifically banning same-sex marriage.

Some would require votes of the people to amend the Oklahoma Constitution. Proposals have been filed by members of both parties.

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Associated Images:

His (Gov. Brad Henry) reluctance to protect traditional marriage could put Oklahoma at risk that a court will force same-sex unions on us here.
-- JAMES WILLIAMSON
SENATE MINORITY FLOOR LEADER, R-TULSA

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Ban on gay marriage debated

by: BRIAN BARBER World Staff Writer
Wednesday, October 13, 2004
5/20/2008 12:38:53 AM

A foe says the pro- posed amendment was not well-thought out, but its Senate author calls criticisms 'red herrings.'

The principal author of a proposed constitutional amendment to define marriage said Tuesday that allowing same-sex marriages would lead to a "no-rules mentality."

"This is not meant to be an attack on the gay community," state Sen. James Williamson, R-Tulsa, said at the Tulsa Press Club's "Two Views" luncheon. "This is meant to protect traditional marriage as the foundation of our society."

Tulsa Oklahomans for Human Rights President Mark Bonney said State Question 711 has legal ramifications that Williamson hasn't explored.

Appearing on the Nov. 2 general election ballot, the proposed amendment prohibits giving the benefits of marriage to unmarried people as well as writes a ban on same-sex marriages into the state constitution.

Bonney, a lawyer, argued that it could put all common-law marriages in jeopardy.

He also questioned whether companies such as QuikTrip and Whirlpool, which offer domestic-partner benefits, could continue to do so.

"This question was not fully studied or debated before it was rushed through the Capitol and onto the ballot," he said.

Williamson, also a lawyer, said he doesn't believe that the amendment would affect common-law marriages or prohibit companies from offering whatever benefits they want but that those issues could be decided by the courts.

"These side arguments are red herrings," he said.

Williamson said the amendment is necessary, even though Oklahoma laws already define marriage as between one man and one woman.

A similar law in Massachusetts was declared unconstitutional by that state's Supreme Court and led to the legalization of gay marriage there, he said.

"It is one thing to tolerate the homosexual lifestyle and another to legitimize it through marriage," he said.

If same-sex marriages were legalized, Williamson said, it could lead to gay adoptions, multiple partners in marriages and more expensive health benefits.

Bonney criticized the system for allowing Williamson to marry multiple times and heterosexuals to marry mail-order brides but for not allowing him to marry his partner of seven years.

"If Oklahomans approve this amendment in November as expected," he said, "they are saying, 'Mark Bonney, you are not welcome here. You can't have a recognized, valued relationship like the rest of us.' "

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Associated Images:

From both sides now

Tulsa Oklahomans for Human Rights President Mark Bonney speaks as state Sen. James Williamson listens during their Tulsa Press Club debate Tuesday on the proposed constitutional amendment to define marriage.

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Local 'Pro-Marriage Rally' takes aim at same-sex unions

by: ROBERT EVATT World Staff Writer
Wednesday, August 25, 2004
5/29/2008 7:45:05 AM

More than 4,000 people attended a "Pro-Marriage Rally" on Tuesday, an event organized by more than 40 Tulsa-area churches.

Nick Garland, pastor of the First Baptist Church of Broken Arrow, said in a press release that the purpose of the rally, held at the Union High School Performing Arts Center, was to "celebrate marriage between a man and a woman."

Many religious leaders spoke at the rally, along with author and minister Gary Chapman, state Sen. James Williamson, R-Tulsa, and Tulsa Mayor Bill LaFortune.

"If you believe in Christ, if you believe in this country, and if you believe in this city, you believe that marriage is a covenant between God, a man and a woman," LaFortune said.

Chapman, the keynote speaker, is the senior associate pastor of Calvary Baptist Church in Winston-Salem, N.C., and author of "The Five Love Languages" series of books. He speaks frequently on faith-based ways of building better marriages.

At the rally, he focused on strengthening marriages.

"We've got to do a better job in our churches of helping people have better marriages," Chapman said.

Many speakers expressed a belief that marriage is a religious bond that can be entered into only by heterosexuals.

"Marriage is still God's idea, and I don't think he'd change his mind," said Carmen Gill, a Victory Christian Center pastor.

However, much of the rally was devoted to discussing homosexuality and opposition to marriage between people of the same gender.

"As Christians, we are called to love homosexuals," Williamson said. "But I hope everyone at this rally knows the Scriptures prohibit homosexual acts."

He touted State Question 711, which would define marriage in the state Constitution solely as the union of one man and one woman. The question will be on the Nov. 2 ballot.

The crowd gave Williamson sustained applause when he said the bill would also prohibit the recognition of same-sex marriages that have been legitimized by other states.

Mark Bonney, president of Tulsa Oklahomans for Human Rights, a local gay rights group, attended the rally. He said he was disappointed that its focus wasn't on strengthening marriages of all types.

"I wish that rather than being two-thirds hatred and one-third love discussion, that it was all about what Chapman had to say," Bonney said. "Working on positive marriages is . . . helpful to people."

During a taped message, James Dobson, founder of the national advocacy group Focus on the Family, urged attendees to fight any attempt to extend to gay people the right to marry.

"We're engaged in a critical battle, and the fate of Western civilization hangs in the balance," Dobson said.

Lou Sheldon, chairman of the national lobbying group Traditional Values Coalition, said homosexuality, along with "fornication, adultery and sexual hedonism," threatens the nation.

Four people stood outside the auditorium Tuesday night and handed out flyers urging people not to back the amendment prohibiting same-sex marriage.

"We just want to show a different perspective in favor of civil rights," David Palinskee said. "If you spend your entire life with a partner and one passes, you lose everything the two of you have worked for."

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Associated Images:

A packed house listens to musician Dennis Jernigan during a rally to support both marriage and a state question that would write a ban on same-sex marriage into the state constitution.

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Focus: Gay-marriage clamor grows louder and louder

by: DAVID HARPER World Staff Writer
Monday, March 22, 2004

To some people it's a matter of equal rights; to others it's about upholding their views of morality.

One thing is certain: The debate over whether same-sex couples should be allowed to marry has never been as loud as it is now.

People disagree even over how to refer to such unions. Mark Shields, a spokesman for the Human Rights Campaign -- a Washington-based gay and lesbian lobbying group -- says even the term "gay marriage" is misleading.

Shields says it suggests an effort to establish some sort of "separate and new institution."

Instead, gays and lesbians are merely trying to win the right to the same legal protections straight couples enjoy, he said.

On Feb. 24, President Bush urged approval of a constitutional amendment that would limit marriage to only heterosexual couples.

Democratic presidential candidate John Kerry is opposed to same-sex marriages, although he supports legal rights for gay couples through civil unions. He is opposed to amending the U.S. Constitution to bar gay marriages.

An effort to amend the U.S. Constitution ultimately would be decided by state legislators in at least 38 states, assuming that it could get enough support in Congress first. The rules for a constitutional amendment require a two-thirds majority in each house of Congress before it goes to the states.

All seven members of Oklahoma's congressional delegation have expressed opposition to marriages for same-sex couples, but not all have announced where they stand on a constitutional amendment.

U.S. Reps. John Sullivan and Ernest Istook, both Oklahoma Republicans, are co-sponsors of a resolution for such an amendment.

The Senate library notes that roughly 11,000 constitutional amendments have been proposed over the years. Only six have made it into the Constitution in the 70 years since the repeal of Prohibition. The last amendment was added in 1992, requiring that a general election pass before any congressional pay increase can take effect.

One of Bush's themes in the 2000 campaign was that he wanted to be a "uniter and not a divider." But Kerry said in February that by backing the proposed constitutional amendment, Bush "is looking for a wedge issue to divide the American people."

According to a poll released Feb. 27 by the Pew Research Center for the People & the Press, respondents opposed same-sex marriage by more than a 2-1 margin, but when asked if they consider a constitutional amendment a top priority, they placed it 21st in a list of 22 choices.

Kerry's home state became the epicenter in the controversy in November when the Massachusetts Supreme

Judicial Court ruled that the state's constitution guarantees gay and lesbian couples the right to marry.

In its 4-3 decision, the court gave the Massachusetts Legislature six months to rewrite the state's marriage laws.

The Massachusetts court definitively reaffirmed the decision in February, clearing the way for the first state-recognized marriages of same-sex couples in U.S. history to start taking place as early as May 17.

Oklahoma state Sen. James A. Williamson, R-Tulsa, said that after the Massachusetts court ruled, he asked his staff members to analyze whether Oklahoma's laws could be interpreted the same way by a court.

After hearing that they could, Williamson said he wanted the state constitution changed "to make it clear that marriage in Oklahoma is with one man and one woman."

Ultimately, Sen. Bernest Cain, D-Oklahoma City, refused to give the proposal a hearing in his Senate Human Resources Committee.

Cain said marriage already is defined in Oklahoma law and that adding language to the state's Constitution is unnecessary.

He said he doesn't think marriage between same-sex couples is "a real issue for the state of Oklahoma because we already have in statute that we don't accept same-sex marriages from other states."

Senate President Pro Tem Cal Hobson, D-Lexington, has blasted Republicans for showing "hysteria" over the issue. He said Oklahoma does not have the kind of judges who would overturn the ban in state law.

Earlier this month, Williamson again urged Democratic Gov. Brad Henry to "do the right and moral thing" by helping to pass a state constitutional amendment defining marriage.

Williamson said the governor had "not provided any assistance" in help ing to deliver the Democratic votes needed to get the measure out of committee.

The measure was one of several anti-gay-marriage proposals to die in House and Senate committees.

State Rep. Bill Graves, R-Oklahoma City, has said he is optimistic that such measures would be supported by most Oklahomans.

"This is a Bible Belt state," Graves said. "Most people don't want that sort of thing here."

When asked if such measures would translate to state-sanctioned discrimination, Graves replied, "Gay people might call it discrimination, but I call it upholding morality."

Shields, the Human Rights Campaign spokesman, said, "Civil rights shouldn't be a question of popularity; it should be a question of right and wrong."

After the 1996 federal Defense of Marriage Act was approved by President Clinton, many states passed their own "mini-DOMA" laws, University of Tulsa family law professor Marianne Blair noted.

The national Defense of Marriage Act denies federal recognition of same-sex marriages and allows states to do the same.

At least 38 states have laws that de fine marriage as a union between a man and a woman and that deny recognition to marriages of gay and lesbian couples performed in other states.

Some people say such legislation runs counter to the Full Faith and Credit Clause of the U.S. Constitution, which requires states to recognize the validity of each other's laws.

But Blair noted that the U.S. Supreme Court has recognized a "public policy exception" that applies if a state finds the legal pronouncements of another state to be in conflict with its own public policy.

However, a court in a state with a "mini-DOMA" could decide that such legislation runs counter to the Equal Protection Clause of the state's own constitution, she said.

Keith Smith, an Oklahoma City-based national board member of the Stonewall Democrats -- a gay and lesbian caucus -- said that if the efforts to amend national and state constitutions are successful, it would be the first time the documents have been changed to narrow human rights.

"Intolerance and hatred should have no place in either document," he said.

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Changing times

May 5, 1993: Hawaii Supreme Court rules that a prohibition on same-sex couples' marrying amounts to gender discrimination under the state constitution and can be upheld only if prohibition is justified by a compelling reason.

July 6, 1995: Tulsa County Court Clerk Sally Howe Smith refuses to grant a Tulsa lesbian couple's request for a marriage license.

April 29, 1996: Then-Oklahoma Gov. Frank Keating signs into law a bill denying recognition of same-sex marriages performed in other states.

Sept. 21, 1996: President Clinton signs federal Defense of Marriage Act.

Dec. 3, 1996: Hawaii judge says denying marriage licenses to gay couples is not justified and sends case back to state Supreme Court.

Nov. 3, 1998: Before Hawaii Supreme Court can issue final ruling, Hawaii voters approve a constitutional amendment against same-sex marriage. Hawaii now grants various rights to same-sex couples registered as domestic partners.

Dec. 20, 1999: Vermont Supreme Court rules that gay couples are entitled to the same benefits and protections as wedded couples.

July 1, 2000: Vermont begins granting civil union recognition.

May 21, 2003: Federal Marriage Amendment introduced in Congress.

Nov. 18: Massachusetts Supreme Judicial Court rules 4-3 that the state's ban on same-sex marriage is unconstitutional. The state is scheduled to begin granting marriage licenses to same-sex couples May 17.

Feb. 12: City and county of San Francisco Mayor Gavin Newsom authorizes the county clerk to begin issuing marriage licenses to same-sex couples.

Feb. 20: Sandoval County, N.M., Clerk's Office grants licenses to 26 same-sex couples before New Mexico Attorney General Patricia Madrid issues a late afternoon opinion saying the licenses are invalid.

Feb. 27: New Paltz, N.Y., Mayor Jason West begins officiating at weddings of same-sex couples.

March 1: Ithaca, N.Y., Mayor Carolyn K. Peterson announces that the city will begin accepting applications for marriage licenses from same-sex couples.

March 2: Ulster County, N.Y., District Attorney Donald Williams charges New Paltz Mayor West with 19 criminal counts of solemnizing marriages for couples who had no licenses, a misdemeanor, but says he lacks the authority to stop West from performing more weddings.

March 3: West pleads innocent to 19 criminal counts.

March 3: Hundreds of gay couples are issued marriage licenses at Multnomah County offices in Portland, Ore.

March 8: Seattle Mayor Greg Nickels orders the city to recognize same-sex marriages of municipal employees.

March 8: Asbury Park, N.J., begins issuing marriage licenses to same-sex couples.

March 9: New Jersey attorney general orders Asbury Park officials to stop issuing marriage licenses to same-sex couples and says those already issued are not valid.

March 9: San Jose, Calif., City Council authorizes the city to recognize city workers' same-sex marriages performed elsewhere.

March 11: The California Supreme Court halts same-sex weddings in San Francisco while it decides whether the city/county had the authority to issue the marriage licenses. The city files a lawsuit demanding that the marriages be declared constitutionally permissible.

March 12: Oregon Attorney General Hardy Myers issues an opinion that says banning same-sex marriage probably violates the state constitution.

March 15: Benton County, Oregon, announces that it will become the state's second county to begin issuing marriage licenses to gay couples.

Friday: Oklahoma Attorney General Drew Edmondson issues opinion that marriage is a civil contract between a man and a woman.

MARRIAGE AND THE LAW

What the federal and state governments say

U.S. Constitution
Full Faith and Credit Clause
Article IV, Section 1
"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. ..."

Equal Protection Clause
Amendment XIV, Section 1
"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Proposed Federal Marriage Amendment
"Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

Federal Defense of Marriage Act
U.S. Code, Title 1, Chapter 1
"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."

Title 28, Chapter 115
"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

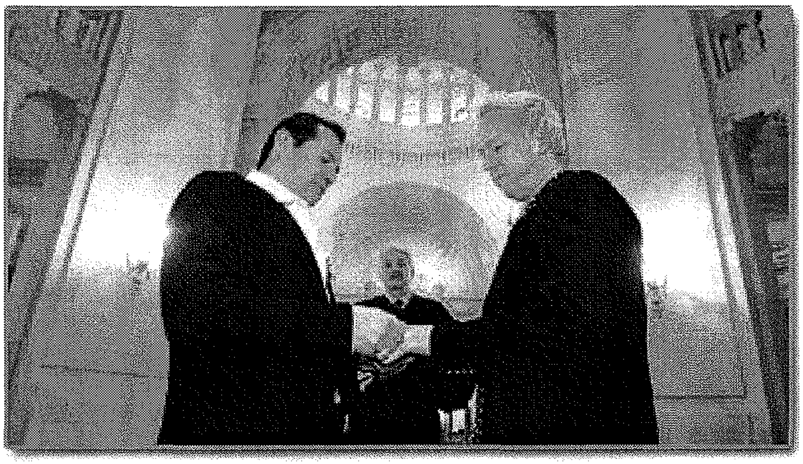
Oklahoma Constitution
Equal Protection Clause
Section II-2
"All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of

their own industry."

Oklahoma Statutes
Title 43, Section 43-1
"Any unmarried person of the age of eighteen (18) years or upwards and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex ...."

Section 43-3.1
"A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."

Associated Images:



Some 4,037 marriage licenses were issued to same-sex couples from mid-February through mid-March at San Francisco's City Hall. Here, Daniel Dominquez puts a ring on the finger of his partner, Edgardo Moncada (right), as they are married by Deputy Marriage Commissioner James Illigh upstairs in the City Hall Rotunda.

U.S. Rep. John Sullivan, R-Okla., a co-sponsor of a constitutional amendment that would bar states from allowing gay couples to marry, speaks last month at a state Capitol rally. Other Oklahomans rallied across the street in support of extending marriage to same-sex couples.

GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

January 23, 2004

The Honorable Bill Frist
Majority Leader
United States Senate

Subject: *Defense of Marriage Act: Update to Prior Report*

Dear Senator Frist:

The Defense of Marriage Act (DOMA) provides definitions of "marriage" and "spouse" that are to be used in construing the meaning of a federal law and, thus, affect the interpretation of a wide variety of federal laws in which marital status is a factor.[1] In 1997, we issued a report identifying 1,049 federal statutory provisions classified to the United States Code in which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor.[2] In preparing the 1997 report, we limited our search to laws enacted prior to September 21, 1996, the date DOMA was signed into law. Recently, you asked us to update our 1997 compilation.

We have identified 120 statutory provisions involving marital status that were enacted between September 21, 1996, and December 31, 2003. During the same period, 31 statutory provisions involving marital status were repealed or amended in such a way as to eliminate marital status as a factor. Consequently, as of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.

To prepare the updated list, we used the same research methods and legal databases that we employed in 1997. Accordingly, the same caveats concerning the completeness of our

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[1] The Defense of Marriage Act defines "marriage" as "a legal union between one man and one woman as husband and wife"; it defines "spouse" as referring "only to a person of the opposite sex who is a husband or a wife." The Act requires that these definitions apply "[i]n 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." 1 U.S.C. § 7.

[2] U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C.: January 31, 1997).

EXHIBIT
tabbies
6

collection of laws apply to this updated compilation, as explained more fully in our prior report. For example, because of the inherent limitations of any global electronic search and the many ways in which the laws of the United States Code may deal with marital status, we cannot guarantee that we have captured every individual law in the United States Code in which marital status figures. However, we believe that the probability is high that the updated list identifies federal programs in the United States Code in which marital status is a factor.

We have organized our research using the same 13 subject categories as the 1997 report. As agreed with your staff, in addition to providing you with a primary table of new statutory provisions involving marital status, we have prepared a second table identifying those provisions in our prior report that subsequently have been repealed or amended in a manner that eliminates marital status as a factor. Finally, in a third table, we have listed those provisions identified in our 1997 report that have since been relocated to a different section of the United States Code. We have also attached a brief summary of the 13 research categories; a full description of each category is set forth in the 1997 report.

We plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies of this letter to interested congressional committees. The letter will also be available on GAO's home page at http://www.gao.gov.

If you have any questions, please contact me at (202) 512-8208 or by E-mail at shahd@gao.gov. Behn Miller Kelly and Richard Burkard made key contributions to this project.

Sincerely yours,

Dayna K. Shah

Dayna K. Shah
Associate General Counsel

APPENDIX 1

Table of Statutory Provisions Involving Marital Status Added to the United States Code Between September 21, 1996, and December 31, 2003, by Category

CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS

Title 42 – The Public Health and Welfare	
Chapter 6A—Public Health Service	
Subchapter II	
Part D—Primary Health Care	
Subpart I—Health Centers	
§ 254d	National Health Service Corps
Subchapter IV—Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services	
Part B—Child and Family Services	
Subpart 2—Promoting Safe and Stable Families	
§ 629a	Definitions
Subchapter XI—General Provisions, Peer Review, and Administrative Simplification	
Part A—General Provisions	
§ 1320a-7	Exclusion of certain individuals and entities from participation in Medicare and state health care programs
§ 1320b-17	Recovery of SSI overpayments from other benefits
Part C—Medicare + Choice Program	
§ 1395w-22	Benefits and beneficiary protections
§ 1395w-23	Payments to Medicare + Choice organizations
§ 1395w-27	Contracts with Medicare + Choice organizations
Part D—Miscellaneous Provisions	
§ 1395x	Definitions
§ 1395ff	Determinations; appeals
Chapter 35—Programs for Older Americans	
Subchapter III—Grants for States and Community Programs on Aging	
Part C—Nutrition Services	
Subpart III—General Provisions	
§ 3030g-21	General provisions—nutrition
§ 3030s	Definitions
Chapter 46—Justice System Improvement	
Subchapter XII—F—Public Safety Officers' Death Benefits	
Part A—Death Benefits	
§ 3796d	Purposes
§ 3796d-1	Basic eligibility
Subchapter XII—H—Grants to Combat Violent Crimes against Women	
§ 3796gg-1	State grants
Chapter 84—Department of Energy	
Part A—Establishment of Compensation Program and Compensation Fund	
Subchapter XVI—Energy Employees Occupational Illness Compensation Program	
§ 7384s	Compensation and benefits to be provided
§ 7384u	Separate treatment of certain uranium employees
Part C—Treatment, Coordination, and Forfeiture of Compensation and Benefits	
§ 7385c	Exclusivity of remedy against the United States and against contractors and subcontractors
Chapter 110—Family Violence Prevention and Services	
§ 10410	Grants for state domestic violence coalitions
§ 10421	Definitions

Chapter 129—National and Community Service *Subchapter I—National and Community Service State Grant Program* *Division F—Administrative Provisions*	
§ 12639	Evaluation
Chapter 130—National Affordable Housing *Subchapter I—General Provisions and Policies*	
§ 12704	Definitions
§12713	Eligibility under first-time home-buyer programs
Chapter 136—Violent Crime Control and Law Enforcement *Subchapter III—Violence against Women* *Part C—Civil Rights for Women*	
§ 13981	Civil rights
§ 13992	Training provided by grants
Chapter 143—Intercountry Adoptions *Subchapter V—General Provisions*	
§ 14952	Special rules for certain cases

CATEGORY 2—VETERANS' BENEFITS

Title 38—Veterans' Benefits	
Part II—General Benefits **Chapter 17—Hospital, Nursing Home, Domiciliary, and Medical Care** *Subchapter II—Hospital, Nursing Home, Or Domiciliary Care and Medical Treatment*	
§ 1710B	Extended care services
Subchapter VIII—Health Care of Persons other than Veterans	
§ 1781	Medical care for survivors and dependents of certain veterans
Chapter 18—Benefits for Children of Vietnam Veterans *Subchapter III—General Provisions*	
§ 1821	Definitions
Chapter 19—Insurance *Subchapter III—Servicemembers' Group Life Insurance*	
§ 1967	Person insured; amount
§ 1969	Deductions; payment; investment; expenses
Chapter 23—Burial Benefits	
§ 2306	Headstones, markers, and burial receptacles
Part III—Readjustment and Related Benefits **Chapter 30—All-Volunteer Force Educational Assistance Program** *Subchapter II—Basic Educational Assistance*	
§ 3020	Transfer of entitlement to basic educational assistance: members of the Armed Forces with critical military skills
Chapter 42—Employment and Reemployment Rights of Members of the Uniformed Services	
§ 4215	Priority of service for veterans in Department of Labor job training programs
Part IV—General Administrative Provisions **Chapter 53—Special Provisions Relating to Benefits**	
§ 5302	Waiver of recovery of claims by the United States
§ 5313B	Prohibition on providing certain benefits with respect to persons who are fugitive felons
Part V—Boards, Administrations, and Services **Chapter 77—Veterans Benefits Administration** *Subchapter II—Veterans Outreach Services Program*	
§ 7721	Purpose; definitions

CATEGORY 3—TAXATION

Title 26—Internal Revenue Code	
Subtitle A—Income Taxes	
Chapter 1—Normal Taxes and Surtaxes	
	Subchapter A—Determination of Tax Liability
	Part IV—Credits Against Tax
	Subpart A—Nonrefundable Personal Credits
§ 24	Child tax credit
§25A	Hope and lifetime learning credits
§ 25B	Tax imposed on individuals
	Subchapter B—Computation of Taxable Income
	Part III—Items Specifically Excluded from Gross Income
§ 101	Certain death benefits
	Part VII—Additional Itemized Deductions for Individuals
§ 138	Medicare + Choice MSA
§ 221	Interest on education loans
	Subchapter D—Deferred Compensation, Etc.
	Part I—Pension, Profit-Sharing, Stock Bonus Plans, Etc.
	Subpart A—General Rule
§ 408A	Roth IRAs
	Subchapter F—Exempt Organizations
	Part VIII—Higher Education Savings Entities
§ 529	Qualified tuition programs
§ 530	Coverdell education savings accounts
	Subchapter K—Partners and Partnerships
	Part IV—Special Rules for Electing Large Partnerships
§ 774	Other modifications
§ 775	Electing large partnership defined
	Subchapter O—Gain or Loss on Disposition of Property
	Part II—Basis Rules of General Application
§ 1022	Treatment of property acquired by decedent dying after December 31, 2009
	Subchapter W—District of Columbia Enterprise Zone
§ 1400C	First-time home-buyer credit for District of Columbia
Subtitle B—Estate and Gift Taxes	
Chapter 11—Estate Tax	
	Subchapter A—Estates Of Citizens Or Residents
	Part IV—Taxable Estate
§ 2057	Family-owned business interests
	Subchapter C—Miscellaneous
§ 2210	Termination
Chapter 12—Gift Tax	
	Subchapter B—Transfers
§ 2511	Transfers in general
Chapter 13—Tax on Generation-Skipping Transfers	
	Subchapter D—GST Exemption
§ 2632	Special rules for allocation of GST exemption
Subtitle F—Procedure and Administration	
Chapter 61—Information and Returns	
	Subchapter A—Returns and Records
	Part II—Tax Returns or Statements
	Subpart B—Income Tax Returns
§ 6015	Relief from joint and several liability on joint return
	Part III—Information Returns
	Subpart B—Information Concerning Transactions with Other Persons
§ 6045	Returns of brokers

Chapter 62—Time and Place for Paying Tax *Subchapter A—Place and Due Date for Payment of Tax*	
§ 6159	Agreements for payment of tax liability in installments
Chapter 63—Assessment *Subchapter C—Tax Treatment of Partnership Items*	
§ 6230	Additional administrative provisions
Chapter 66—Limitations *Subchapter B—Limitations on Credit or Refund*	
§ 6511	Limitations on credit or refund

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

Title 5—Government Organization and Employees	
Part III—Employees **Subpart A—General Provisions** **Chapter 23—Merit system principles**	
§ 2301	Merit system principles
§ 2302	Prohibited personnel practices
Subpart B—Employment and Retention **Chapter 33—Examination, Selection, and Placement** *Subchapter I—Examination, Certification and Appointment*	
§ 3301	Civil service; generally
Subpart D—Pay and Allowances **Chapter 57—Travel, Transportation, And Subsistence** *Subchapter II—Travel And Transportation Expenses; New Appointees, Student Trainees, And Transferred Employees*	
§ 5737	Relocation expenses of an employee who is performing an extended assignment
Chapter 59—Allowances *Subchapter III—Overseas Differentials And Allowances*	
§ 5922	General provisions
Subpart G—Insurance and Annuities **Chapter 90—Long-term Care Insurance**	
§ 9001	Definitions
§ 9002	Availability of insurance
§ 9003	Contracting authority
Title 6—Domestic Security	
Chapter 1—Homeland Security Organization	
§ 331	Treatment of charitable trusts for members of the armed services and other governmental organizations
Title 10—Armed Forces	
Subtitle A—General Military Law **Part I—Organization and General Military Powers** **Chapter 2—Department of Defense**	
§ 118a	Quadrennial quality of life review
Part II—Personnel **Chapter 55—Medical and Dental Care**	
§ 1108	Health care coverage through federal employees' health benefits program: demonstration project
Chapter 73—Annuities based on Retired or Retainer Pay *Subchapter II—Survivor Benefit Plan*	
§ 1448a	Election to discontinue participation: one-year opportunity after second anniversary of commencement of payment of retired pay
Chapter 88—Military Family Care Programs and Military Child Care *Subchapter II—Military Child Care*	

§ 1798	Child care services and youth program services for dependents: financial assistance for providers
Title 37—Pay and Allowances of The Uniformed Services	
Chapter 7—Allowances	
§ 403	Basic allowance for housing
§ 407	Travel and transportation allowances: dislocation allowance
§ 411f	Travel and transportation allowances: transportation for survivors of deceased member to attend the member's burial ceremonies
§ 427	Family separation allowance

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED STATUTORY PROVISIONS

Title 29—Labor	
Chapter 30—Workforce Investment Systems	
Subchapter I—Workforce Investment Definitions	
§ 2801	Definitions
Subchapter IV—National Programs	
§ 2918	National emergency grants
Title 30—Mineral Lands and Mining	
Chapter 25—Surface Mining Control and Reclamation	
Subchapter VII—Administrative and Miscellaneous Provisions	
§ 1304	Surface owner protection
Title 42—The Public Health and Welfare	
Chapter 46—Justice System Improvement	
Subchapter XII—Public Safety Officers' Death Benefits	
Part B—Educational Assistance to Dependents of Civilian Federal Law Enforcement Officers Killed or Disabled in the Line of Duty	
§ 3796d	Purposes
§ 3796d-1	Basic eligibility
Chapter 84—Department of Energy	
Subchapter XVI—Energy Employees Occupational Illness Compensation Program	
§ 7384s	Compensation and benefits to be provided
§ 7384u	Separate treatment of certain uranium employees
§ 7385c	Exclusivity of remedy against the United States and against contractors and subcontractors

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

Title 8—Aliens and Nationality	
Chapter 12—Immigration and Nationality	
Subchapter II—Immigration	
Part II—Admission Qualifications fFor Aliens; Travel Control of Citizens And Aliens	
§ 1183a	Requirements for sponsor's affidavit of support
Part IV—Inspection, Apprehension, Examination, Exclusion, and Removal	
§ 1227	General classes of deportable aliens
§ 1229a	Removal proceedings
§ 1229b	Cancellation of removal; adjustment of status
§ 1229c	Voluntary departure
Part IX—Miscellaneous	
§ 1367	Penalties for disclosure of information
§ 1375	Mail-order bride business

Chapter 14—Restricting Welfare and Public Benefits for Aliens	
Subchapter IV—General Provisions	
§ 1641	Definitions
Chapter 15—Enhanced Border Security and Visa Entry Reform	
Subchapter V—Foreign Students and Exchange Visitors	
§ 1761	Foreign student monitoring program
Title 19—Customs Duties	
Chapter 24—Bipartisan Trade Promotion	
§ 3805*note*	United States—Chile Free Trade Agreement Implementation Act

CATEGORY 7--INDIANS

Title 25—Indians	
Chapter 18—Indian Health Care	
Subchapter II—Health Services	
§ 1621h	Mental health services
Chapter 24—Indian Land Consolidation	
§ 2206	Descent and distribution
§ 2216	Trust and restricted land transactions
Chapter 43—Native American Housing Assistance and Self-Determination	
§ 4103	Definitions
Subchapter VIII—Housing Assistance for Native Hawaiians	
§ 4221	Definitions

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

Title 12—Banks and Banking	
Chapter 13—National Housing	
§ 1701q	Supportive housing for the elderly
	Subchapter II—Mortgage Insurance
§ 1707	Definitions
§ 1713	Rental housing insurance
§ 1715e	Cooperative housing insurance
Chapter 17—Bank Holding Companies	
§ 1841	Definitions
Chapter 31—National Consumer Cooperative Bank	
Subchapter I—Establishment and Operation	
§ 3015	Eligibility of cooperatives
Chapter 32—Foreign Bank Participation in Domestic Markets	
§ 3106a	Compliance with state and federal laws
Title 15—Commerce and Trade	
Chapter 14A—Aid to Small Business	
§ 632	Small business concern
Chapter 14B—Small Business Investment Program	
Subchapter V—Loans to State and Local Development Companies	
§ 696	Loans for plant acquisition, construction, conversion, and expansion
Chapter 41—Consumer Credit Protection	
Subchapter IV—Equal Credit Opportunity	
§ 1691	Scope of prohibition

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

Title 7—Agriculture	
Chapter 50—Agricultural Credit	
Subchapter VI—Delta Regional Authority	
§ 2009aa-1	Delta Regional Authority
Subchapter VII—Northern Great Plains Regional Authority	
§ 2009bb-1	Northern Great Plains Regional Authority
Subchapter IX—Rural Strategic Investment Program	
§ 2009dd-3	National Board on rural America

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

Title 18—Crimes and Criminal Procedure	
Part I—Crimes	
Chapter 46—Forfeiture	
§ 983	General rules for civil forfeiture proceedings
Chapter 110A—Domestic Violence	
§ 2261A	Interstate stalking
Title 20	
Chapter 28—Higher Education Resources and Student Assistance	
Subchapter VIII—Miscellaneous	
§ 1152	Grants to combat violent crimes against women on campuses
Title 28—Judiciary and Judicial Procedure	
Part V—Procedure	
Chapter 115—Evidence; Documentary	
§ 1738C	Certain acts, records, and proceedings and the effect thereof
Title 42—The Public Health And Welfare	
Chapter 135—Violent Crime Control and Law Enforcement	
Subchapter III—Violence against Women	
Subpart 3—Rural Domestic Violence and Child Abuse Enforcement	
Part C—Civil Rights for Women	
§ 13981	Civil rights
Part D—Equal Justice for Women in the Courts Act	
Subpart 1—Education and Training for Judges and Court Personnel in State Courts	
§ 13992	Training provided by grants

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

No new provisions in this category of statutes.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED STATUTORY PROVISIONS

No new provisions in this category of statutes.

CATEGORY 13—MISCELLANEOUS STATUTORY PROVISIONS

Title 20—Education	
	Chapter 70—Strengthening and Improvement of Elementary and Secondary Schools
	Subchapter II—Preparing, Training, and Recruiting High Quality Teachers and Principals
	Part C—Innovation for Teacher Quality
	Subpart 1—Transition to Teaching
§ 6674	Participation agreement and financial assistance
	Subchapter VII—Bilingual Education, Language Enhancement, and Language Acquisition Programs
	Part B—Native Hawaiian Education
§ 7512	Findings
Title 22—Foreign Relations and Intercourse	
	Chapter 75—Chemical Weapons Convention Implementation
Subchapter I—General Provisions	
§ 6713	Civil liability of the United States

APPENDIX 2

Tables of Statutory Provisions Identified in 1997 Report as Involving Marital Status That Have Been Repealed or Amended to Remove Reference to Marital Status

Category 1—Social Security and Related Programs, Housing, and Food Stamps

Subject	1997 Statutory Citation	Status
Regulations pertaining to garnishments	42 U.S.C. §§661-662	Repealed by Pub. L. No. 104-193, § 362(b)(1), effective February 22, 1997, 110 Stat. 2246.

Category 3—Taxation

Subject	1997 Statutory Citation	Status
Collapsible corporations	26 U.S.C. § 341	Repealed by Pub. L. No. 108-27, § 302(e), May 28, 2003, 117 Stat. 763.
Rollover of gain on sale of principal residence	26 U.S.C. § 1034	Repealed by Pub. L. No. 105-34, § 312(b), Aug. 5, 1997, 111 Stat. 839.
Tax on excess distribution from qualified retirement plans	26 U.S.C. § 4980A	Repealed by Pub. L. No. 105-34, § 1073(a), Aug. 7, 1997, 111 Stat. 948.

Category 4—Federal Civilian and Military Service Benefits

Subject	1997 Statutory Citation	Status
Employment of retired members of the uniformed services; reduction in retired or retainer pay	5 U.S.C. § 5532	Repealed by Pub. L. No. 106-65, § 651(a)(1), Oct. 1, 1999, 113 Stat. 664.
Assistance to separated members to obtain certification and employment as teachers or employment as teachers' aides	10 U.S.C. § 1151	Repealed by Pub. L. No. 106-655, § 1707(a)(1), Oct. 5, 1999, 113 Stat. 823.
Military child care employees	10 U.S.C. § 1792	Amended by Pub. L. No. 105-261, § 1106, Oct. 17, 1998, 112 Stat. 2142; reference to marital status removed.
Job training partnership, application of federal law	29 U.S.C. § 1706	Repealed by Pub. L. No. 105-220, § 199(b) (2), effective July 1, 2000, 112 Stat. 1059.
Rights, benefits, privileges, and immunities; exercise of authority of Secretary of Commerce or designee (National Ocean Survey employees)	33 U.S.C. § 857a	Repealed by Pub. L. No. 107-372, § 271(2), Dec. 19, 2002, 116 Stat. 3094 and replaced with similar provisions that omit any reference to marital status. See 33 U.S.C. 3071 (National Oceanic and Atmospheric Administration Commissioned Officer Corps - Rights and benefits).

Category 5—Employment Benefits and Related Statutory Provisions

Subject	1997 Statutory Citation	Status
Youth training program for the disadvantaged	29 U.S.C. § 1644	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.
Job Corps—Allowances and support	29 U.S.C. § 1699	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.
Labor market information	29 U.S.C. § 1752	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.

Category 6—Immigration, Naturalization, and Aliens

Subject	1997 Statutory Citation	Status
Suspension of deportation of aliens	8 U.S.C. § 1251	Repealed by Pub. L. No. 104-208, § 308(b)(7), Sep. 30, 1996, 110 Stat. 3009-615.

Category 9—Financial Disclosure and Conflict of Interest

Subject	1997 Statutory Citation	Status
Alternative Agricultural Research and Commercialization Corporation—Board of Directors, Employees, and Facilities	7 U.S.C. § 5903	Repealed by Pub. L. No. 107-171, § 6201(a), May 13, 2002, 116 Stat. 418.

Category 10—Crimes and Family Violence

Subject	1997 Statutory Citation	Status
Interstate violation of a protection order	18 U.S.C. § 2262	Amended by Pub. L. 106-386, § 1107, Oct. 28, 2000, 114 Stat. 1464: reference to marital status removed.
Narcotic addict rehabilitation—definitions	42 U.S.C. § 3411	Repealed by Pub. L. No. 106-310, § 3405(b), Oct. 17, 2000, 114 Stat. 1221.
Model state leadership grants for domestic violence intervention	42 U.S.C. § 10415	Repealed by Pub. L. No. 108-36, § 410, June 25, 2003, 117 Stat. 827.

Category 11—Loans, Guarantees, and Payments in Agriculture

Subject	1997 Statutory Citation	Status
Paul Douglas Teaching Scholarships—exceptions to repayment provisions	20 U.S.C. § 1104g	Amended by Pub. L. No. 105-244, § 501, October 7, 1998, 112 Stat. 1581: reference to marital status removed.
Faculty Development Fellowship Program—exceptions to repayment provisions	20 U.S.C. § 1134r-5	Repealed by Pub. L. No. 105-244, § 701, October 7, 1998,112 Stat. 1581.

Category 13—Miscellaneous Statutory Provisions

Subject	1997 Statutory Citation	Status
Vocational education state plans	20 U.S.C. § 2323	Amended by Pub. L. No. 105-332, § 1(b), October 31, 1998, 112 Stat. 3076; reference to marital status removed.
Vocational education definitions	20 U.S.C. § 2471	Amended by Pub. L. No. 105-332, § 1(b), October 31, 1998, 112 Stat. 3076; reference to marital status removed.
Agricultural Hall of Fame	36 U.S.C. § 977	Amended by Pub. L. No. 105-354, § 1, Aug. 12, 1998, 112 Stat. 3238; reference to marital status removed.
Audits of Federally Chartered Corporations	36 U.S.C. § 1101	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1253; reference to marital status removed.
Gold Star Wives of America	36 U.S.C. § 1602	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1253; replaced provision's reference to "gold wives" with "corporation". (The name of the organization continues to be the Gold Star Wives of America.)
Navy Wives Clubs of America	36 U.S.C. § 2802	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1436; replaced provision's reference to "Navy Wives" with "corporation". (The name of the organization continues to be the Navy Wives Clubs of America.)
Aviation Hall of Fame	36 U.S.C. § 4307 and § 4309	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1312. These provisions' references to "survivors" were deleted.
Membership of Martin Luther King, Jr., Federal Holiday Commission	36 U.S.C. § 169j-3	Repealed by Pub. L. No. 105-225, § 6, Aug. 12, 1998, 112 Stat. 1253.
Testing and other early intervention services for state prisoners	42 U.S.C. § 300ff-48	Repealed by Pub. L. No. 106-345, § 301(a), Oct. 20, 2000, 114 Stat. 1345.
Programs for older Americans—Demonstration projects	42 U.S.C. § 3035a	Provision was omitted by Pub. L. No. 106-501, Nov. 13, 2001, 114 Stat. 2257.

APPENDIX 3

Tables of Statutory Provisions Identified in 1997 Report as Involving Marital Status That Have Been Relocated in the United States Code

Category 1—Social Security and Related Programs, Housing, and Food Stamps

Subject	1997 Statutory Citation	Status
Alien's eligibility for benefits	42 U.S.C. § 615	Relocated to 42 U.S.C. § 608(f)

Category 2—Veterans' Benefits

Subject	1997 Statutory Citation	Status
Medical care for survivors and dependents of certain veterans	38 U.S.C. § 1713	Relocated to 38 U.S.C. § 1781

Category 4—Federal Civilian and Military Service Benefits

Subject	1997 Statutory Citation	Status
House of Representatives Child Care Center	40 U.S.C. § 184g	Relocated to 2 U.S.C. § 2062
National Oceanic and Atmospheric Administration commissary privileges	33 U.S.C. § 857-4	Relocated to 33 U.S.C. § 3074
Gratuities for survivors of deceased House employees; computation	40 U.S.C. § 166b-4	Relocated to 2 U.S.C. § 125
Senate employee child care benefits	40 U.S.C. § 214d	Relocated to 2 U.S.C. § 2063

Category 5—Employment Benefits and Related Statutory Provisions

Subject	1997 Statutory Citation	Status
Job training partnership—definitions	29 U.S.C. § 1503	Relocated to 29 U.S.C. § 2801

Category 6—Immigration, Naturalization, and Aliens

Subject	1997 Statutory Citation	Status
Deportable aliens	8 U.S.C. § 1251	Relocated to 8 U.S.C. § 1227

Category 7—Indians

Subject	1997 Statutory Citation	Status
Indian land consolidation—Descent and distribution	25 U.S.C. § 2205	Relocated to 25 U.S.C. § 2206

Category 9—Financial Disclosure and Conflict of Interest

Subject	1997 Statutory Citation	Status
Appalachian Regional Commission—personal financial interests	40 U.S.C. § 108	Relocated to 40 U.S.C. § 14309

Category 10—Crimes and Family Violence

Subject	1997 Statutory Citation	Status
Family violence prevention and Services—definitions	40 U.S.C. § 10408	Relocated to 40 U.S.C. § 10421

Category 13—Miscellaneous Statutory Provisions

Subject	1997 Statutory Citation	Status
Marine Corps League	36 U.S.C. § 57a	Relocated to chapter 2301 § 140102
Veterans of Foreign Wars of the United States	36 U.S.C. § 113	Relocated to chapter 2301 § 230102
Legion of Valor of the United States of America	36 U.S.C. § 633	Relocated to chapter 1303 § 130302
Veterans of World War I of the United States of America	36 U.S.C. § 763	Relocated to chapter 2303 § 230302
The Congressional Medal of Honor Society of the United States	36 U.S.C. § 793 and § 799	Relocated to chapter 405 § 40502 and § 40506
Blinded Veterans Association	36 U.S.C. § 859	Relocated to chapter 303 § 30307
National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic	36 U.S.C. § 1005	Relocated to chapter 1537 § 153703
Gold Star Wives of America	36 U.S.C. § 1601	Relocated to chapter 805 § 80502
American Ex-Prisoners of War	36 U.S.C. § 2103	Relocated to chapter 209 § 20903
Catholic War Veterans of the United States of America, Inc.	36 U.S.C. § 2603	Relocated to chapter 401 § 40103
Navy Wives Clubs of America	36 U.S.C. §2801 and § 2803	Relocated to chapter 1545, § 154502 and §154503.
Army and Navy Union of the United States	36 U.S.C. § 3903	Relocated to chapter 229 § 22903
Non-Commissioned Officers Association of the United States	36 U.S.C. § 4003	Relocated to chapter 1547 § 4003
Retired Enlisted Association, Incorporated	36 U.S.C. § 5103	Relocated to chapter 1903 § 190303
National Fallen Firefighters Foundation	36 U.S.C. § 5201	Relocated to Chapter 1513 § 151302
Public Health Service grants for services of substance abusers	42 U.S.C. § 280d	Relocated to 42 U.S.C. § 290bb-25
Programs for older Americans—state plans	42 U.S.C. § 3035	Relocated to 42 U.S.C. § 3027

APPENDIX 4
CATEGORIES OF STATUTORY PROVISIONS

CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS

This category includes the major federal health and welfare programs, particularly those considered entitlements, such as Social Security retirement and disability benefits, food stamps, welfare, and Medicare and Medicaid. Most of these provisions are found in Title 42 of the United States Code, Public Health and Welfare; food stamp legislation is in Title 7, Agriculture.

CATEGORY 2—VETERANS' BENEFITS

Veterans' benefits, which are codified in Title 38 of the United States Code, include pensions, indemnity compensation for service-connected deaths, medical care, nursing home care, right to burial in veterans' cemeteries, educational assistance, and housing. Husbands or wives of veterans have many rights and privileges by virtue of the marital relationship.

CATEGORY 3—TAXATION

While the distinction between married and unmarried status is pervasive in federal tax law, terms such as "husband," "wife," or "married" are not defined. However, marital status figures in federal tax law in provisions as basic as those giving married taxpayers the option to file joint or separate income tax returns. It is also seen in the related provisions prescribing different tax consequences, depending on whether a taxpayer is married filing jointly, married filing separately, unmarried but the head of a household, or unmarried and not the head of a household.

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

This category includes statutory provisions dealing with current and retired federal officers and employees, members of the Armed Forces, elected officials, and judges, in which marital status is a factor. Typically these provisions address the various health, leave, retirement, survivor, and insurance benefits provided by the United States to those in federal service and their families.

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED PROVISIONS

Marital status comes into play in many different ways in federal laws relating to employment in the private sector. Most provisions appear in Title 29 of the United States Code, Labor.

However, others are in Title 30, Mineral Lands and Mining; Title 33, Navigation and Navigable Waters; and Title 45, Railroads. This category includes laws that address the rights of employees under employer-sponsored employee benefit plans; that provide for continuation of employer-sponsored health benefits after events like the death or divorce of the employee; and that give employees the right to unpaid leave in order to care for a seriously ill spouse. In addition, Congress has extended special benefits in connection with certain occupations, like mining and public safety.

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

This category includes federal statutory provisions governing the conditions under which noncitizens may enter and remain in the United States, be deported, or become citizens. Most are found in Title 8, Aliens and Nationality. The law gives special consideration to spouses of immigrant and nonimmigrant aliens in a wide variety of circumstances. Under immigration law, aliens may receive special status by virtue of their employment, and that treatment may extend to their spouses. Also, spouses of aliens granted asylum can be given the same status if they accompany or join their spouses.

CATEGORY 7—INDIANS

The indigenous peoples of the United States have long had a special legal relationship with the federal government through treaties and laws that are classified to Title 25, Indians. Various laws set out the rights to tribal property of "white" men marrying "Indian" women, or of "Indian" women marrying "white" men. The law also outlines the descent and distribution rights for Indians' property. In addition, there are laws pertaining to health care eligibility for Indians and spouses and reimbursement of travel expenses of spouses and candidates seeking positions in the Indian Health Service.

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

This category includes provisions concerning foreign or domestic business and commerce, in the following titles of the United States Code: Bankruptcy, Title 11; Banks and Banking, Title
12; Commerce and Trade, Title 15; Copyrights, Title 17; and Customs Duties, Title 19. This category also includes the National Housing Act (rights of mortgage borrowers); the Consumer Credit Protection Act (governs wage garnishment); and the Copyright Act (spousal copyright renewal and termination rights).

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

Federal law imposes obligations on members of Congress, employees or officers of the federal government, and members of the boards of directors of some government-related or government chartered entities, to prevent actual or apparent conflicts of interest. These individuals are required to disclose publicly certain gifts, interests, and transactions. Many of these requirements, which are found in 16 different titles of the United States Code, apply also to the individual's spouse.

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

This category includes laws that implicate marriage in connection with criminal justice or family violence. The nature of these provisions varies greatly. Some deal with spouses as victims of crimes, others with spouses as perpetrators. These laws are found primarily in Title 18, Crimes and Criminal Procedure, but some statutory provisions, dealing with crime prevention and family violence, are in Title 42, Public Health and Welfare.

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

Under many federal loan programs, a spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the program. In other instances, marital status is a factor in determining the amount of federal assistance to which a person is entitled or the repayment schedule. This category includes education loan programs, housing loan programs for veterans, and provisions governing agricultural price supports and loan programs that are affected by the spousal relationship.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED PROVISIONS

Federal law gives special rights to spouses in connection with a variety of transactions involving federal lands and other federal property. These transactions include purchase and sale of land by the federal government and lease by the government of water and mineral rights.

CATEGORY 13—MISCELLANEOUS PROVISIONS

This category comprises federal statutory provisions that do not fit readily in any of the other 12 categories. Federal provisions that prohibit discrimination on the basis of marital status are included in this category. This category also includes various patriotic societies chartered in federal law, such as the Veterans of Foreign Wars or the Gold Star Wives of America.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, February 23, 2011

Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act

WASHINGTON – The Attorney General sent the following letter today to Congressional leadership to inform them of the Department's course of action in two lawsuits, *Pedersen v. OPM*and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman. A copy of the letter is also attached.

EXHIBIT
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The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, [i] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2010, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsorv. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases. [ii]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). [iii]

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see*Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see*Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*,517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely*to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence*and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*,Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers*in *Lawrence v. Texas*, 538 U.S. 558 (2003). [iv] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings. [v] And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence*and *Romer*. [vi] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United Statesv. Virginia*, 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against. [vii] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear" are not permissible bases for discriminatory treatment); *see alsoRomer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 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.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor*and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor*and *Pedersen*of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor*and *Pedersen*cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.
Attorney General

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[i]DOMA Section 3 states: "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."

[ii]*See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[iii]While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

[iv]*SeeEquality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[v]*See, e.g., Loftonv. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale*); High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[vi]*SeeCook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[vii]*See, e.g.,*H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers*that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer*that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").