JOSEPH J. LEVIN, JR. (*Pro Hac Vice*)
joe.levin@splcenter.org
CHRISTINE P. SUN (SBN 218701)
christine.sun@splcenter.org
CAREN E. SHORT (*Pro Hac Vice*)
caren.short@splcenter.org
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, AL 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481

(*Caption Continued on Next Page*)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TRACEY COOPER-HARRIS and MAGGIE COOPER-HARRIS

Plaintiffs,

vs.

UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., in his official capacity as Attorney General; and ERIC K. SHINSEKI, in his official capacity as Secretary of Veterans Affairs,

Defendants,

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant.

No. 2:12-cv-887-CBM (AJWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing: April 1, 2013
Time: 11:00 a.m.
Hon. Consuelo B. Marshall

WilmerHale
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071

Randall R. Lee (SBN 152672)
randall.lee@wilmerhale.com
Matthew D. Benedetto (SBN 252379)
matthew.benedetto@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400

Adam P. Romero (*Pro Hac Vice*)
adam.romero@wilmerhale.com
Rubina Ali (*Pro Hac Vice*)
rubina.ali@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Eugene Marder (SBN 275762)
eugene.marder@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
950 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 858-6000
Facsimile: (650) 858-6100

Attorneys for Plaintiffs

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Los Angeles, CA 90071

I. PRELIMINARY STATEMENT

Tracey Cooper-Harris is a decorated United States Army veteran who suffers from multiple sclerosis and post-traumatic stress disorder ("PTSD"), conditions connected to her military service. Tracey faces her disabilities bravely with the love and assistance of her same-sex spouse, Maggie Cooper-Harris. When Tracey wakes up terrorized by a PTSD-triggered nightmare, Maggie comforts her. Maggie accompanies Tracey to her weekly medical appointments, helps Tracey manage her medical conditions, and monitors Tracey's health for symptoms that the multiple sclerosis is progressing. As any loving spouse of a disabled veteran would do, Maggie has committed to care for Tracey as the multiple sclerosis advances, knowing that the disease will likely cause Tracey to lose vision and damage her neuromuscular function to the point of requiring her to use a wheelchair. Tracey and Maggie rely on one another, as spouses do, and their love is, in a word, unconditional.

Because Tracey's disabilities are connected to her military service, she receives disability compensation from the Veterans Administration ("VA"). Unlike similarly-situated veterans and their opposite-sex spouses, however, Tracey and Maggie are denied certain veterans benefits because they are both women. That is because 38 U.S.C. §§ 101(3) & (31) ("Title 38") and Section 3 of 1 U.S.C. § 7 ("DOMA") separately proscribe the federal government from recognizing Tracey and Maggie's valid same-sex marriage, and therefore bar the VA from providing Tracey and Maggie benefits that heterosexual married veterans and their spouses are entitled to receive.

This discrimination violates Tracey's and Maggie's right to equal protection of the laws that is guaranteed by the Fifth Amendment to the United States Constitution. The Department of Justice has declined to defend Title 38 and DOMA. At its core, this case presents a straightforward question of constitutional law: Should the government be permitted to treat Tracey and Maggie's marriage differently simply because, as lesbians, they married someone of the same sex, instead of someone of the

opposite sex? Under any standard of review, the answer to that question is no. Title 38 and DOMA are unconstitutional, and Tracey and Maggie are entitled to summary judgment in their favor.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Tracey Cooper-Harris Served Our Country With Honor in Both the Afghanistan and Iraq Wars

Tracey Cooper-Harris served in the United States Army for twelve years, ten of them in active service. (Declaration of Tracey Cooper-Harris in Support of Plaintiffs' Motion for Summary Judgment ¶ 4 (Ex. C to the Declaration of Christine Sun ("Sun. Decl.").) Tracey enlisted in the Army in 1991, right after graduating high school. *Id.* Over the next eight years, Tracey was stationed at Bitburg Air Base in Germany, Brunswick Naval Air Station in Maine, and Yongsan Army Post in South Korea. *Id.* After completing her active duty service, Tracey continued her military service in the Army Reserves with the 109th Medical Detachment out of Stanton, California. *Id.* ¶ 5.

In October 2001, the United States began Operation Enduring Freedom in Afghanistan. *Id.* ¶ 6. In July 2002, Tracey was called up to active duty. *Id.* One month later, she reported to Camp Doha in Kuwait, where she was assigned to the 376th Expeditionary Medical Group, 376th Air Expeditionary Wing of the U.S. Air Force in Kyrgyzstan. *Id.* Around this time, Tracey was promoted to Sergeant. *Id.* While in Kyrgyzstan, Tracey was responsible for the well-being of over fifty military working dogs. *Id.* She provided medical care to Military Police dogs so they could safeguard military bases and detect explosives to protect the lives of American troops. *Id.*

While Tracey was stationed in Kyrgyzstan, the United States commenced Operation Iraqi Freedom. *Id.* ¶ 7. In February 2003, Tracey was transferred back to Camp Doha and was sent on frequent missions into southern Iraq to assist military veterinarians and maintain the well-being of military working dogs. *Id.* In June 2003, after more than nine years of active duty and approximately three years of reserve duty, Tracey was honorably discharged from the United States Army. *Id.* ¶ 8.

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During her military career, Tracey was awarded, among other honors, three Army Commendation Medals; the Air Force Commendation Medal; five Army Achievement Medals; the Armed Forces Reserve Medal with Mobilization Device; two National Defense Service Medals; an Iraq Campaign Medal with two Bronze Service Stars; and the Global War on Terrorism Expeditionary Medal. *Id.* ¶ 9.

B. Tracey Returns To Civilian Life, Marries Maggie, And The Couple Copes With Tracey's Service-Connected Disabilities

Like many veterans returning from war, Tracey had an uneasy transition back to civilian live. *Id.* ¶ 11. She was diagnosed by the VA with service-connected PTSD, an anxiety disorder often triggered by a traumatic event that is common among veterans. *Id.* Tracey's symptoms included avoidance of social situations, trouble sleeping, nightmares, and debilitating guilt for being discharged while her fellow soldiers fought on. *Id.* ¶ 12. Tracey receives treatment for PTSD at VA hospitals, but continues to suffer from its symptoms today. *Id.* ¶ 11.

One way Tracey was able to cope with the stress and pain of her PTSD was by joining a local rugby group, where she met Maggie. *Id.* ¶13. Tracey and Maggie started dating in the fall of 2005. *Id.* ¶ 14. In November 2008, Tracey and Maggie married in front of their friends and family in a large ceremony in Van Nuys, California. *Id.* ¶15. The State of California granted Tracey and Maggie a marriage license, providing them with the same status, responsibilities, and protections as other legally married couples under state law. *Id.* ¶ 3. Tracey and Maggie currently reside together in Pasadena, California. *Id.*

It was evident early on that Tracey's PTSD would affect both of their lives. Maggie stayed by Tracey's side during her nightmares, drove her to counseling and other appointments, and dealt with her PTSD-induced conditions. *Id.* ¶ 17. Though providing Tracey with the care that her PTSD requires means that Maggie has to sacrifice her days off, her sleep, and her emotional energy, Maggie continues to demonstrate the unconditional love that any committed and loving spouse would

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show. Declaration of Maggie Cooper-Harris in Support of Plaintiffs' Motion for Summary Judgment ¶ 4 (Sun Decl., Ex. B).

Tracey began experiencing early symptoms of multiple sclerosis in December 2009. T. Cooper-Harris Decl. ¶ 18. In 2010, Tracey was diagnosed with multiple sclerosis by a neurologist at her local VA hospital, and in 2011, the VA concluded that Tracey's multiple sclerosis stems from her military service. *Id.* Multiple sclerosis is an autoimmune disease that affects the brain and central nervous system. *Id.*

Tracey's current symptoms include impaired vision, loss of balance, sharp electrical charges in different parts of her body, tingling in her extremities, and chronic fatigue. *Id.* ¶19. During the pendency of this lawsuit, Tracey's symptoms have become more frequent, including increased fatigue and exhaustion, hand tremors, and blurred vision. *Id.* ¶ 20. As her disease progresses, Tracey is likely to need a wheelchair, suffer limited vision or loss of vision, lose control over her neuromuscular function and coordination, experience difficulty communicating, and develop problems with her memory and temper. *Id.* ¶ 21. There is no known cure for multiple sclerosis. *Id.* ¶ 18.

C. Tracey and Maggie's Valid Marriage is Not Recognized by the Federal Government

Tracey receives compensation from the VA because of her service-connected disabilities. *Id.* ¶ 24. For disabled veterans married to persons of the opposite sex, the VA provides a number of significant benefits, including additional disability benefits; Dependency and Indemnity Compensation, which provides monthly benefits to a surviving spouse after a veteran has died from a service-connected injury or disease; and joint burial benefits for the veteran and his or her spouse at a veterans cemetery. *Id.* ¶ 25; Expert Report of Major General (Ret.) Dennis Laich ("Laich Rep.") ¶ 23(Sun Decl., Ex. F). In August 2011, Tracey's claim for additional dependency compensation was denied on the grounds that "[t]he veteran's marriage is not valid for VA purposes." T. Cooper-Harris Decl. ¶ 26 (*Id.*, Ex. C).

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D. The Federal Government Provides Significant Benefits to Servicemembers, Veterans, and Their Families To Promote Military Recruitment, Retention, and Readiness

The United States government provides a number of benefits to active duty military service members, retired service members, and veterans to ease the burden that military service imposes on a service member and the service member's family, as well as to honor the veteran's service and the sacrifices made by the veteran's family. Expert Report of Dr. Lawrence J. Korb ("Korb Rep.") ¶¶ 15-18 (Sun Decl., Ex. E). In addition, military and veterans benefits are an important way in which the military facilitates recruitment and retention of service members, as well as helps to ensure unit cohesion and military readiness. Korb Rep. ¶ 21 (*Id*., Ex. E); *see* Laich Rep. ¶ 32 (Sun Decl., Ex. F). Military leadership has made the professional judgment that provision of these benefits to service members and their families is necessary to encourage people to choose military service as a lifelong career. Korb Rep. ¶ 16 (Sun Decl., Ex. E). Congress has concurred in that judgment and has established comprehensive benefits schemes for veterans and their families. *Id.*

One benefit that the VA provides to veterans and their families is compensation for disabilities that the VA has determined are "service-connected." *See* U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* 28-29 (2012) (hereinafter "*Federal Benefits for Veterans*").[1] The VA determines monthly compensation for veterans with service-connected disabilities based on a system of percentages. For veterans rated as 30% disabled or higher, VA compensation increases when the veteran is married and/or has dependents. *See id.* Based on her service-connected multiple sclerosis, PTSD, and other conditions, Tracey is currently rated as 80% disabled. T. Cooper-Harris Decl. ¶ 24 (Sun Decl., Ex. C).

The VA also provides Disability and Indemnity Compensation to surviving spouses of (1) veterans whose death resulted from a service-connected injury or disease, and (2) veterans whose death resulted from a non-service-connected injury or

[1] Available at: http://www.va.gov/opa/publications/benefits_book/2012_Federal_benefits_ebook_final.pdf

disease and who were receiving, or entitled to receive, VA compensation for a service-connected disability that was rated as totally disabling for a specified number of years. *See Federal Benefits for Veterans* 101-03. Tracey and Maggie are not eligible to receive this benefit because the VA does not recognize their marriage.

Another important benefit that the VA provides to veterans and their spouses is burial benefits. Burial benefits include a gravesite at a veterans' cemetery; a government headstone or marker; and spousal burial with the veteran, even if the spouse predeceases the veteran. *See Federal Benefits for Veterans* 71. The Northern California Veteran's Cemetery has informed Tracey that while she could be buried in the cemetery, Maggie could not, because only opposite-sex spouses are eligible to be buried with their veteran spouses. T. Cooper-Harris Decl. ¶ 27 (Sun Decl., Ex. C).

E. Title 38 Commands That The Federal Government Defer to State Determinations of Marriage Except For Same-Sex Marriages

Title 38 of the United States Code, which governs veterans benefits, recognizes that the federal government should defer to the states when determining whether a person is legally married: "In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." 38 U.S.C. § 103(c). This includes common law marriages that are recognized in the jurisdiction where the veteran resides.

Another section of Title 38, however, defines the term "spouse" as "a person of the opposite sex who is a wife or husband." *Id.* § 101(31). Similarly, the term "surviving spouse" is defined as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death . . . ." *Id.* § 101(3).

The legislative history behind Title 38's definition of "spouse" as "a person of the opposite sex" does not reflect Congressional intent to preclude veterans in same-sex marriages from obtaining spousal benefits. Rather, this language represents a

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legislative effort to create gender equality in the statute. In 1975, two years after the Supreme Court ruled that the military could not distribute benefits differently based on gender in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Congress removed references to exclusively male veterans and their "widows" from Title 38. The legislative history contains no discussion of veterans who are in same-sex marriages.

Instead, the Senate Committee on Veterans Affairs explained that it "add[ed] the term 'spouse' to mean wife *or* husband and the term 'surviving spouse' to mean widow *or* widower" to the definition section of Title 38 and substituted these terms throughout the title in order "to eliminate unnecessary gender references." S. Rep. No. 94-532, at 19-20 (1975) (emphasis added), *reprinted in* 1975 U.S.C.C.A.N. 2078, 2088-89. Thus, the definition of "spouse" as a "person of the opposite sex" manifests Congress's commitment to equality—not its intent to deny spousal benefits to same-sex spouses of veterans or to create a federal definition of marriage for the purpose of excluding same-sex couples. Nevertheless, those definitions now bar Tracey and Maggie from receiving additional benefits solely because of their sexual orientation and because of their sex in relation to each other.

F. The So-Called Defense of Marriage Act Represents a Radical Departure from the Federal Government's Long-Standing Practice of Deferring to State Determinations of Marriage

Even if the definitions of "spouse" and "surviving spouse" in Title 38 included same-sex spouses, Section 3 of the Defense of Marriage Act ("DOMA") would prohibit the VA from recognizing Tracey and Maggie's marriage for purposes of determining the couple's eligibility to receive benefits. Section 3 of DOMA provides, in pertinent part:

> "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."

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Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7)

DOMA is a sweeping statute that rewrites over 1000 federal laws attached to more than 1000 different protections or obligations tied to marriage. *See* Gen. Accounting Office (GAO), GAO/OGC-97-16, Report on DOMA to the House Judiciary Committee (Jan. 31, 1997).[2] Significantly, DOMA also overturned the federal government's long-standing practice of deferring to state determinations of marital status, despite significant variation in marriage laws from state to state. The practice of deferring to the states changed in 1996, when, following a decision from the Hawaii Supreme Court which Congress feared would lead to same-sex couples having the opportunity to marry, the federal government enacted DOMA, thereby preemptively refusing federal recognition of otherwise valid marriages under state law of gay and lesbian couples. As various courts have concluded, DOMA was enacted primarily based on "the animus toward, and moral rejection of, homosexuality and same-sex relationships [which] are apparent in the Congressional record." *Dragovich v. United States Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011).

Since DOMA's passage, ten states and the District of Columbia have allowed same-sex couples to marry, and several other states recognize marriages of same-sex couples performed elsewhere.[3] Yet, the federal government continues to denigrate state-sanctioned same-sex marriages through DOMA's exclusion of these marriages from all federal protections and obligations.

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, the discovery materials, and any declarations show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see*

[2] Available at http://gao.gov/assets/230/223674.pdf.

[3] California married same-sex couples in 2008 but later that year the voters passed Proposition 8, which amended the state constitution to forbid the state from recognizing same-sex marriage. The same-sex marriages that occurred in 2008, such as Tracey and Maggie's, remain valid and are recognized by California. *Strauss v. Horton*, 46 Cal. 4th 364, 474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (2009) ("[W]e conclude that Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the marriages of same-sex couples that occurred prior to the adoption of Proposition 8. Those marriages remain valid in all respects.").

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also Beard v. Banks, 548 U.S. 521, 529, 534 (2006) (granting summary judgment in constitutional challenge). Because it is undisputed that Tracey and Maggie have been injured by virtue of being denied various benefits routinely provided to veterans with opposite-sex spouses, the only issue in this case is whether their injury violates the Constitution's equal protection guarantee.

IV. ARGUMENT

DOMA and Title 38 classify legally married couples into two distinct groups—married straight couples and married gay couples—and subjects the latter to disparate treatment by, among other things, denying them over 1,000 federal protections and obligations. As the Supreme Court has recognized, treating lesbians and gay men differently than heterosexual people is sexual orientation discrimination. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Martinez* ("*CLS*"), 130 S. Ct. 2971, 2990 (2010). Because DOMA and Title 38 are discriminatory federal legislation directed at an historically and politically marginalized class of people based on an immutable characteristic irrelevant to their ability to contribute to society, the Constitution requires that DOMA and Title 38 be subject to strict, or at the least intermediate, scrutiny. Heightened scrutiny is also warranted because DOMA and Title 38 classify on the basis of sex. As the Attorney General has already concluded, DOMA and Title 38 cannot survive such searching review. Nor can DOMA and Title 38 survive even rational basis review.

A. Sexual Orientation Discrimination Requires Heightened Scrutiny

The guarantee of equal protection "'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996). While most legislative classifications come with a presumption of constitutionality, certain classifications carry a particularly high risk of improper use in the legislative process and, therefore, are treated as "suspect" or "quasi-suspect." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-47 (1985). The Supreme Court has considered the following factors in determining whether a legislative classification should be treated with

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suspicion and subjected to heightened scrutiny: (1) the history of invidious discrimination against the class; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristics are 'immutable' or beyond the class members' control; and (4) the political power of the subject class. *Windsor v. U.S.*, 699 F.3d 169, 181 (citing *Bowen v. Gillard*, 483 U.S. 587, 602 (1987) and *City of Cleburne*, 473 U.S. at 440-41).

No single factor is dispositive, and immutability and lack of political power are not strictly necessary factors to identify a suspect class. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976). Instead, the existence of any one of the factors can serve as a warning sign that a particular classification is "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).

1. The Appropriate Level of Scrutiny for Sexual Orientation Discrimination Is Unsettled in the Ninth Circuit

The appropriate level of scrutiny for sexual orientation classifications is unsettled under Supreme Court and Ninth Circuit jurisprudence. Although in *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), the Ninth Circuit held that lesbians and gay men are not a suspect or quasi-suspect class entitled to greater than rational basis scrutiny, that decision is no longer good law. In *High Tech Gays*, the Ninth Circuit relied on *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986), which held that there is no fundamental right to engage in same-sex intimacy. *Id*. at 571. The Ninth Circuit reasoned that, since same-sex intimacy was not a fundamental right and could be criminalized, gay people could not constitute a suspect or quasi-suspect class. *Id*. In 2003, the Supreme Court overturned *Bowers v. Hardwick* and held that "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The Supreme Court's rejection of the legal foundations on which *High Tech Gays* rested renders

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that decision and its progeny no longer controlling. *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 983-85 (N.D. Cal. 2011).

2. Lesbians and Gay Men Have Suffered a History of Discrimination

The long history of purposeful discrimination that lesbians and gay men have suffered by both governmental and private actors is painfully clear and undisputed in this case. As set forth in the report of Professor George Chauncey, in early colonial America, being identified as an individual who had same-sex sexual relations could endanger one's life. Expert Report of George Chauncey, Ph.D. ("Chauncey Rep.") ¶ 19. (Sun Decl., Ex. A). Well into the 20th century, the medical community condemned homosexuality as a "mental defect" or "disease." *Id.* ¶ 27. This ostensibly scientific view (now rejected) helped legitimize much anti-gay bias. *Id.*¶ 28.

In the domain of federal service, the military systematically attempted to screen out lesbians and gay men from the armed forces during World War II, and to discharge and deny benefits to those soldiers who were "discovered" later. *See id.* ¶¶ 39–41. Such discrimination was not limited to the military. All federal agencies were prohibited from hiring lesbians and gay men after the war (a ban that lasted until 1975), and the federal government engaged in far-reaching surveillance and investigation to purge supposed "homosexuals" from the civil service. *See id.* ¶¶ 42–50. With such blatant official discrimination, it is no surprise that lesbians and gay men were demonized by the media through the 1950s and 1960s. *See id.* ¶¶ 51–55.

Even the slightest advancement in civil rights for lesbians and gay men has been met with vicious anti-gay backlash. *See id.* ¶¶ 66–68; Expert Report of Gary Segura, Ph.D. ("Segura Rep.") ¶¶ 35–44 (Sun Decl., Ex. I). Campaigns have spread false stereotypes of lesbians and gay men as child molesters, unfit parents, and threats to heterosexuals—stereotypes that linger to this day. *See* Chauncey Rep. ¶¶ 68–86 (Sun Decl., Ex. A). Unfortunately, discrimination against gay people is not a historical relic. Until judicial intervention in 2003, states were able to "demean [lesbians' and

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gay men's] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578; *accord Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) ("Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal."). To this day, gay people are subjected to continued opprobrium from leading political and religious figures and the ever-present threat of anti-gay violence. Chauncey Rep. ¶¶ 91–102 (Sun Decl., Ex. A).

Recognizing this painful history, numerous courts have found that "[i]t is easy to conclude that homosexuals have suffered a history of discrimination" and that this factor, therefore, strongly favors application of heightened scrutiny to classifications based on sexual orientation. *Windsor*, 699 F.3d at 182; *see also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009); *Golinski*, 824 F. Supp.2d at 990; *Pedersen v. Office of Pers. Mgmt.*, 881 F.Supp.2d 294, 333 (D. Conn. 2012).

3. Sexual Orientation is Unrelated to Ability to Contribute to Society

Classifications based on a "characteristic" that "frequently bears no relation to ability to perform or contribute to society" further reinforce the need for heightened scrutiny because such classifications are rarely a legitimate basis for government decision-making. *Frontiero*, 411 U.S. at 686. As Plaintiff's uncontroverted expert observes, a person's sexual orientation is not correlated with any "'impairment in judgment, stability, reliability, or general social and vocational capabilities.'" Expert Report of Letitia Anne Peplau, Ph.D ("Peplau Rep.") ¶ 30 (Sun Decl., Ex. H). Indeed, "[b]eing gay or lesbian has no inherent association with a person's ability to participate in or contribute to society." *Id.* ¶ 29. In light of the undisputed record, it is "easy to decide" that sexual orientation bears no relation to an individual's ability to perform or contribute to society. *Windsor*, 699 F.3d at 181. Sexual orientation thus plainly satisfies the two essential heightened scrutiny factors.

4. Sexual Orientation is a Distinguishing Characteristic, a Core Part of Individual Identity, and Immutable

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The alternative factor of whether there are "obvious, immutable, *or* distinguishing characteristics that define . . . a discrete group" applies to sexual orientation classifications. *Windsor*, 699 F.3d at 181. It is well-settled that legislation should not burden individuals on the basis of a core trait they cannot change, another reason for courts to look more closely at laws that do impose such burdens. *Cf. Parham v. Hughes*, 441 U.S. 347, 353 (1979) ("Unlike the illegitimate child for whom the status of illegitimacy is involuntary and immutable . . . .").

When considering the factor of immutability, the Supreme Court has recognized that a defining characteristic need not be absolutely unchangeable for it to form the basis of a suspect classification. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971) (classifications based on alienage subject to strict scrutiny); *see also City of Cleburne*, 473 U.S. at 442–43 & n.10 (relevance of immutability). After all, few if any of the suspect classifications identified by the Supreme Court are truly "immutable" in the strictest sense of the word—people can convert religions, aliens can become naturalized, individuals can change their sex, and some people can "pass" or even modify outward signs of their race or national origin. Nonetheless, all of these classifications have been deemed "immutable" in the heightened scrutiny analysis. Rather, "what matters here is whether the characteristic invites discrimination when it is manifest." *Windsor*, 699 F.3d at 184. Sexual orientation is such a characteristic. *Id.*

Further, the Ninth Circuit has concluded that sexual orientation is "immutable" and "so fundamental to one's identity that a person should not be required to abandon [it]." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005); *see also Perry*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."). Because sexual orientation is a distinguishing characteristic, a core part of a person's identity, and immutable or

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highly resistant to change, this factor also favors heightened scrutiny.

5. Lesbians and Gay Men Lack Political Power

Finally, although political disadvantage is not necessarily required for a classification to be treated as suspect,[4] that factor further supports heightened scrutiny for sexual orientation classifications because lesbians and gay men "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185; *accord* Segura Rep. ¶¶ 10-85 (Sun Decl., Ex. I). "There can be no serious dispute that ongoing political events evince "a continuing antipathy or prejudice" towards lesbians and gay men "and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443 (1985); *see also Plyler*, 457 U.S. at 216 n.14.

For example, gay rights opponents have aggressively used state ballot initiatives to pass discriminatory laws or repeal protective ones and even to amend state constitutions to deny lesbians and gay men important protections. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *see also* Segura Rep. ¶ 37 (citing repeals of legislatively enacted anti-gay discrimination ordinances through popular vote mechanisms); *id.* ¶¶ 38–39 (surveying anti-marriage initiatives) (Sun Decl., Ex. I). This kind of "direct democracy" has been used against lesbians and gay men more than any other group. *Id.* ¶ 43. The extraordinary use of majoritarian processes to disadvantage a gay minority vividly illustrates the inability of that minority to protect itself politically.

That there have been political initiatives in recent years that have helped mitigate discrimination against gay people does not alter this analysis. *Windsor*, 699 F.3d at 184 ("The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." (discussing

[4] Though some Supreme Court precedents have considered political powerlessness as a factor in determining whether heightened scrutiny applies, it is not a necessary factor, *see, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (holding that all racial classifications are subject to strict scrutiny, although many racial groups hold substantial political power).

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Frontiero, 411 U.S. at 685)); Segura Rep. ¶¶ 16–18 (Sun Decl., Ex. I). Indeed, the Supreme Court has applied heightened scrutiny to statutes that rely on racial or sex-based classifications even after racial minorities and women had achieved far greater political victories against discrimination than lesbians and gay men have today. Segura Rep. ¶¶ 82–86 (Sun Decl., Ex. I).

By contrast, lesbians and gay men have virtually no political power when measured by the same yardstick. There is no federal legislation prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. *Id.* ¶ 30. Until 2009, when sexual orientation was added to federal anti-hate crime legislation (over significant opposition), no federal legislation had ever existed to protect individuals on the basis of sexual orientation. *Id.* ¶ 32. Additional progress recently—including repeal of the military's ban on lesbian and gay service members following two judicial findings of unconstitutionality, *see Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010); *Witt v. U.S. Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010)—while important, falls far short of demonstrating meaningful political capital. Segura Rep. ¶ 33 (Sun Decl., Ex. I).

Because sexual orientation satisfies both of the two essential factors relevant to determining if a classification is suspect, as well as the two additional criteria that courts sometimes rely upon, DOMA's and Title 38's exclusion of married same-sex couples from veterans benefits should be subject to strict or, at the very least, intermediate scrutiny. Indeed, other courts have recently so held. *See, e.g.*, *Windsor*, 699 F.3d at 185 ("Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny . . . [w]e further conclude that the class is quasi-suspect . . ."); *Pedersen*, 881 F. Supp. 2d at 333 (holding "homosexuals display all the traditional indicia of suspectness and therefore

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statutory classification based on sexual orientation are entitled to a heightened form of judicial scrutiny.").

B. Heightened Scrutiny Also Applies Because DOMA And Title 38 Discriminate On The Basis Of Sex

DOMA and Title 38 are subject to heightened scrutiny not only because they discriminate based on sexual orientation, but also because they discriminate based on sex. If either Tracey or Maggie were male instead of female, the law would permit them to receive the benefits they are being denied. *See, e.g.*, *Dragovich*, 764 F. Supp.2d at 1182; *In re Levenson*, 560 F.3d 1145, 1149 (9th Cir. 2009). Such sex-based classifications are entitled to intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 533 (1996). DOMA and Title 38's sex-based distinctions are no less invidious because they equally deny male and female veterans in same-sex marriages eligibility for veterans' benefits. *Cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967).

C. DOMA and Title 38 Cannot Survive Rational Basis Scrutiny, Much Less Heightened Scrutiny

The standard for justifying a discriminatory statute such as DOMA or Title 38 under heightened scrutiny is formidable. To survive strict scrutiny, BLAG must prove that the classification at issue is "narrowly tailored" and furthers "compelling governmental interests." *Adarand Constructors*, 515 U.S. at 227. Under intermediate scrutiny, BLAG must establish that the classification is "substantially related" to an "important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under both tests, a statute must be defended by reference to the "actual [governmental] purpose" behind it, and not after-the-fact "rationalizations." *Virginia*, 518 U.S. at 535-36. Given these demanding standards, BLAG cannot possibly meet its burden to demonstrate that DOMA's and Title 38's disparate treatment of married same-sex couples serves any compelling or important state interest, much less one that is narrowly tailored or substantially related to an important governmental objective.

To be sure, DOMA and Title 38 fail even the more lenient rational basis standard. Under rational basis review, a statute will be upheld as constitutional "if the

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classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Still, there must be a "link between classification and objective," *Romer*, 517 U.S. at 632, *i.e.*, "some relation between the classification and the purpose it serve[s]." *Id.* at 633. Importantly, it is the classification—the challenged discrimination—and not the law as a whole that must rationally advance a legitimate governmental interest. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001). "In a long line of cases, the Supreme Court has applied rational basis scrutiny to strike down legislation where the permissible bounds of rationality were exceeded." *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345, 364 (S.D.N.Y. 1989) (citing cases).

A classification fails rational basis review if its connection to the asserted purpose, while not totally lacking, is "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. For example, in *Romer*, Colorado defended its ban on antidiscrimination protection for gay people by asserting that the ban rationally furthered two state interests: (1) respecting the religious liberties of landlords and employers, and (2) conserving state resources to fight discrimination against other groups. 517 U.S. at 635. Yet the Supreme Court held that those interests, even if legitimate on their own, were "so far removed" from the ban's classification, which singled out gay people for its burden, that it was "impossible to credit" that they were the reason for the law. *Id.* Here too, DOMA and Title 38 are so far removed from any legitimate purpose that it is simply impossible to credit any "relation between the classification and the purpose it served." *Id.* at 633.

1. All of Congress's Purported Justifications for DOMA Fail

According to the legislative history, DOMA's exclusion in 1996 of all same-sex couples who might one day get married from all federal marital protections and obligations was intended to: (a) "defend[] and nurtur[e] the institution of traditional, heterosexual marriage," H.R. Rep. No. 104-664, at 12 (1996); (b) "promot[e]

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heterosexuality," *id.* at 15 n.53; (c) "encourag[e] responsible procreation and childrearing," *id.* at 13; (d) "protect[] . . . democratic self-governance," *id.* at 16; (e) "preserve scarce government resources" by preventing marital benefits from "hav[ing] to be made available to homosexual couples and surviving spouses of homosexual marriages," *id.* at 18; and (f) promote a "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," *id.* at 16.

a) *Preserving "Traditional" Marriage Is Not a Legitimate Government Interest*

It is well-settled that "tradition" alone cannot justify the government's discrimination against a class of individuals. *Williams v. Illinois*, 399 U.S. 235, 239 (1970) (noting in equal protection challenge that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"). In other words, under the Constitution, discriminatory classifications cannot merely perpetuate past stereotypes or enforce prior discrimination. *See Romer*, 517 U.S. at 633. Thus, that lesbians and gay men have historically been denied access to marriage cannot provide the necessary independent basis for the federal government's disregard of existing state-approved marriages of same-sex couples and cannot provide a rational basis for DOMA's denigration of married same-sex couples. *Gill*, 699 F. Supp. 2d at 389-90; *In re Levenson*, 587 F.3d at 932; *Dragovich*, 872 F. Supp.2d 944, 963 (N.D. Cal. 2012).

b) *DOMA Does Not Promote Heterosexuality*

Similarly, any suggestion that DOMA promotes and encourages heterosexuality deserves short shrift. It is entirely unclear how, for example, denying a decorated Army veteran additional disability benefits promotes heterosexuality, either with respect to Tracey or anyone else. To the contrary, the undisputed scientific consensus is that a person's sexual orientation is enduring and stable, and not the result of personal choice. Peplau Rep. ¶ 29 (Sun Decl., Ex. H). Nor could anyone rationally

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credit that denying the validity of state-approved marriages of same-sex couples would have any impact on whether different-sex couples marry, divorce, or cohabit. Nor does DOMA "encourage [gay men and lesbians] to enter into marriages with members of the opposite sex." *In re Levenson*, 587 F.3d at 932.

c) *DOMA Does Not Advance Any Legitimate Interest in Child-Rearing*

Excluding married same-sex couples from all federal marital protections and obligations is also thoroughly unrelated to any interest the federal government may have in promoting "responsible procreation" or child-rearing. *First*, procreation and child-rearing are not the sole or even the primary focus of marriage. "The ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country." *Gill*, 699 F. Supp. 2d at 389; *see also* Expert Report of Nancy Cott ("Cott Rep.") ¶ 19 (Sun Decl., Ex. D). Nor has the federal government ever treated married heterosexual couples differently if they were infertile or otherwise unable or unwilling to procreate. And the great majority of the federal protections and obligations that come with marriage relate not to child-rearing or procreation but to practical protections aimed at adults. On the other hand, DOMA excludes married same-sex couples not just from federal recognition of their relationship in contexts relating to children or procreation, but in every one of the federal statutes and programs that relate to marriage in any way. DOMA's sweeping breadth, and the striking disconnect between the classification and the purported purpose, make it "impossible to credit" that this law was crafted to promote child-rearing by heterosexuals. *Romer*, 517 U.S. at 635.

Second, because it is "beyond scientific dispute" that a child's adjustment is not determined by his parents' sexual orientation, *see* Expert Report of Michael Lamb, Ph.D. ("Lamb Rep.") ¶ 14 (Sun Decl., Ex. G), any suggestion by DOMA's defenders that it advances a legitimate interest in ensuring that children will be better adjusted cannot provide a rational basis for DOMA's discrimination. *Gill*, 699 F. Supp. 2d at

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388–89. There is clear expert consensus, based on decades of social science research, that children raised by gay parents are just as well-adjusted as those of heterosexual parents. *See* Lamb Rep. ¶¶ 29–38 (Sun Decl., Ex. G). The factors predicting the healthy adjustment of children, including the quality of the parent-child relationship and the availability of sufficient economic and social resources, are the same for lesbian and gay parents as for heterosexual parents. *See id.* ¶¶ 19–21; *Gill*, 699 F. Supp. 2d at 388 & n.106. The scientific evidence further demonstrates that male and female parents can be equally competent, and that the absence of a male or female parent does not affect child development. Lamb Rep. ¶¶ 24–28 (Sun Decl., Ex. G).

Third, and even more fundamentally, DOMA actually works directly contrary to promoting child-rearing because it "prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law." *Gill*, 699 F. Supp. 2d at 389 (internal quotation marks omitted); Lamb Rep. ¶¶ 42–43 (Sun Decl., Ex. G). And DOMA does nothing to alter the fact that same-sex couples may marry and raise children together. *In re Levenson*, 587 F.3d at 934. As a result, it is simply impossible to credit this so-called "interest" as a rational justification for DOMA's exclusion of same-sex couples from federal benefits.

d) *DOMA Undermines Democratic Self-Governance*

Despite Congress's lip-service to the contrary in 1996, DOMA undermines democratic self-governance because it undermines the ability of citizens of a state (through their democratically elected leaders) to exercise their authority to regulate marriage—or to "vote with their feet" by relocating to a state that recognizes marriage between same sex couples. DOMA instead imposes on all states, and on United States citizens from across the country, a mandatory, second-class category of marriage. Nor can Congress's "interest" in "protecting" democratic self-governance constitute a compelling or important interest that justifies a discriminatory law. This circular

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reasoning would permit the federal government to discriminate simply because the majority wants to discriminate. That, of course, is precisely what the Fifth Amendment was designed to prevent.

e) *DOMA Does Not Conserve Resources*

Congress's justification that federal non-recognition of legal same-sex marriages conserves resources can be easily disposed of because it is demonstrably false. According to the nonpartisan Congressional Budget Office, the recognition of the marriages of same-sex couples would actually increase annual net federal revenue. Cong. Budget Off., U.S. Cong., The Potential Budgetary Impact of Recognizing Same- Sex Marriages 1 (June 21, 2004)[5]; *see also Gill*, 699 F. Supp. 2d at 390 n.116.

Not only is this purported rationale unsupported factually, a cost-cutting rationale, standing alone, would fail because "[t]here is no rational relationship" whatsoever between the sex of a person's spouse and the federal government's desire to limit its outlays. *In re Levenson*, 587 F.3d at 933 ("[T]hat 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."); *accord Gill*, 699 F. Supp. 2d at 390. Nor does cost-cutting rise to the level of a compelling or important government interest. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[A State] must do more than show that denying welfare benefits to new residents saves money."), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

f) *"Moral Disapproval" Is Not A Legitimate Government Interest*

If there is one objective that DOMA was in fact intended to achieve, it is moral condemnation of gay men and lesbians. The legislative history explicitly states that DOMA was intended to express the "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664, at 15–16; *see Dragovich*, 764 F.Supp.2d

[5] http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf

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at 1190 ("[A]nimus toward, and moral rejection of, homosexuality and same-sex relationships are apparent on the congressional record."); *Gill*, 699 F. Supp. 2d at 378-79, nn. 23-24 (quoting legislative record).

But "the denial of federal benefits to same-sex spouses cannot be justified as an expression of the government's disapproval of homosexuality, preference for heterosexuality, or desire to discourage gay marriage." *In re Levenson*, 587 F.3d at 932. Animus against gay people, as a matter of law, is not a legitimate, much less an important or compelling, government interest. *Romer*, 517 U.S. at 632. "[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." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Indeed, the Supreme Court has soundly rejected moral disapproval as a justification for discrimination against gay people, holding that "'the fact that the governing majority in a State has traditionally viewed [homosexuality] as immoral is not a sufficient reason for upholding a law prohibiting the practice.'" *Lawrence*, 539 U.S. at 577. Here too, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . , are not permissible bases" for governmental discrimination. *City of Cleburne*, 473 U.S. at 488.

2. No Other Rational Basis for DOMA Can Be Supported

None of the additional purported justifications asserted in previous litigation regarding DOMA can overcome the patent lack of a rational basis for that statute's or Title 38's discrimination.

DOMA does not avoid inconsistency. The claim that DOMA's definition of marriage avoids inconsistency across states, because same-sex couples cannot marry in every jurisdiction, must fail "[e]ven under the more deferential rational basis review . . . ." *In re Levenson*, 587 F.3d at 933. Varying state eligibility requirements for marriage throughout our country's history have meant that heterosexual couples who

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could validly marry in one state might not be able to in another. *Gill*, 699 F. Supp. 2d at 391; Cott Rep. ¶¶ 26–66 (Sun Decl., Ex. D). "And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law." *Gill*, 699 F. Supp. 2d at 391.

Congress has never before cared about uniformity across state definitions of marriage, even though, for example, only a minority of states recognize common law marriages, Cott Rep. ¶¶ 37–40 (Sun Decl., Ex. D), so any assertion of such an interest here simply cannot be credited. While the rational basis inquiry may not require a perfect fit between a classification and its justification, "this deferential constitutional test nonetheless demands some reasonable relation between the classification in question and the purpose it purportedly serves." *Gill*, 699 F. Supp. 2d at 396. The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 388.

DOMA does not preserve the status quo. The argument that DOMA "preserves the status quo," in that no state allowed same-sex couples to marry when DOMA was enacted in 1996, is also unavailing. As courts applying rational basis review have noted, the "assertion that pursuit of this interest provides a justification for DOMA rests on a conspicuous misconception of what the status quo was *at the federal level* in 1996." *Gill*, 699 F. Supp. 2d at 393. At the time, the federal status quo "was to recognize, for federal purposes, any marriage declared valid according to state law." *Id.* In other words, "DOMA did not preserve the status quo vis-à-vis the relationship between federal and state definitions of marriage; to the contrary, it disrupted the long-standing practice of the federal government deferring to each state's decisions as to the requirements for a valid marriage." *In re Levenson*, 587 F.3d at 933.

As the Supreme Court has explained, "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer*, 517 U.S. at

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633. They are rare in part because such classifications generally lack any rational connection to a legitimate government interest. The Supreme Court in *Romer* held that the purported justifications for the Colorado amendment at issue failed to provide a rational basis because "[the amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]." *Id.* at 632. DOMA's sweeping breadth—including denying legally married couples recognition of their marriage for purposes of the marital exemption to the federal estate tax; denying married lesbian and gay federal employees the ability to provide health insurance to their spouses; and preventing married bi-national same-sex couples from remaining together in the United States in the ways available to straight couples—makes it impossible to explain the exclusion of married same-sex couples from those benefits and protections by anything other than sheer animus. Because, under our constitutional framework, the government needs more than animus to justify the harms that DOMA imposes on married same-sex couples, the statutes fail even rational basis review.

3. There is No Rational Basis For Title 38's Exclusion of Same-Sex Marriages

Similarly, no justification can be asserted for Title 38 that would establish a rational basis for discriminating against veterans in legal same-sex marriages. Indeed, Congress enacted Title 38 to remove "unnecessary gender references" from the statute, S. Rep. No. 94-532, at 19-20 (1975) (emphasis added), not to preclude veterans in same-sex marriages from obtaining spousal benefits. Nothing in Title 38's legislative history suggests that Congress intended to deny veterans benefits on the basis of sexual orientation; on the contrary, Congressional intent was to promote equality of the sexes and expand the availability of veterans' benefits. The categorical exclusion of same-sex marriages is wholly inconsistent with Congress's stated purpose in amending Title 38 because the statute in fact promotes gender *inequality* by discriminating against Tracey and those similarly-situated to her solely because she

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350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071

is a woman married to a woman.

Nor could it be argued that the discrimination created by Title 38 is rationally related to any military purpose.[6] As Plaintiffs' expert Dr. Lawrence Korb explains, "years of military experience have shown these benefits for service members and families to be *essential* to the proper functioning of the armed forces by ensuring that our men and women in uniform are capable of serving at their maximum potential." Korb Rep. ¶ 27 (Sun Decl., Ex. E). Far from advancing the interests of the military, Title 38 undermines military recruiting, retention, readiness, and cohesion by preventing gay and lesbian veterans from receiving the same benefits as their heterosexual counterparts. *See* Laich Rep. ¶¶ 17-19 (recruiting), 21-27 (retention), 28-33 (readiness and cohesion) (Sun Decl., Ex. F); Korb Rep. ¶¶ 27 (readiness); 28-29 (recruiting and retention); 30 (cohesion) (*Id*., Ex. E). Further, Title 38 is antithetical to the military's commitments to caring for and providing for the families of veterans—particularly those veterans who are injured while serving. Korb Rep. ¶ 26 (*Id*., Ex. E).

V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in the Plaintiffs' favor.

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SOUTHERN POVERTY LAW CENTER

WILMER CUTLER PICKERING HALE AND DORR LLP

BY: /s/ Randall R. Lee
RANDALL R. LEE
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
(213) 443-5300
randall.lee@wilmerhale.com

Attorneys for Plaintiffs

[6] Indeed, Federal Defendants, including the Secretary of the VA, have indicated that Title 38 is unconstitutional and that no rationale exists "for providing veterans' benefits to opposite-sex spouses of veterans but not to legally married same-sex spouses of veterans. Neither the Department of Defense nor the Department of Veterans Affairs identified any justification for that distinction that could warrant treating [the Title 38 provisions] differently from Section 3 of DOMA. (ECF No. 16-3 at 2.)

WilmerHale
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071