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11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 KAREN GOLINSKI

14 Plaintiff,

15 v.

16 THE UNITED STATES OFFICE OF  
17 PERSONNEL MANAGEMENT, et al.

18 Defendants.  
19

No. C 3:10-00257-JSW

**DEFENDANTS' BRIEF IN OPPOSITION  
TO MOTIONS TO DISMISS**

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## INTRODUCTION AND BACKGROUND

Plaintiff Karen Golinski, a staff attorney with the U.S. Court of Appeals for the Ninth Circuit, is enrolled in the Federal Employees Health Benefits Plan ("FEHBP"). 2d Am. Compl. ¶¶ 18-19.<sup>1</sup> Since August 2008, Plaintiff has been married under the laws of California to a spouse who, like Plaintiff, is a woman. *Id.* ¶ 17. After becoming married, Plaintiff sought to have her wife enrolled as an additional beneficiary under her FEHBP plan. *Id.* ¶ 22. Plaintiff's efforts to have her wife enrolled as an additional beneficiary were ultimately unsuccessful, as the FEHBA, 5 U.S.C. §§ 8901-8914, when read in light of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), prohibits the extension of FEHBP coverage to same-sex spouses. In pertinent part, DOMA provides:

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 wife.

1 U.S.C. § 7.

After the completion of an administrative hearing process under the Ninth Circuit's Employee Dispute Resolution ("EDR") Plan, Plaintiff brought the instant action on January 20, 2010.<sup>2</sup> Plaintiff's First Amended Complaint was dismissed by this Court on March 16, 2011. ECF No. 98. On April 14, 2011, Plaintiff filed her Second Amended Complaint, ECF No. 102,

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<sup>1</sup> The FEHBP was established pursuant to the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901 *et seq.* ("FEHBA"), which created the FEHBP as a comprehensive health insurance program for federal civilian employees, their family members, and others. FEHBA confers broad authority on the United States Office of Personnel Management ("OPM") to administer the program and to promulgate regulations necessary to carry out the statute's objectives, including regulations prescribing "the manner and conditions under which an employee is eligible to enroll." 5 U.S.C. § 8913. FEHBA grants OPM authority to contract with "qualified carriers" offering health insurance plans. 5 U.S.C. §§ 8902, 8903, 8906. The "employees" who may participate in the FEHBP include employees of the Judiciary. 5 U.S.C. §§ 2105(a)(2), 8901(1)(A).

<sup>2</sup> A more detailed recitation of the factual and procedural history of this case is set forth in this Court's Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction of March 16, 2011, at 2-5 and *passim*. ECF No. 98.



1 which now asserts that DOMA is unconstitutional as applied to her. It is to that constitutional  
 2 argument that this brief is addressed. Plaintiff also appears to assert that the Defendants  
 3 incorrectly or unreasonably read FEHBA to deny Plaintiff's request for the enrollment of her  
 4 wife as an additional beneficiary under the plan. As set forth in the memorandum in support of  
 5 Defendants' motion to dismiss, ECF No. 118-1, such claim should be dismissed to the extent it is  
 6 adequately asserted in the first instance.

7 Plaintiff's wife remains uncovered by Plaintiff's FEHBP plan.

### 8 **STANDARD OF REVIEW**

9 To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint "must  
 10 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its  
 11 face.'" *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic v.*  
 12 *Twombly*, 550 U.S. 544, 570 (2007)). Under *Iqbal* and *Twombly*, "[a] claim has facial  
 13 plausibility when the pleaded factual content allows the court to draw the reasonable inference  
 14 that the defendant is liable for the misconduct alleged." *Id.*

### 15 **ARGUMENT**

#### 16 **I. DOMA VIOLATES EQUAL PROTECTION.**

17 The Constitution's guarantee of equal protection of the laws, applicable to the federal  
 18 government through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347  
 19 U.S. 497, 500 (1954), embodies a fundamental requirement that "all persons similarly situated  
 20 should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).  
 21 DOMA Section 3 is inconsistent with that principle of equality, as it denies legally married same-  
 22 sex couples federal benefits that are available to similarly situated opposite-sex couples.

23 For the reasons set forth below, heightened scrutiny, rather than rational basis review, is  
 24 the appropriate standard of review for classifications based on sexual orientation. Under that  
 25 more rigorous standard, Section 3 of DOMA cannot withstand constitutional muster.  
 26  
 27  
 28

**A. PLAINTIFFS' EQUAL PROTECTION CHALLENGE TO DOMA IS SUBJECT TO HEIGHTENED SCRUTINY UNDER SUPREME COURT PRECEDENT.**

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

Such suspect or quasi-suspect classifications are reviewed under a standard of heightened scrutiny, under which the government must show, at a minimum, that a law is “substantially related to an important government objective.” *Clark v. Jeter*, 586 U.S. 456, 461 (1988). This more searching review enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and serves to prevent implementation of classifications that are the product of impermissible prejudice or stereotypes. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States v. Virginia (“VMI”)*, 518 U.S. 515, 533 (1996).

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation.<sup>3</sup> It has, however, established and repeatedly confirmed a set of

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<sup>3</sup> In neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In both cases, the Court invalidated sexual orientation classifications under a more permissive standard of review without having to decide whether heightened scrutiny applied (*Romer* found that the legislation failed rational basis review, 517 U.S. at 634–35; *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574–75).

Nor did the Court decide the question in its one-line per curiam order in *Baker v. Nelson*, 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple, *id.* at 810. *Baker* did not concern the

1 factors that guide the determination of whether heightened scrutiny applies to a classification that  
2 singles out a particular group. These include: (1) whether the group in question has suffered a  
3 history of discrimination; (2) whether members of the group “exhibit obvious, immutable, or  
4 distinguishing characteristics that define them as a discrete group”; (3) whether the group is a  
5 minority or is politically powerless; and (4) whether the characteristics distinguishing the group  
6 have little relation to legitimate policy objectives or to an individual’s “ability to perform or  
7 contribute to society.” *See Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *Cleburne*, 473 U.S.  
8 at 441–42.

9 Although there is substantial circuit court authority, including binding authority of this  
10 circuit, holding that rational basis review generally applies to sexual orientation classifications,  
11 *see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570 (9th Cir.  
12 1990), most of these decisions fail to give adequate consideration to these enumerated factors.  
13 Indeed, the reasoning of this line of case law traces back to circuit court decisions from the late  
14 1980s and early 1990s, a time when *Bowers v. Hardwick*, 478 U.S. 186 (1986), was still the law.  
15 The Supreme Court subsequently overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003),  
16 and the reasoning of these circuit decisions no longer withstands scrutiny.

17 In *High Tech Gays*, for example, the Ninth Circuit considered a constitutional challenge  
18 to the Department of Defense’s practice of conducting mandatory investigations of security  
19 clearance applicants known or suspected to be gay. Without expressly relying on the deference  
20 due to military judgments, *cf. Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), the court concluded  
21  
22

23 constitutionality of a federal law, like DOMA Section 3, that distinguishes among couples who  
24 are already legally married in their own states, and was motivated by animus toward gay and  
25 lesbian people. *See* Part I.B, *infra*. Moreover, neither the Minnesota Supreme Court decision,  
26 *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the  
27 plaintiffs’ jurisdictional statement raised whether classifications based on sexual orientation are  
28 subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup.  
Ct.), at 2; *see also id.* at 13 (repeatedly describing equal protection challenge as based on the  
“arbitrary” nature of the state law). There is no indication in the Court’s order that the Court  
nevertheless considered, much less resolved, that question.

1 that the challenged classification was subject only to rational basis review.<sup>4</sup> To the extent that  
 2 conclusion rested on inferences drawn from the Supreme Court's decision in *Bowers*, see *High*  
 3 *Tech Gays*, 895 F.2d at 574, that rationale does not survive the overruling of *Bowers* in  
 4 *Lawrence*. And to the extent *High Tech Gays* considered the factors the Supreme Court has  
 5 identified as relevant to the inquiry, see *High Tech Gays*, 895, F.2d at 573–74, we respectfully  
 6 submit that its consideration was incomplete and ultimately incorrect for the reasons explained  
 7 below.<sup>5</sup> Careful consideration of those factors demonstrates that classifications based on sexual  
 8 orientation should be subject to heightened scrutiny.

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 10  
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 13 <sup>4</sup> *High Tech Gays* and a number of cases in other circuits involved challenges to military policy  
 14 on homosexual conduct. See, e.g., *High Tech Gays*, 895 F.2d at 565; see also *Cook v. Gates*, 528  
 15 F.3d 42, 45 (1st Cir. 2008); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v.*  
 16 *Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en  
 17 banc); *Woodard v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*,  
 881 F.2d 454, 456 (7th Cir. 1989). Classifications in the military context, however, present  
 different questions from classifications in the civilian context, see, e.g., *Rostker v. Goldberg*, 453  
 U.S. 57, 66 (1981), and the military is not involved here.

18 <sup>5</sup> As noted above, other courts of appeals have held that classifications on the basis of sexual  
 19 orientation are not subject to heightened scrutiny, but the reasoning of these courts is similarly  
 20 flawed. Many of those courts relied in part or in whole on *Bowers*. See *Equality Found. v. City*  
 21 *of Cincinnati*, 54 F.3d 261, 266–67 & n. 2 (6th Cir. 1995); *Steffan*, 41 F.3d at 685; *Woodward*,  
 871 F.2d at 1076 (Fed. Cir. 1989); *Ben-Shalom*, 881 F.2d at 464; see also *Richenberg v. Perry*,  
 97 F.3d at 260 (citing to reasoning of prior appellate decision that were based on *Bowers*);  
 22 *Thomasson*, 80 F.3d at 928 (same). Other courts relied on the fact that the Supreme Court has  
 23 not recognized that gays and lesbians constitute a suspect or quasi-suspect class. *Cook*, 528 F.3d  
 24 at 61; *Johnson v. Johnson*, 358 F.3d 503, 532 (5<sup>th</sup> Cir. 2004). Though it is true that the Supreme  
 25 Court thus far has not yet recognized that gays and lesbians constitute a suspect class, see Note 3,  
 26 *supra*, the Supreme Court does not decide a question by failing to opine on it in dicta  
 unnecessary to the resolution of a case. Finally, the remaining courts to address the issue offered  
 no pertinent reasoning in so doing. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358  
 27 F.3d 804, 818 (11th Cir. 2004); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th  
 Cir. 1984).

1                   **1.       Gays and Lesbians Are a Quasi-Suspect or Suspect**  
 2                   **Class under the Relevant Factors Identified by the**  
 3                   **Supreme Court.**

4                   **i.       Gays and Lesbians Have Been Subject to**  
 5                   **a History of Discrimination.**

6                   First, as the Ninth Circuit has previously recognized, gay and lesbian individuals have  
 7                   suffered a long and significant history of purposeful discrimination. *See High Tech Gays*, 895  
 8                   F.2d at 574 (“[W]e do agree that homosexuals have suffered a history of discrimination . . .”);  
 9                   *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (noting that  
 10                  “[h]omosexuals have suffered a history of discrimination and still do, though possibly now in  
 11                  less degree”). So far as we are aware, no court to consider this question has ever ruled otherwise.

12                  Discrimination against gay and lesbian individuals has a long history in this country,  
 13                  *Bowers*, 478 U.S. at 192, from colonial laws ordering the death of “any man [that] shall lie with  
 14                  mankind, as he lieth with womankind” to state laws that, until very recently, have “demean[ed]  
 15                  the[] existence” of gay and lesbian people “by making their private sexual conduct a crime,”  
 16                  *Lawrence*, 539 U.S. at 578. In addition to the discrimination reflected in DOMA itself, as  
 17                  explained below, the federal government, state and local governments, and private parties all  
 18                  have contributed to this long history of discrimination.<sup>6</sup>

19                               Discrimination by the Federal Government

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

22                  For years, the federal government deemed gays and lesbians unfit for employment,

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23                  <sup>6</sup> We do not understand the Supreme Court to have called into question this well-documented  
 24                  history when it said in *Lawrence* that “it was not until the 1970’s that any State singled out  
 25                  same-sex relations for criminal prosecution,” 539 U.S. at 570, and that only nine States had done  
 26                  so by the time of *Lawrence*. The question before the Court in *Lawrence* was whether, as *Bowers*  
 27                  had asserted, same-sex sodomy prohibitions were so deeply rooted in history that they could not  
 28                  be understood to contravene the Due Process Clause. That the Court rejected that argument and  
 29                  invalidated Texas’s sodomy law on due process grounds casts no doubt on the duration and scope  
 30                  of discrimination against gay and lesbian people writ large.

1 barring them from federal jobs on the basis of their sexual orientation. *See Employment of*  
2 *Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee  
3 by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Congress), December 15,  
4 1950 ("Interim Report"), at 9. In 1950, Senate Resolution 280 directed a Senate subcommittee  
5 "to make an investigation in the employment by the Government of homosexuals and other  
6 sexual perverts." Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va.  
7 L. Rev. 1551, 1565–66 (1993). The Committee found that from 1947 to 1950, "approximately  
8 1,700 applicants for federal positions were denied employment because they had a record of  
9 homosexuality or other sex perversion." Interim Report at 9.

10 In April 1953, in the wake of the Senate investigation, President Eisenhower issued  
11 Executive Order 10450, which officially added "sexual perversion" as a ground for investigation  
12 and possible dismissal from federal service. Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953);  
13 *see also* 81 Fed. Reg. 2489. The Order expanded the investigations of civilian employees for  
14 "sexual perversion" to include every agency and department of the federal government, and thus  
15 had the effect of requiring the termination of all gay people from federal employment. *See*  
16 General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the*  
17 *Clearance Process*, at 2 (Mar. 1995).

18 The federal government enforced Executive Order 10450 zealously, engaging various  
19 agencies in intrusive investigatory techniques to purge gays and lesbians from the federal civilian  
20 workforce. The State Department, for example, charged "'skilled' investigators" with  
21 "interrogating every potential male applicant to discover if they had any effeminate tendencies or  
22 mannerisms," used polygraphs on individuals accused of homosexuality who denied it, and sent  
23 inspectors "to every embassy, consulate, and mission" to uncover homosexuality. Edward L.  
24 Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against*  
25 *Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602 (2006). In order to identify gays and lesbians  
26 in the civil service, the FBI "sought out state and local police officers to supply arrest records on  
27



1 morals charges, regardless of whether there were convictions; data on gay bars; lists of other  
 2 places frequented by homosexuals; and press articles on the largely subterranean gay world.”  
 3 Williams Institute, “Documenting Discrimination on the Basis of Sexual Orientation and Gender  
 4 Identity in State Employment,” ch. 5 at 7, *available at*  
 5 [http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports\\_ENDA.html](http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html)  
 6 (“Williams Report”). The United States Postal Service (“USPS”), for its part, aided the FBI by  
 7 establishing “a watch list on the recipients of physique magazines, subscrib[ing] to pen pal clubs,  
 8 and initiat[ing] correspondence with men whom [it] believed might be homosexual.” *Id.* The  
 9 mail of individuals concluded to be homosexual would then be traced “in order to locate other  
 10 homosexuals.” *Id.* The end result was thousands of men and women forced from their federal  
 11 jobs based on the suspicion that they were gay or lesbian. It was not until 1975 that the Civil  
 12 Service Commission prohibited discrimination on the basis of sexual orientation in federal  
 13 civilian hiring. *See* General Accounting Office, *Security Clearances: Consideration of Sexual*  
 14 *Orientation in the Clearance Process* (1995) (describing the federal government’s restrictions on  
 15 the employment of gay and lesbian individuals).<sup>7</sup>

16 The history of the federal government’s discrimination against gays and lesbians extends  
 17 beyond the employment context. For decades, gay and lesbian noncitizens were categorically  
 18 barred from entering the United States, on grounds that they were “persons of constitutional  
 19 psychopathic inferiority,” “mentally defective,” or sexually deviant. *Lesbian/Gay Freedom Day*  
 20 *Comm., Inc. v. INS*, 541 F. Supp. 569, 571–72 (N.D. Cal. 1982) (quoting Ch. 29, § 3, 39 Stat.  
 21 874 (1917)). As the Supreme Court held in *Boutilier v. INS*, 387 U.S. 118 (1967), “[t]he  
 22 legislative history of [the Immigration and Nationality Act of 1952] indicates beyond a shadow  
 23 of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include

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24  
 25 <sup>7</sup> Open military service by gays and lesbians was prohibited, first by regulation and then by  
 26 statute, 10 U.S.C. § 654 (2007), until the “Don’t Ask, Don’t Tell” Repeal Act, enacted last year,  
 27 111 P.L. 321, 124 Stat. 3515 (2010), and remains so pending completion of the repeal process  
 28 mandated by the Act.

1 homosexuals.” *Id.* at 120. This exclusion remained in effect until Congress repealed it in 1990.  
 2 See Pub. L. No. 101-649, 104 Stat. 4978 (1990).

### 3 Discrimination by State and Local Governments

4 Like the federal government, state and local governments have long discriminated against  
 5 gays and lesbians in public employment. By the 1950s, many state and local governments had  
 6 banned gay and lesbian employees, as well as gay and lesbian “employees of state funded schools  
 7 and colleges, and private individuals in professions requiring state licenses.” Williams Report,  
 8 ch. 5 at 18. Many states and localities began aggressive campaigns to purge gay and lesbian  
 9 employees from government services as early as the 1940s. *Id.* at 18–34.

10 This employment discrimination was interrelated with longstanding state law prohibitions  
 11 on sodomy; the discrimination was frequently justified by the assumption that gays and lesbians  
 12 had engaged in criminalized and immoral sexual conduct. See, e.g., *Childers v. Dallas Police*  
 13 *Dep’t*, 513 F. Supp. 134,138 (N.D. Tex. 1981) (holding that police could refuse to hire gays),  
 14 *aff’d without opinion*, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559  
 15 P.2d 1340, 1342 (Wash. 1977) (upholding the dismissal of a openly gay school teacher who was  
 16 fired based on a local school board policy that allowed removal for “immorality”); *Burton v.*  
 17 *Cascade Sch. Dist. Union High Sch., No.5*, 512 F.2d 850, 851 (9th Cir. 1975) (upholding the  
 18 dismissal of a lesbian teacher in Oregon, after adopting a resolution stating that she was being  
 19 terminated “because of her immorality of being a practicing homosexual”); *Bd. of Educ. v.*  
 20 *Calderon*, 110 Cal. Rptr. 916, 919 (1973) (holding that state sodomy statute was a valid ground  
 21 for discrimination against gays as teachers); see also *Baker v. Wade*, 553 F. Supp. 1121, 1128 n.9  
 22 (N.D. Tex. 1982) (“A school board member testified that [the defendant] would have been fired  
 23 [from his teaching position] if there had even been a suspicion that he had violated [the Texas  
 24 sodomy statute].”) *rev’d*, 769 F.2d 289 (5th Cir. 1985) (holding that challenged Texas  
 25 homosexual sodomy law was constitutional). Some of these discriminatory employment policies  
 26 continued into the 1990s. See *Shahar v. Bowers*, 114 F.3d 1097, 1105 & n.17, 1107–10 (11th



1 Cir. 1997) (en banc) (upholding Georgia Attorney General's Office's rescission of a job offer to  
2 plaintiff after she mentioned to co-workers her upcoming wedding to her same-sex partner); *City*  
3 *of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding unconstitutional Dallas Police  
4 Department policy denying gays and lesbians employment).

5 Based on similar assumptions regarding the criminal sexual conduct of gays and lesbians,  
6 states and localities also denied child custody and visitation rights to gay and lesbian parents.  
7 *See, e.g., Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in  
8 denial of custody to lesbian mother on ground that "homosexual conduct is . . . abhorrent,  
9 immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's  
10 God [and] an inherent evil against which children must be protected."); *Pulliam v. Smith*, 501  
11 S.E.2d 898, 903–04 (N.C. 1998) (upholding denial of custody to a gay man who had a same-sex  
12 partner; emphasizing that father engaged in sexual acts while unmarried and refused to "counsel  
13 the children against such conduct"); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997)  
14 (holding that a trial court did not err in granting a father custody of his son on the basis that  
15 people in town had rumored that the son's mother was involved in a lesbian relationship);  
16 *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that, although the Court had  
17 previously held "that a lesbian mother is not per se an unfit parent," the "[c]onduct inherent in  
18 lesbianism is punishable as a Class 6 felony in the Commonwealth" and therefore "that conduct  
19 is another important consideration in determining custody"); *Roe v. Roe*, 324 S.E.2d 691, 692, 694  
20 (Va. 1985) (holding that father, who was in a gay relationship, was "an unfit and improper  
21 custodian as a matter of law" because of his "continuous exposure of the child to his immoral  
22 and illicit relationship").

23 State and local law also has been used to prevent gay and lesbian people from associating  
24 freely. Liquor licensing laws, both on their face and through discriminatory enforcement, were  
25 long used to harass and shut down establishments patronized by gays and lesbians. *See William*  
26 *N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet*, 1946–1961, 24 Fla. St.

U. L. Rev. 703, 762–66 (1997) (describing such efforts in New York, New Jersey, Michigan, California, and Florida); *see also Irvis v. Scott*, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970) (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass gays and lesbians, often when gay and lesbian people congregated in public. *See, e.g., Pryor v. Mun. Court*, 599 P.2d 636, 644 (Cal. 1979) (“Three studies of law enforcement in Los Angeles County indicate[d] that the overwhelming majority of arrests for violation of [the ‘lewd or dissolute’ conduct statute] involved male homosexuals.”); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City, 1960–1980*, 12 Colum. Hum. Rts. L. Rev. 159, 162–63 (1982); Florida State Legislative Investigation Committee (Johns Committee), *Report: Homosexuality and Citizenship in Florida*, at 14 (1964) (“Many homosexuals are picked up and prosecuted on vagrancy or similar non-specific charges, fined a moderate amount, and then released.”). Similar practices persist to this day. *See, e.g., Calhoun v. Pennington*, No. 09-3286 (N.D. Ga.) (involving September 2009 raid on Atlanta gay bar and police harassment of patrons); *Settlement in Gay Bar Raid*, N.Y. Times (Mar. 23, 2011) (involving injuries sustained by gay bar patron during raid by Fort Worth police officers and the Texas Alcoholic Beverage Commission).

Efforts to combat discrimination against gays and lesbians also have led to significant political backlash, as evidenced by the long history of successful state and local initiatives repealing laws that protected gays and lesbians from discrimination. *See also* Part I.A.1.iii., *infra*. A rash of such initiatives succeeded in the late 1970s. *See, e.g.,* Christopher R. Leslie, *The Evolution of Academic Discourse on Sexual Orientation and the Law*, 84 Chi. Kent L. Rev. 345, 359 (2009) (Boulder, Colorado in 1974); Rebecca Mae Salokar, Note, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 Fla. Int’l. U. L. Rev. 473, 477 (2009) (Dade County, Florida in 1977); *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (St. Paul, Minnesota in 1978); *Gay rights referendum in Oregon*, Washington Post, May 11 (1978), at A14 (Wichita, Kansas in 1978); *Why*

1 *tide is turning against homosexuals*, U.S. News & World Report (June 5, 1978), at 29 (Eugene,  
 2 Oregon in 1978). The laws at issue in *Romer* and in *Equality Foundation v. City of Cincinnati*,  
 3 54 F.3d 261 (6th Cir. 1995), are just two of a number of more recent examples from the 1990s.  
 4 In fact, in May 2011, the Tennessee legislature enacted a law stripping counties and  
 5 municipalities of their ability to pass local non-discrimination ordinances that would prohibit  
 6 discrimination on the basis of sexual orientation, and repealing the ordinances that had recently  
 7 been passed by Nashville and other localities.<sup>8</sup> Similar responses have followed states' decisions  
 8 to recognize same-sex marriages. *See infra* at 15.

#### 9 Discrimination by Private Parties

10 Finally, private discrimination against gays and lesbians in employment and other areas  
 11 has been pervasive and continues to this day.<sup>9</sup> *See, e.g.*, Williams Report, ch. 5 at 8–9  
 12 (explaining that private companies and organizations independently adopted discriminatory  
 13 employment policies modeled after the federal government's, and as "federal employers shared  
 14 police and military records on gay and lesbian individuals with private employers, these same  
 15 persons who were barred from federal employment on the basis of their sexual orientation were  
 16 simultaneously blacklisted from employment by many private companies"). The pervasiveness  
 17 of private animus against gays and lesbians is underscored by statistics showing that gays and  
 18 lesbians continue to be among the most frequent victims of all reported hate crimes. *See* H.R.  
 19 Rep. 111-86, at 10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's  
 20 sexual orientation—gay, lesbian, or bisexual—constituted the third highest category  
 21

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22 <sup>8</sup> *See* State of Tennessee, Public Chapter No. 278, *available at*  
 23 <http://state.tn.us/sos/acts/107/pub/pc0278.pdf>.

24 <sup>9</sup> Private discrimination, as well as official discrimination, is relevant to whether a group has  
 25 suffered a history of discrimination for purposes of the heightened scrutiny inquiry. *Frontiero v.*  
 26 *Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]omen still face pervasive, although at  
 27 times more subtle, discrimination in our educational institutions, in the job market and, perhaps  
 most conspicuously, in the political arena.").

1 reported—1,265 incidents, or one-sixth of all reported hate crimes.”); Kendall Thomas, *Beyond*  
 2 *the Privacy Principle*, 92 Colum. L. Rev. 1431, 1464 (1992).

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

7 **ii. Gays and Lesbians Exhibit Immutable**  
 8 **Characteristics that Distinguish Them as**  
 9 **a Group.**

10 Over ten years ago, in considering whether gays and lesbians constituted a “particular  
 11 social group” for asylum purposes, the Ninth Circuit recognized that “[s]exual orientation and  
 12 sexual identity are immutable,” and that “[h]omosexuality is as deeply ingrained as  
 13 heterosexuality.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal  
 14 quotation marks omitted). *But see High Tech Gays*, 895 F.2d at 573 (stating that sexual  
 15 orientation is not immutable because “it is behavioral”). Sexual orientation, the Ninth Circuit  
 16 explained, is “fundamental to one’s identity,” and gay and lesbian individuals “should not be  
 17 required to abandon” it to gain access to fundamental rights guaranteed to all people.  
*Hernandez-Montiel*, 225 F.3d at 1093.

18 That conclusion is consistent with the overwhelming consensus in the scientific  
 19 community that sexual orientation is an immutable characteristic. *See e.g.*, G.M. Herek, et al.  
 20 *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and*  
 21 *Bisexual Adults*, 7, 176–200 (2010), available at  
 22 <http://www.springerlink.com/content//fulltext.pdf> (noting that in a national survey conducted  
 23 with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95  
 24 percent of the gay men and 83 percent of lesbian women reported that they experienced “no  
 25 choice at all” or “very little choice” about their sexual orientation). There is also a consensus  
 26 among the established medical community that efforts to change an individual’s sexual  
 27

orientation are generally futile and potentially dangerous to an individual's well-being.<sup>10</sup> See Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); see also Richard A. Posner, *Sex and Reason* 101 n.35 (1992) (describing "failure of treatment strategies . . . to alter homosexual orientation"); Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

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

### iii. Gays and Lesbians Are Minorities with Limited Political Power.

Third, gays and lesbians are a minority group,<sup>11</sup> *Able v. United States*, 968 F. Supp. 850,

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<sup>10</sup> In fact, every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gays and lesbians. These policy statements are reproduced in a 2009 publication of the American Psychological Association, available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>.

<sup>11</sup> It is difficult to offer a definitive estimate for the size of the gay and lesbian community in the United States. According to an analysis of various data sources published in April 2011 by the

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

The strong backlash in the 1970s, 1980s, and 1990s to these civil rights ordinances has been followed in the 2000s with similar political backlashes against same-sex marriage. In 1996, at the time DOMA was enacted, only three states had statutes restricting marriage to opposite-sex couples. National Conference of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, available at <http://www.ncsl.org/default.aspx?tabid=16430> (last updated May 2011). Today, thirty-seven states have such statutes, and thirty states have constitutional amendments explicitly restricting marriage to opposite-sex couples. *Id.*

California and Iowa are recent examples of such backlash. In May 2008, the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage. *In re Marriage Cases*, 183 P.3d 384, 419 (Cal. 2008). In November 2008, California’s voters

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Williams Institute, there appear to be 8 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population. *See* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* available at <http://www3.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf> (last reviewed June 30, 2011). Ascertaining the precise percentage of gays and lesbians in the population, however, is not relevant to the analysis, as it is clear that whatever the data reveal, there is no dispute that gays and lesbians constitute a minority in the country.



1 passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex  
 2 couples. *See Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009). In November 2010, when three  
 3 Iowa state supreme court justices who had been part of a unanimous decision legalizing same-sex  
 4 marriage were up for reelection, Iowa voters recalled all of them. *See* A.G. Sulzberger, *Ouster of*  
 5 *Iowa Judges Sends Signal to Bench*, N.Y. Times (Nov. 3, 2010).

6 Beyond these state ballot initiatives, the relatively recent passages of anti-sodomy laws  
 7 singling out same-sex conduct, such as the Texas law the Supreme Court ultimately invalidated  
 8 in *Lawrence*, indicate that gays and lesbians lack the consistent “ability to attract the [favorable]  
 9 attention of the lawmakers.” *Cleburne*, 473 U.S. at 445.

10 This is not to say that the political process is closed entirely to gay and lesbian people.  
 11 But complete foreclosure from meaningful political participation is not the standard by which the  
 12 Supreme Court has judged “political powerlessness.” When the Court ruled in 1973 that gender-  
 13 based classifications were subject to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677  
 14 (1973), women already had won major political victories including a constitutional amendment  
 15 granting the right to vote and protection against employment discrimination under Title VII. As  
 16 *Frontiero* makes clear, the “political power” factor does not require a complete absence of  
 17 political protection, and its application is not intended to change with every political success.<sup>12</sup>

18 **iv. Sexual Orientation Bears No Relation to**  
 19 **Legitimate Policy Objectives or Ability to**  
 20 **Perform or Contribute to Society.**

21 Even where other factors might point toward heightened scrutiny, the Court has declined  
 22 to treat as suspect those classifications that generally bear on “ability to perform or contribute to  
 23 society.” *See Cleburne*, 473 U.S. at 441 (mental disability not a suspect classification) (internal

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24 <sup>12</sup> In determining that gender classifications warranted heightened scrutiny, the plurality in  
 25 *Frontiero* noted that “in part because of past discrimination, women are vastly underrepresented  
 26 in this Nation’s decision-making councils. There has never been a female President, nor a female  
 27 member of this court. Not a single woman presently sits in the United States Senate, and only 14  
 28 women hold seats in the House of Representatives.” 411 U.S. at 686 n. 17 (plurality opinion).

1 quotation omitted); *see also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976) (age  
2 not a suspect classification).

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

12 Just as a person’s gender, race, or religion does not bear an inherent relation to a person’s  
13 ability or capacity to contribute to society, a person’s sexual orientation bears no inherent relation  
14 to ability to perform or contribute. President Obama elaborated on this principle in the context of  
15 the military when he signed the Don’t Ask, Don’t Tell Repeal Act of 2010:

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

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

26 The Supreme Court has also recognized that, although opposition to homosexuality,  
27 though it may reflect deeply held personal religious and moral views, it is not a legitimate policy  
28 objective. *Lawrence*, 539 U.S. at 577 (“[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.”); *Romer*, 517 U.S. at 633 (noting that a law cannot broadly disfavor gays and lesbians because of “personal or religious objections to homosexuality.” (internal quotation omitted)). Whether premised on pernicious stereotypes or simple moral disapproval, laws classifying on the basis of sexual orientation rest on a “factor [that] generally provides no sensible ground for differential treatment,” see *Cleburne*, 473 U.S. at 441, and thus such laws merit heightened scrutiny.

#### **B. DOMA FAILS HEIGHTENED SCRUTINY.**

For the reasons described above, heightened scrutiny is the appropriate standard by which to review classifications based on sexual orientation, including DOMA Section 3.<sup>13</sup> In reviewing a legislative classification under heightened scrutiny, the government must establish, at a minimum, that the classification is “substantially related to an important government objective.” *Clark*, 586 U.S. at 461. Moreover, under any form of heightened scrutiny, a statute must be defended by reference to the “actual [governmental] purpose” behind it, not a different “rationalization.” *VMI*, 518 U.S. at 535–36.

Section 3 fails this analysis.<sup>14</sup> First, the legislative history demonstrates that the statute was motivated in significant part by animus towards gays and lesbians and their intimate and family relationships.<sup>15</sup> Among the interests expressly identified by Congress in enacting DOMA

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<sup>13</sup> The government takes no position on whether sexual orientation classifications should be considered suspect, as opposed to quasi-suspect, and therefore whether DOMA should be subject to intermediate or strict scrutiny.

<sup>14</sup> Though the government believes that heightened scrutiny is the appropriate standard of review for Section 3 of DOMA, if this Court holds that rational basis is the appropriate standard, as the government has previously stated, a reasonable argument for the constitutionality of DOMA Section 3 can be made under that permissive standard.

<sup>15</sup> We note that some members of the majority in Congress that enacted DOMA have changed their views on the law, and the legitimacy of its rationales, since 1996. See, e.g., Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), available at <http://www.latimes.com/news/politics/newsletter/la-oe-barr5-2009jan05,0,2810156.story?track=newslettertext>. In reviewing the statute under heightened scrutiny,

1 was “the government’s interest in defending traditional notions of morality.” H.R. Rep. No. 104-  
 2 664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (“H.R. Rep.”). The House Report  
 3 repeatedly claims that DOMA upholds “traditional notions of morality” by condemning  
 4 homosexuality and by expressing disapproval of gays and lesbians and their committed  
 5 relationships. *See, e.g.*, H.R. Rep. at 15–16 (“[J]udgment [opposing same-sex marriage] entails  
 6 both moral disapproval of homosexuality and a moral conviction that heterosexuality better  
 7 comports with traditional (especially Judeo-Christian) morality.”); *id.* at 16 (stating that same-sex  
 8 marriage “legitimizes a public union, a legal status that most people . . . feel ought to be  
 9 illegitimate” and “put[s] a stamp of approval . . . on a union that many people . . . think is  
 10 immoral”); *id.* at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a  
 11 collective moral judgment about human sexuality”); *id.* at 31 (favorably citing the holding in  
 12 *Bowers* that an “anti-sodomy law served the rational purpose of expressing the presumed belief .  
 13 . . that homosexual sodomy is immoral and unacceptable”).

14 The House Report also explicitly stated an interest in extending legal preferences to  
 15 heterosexual couples in various ways to “promote heterosexuality” and discourage  
 16 homosexuality. H.R. Rep. at 15 n.53 (“Closely related to this interest in protecting traditional  
 17 marriage is a corresponding interest in promoting heterosexuality. . . . Maintaining a preferred  
 18 societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . .”).  
 19 Thus, one of the goals of DOMA was to provide gays and lesbians with an incentive to abandon  
 20 or at least to hide from view a core aspect of their identities, which legislators regarded as  
 21 immoral and inferior.

22 This record evidences the kind of animus and stereotype-based thinking that the Equal  
 23 Protection Clause is designed to guard against. *Cf. Dep’t of Agriculture v. Moreno*, 413 U.S.  
 24 528, 534 (1973) (“If the constitutional conception of ‘equal protection of the laws’ means

25 \_\_\_\_\_  
 26 however, what is relevant are the views of Congress at the time of enactment, as evidenced by  
 27 the legislative record.

1 anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular  
2 group cannot constitute a legitimate governmental interest.”); *see also Lawrence*, 539 U.S. at 580  
3 (O’Connor, J., concurring) (“[The Supreme Court] ha[s] consistently held . . . that some  
4 objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state  
5 interests”). And even if Congress’s opposition to gay and lesbian relationships could be  
6 understood as reflecting moral or religious objections, that would remain an impermissible basis  
7 for sexual-orientation discrimination. *See supra* at 17-18; *Romer*, 517 U.S. at 633 (holding that  
8 law cannot broadly disfavor gays and lesbians because of “personal or religious objections to  
9 homosexuality”). Discouraging homosexuality, in other words, is not a governmental interest  
10 that justifies sexual orientation discrimination.

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

1 between an end of defending “traditional” marriage and the means employed by Section 3.

2 The same is true of Congress’s interest in “promoting responsible procreation and  
3 child-rearing,” which the House Report identified not as a separate rationale for DOMA Section  
4 3, but as the basis for its larger interest in defending “the institution of traditional, heterosexual  
5 marriage.” *See, e.g.*, H. Rep. at 12–13 (“At bottom, civil society has an interest in maintaining  
6 and protecting the institution of heterosexual marriage because it has a deep and abiding interest  
7 in encouraging responsible procreation and child-rearing.”); *id.* at 14 (“Were it not for the  
8 possibility of begetting children inherent in heterosexual unions, *society would have no*  
9 *particular interest* in encouraging citizens to come together in a committed relationship.”)  
10 (emphasis added). Again, even assuming that Congress legislated on the basis of an independent  
11 and animus-free interest in promoting responsible procreation and child-rearing, that interest is  
12 not materially advanced by Section 3 of DOMA and so cannot justify that provision under  
13 heightened scrutiny.

14 First, there is no sound basis for concluding that same-sex couples who have committed  
15 to marriages recognized by state law are anything other than fully capable of responsible  
16 parenting and child-rearing. To the contrary, many leading medical, psychological, and social  
17 welfare organizations have issued policies opposing restrictions on lesbian and gay parenting  
18 based on their conclusions, supported by numerous studies, that children raised by gay and  
19 lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. *See,*  
20 *e.g.*, American Academy of Pediatrics, Coparent or Second-Parent Adoption by 16 Same-Sex  
21 Parents (Feb. 2002), *available at*  
22 <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339>; American  
23 Psychological Association, Sexual Orientation, Parents, & Children (July 2004), *available at*  
24 <http://www.apa.org/about/governance/council/policy/parenting.aspx>; American Academy of  
25 Child and Adolescent Psychiatry, Gay, Lesbian, Bisexual, or Transgender Parents Policy  
26 Statement (Oct. 2008), *available at*

1 [http://www.aacap.org/cs/root/policy\\_statements/gay\\_lesbian\\_transgender\\_and\\_bisexual\\_parents\\_](http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement)  
2 [policy\\_statement](http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement); American Medical Association, AMA Policy Regarding Sexual Orientation,  
3 *available at* [http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-](http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml)  
4 [sections/glb-t-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml](http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml); Child Welfare  
5 League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual  
6 Adults, *available at* <http://www.cwla.org/programs/culture/glb-tqposition.htm>. For this reason  
7 alone, no penalty or prohibition on same-sex marriage can be “substantially” related to an interest  
8 in promoting responsible child-rearing.

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

18       Finally, as to “responsible procreation,” even assuming an important governmental  
19 interest in providing benefits only to couples who procreate, Section 3 is not sufficiently tailored  
20 to that interest to survive heightened scrutiny. Many state-recognized same-sex marriages  
21 involve families with children; many opposite-sex marriages do not. And ability to procreate has  
22 never been a requirement of marriage or of eligibility for federal marriage benefits; opposite-sex  
23 couples who cannot procreate for reasons related to age or other physical characteristics are  
24 permitted to marry and to receive federal marriage benefits. *Cf.* H.R. Rep. at 14 (noting “that  
25 society permits heterosexual couples to marry regardless of whether they intend or are even able  
26  
27

1 to have children” but describing this objection to DOMA as “not a serious argument”).<sup>16</sup>

2 In sum, the official legislative record makes plain that DOMA Section 3 was motivated in  
3 substantial part by animus toward gay and lesbian individuals and their intimate relationships,  
4 and Congress identified no other interest that is materially advanced by Section 3. Section 3 of  
5 DOMA is therefore unconstitutional.

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

**CONCLUSION**

For the reasons set forth above, Section 3 of DOMA fails heightened scrutiny, and this Court should deny the motions to dismiss Plaintiff's constitutional claim.

Dated: July 1, 2011

Respectfully Submitted,

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