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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI

Plaintiff,

v.

THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.

Defendants.

No. C 3:10-00257-JSW

DEFENDANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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SUMMARY OF ARGUMENT

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation, but it has established and repeatedly confirmed a set of factors that guides the determination whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Careful consideration of those factors demonstrates that sexual orientation classifications should be subject to heightened scrutiny.

Although binding authority of this circuit holds that rational basis review applies to sexual orientation classifications, *see, e.g.*, *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 570 (9th Cir. 1990), we respectfully submit that this decision no longer withstands scrutiny. To the extent *High Tech Gays* rested on inferences drawn from the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that rationale does not survive the Supreme Court's subsequent overruling of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). To the extent *High Tech Gays* considered the factors the Supreme Court has identified as relevant to the inquiry, we respectfully submit that its consideration was incomplete and ultimately incorrect.

Heightened scrutiny should be applied, and Section 3 of DOMA is unconstitutional under that level of review.

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.[1] 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.[2] 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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[1] 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).

[2] 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.

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

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

STANDARD OF REVIEW

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

ARGUMENT

I. DOMA VIOLATES EQUAL PROTECTION.

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

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

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.[3] It has, however, established and repeatedly confirmed a set of

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[3] 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

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

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

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

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

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

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[4] *High Tech Gays* and a number of cases in other circuits involved challenges to military policy on homosexual conduct. *See, e.g.*, *High Tech Gays*, 895 F.2d at 565; *see also Cook v. Gates*, 528 F.3d 42, 45 (1st Cir. 2008); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en banc); *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.

[5] As noted above, other courts of appeals have held that classifications on the basis of sexual orientation are not subject to heightened scrutiny, but the reasoning of these courts is similarly flawed. Many of those courts relied in part or in whole on *Bowers*. *See Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2 (6th Cir. 1995); *Steffan*, 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*); *Thomasson*, 80 F.3d at 928 (same). Other courts relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect or quasi-suspect class. *Cook*, 528 F.3d at 61; *Johnson v. Johnson*, 358 F.3d 503, 532 (5th Cir. 2004). Though it is true that the Supreme Court thus far has not yet recognized that gays and lesbians constitute a suspect class, *see* Note 3, *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 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. Gays and Lesbians Are a Quasi-Suspect or Suspect Class under the Relevant Factors Identified by the Supreme Court.

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

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

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

Discrimination by the Federal Government

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

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

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

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

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

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

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

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

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[7] Open military service by gays and lesbians was prohibited, first by regulation and then by statute, 10 U.S.C. § 654 (2007), until the "Don't Ask, Don't Tell" Repeal Act, enacted last year, 111 P.L. 321, 124 Stat. 3515 (2010), and remains so pending completion of the repeal process mandated by the Act.

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

Discrimination by State and Local Governments

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

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

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

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

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

U. L. Rev. 703, 762–66 (1997) (describing such efforts in New York, New Jersey, Michigan, California, and Florida); *see also Irvis v. Scott*, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970) (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass 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*

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

Discrimination by Private Parties

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

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[8] *See* State of Tennessee, Public Chapter No. 278, *available at* http://state.tn.us/sos/acts/107/pub/pc0278.pdf.

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

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

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

ii. Gays and Lesbians Exhibit Immutable Characteristics that Distinguish Them as a Group.

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

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

orientation are generally futile and potentially dangerous to an individual's well-being.[10] *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,[11] *Able v. United States*, 968 F. Supp. 850,

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[10] 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.

[11] 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.

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court has also recognized that, although opposition to homosexuality, though it may reflect deeply held personal religious and moral views, it is not a legitimate policy 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.[13] 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.[14] 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.[15] Among the interests expressly identified by Congress in enacting DOMA

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[13] 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.

[14] 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.

[15] 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,

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

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

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

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however, what is relevant are the views of Congress at the time of enactment, as evidenced by the legislative record.

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

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

between an end of defending "traditional" marriage and the means employed by Section 3.

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

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

http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, AMA Policy Regarding Sexual Orientation, *available at* http://www.ama-assn.org/ama/ pub/about-ama/our-people/member-groups-sections/glbt-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, *available at* http://www.cwla.org/ programs/culture/glbtqposition.htm. For this reason alone, no penalty or prohibition on same-sex marriage can be "substantially" related to an interest in promoting responsible child-rearing.

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

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

to have children" but describing this objection to DOMA as "not a serious argument").[16]

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

[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

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