Nos. 12-15388 & 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants-Appellants,

and

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

On Appeal from the United States District Court for the Northern District of California

BRIEF OF INTERVENOR-DEFENDANT-APPELLANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES OF REPRESENTATIVES

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a United States district court; this Court has jurisdiction pursuant to 28 U.S.C. § 1291. As Plaintiff has brought claims against federal agencies and officers and challenged the constitutionality of a federal statute, the district court had jurisdiction under 5 U.S.C. § 8912 and 28 U.S.C. § 1331. The district court's final order, disposing of all claims in the case, was entered on February 22, 2012. The House filed its notice of appeal on February 24, 2012, making the appeal timely under 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUES

1. Whether Section 3 of the Defense of Marriage Act ("DOMA")—which reaffirms that the terms "marriage" and "spouse" when in federal statutes mean, as they always have meant in federal law, the lawful union of one man and one woman—violates the equal protection component of the Fifth Amendment.

2. Whether the district court erred by applying heightened scrutiny to Section 3 of DOMA despite this Court's many holdings that rational basis review applies to sexual orientation classifications.

3. Whether Congress could rationally conclude that Section 3 of DOMA would further the governmental interests in:

- Maintaining uniformity across state lines in the allocation of federal benefits;

- Preserving the public fisc and previous legislative judgments allocating marital benefits on the understanding that they would apply only to opposite-sex married couples;
- Exercising caution in confronting the unknown effects of an unprecedented redefinition of our foundational social institution;
- Encouraging and supporting those committed relationships (*i.e.*, committed opposite-sex relationships) that most frequently result in the begetting and raising of children;
- Encouraging and supporting the raising of children by their own biological mothers and fathers; and
- Encouraging and supporting family structures in which children will have both a male parent and a female parent.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 3 of DOMA, 1 U.S.C. § 7, 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 a wife.

The Fifth Amendment provides, in pertinent part, that "No person shall … be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE FACTS AND THE CASE

Plaintiff Karen Golinski, a staff attorney employed by this Court, married Amy Cunninghis in California in 2008. Ms. Golinski seeks federal spousal health benefits for Ms. Cunninghis based on Ms. Golinski's federal employment and their California marriage.

Ms. Golinski's initial complaint in this suit sought to enforce an administrative order by Chief Judge Kozinski, who, pursuant to this Court's internal dispute-resolution procedures, had found her entitled to spousal health coverage on non-constitutional grounds, and authorized her to petition for enforcement or mandamus. *In re Golinski*, 587 F.3d 901 (9th Cir. E.D.R. 2009), 587 F.3d 956 (9th Cir. E.D.R. 2009). The district court dismissed that petition, holding that it was not authorized to award mandamus relief in those circumstances. *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011). As Ms. Golinski did not appeal from that dismissal, neither the non-constitutional grounds invoked by Chief Judge Kozinski nor the district court's refusal of mandamus are before this Court.

Instead, in its opinion denying mandamus relief, the district court affirmatively invited Ms. Golinski to bring a constitutional challenge to DOMA:

> The Court would, if it could, address the constitutionality of … the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages …. However, the Court is not able to reach these constitutional issues due

> to the unique procedural posture of this matter…. [T]he Court grants Plaintiff leave to amend to attempt to plead a claim that the Court may legitimately address.

Id. at 975 (citations omitted).

Ms. Golinski obliged and filed in April 2011 a Second Amended Complaint, alleging that DOMA violates equal protection and substantive due process. In response, the United States Department of Justice ("Department" or "DOJ") informed the court that it would no longer defend DOMA in the suit. DOJ had for years been successfully defending DOMA's constitutionality in other cases, including in this Circuit, relying on Circuit precedent applying rational basis review to classifications based on sexual orientation. *E.g.*, *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding DOMA against equal protection and other constitutional challenges), *aff'd in part and vacated in part for lack of standing*, 477 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); Br. for Resp't, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. Aug. 12, 2010); Br. for Resp't, *Lui v. Holder*, No. 09-72068 (9th Cir. Apr. 29, 2010); Br. for Appellee United States, *Smelt*, No. 05-56040 (9th Cir. Oct. 13, 2005); Mem. of Points and Authorities in Supp. of Def.-Intervenor United States of America's Mot. for Summ. J., *Smelt*, No. 04-CV-1042 (C.D. Cal. Dec. 6, 2004). In February 2011, however, the Attorney General notified Congress that DOJ had decided "to forgo the defense" of DOMA. Letter

from Attorney General Eric H. Holder, Jr. to the Hon. John A. Boehner (Feb. 23, 2011) ("Holder Letter"), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder stated that he and President Obama are of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

At the same time, the Attorney General acknowledged that:

(1) the binding precedents of the great majority of the United States Courts of Appeals (the exact number was eleven) hold that sexual orientation classifications are subject only to rational basis review, *id.* nn.iv-vi;

(2) in light of "the respect appropriately due to a coequal branch of government," DOJ "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id.* (text); and

(3) in fact, "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard," *id.*

In light of DOJ's abandonment of its constitutional responsibilities, the Bipartisan Legal Advisory Group of the United States House of Representatives ("the House"), acting on behalf of the entire House, intervened to defend DOMA's constitutionality.[1]

[1] The Bipartisan Legal Advisory Group, which speaks for the House of Representatives in litigation matters, is currently comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader,

(*Continued* …)

The House moved to dismiss Ms. Golinski's complaint, and Ms. Golinski moved for summary judgment. The district court denied the House's motion and granted Ms. Golinski's motion. It held that (i) sexual orientation classifications are quasi-suspect and subject to heightened scrutiny under equal protection, ER 15-25, (ii) DOMA fails heightened scrutiny, ER 25-32, and (iii) in the alternative, DOMA fails rational basis scrutiny, ER 33-42.

The district court gave short shrift to the binding precedents of the Supreme Court and of this Court. It relegated *Baker v. Nelson*, 409 U.S. 810 (1972), in which the Supreme Court summarily rejected an equal protection challenge brought by a same-sex couple to a state law defining marriage as between one man and one woman, to a single cryptic footnote. ER 15 n.5. The district court failed to even mention *Adams v. Howerton*, 673 F.2d 1036, 1042-43 (9th Cir. 1982), in which this Court held that a federal statute using the traditional definition of marriage comports with equal protection, even as applied to couples married under state law. The district court also concluded that this Court's precedents requiring rational basis scrutiny for sexual orientation classifications, *see, e.g.*, *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573-74 (9th

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the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip decline to support the filing of this brief.

Cir. 1990), were overturned by the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). ER 15-17. The district court did not, however, acknowledge that this Court already expressly rejected that contention in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

The district court declared DOMA unconstitutional and enjoined the executive branch defendants from enforcing DOMA as to Golinski. The House filed a notice of appeal. DOJ followed with its own (superfluous) appeal, and this Court consolidated the two. ECF No. 22 (Apr. 11, 2012).

DOJ, well aware that binding circuit precedent forecloses its view that sexual orientation classifications should be subject to heightened scrutiny, petitioned this Court for initial en banc hearing. ECF No. 18 (Mar. 26, 2012). This Court denied DOJ's petition. ECF No. 34 (May 22, 2012).

DOMA'S BACKGROUND

DOMA defines "marriage" for purposes of federal law as the legal union of a man and a woman. Thus, DOMA reaffirms Congress' intention to treat married couples involving one woman and one man distinctively for federal law purposes. DOMA also confirms that federal marital benefits and duties extend only to those relationships, and not to others.

Congress, of course, did not invent the meanings of "marriage" and "spouse" in 1996. Rather, DOMA merely reaffirmed what Congress has always meant—and

what courts and the Executive Branch have always understood it to mean—in using those words: a traditional male-female couple. *E.g.*, Revenue Act of 1921, § 223(3)(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return); 38 U.S.C. § 101(31) ("The term 'spouse' means … a person of the opposite sex …."); U.S. Dep't of Labor, Final Rule, *Family Medical Leave Act of 1993*, 60 Fed. Reg. 2180, 2190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting a District of Columbia marriage statute, intended "that 'marriage' is limited to opposite-sex couples").

Although Congress often has made eligibility for federal marital benefits or duties turn on a couple's state-law marital status, Congress also has a long history of supplying federal marital definitions in various contexts. *E.g.*, I.R.C. § 2(b)(2) (deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); I.R.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-

security purposes); 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria regarding marriage in immigration law context).

I. DOMA's Legislative Branch History

DOMA was enacted by the 104th Congress by overwhelming, bipartisan votes of 342-67 in the House and 85-14 in the Senate. 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate). President Clinton signed DOMA into law. 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

DOMA was enacted in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that the denial of marriage licenses to same-sex couples was subject to strict scrutiny under the state constitution. As the Hawaii courts "appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples," H.R. Rep. No. 104-664 4-5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."), Congress was concerned that this could interfere with the ability of other states and the federal government to define marriage along traditional lines. Section 2 of DOMA therefore clarified that states need not recognize foreign same-sex marriages. And with Section 3, Congress reaffirmed that, no matter how any state might choose to

redefine marriage under state law, the federal definition of marriage would not need to follow suit, but could remain what Congress had always intended—the lawful union of one man and one woman—until and unless Congress itself saw fit to change that definition.

In DOMA's extensive legislative history, Congress recognized that past Congresses uniformly used the words "marriage" and "spouse" to refer solely to opposite-sex couples. House Rep. 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 29 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *id.* at 17072 (Rep. Sensenbrenner). DOMA thus was intended to ensure that the meaning of federal statutes already on the books, and the legislative judgments of earlier Congresses, would not be altered by changes in state law. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 32 (1996) ("House Hrg.") (Rep. Sensenbrenner) ("When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages.").

Congress stressed that disagreements among the states regarding which couples can marry should not be permitted to create serious geographical disparities in the applicability of *federal* marital duties and benefits. As Senator Ashcroft stated, a federal definition "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently … [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459. Federal benefits "should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State." *Id.*

Congress also enacted DOMA to conserve the public fisc. "Government currently provides an array of material and other benefits to married couples," and those benefits "impose certain fiscal obligations on the federal government." House Rep. 18. Congress believed that DOMA would "preserve scarce government resources, surely a legitimate government purpose." *Id*.

Congress also repeatedly emphasized "'[t]he enormous importance of marriage for civilized society.'" House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), in which the Supreme Court referred to "the idea of the family, as consisting in and

springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." House Rep. 12; *see* 142 Cong. Rec. 16799 (1996) (Rep. Largent) ("[T]here is absolutely nothing that we do that is more important than protecting our families and protecting the institution of marriage."); *id.* at 16970 (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id.* at 22442 (Sen. Gramm) ("There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society—it is the oldest institution that exists."); *id.* at 22454 (Sen. Burns) ("[M]arriage between one man and one woman is still the single most important social institution."). And Congress recognized that these benefits have been generated by the institution of marriage as it has traditionally been defined in American law—the union of one man and one woman. *See* House Rep. 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); House Hrg. 1 (statement of Rep. Canady) ("[I]n the history of our country, marriage has never meant anything else."); 142 Cong. Rec. 16796 (1996) (Rep. McInnis) ("If we look at any definition, whether it is Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as [a] union between a man and a woman … and this Congress should respect that."); *id.* at 22451 (Sen. Coats) (DOMA "merely restates the understanding of marriage shared by Americans, and by peoples and cultures all over the world.");

id. at 22452 (Sen. Mikulski) (DOMA "is about reaffirming the basic American tenet of marriage.").

Congress also explained that the reason "society recognizes the institution of marriage and grants married persons preferred legal status" is that it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 12, 13. Congress recognized the basic biological fact that only a man and a woman can beget a child together, and our profound national commitment to the norm that children should when possible be raised in families headed by their biological mothers and fathers. *See* 142 Cong. Rec. 22446 (1996) (Sen. Byrd); 142 Cong. Rec. S10002 (daily ed. Sept. 6, 1996) (Sen. Lieberman) ("I intend to support the Defense of Marriage Act because I think that affirms another basic American mainstream value, … marriage as an institution between a man and a woman, the best institution to raise children in our society."); House Hrg. 1 (Rep. Canady) ("[Marriage] is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children."); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) ("[M]arriage of a man and woman is the foundation of the family. The marriage relationship provides children with the best environment in which to grow and learn.").

Congress received and considered advice on DOMA's constitutionality and determined that DOMA is constitutional. *See, e.g.*, House Rep. 32 (DOMA "plainly constitutional"); *id.* at 33-34 (letters to House from DOJ advising that DOMA is constitutional); House Hrg. 86-117 (testimony of Professor Hadley Arkes); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 2 (1996) (hereinafter "Senate Hrg.") (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 2 (DOJ letter to Senate advising that DOMA is constitutional); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell); *see also* 150 Cong. Rec. S7879 (daily ed. July 9, 2004) (Sen. Hatch) ("There is an obvious[] rational basis for legislation that protects traditional marriage."); *id.* at H7896 (daily ed. Sept. 30, 2004) (Letter from former Att'y Gen. Edwin Meese to Rep. Musgrave); 150 Cong. Rec. S8008 (daily ed. July 13, 2004) (Sen. Sessions) ("No one disputes that a two-parent traditional family is a healthy, positive force for our society. That is why it is perfectly legitimate for any government to provide laws that further [marriage].").

II. DOMA's Executive Branch History

During the Clinton Administration, DOJ three times advised Congress that DOMA is constitutional. *See* Letters from Andrew Fois, Assistant Att'y Gen., to

Rep. Canady (May 29, 1996), *reprinted in* House Rep. 33; to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 22-23; *and* to Sen. Hatch (July 9, 1996), *reprinted in* Senate Hrg. 2.

During the Bush Administration, DOJ successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment. *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Smelt*, 374 F. Supp. 2d 861; *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after defendants moved to dismiss); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005); *Kandu,* 315 B.R. 123.

During the first two years of the Obama Administration, DOJ continued to defend DOMA. However, in February 2011, the Obama Administration announced its view that DOMA is unconstitutional and abandoned its responsibility to defend this Act of Congress. Since then DOJ has filed an extraordinary series of briefs not only failing to defend DOMA but affirmatively attacking DOMA's constitutionality, and accusing Congress of bigotry and animus in enacting the law. *E.g.*, Defs.' Br. in Opp'n to Mot. to Dismiss, *Golinski*, No. 10-CV-257, at 18-23 (N.D. Cal. July 1, 2011) (ECF No. 145). While recognizing, as its own briefs filed during the Obama Administration contended, that DOMA satisfies rational basis review, DOJ has adopted the awkward posture of advocating for heightened constitutional scrutiny of sexual orientation classifications even to

district courts and panels bound by circuit precedent to the contrary. *E.g.*, *id.* at vi, 4-5 (arguing that "binding authority of this circuit" is "incorrect").

District courts in this Circuit have split on DOMA's constitutionality. *Compare Smelt*, 374 F. Supp. 2d 861; *Lui v. Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011), ER 74-78; *and Torres-Barragan v. Holder*, No. 2:09-cv-08564 (C.D. Cal. Apr. 30, 2010) (DOMA constitutional); *with Golinski*, *and with Dragovich v. U.S. Dep't of Treasury*, No. 4:10-CV-01564 (N.D. Cal. May 24, 2012) (DOMA unconstitutional). As described above, with one pending exception,[2] challenges to DOMA in other Circuits have uniformly failed.

SUMMARY OF ARGUMENT

1. Binding precedent forecloses Ms. Golinski's equal protection challenge to DOMA. The Supreme Court, in *Baker v. Nelson*, 409 U.S. 810, held that a state may use the traditional definition of marriage without violating equal protection. It follows that the federal government may do the same. This Court, in *Adams v. Howerton*, 673 F.2d at 1042-43, held that an Act of Congress limiting a federal benefit to opposite-sex married couples comported with equal protection.

[2] *See Massachusetts v. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207 & 10-2214, at 11, 14 (1st Cir. May 31, 2012) (finding DOMA unconstitutional under modified rational-basis scrutiny but recognizing that "only the Supreme Court can finally decide this unique case").

2. Even if *Baker* and *Adams* did not require rejection of Ms. Golinski's equal protection challenge to DOMA, this Court, in *High Tech Gays*, 895 F.2d at573-74, and subsequent cases held that classifications based on sexual orientation are subject only to rational basis review, the most deferential form of equal protection review. The court below clearly erred in applying heightened scrutiny to DOMA. It concluded that the standard of review applicable to sexual orientation classifications is an open question after *Lawrence v. Texas*, 539 U.S. at 558. But this Court in *Witt*, 527 F.3d at 821, has already held that *Lawrence* did not disturb this Court's precedents requiring the application of the rational basis test to such classifications.

3. DOMA easily passes muster under rational basis review, as DOMA is supported by numerous rational bases. Congress saw that expanding federal marital benefits to same-sex couples, who at the time of DOMA's passage were not recognized as married in any states, would raise significant problems of disuniformity and unfairness in the distribution of such benefits. Moreover, any extension of federal marital benefits likely would increase demands on federal resources, create unpredictable changes in the budgets of countless federal programs, and upset the calibration of the countless prior statutes dealing with marriages, all of which were structured on the understanding that the institution included only opposite-sex couples. Congress also was acutely aware of the

central importance of the institution of marriage to our society, and legitimately concerned about the nation's lack of experience with the long-term or even medium-term consequences of changing this foundational social institution in an unprecedented way to include same-sex couples.

Any of these interests suffices to justify Congress in adhering to the traditional definition of marriage that has always been used by the large majority of states. And the government interests that supported the adoption of that definition by the states in the first place also support DOMA. The institution of marriage is justified by its close connection to the procreation and rearing of the next generation of citizens—a government interest that opposite-sex couples implicate in a way that same-sex couples do not, thus explaining their differential treatment. Traditional marriage also furthers the legitimate government purpose of encouraging the raising of the next generation of citizens by their own biological mothers and fathers.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's denial of [a] motion to dismiss for failure to state a claim upon which relief can be granted." *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). It "also review[s] *de novo* a

grant or denial of summary judgment." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002).

This Court "review[s] *de novo* challenges to the constitutionality of a statute." *Id.* "[J]udging the constitutionality of an Act of Congress is the gravest and most delicate duty that [the courts are] called on to perform. The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-05 (2009) (quotation marks and citations omitted). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). For these reasons, the Supreme "Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). *See supra* p.14. "This deference to congressional judgment must be afforded even though the claim is that a statute" violates the Fifth Amendment. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985); *see*

Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) ("[W]e accord[] great weight to the decisions of Congress even though the legislation … raises equal protection concerns." (quotation marks omitted)), *receded from on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

II. Binding Supreme Court and Ninth Circuit Precedent Foreclose an Equal Protection Challenge to DOMA.

The Supreme Court and this Court have already held that the traditional definition of marriage as the legal union of one man and one woman comports with equal protection. These binding precedents foreclose Ms. Golinski's equal protection challenge to Section 3 of DOMA.

A. The Supreme Court Has Held That the Traditional Definition of Marriage Does Not Violate Equal Protection.

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the plaintiffs—two men who were denied a marriage license "on the sole ground that [they] were of the same sex," *id*. at 185—brought an equal protection challenge to Minnesota's statute defining marriage as a "union between persons of the opposite sex," *id*. at 186. They argued "that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Id.* The Minnesota Supreme Court rejected their challenge, holding that equal protection "is not

offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id*. at 187.

The plaintiffs took an appeal as of right to the Supreme Court under former 28 U.S.C. § 1257(2). Their Jurisdictional Statement presented the question "[w]hether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights [to] equal protection." ER 83. The plaintiffs argued that Minnesota law unconstitutionally discriminated based on both sex and sexual orientation. On the latter point, they argued that "there is no justification in law for the discrimination against homosexuals," and that they were "similarly circumstanced" to "childless heterosexual couples" and therefore entitled to the same "benefits awarded by law." ER 87, 90. They argued that the Minnesota marriage statute failed both heightened scrutiny and rational basis review. ER 89 (arguing that the state's proscription of "single sex marriage" did not a "describe a legitimate government interest which is so compelling that no less restrictive means can be found" and in the alternative that "Minnesota's proscription simply has not been shown to be rationally related to any governmental interest").

The U.S. Supreme Court rejected these arguments and summarily affirmed. It unanimously dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Such a disposition is a decision on the merits, not a mere

denial of certiorari. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). It means that "the Court found that the decision below was correct and that no substantial question of the merits was raised." Eugene Gressman et al., *Supreme Court Practice* 365 (9th ed. 2007); *see White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984) ("A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question operates as a decision on the merits on the challenges presented in the statement of jurisdiction."). Because the Court's appellate jurisdiction under former § 1257(2) was mandatory, "the Supreme Court had no discretion to refuse to adjudicate [*Baker*] on its merits," *Wilson*, 354 F. Supp. 2d at 1304, and its "dismissal[] for want of a substantial federal question without doubt reject[ed] the specific challenges presented in the statement of jurisdiction," *Mandel*, 432 U.S. at 176—*i.e.*, the contention that prohibiting same-sex marriages violated equal protection.

Despite *Baker*'s obvious relevance, the district court relegated it to a footnote, and attempted to distinguish it on the ground that *Baker* involved a state rather than a federal definition of marriage. ER 15 n.5. To be sure, the equal protection challenge here arises not under the Fourteenth Amendment (governing state action) but under the Fifth Amendment (governing federal action). But the Supreme Court's "approach to Fifth Amendment equal protection claims has

always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Adarand*, 515 U.S. at 217 (quotation marks omitted). *Baker* holds that states may use the traditional definition of marriage without violating equal protection; it necessarily follows that Congress may define marriage the same way for federal purposes without violating equal protection. *See McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) (in a claim for federal marital benefits by a same-sex couple, *Baker* "constitutes an adjudication on the merits which is binding on the lower federal courts"); *Adams*, 486 F. Supp. at 1124 (same), *aff'd*, 673 F.2d at 1039 n.2 (acknowledging precedential nature of *Baker* while conducting independent analysis); *Wilson*, 354 F. Supp. 2d at 1305 (*Baker* is "binding precedent" with "dispositive effect" requiring dismissal of equal protection challenge to DOMA).[3] In its determination to strike down DOMA, the district court simply ignored this fact and erred as a matter of law.

Because "[t]he Supreme Court has not explicitly or implicitly overturned its holding," *Wilson*, 354 F. Supp. 2d at 1305, this Court is obligated to follow *Baker*.

[3] In *Perry v. Brown*, 671 F.3d 1052, 1081 n.14 (9th Cir. 2012), the panel said that *Baker* was "not pertinent" because the panel was not addressing the constitutionality of a statute employing the traditional definition of marriage. *Perry* addressed a "wholly different question: whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others." *Id*. That question is not presented in this case: Because same-sex married couples have never been eligible for federal benefits, DOMA did not "strip" such couples of any "previously enjoyed" right or benefit.

"[L]ower courts are bound by summary decisions by [the Supreme] Court until such time as the [Supreme] Court informs them they are not," *Hicks*, 422 U.S. at 344-45 (quotation marks and parentheses omitted), and the Supreme Court has never disturbed *Baker*. In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Court specifically *declined* to revisit the question "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." And Justice O'Connor expressly stated that statutes "preserving the traditional institution of marriage" remain valid. *Id.* at 585 (O'Connor, J., concurring).[4] There is no warrant for second-guessing the *Lawrence* Court's own statement about what it was and was not deciding. It could not be clearer that the Supreme Court has left the binding nature of *Baker's* holding unimpaired.

B. This Court Has Held That Equal Protection Does Not Require the Federal Government to Recognize Same-Sex Marriage, Even Where a State Does.

Even if *Baker* did not control here (which it does), this Court's decision in *Adams v. Howerton* would. In *Adams*, this Court held that it was constitutional for Congress to limit a spousal immigration preference to opposite-sex spouses. The case involved two men who were married and obtained a marriage license in Colorado. 673 F.2d at 1038. This Court assumed *arguendo* that the marriage was

[4] Moreover, *Lawrence* involved only the Fourteenth Amendment's Due Process Clause, and this Court has expressly recognized that *Lawrence* did not change this Court's equal protection jurisprudence. *Witt*, 527 F.3d at 821; *see infra* pp.28-29.

valid under state law, *id.* at 1039, but found that "Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b)" of the Immigration and Nationality Act. *Id.* at 1041.

The *Adams* Court then rejected the couple's claim that "the law violates the equal protection clause because it discriminates against them on the bases of sex and homosexuality." *Id*. (footnote omitted). Applying the rational basis test, this Court held "that Congress's decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Id*. at 1042. Finding it unnecessary to enumerate all of the rational bases Congress possibly could have had, this Court said that Congress could have rationally based its decision on the fact that same-sex marriages "are not recognized in most, if in any, of the states" or that such marriages "never produce offspring." *Id*. at 1043. Finally, although *Adams* arose in the immigration context, this Court applied ordinary rational basis review, stating that "[t]here is no occasion to consider in this case whether some lesser standard of review should apply." *Id.* at 1042.

DOMA Section 3 is constitutional because it uses the same definitions of spouse and marriage upheld in *Adams*.[5] As DOJ itself told this Court in another

[5] *Adams* was not affected by this Court's decision in *Perry*, which addressed a different issue. *See supra* n.3.

DOMA case, "*Adams* is directly on point and dispositive." Br. for Resp't 62, *Torres-Barragan v. Holder*, Nos. 08-73745 & 09-71226 (9th Cir. Aug. 12, 2010). The district court's failure to follow, or even cite, this "on point and dispositive" precedent was clear error.

III. BINDING PRECEDENT OF THIS COURT ESTABLISHES THAT RATIONAL BASIS REVIEW APPLIES TO SEXUAL ORIENTATION CLASSIFICATIONS.

Even outside the context of marital rights and duties, this Court repeatedly has made clear that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny." *High Tech Gays*, 895 F.2d at 574; *see Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997).

High Tech Gays involved an equal protection challenge to the procedures for determining whether homosexual persons could obtain certain federal security clearances. 895 F.2d at 566-68. This Court rejected the plaintiffs' claim that "homosexuality should be added to the list of suspect or quasi-suspect classifications requiring strict or heightened scrutiny," *id.* at 571, and instead held that rational basis review applied, in "agree[ment] with the other circuits that have ruled on this issue." *Id.* at 574.[6] Noting that the Supreme Court "has never held

[6] Ten other Circuit Courts also hold that rational basis review applies to sexual orientation classifications; no Circuit has held otherwise. *See Massachusetts v.*

(*Continued* …)

homosexuality to a heightened standard of review," this Court reviewed the factors that the Supreme Court has identified as relevant to suspect-classification status, and held that "[h]omosexuality is not an immutable characteristic" because "it is fundamentally different from traits such as race, gender, or alienage," where "[t]he behavior or conduct of such already recognized classes is irrelevant to their definition." *Id.* at 573-74. The Court further concluded that "homosexuals are not without political power," as evidenced by "the passage of anti-discrimination legislation." *Id*. at 574.[7] Although the Court noted that its decision was supported by the Supreme Court's determination that state sodomy prohibitions were constitutional, *id.* at 571-72 (citing *Bowers v. Hardwick*, 478 U.S. 186, 194-96

HHS, *supra* n.2, at 14 (applying modified rational-basis scrutiny); *Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing cases from the Fourth, Sixth, Seventh, Tenth, Federal and D.C. Circuits).

[7] Needless to say, the political power of gays and lesbians has increased dramatically since *High Tech Gays*. Not only is the Executive Branch actively seeking DOMA's demise in this very case, but same-sex marriage is supported by the President, the sitting and former Vice Presidents, the majority leader of the Senate, and the minority leader of the House of Representatives. And nearly one-third of the Members of the House joined an *amici* brief in the First Circuit attacking not just the wisdom of DOMA but its constitutionality. Brief of Members of the U.S. House of Representatives, *Massachusetts v. HHS*, No. 10-2204 (1st Cir. Nov. 3, 2011).

(1986)), the Court's examination of immutability and political power was entirely independent of *Bowers*.

The Court reaffirmed this conclusion in *Philips*, which "reject[ed]" the plaintiff's "suggestion that classifications along the lines of sexual orientation ought to receive heightened judicial scrutiny," 106 F.3d at 1425, and instead upheld the armed forces' since-rescinded "don't ask, don't tell" policy under rational basis review. *Id.* at 1429. A third panel reiterated this holding in *Holmes*. 124 F.3d at 1132 ("Because homosexuals do not constitute a suspect or quasi-suspect class, we subject the military's 'don't ask/don't tell' policy to rational basis review.").

The district court viewed these cases as "outdated." ER 18. It concluded that these holdings were abrogated when the Supreme Court overruled *Bowers* in *Lawrence*. ER 15-18. It thus averred that "the question of what level of scrutiny applies to classifications based on sexual orientation is still open." ER 18. But the district court simply ignored a decision of this Court squarely rejecting the district court's theory.

Holmes, *Philips*, and *High Tech Gays* all involved equal protection claims, like Ms. Golinski's claim here. In *Lawrence*, however, the Supreme Court expressly passed over the plaintiffs' equal protection arguments to rule on substantive due process grounds instead. 539 U.S. at 574-75. In *Witt*, this Court

held that when a plaintiff states a substantive due process claim under *Lawrence*, "heightened scrutiny" applies, 527 F.3d at 817-18, but noted that *Lawrence* "declined to address equal protection," *id.* at 821. Accordingly, this Court held that the rule of *Philips*, requiring rational-basis review for sexual orientation classifications under equal protection, "was not disturbed by *Lawrence*." *Id.* In doing so it rejected a dissent that embraced exactly the same argument as the district court here. *Cf. id.* at 824 (Canby, J., concurring and dissenting).

Therefore, as DOJ recognized in seeking initial *en banc* hearing, it is clear that rational basis review continues to apply to sexual orientation classifications in this Circuit post-*Lawrence*. The district court simply ignored *Witt*'s holding to that effect.[8]

[8] The district court also concluded that this Court's holding in *High Tech Gays*—that sexual orientation is not suitable for suspect-class status as are race and sex because it is determined mostly by observing the conduct of the person in question—was "rejected" by the Supreme Court in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) ("*CLS*"). ER 16-17. To say the least, this overreads *CLS*. That case involved a First Amendment challenge to a university's anti-discrimination policy by a faith-based student organization, and the Court concluded that the university reasonably *could* prohibit discrimination based on homosexual conduct because of the difficulty of distinguishing it from discrimination based on homosexual orientation. 130 S. Ct. at 2990. That observation, made in service of the Court's First Amendment ruling, in no way contradicts this Court's level-of-scrutiny conclusion in *High Tech Gays*.

IV. DOMA Easily Passes Rational Basis Review.

Rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). Under such review, a statute receives "a strong presumption of validity" and must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993).

"[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The government "has no obligation to produce evidence to sustain the rationality of a statutory classification," and "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 320, 321 (1993). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Indeed, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* "[T]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis*

which might support it, whether or not that basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (quotation marks, brackets, and citations omitted) (emphasis added). Furthermore, the courts may not "substitute [their] personal notions of good public policy for those of Congress." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

So strong is the presumption of validity under rational basis review that only once (to our knowledge) has the Supreme Court applied it to strike down a federal statute as an equal protection violation. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[9] That striking fact is a direct product of the deferential nature of rational basis review and how extraordinarily difficult it is for a federal court to conclude the coordinate branches which enacted and signed a law were not just unwise, but wholly irrational.

This deferential standard is at its zenith when it comes to statutory definitions and other line-drawing exercises such as DOMA. The Supreme Court has recognized a broad category of regulations in which "Congress had to draw the

[9] *Cf. Jimenez v. Weinberger*, 417 U.S. 628 (1974) (finding unconstitutional under any standard a classification based on illegitimacy, which the Court was then in the process of recognizing as quasi-suspect). The lone exception of *Moreno* is readily distinguishable. The classification there could not further the interests identified by the government because the vast majority of individuals who it excluded could easily rearrange their affairs to become eligible, while the neediest people would not be able to do so. *See Moreno*, 413 U.S. at 538. There are no analogous difficulties with DOMA.

line somewhere," *Beach Commc'ns*, 508 U.S. at 316, and which "inevitably require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker*, 450 U.S. at 238 (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle") (footnote omitted). In such cases, Congress' decision where to draw the line is "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316.

The Supreme Court has long recognized that governmental definitions of who or what constitutes a family are precisely this kind of exercise in line-drawing. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), the Court upheld on rational basis review a zoning regulation defining unmarried couples as "families" permitted to live together, but prohibiting cohabitation by larger groups. The Court rejected the argument "that if two unmarried people can constitute a 'family,' there is no reason why three or four may not," noting that "every line drawn by a legislature leaves some out that might well have been included." *Id.* In such cases, said the Court, "the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* n.5 (quotation omitted). Thus, DOMA can be struck down as irrational only if the line it draws between a relationship between one man and one woman and every other

relationship—a line that virtually every society everywhere has drawn for all of recorded history—is "very wide of any reasonable mark." *Id.* To the contrary, DOMA and its traditional definition of marriage are supported by multiple rational bases.

A. Uniquely Federal Interests

In defining marriage for purposes of federal law, Congress could and did consider the interests that motivate the states' traditional definitions of marriage. *See infra* Pt. IV.B. But Congress also was motivated by several interests particular to the federal government:[10] Creating uniformity in federal marital status across state lines, protecting the public fisc and preserving the judgments of previous Congresses, and exercising caution in considering the unknown but surely significant effects of an unprecedented change in our most fundamental social institution.

1. Maintaining a Uniform Federal Definition of Marriage.

DOMA manifestly serves the federal interest in uniform eligibility for federal benefits—that is, in ensuring that similarly-situated couples will be eligible for the same federal marital status regardless of which state they happen to live in. *See, e.g.*, 142 Cong. Rec. S4870 (daily ed. May 8, 1996) (Sen. Nickles) (DOMA

[10] *See Massachusetts*, *supra* n.2, at 21("Congress surely has an interest in who counts as married. The statutes and programs that [DOMA] governs are federal regimes ….")

"will eliminate legal uncertainty concerning Federal benefits"); *id.* S10121 (daily ed. Sept. 10, 1996) (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits"); 150 Cong. Rec. S7966 (daily ed. July 13, 2004) (Sen. Inhofe) (the issue "should be handled on a Federal level [because] people constantly travel and relocate across State lines throughout the Nation"). As this Court has recognized in another context, the Congress has "legitimate interests in efficiency, fairness, predictability, and uniformity" in federal programs. *In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002).

Prior to DOMA, of course, no state permitted same-sex marriages. After the Hawaii *Baehr* decision, the apparent likelihood that at least one state would recognize same-sex marriage presented Congress with three choices with respect to the substantive eligibility criteria for federal marital benefits. Congress could (a) adopt the approach of the overwhelming majority of the states and limit marriage to opposite-sex couples, (b) incorporate a patchwork of state rules into federal law, meaning that federal benefits for same-sex couples would depend on which state they lived in, or (c) flout the majority state approach and recognize same-sex marriage nationwide for federal purposes. Any of these choices would have been rational—including (a), the one that Congress opted for in DOMA.

Plainly, Congress could legitimately conclude that a uniform nationwide definition was desirable, and thus reject option (b). It was more than rational for Congress to avoid treating same-sex couples differently for purposes of federal law based on their state of residence. Even greater confusion would have arisen regarding same-sex couples who married in a state or country that permits it, but resided in a state that does not recognize foreign same-sex marriages:[11] Congress would have been forced to recognize such marriages, in conflict with the couple's own state government, or else be willing to wipe out a previously federally-recognized marriage if the couple moved to a non-recognition state.

Congress also rationally declined option (c), which would have ensured uniformity by treating same-sex couples as married for federal law purposes contrary to the laws of the vast majority of the States. Rather than treat same-sex couples differently based on the happenstance of where they reside or override the approach of the vast majority of states, Congress rationally chose to preserve

[11] *E.g.*, 152 Cong. Rec. S5481 (daily ed. June 6, 2006) (Sen. Carper) (if a Delaware same-sex couple "go[es] to another country or another place where same-sex marriages are allowed … they are not married in my State"); *compare* N.M. Att'y Gen. Op. No. 11-01, 2011 WL 111243 (Jan. 4, 2011) (predicting that New Mexico would recognize out-of-state same-sex marriages despite not issuing its own licenses to same-sex couples), *with, e.g.*, Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, N.J. Att'y Gen. Op. 3-2007, 2007 WL 749807 (Feb. 16, 2007) (foreign same-sex marriages recognized as civil unions), *and with, e.g.*, Fla. Const. art. I, § 27 (declining recognition).

uniformity by adopting the rule of the vast majority of states as its own. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc) (where some states confer a certain status and others do not, it is rational for Congress "in the strong interest of uniformity" not to recognize the state-law status for federal purposes "rather than adopt a piecemeal approach") (quoting *Nunez-Reyes*, 602 F.3d 1102, 1107 (9th Cir. 2010) (Graber, J., concurring)); *Dailey v. Veneman*, No. 01-3146, 2002 WL 31780191, at *3 (6th Cir. Dec. 3, 2002) (describing "Congress's interest in uniformity" as a rational basis and noting as to the program at issue that "Congress may have wanted to avoid confusion by establishing a uniform standard").

The district court dismissed this uniformity argument in a mere five sentences, by incorrectly reducing it to one about "administrative consistency." ER 43. This was error for multiple reasons. First, it is simply wrong to equate the federal government's interest in treating people uniformly no matter where they live as one of mere administrative convenience. DOMA affects benefits under federal programs that implicate truly national interests such as veterans' benefits or the benefits available to federal workers. In the context of such nationwide programs it surely is rational to treat two same-sex couples the same, rather than offering one distinct benefits based on differences in state marriage law. Second, the district court simply erred as dismissing administrative convenience as a

sufficient rationale under rational basis review. Avoiding difficult choice of law questions that could arise if federal benefits turned on state law recognition of out-of-jurisdiction marriages is a sufficient basis to support DOMA.

Moreover, once it became clear that some states might begin recognizing same-sex marriage, Congress had to choose between uniformity in either (i) the substantive eligibility criteria for federal marital benefits, or (ii) the procedural practice of simply deferring to state-law marital determinations. Congress reasonably chose substantive uniformity, and reasonably chose to adopt the majority definition of marriage among the states. The district court, however, had a policy preference for the outcome that would be yielded by procedural uniformity, and therefore declared that Congress' choice of the "wrong" kind of uniformity was irrational. This is the antithesis of rational basis review.

2. Preserving the Public Fisc and Previous Legislative Judgments.

By maintaining the traditional definition of marriage in DOMA, Congress preserved both the public fisc and the legislative judgments of countless earlier Congresses, which used terms like "marriage" and "spouse" on the understanding that the programs they created conferred benefits or imposed duties solely for those in traditional marriages. *See* House Rep. 18; *supra* pp.7-9, 12-13.

Although DOMA applies to federal marital burdens as well as benefits, on balance, Congress reasonably could have concluded that a more restricted

definition of marriage would preserve the federal fisc. *See Massachusetts*, *supra* n.2, at 14. Saving money by declining to expand pre-existing eligibility requirements is itself a legitimate government interest. *See*, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."); *Hassan v. Wright*, 45 F.3d 1063, 1069 (7th Cir. 1995) ("[P]rotecting the fisc provides a rational basis for Congress's line drawing in this instance."); *Ass'n of Residential Res. in Minn., Inc. v. Gomez*, 51 F.3d 137, 141 (8th Cir. 1995) ("Preserving the fiscal integrity of welfare programs is a legitimate state interest.").

To be sure, when government *withdraws* benefits that it previously offered to a class of people, or denies benefits in a way that infringes on a fundamental right, saving money alone may not justify the deprivation. *See Plyler v. Doe*, 457 U.S. 202, 205, 227 (1982); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); *Diaz v. Brewer*, 656 F.3d 1008, 1010, 1014 (9th Cir. 2011); *cf. Perry*, 671 F.3d at 1081 n.14. But DOMA does neither of these things. When Congress declines to extend benefits to those not previously eligible, the Supreme Court has recognized that this is justified by the government interest in proceeding "cautiously" and protecting the fisc. *Bowen v. Owens*, 476 U.S. 340, 348 (1986) ("A constitutional rule that would invalidate Congress' attempts to proceed cautiously in awarding

increased benefits might deter Congress from making any increases at all. The Due Process Clause does not impose any such constitutional straitjacket.") (citation and quotation marks omitted). This district court failed to acknowledge this distinction, and in fact cited a *dissenting* opinion, without noting that it was a dissent, for the proposition that "preserving the government fisc [does not] satisf[y] rational basis review." ER 35 (citing *Lyng v. Int'l Union*, 485 U.S. 360, 376-77 (1988) (Marshall, J., dissenting)).

Congress expressly relied on this cost-saving rationale in enacting DOMA. House Rep. 18. Indeed, Congress' realization that recognizing same-sex marriage for federal purposes would have a large and unpredictable effect on the budgets of various federal agencies—benefitting some agency budgets and substantially burdening others—would be a rational reason to avoid such budgetary turmoil even were there some question whether the overall net effect would be positive or negative. It was perfectly rational for Congress to avoid that uncertainty by maintaining the traditional definition.

Additionally, in enacting DOMA Congress recognized that a host of pre-existing federal statutes allocated marital burdens and benefits based on the traditional definition of marriage—because there had never been any other definition. The Congresses that enacted these programs therefore reached legislative judgments exclusively with opposite-sex couples in mind. It was

reasonable for the Congress that enacted DOMA to preserve those legislative judgments and to allow those programs to operate in the manner initially intended. In the context of federal regulation and spending, that is surely a rational basis.

3. Caution in Facing the Unknown Consequences of a Novel Redefinition of a Foundational Social Institution.

Marriage is the Nation's most important social institution and one of the foundations of our society. *See* 150 Cong. Rec. S7994 (daily ed. July 13, 2004) (Sen. Clinton) (calling marriage "the fundamental bedrock principle that exists between a man and a woman, going back into the mi[]st of history as one of the foundational institutions of history and humanity and civilization").

And the definition of marriage as exclusively between one woman and one man had been universally accepted in America—and virtually everywhere else—until only a very few years ago. No human society has experienced the long- or even medium-term effects of widespread acceptance of same-sex relationships as marriages. There thus is ample room for a wide range of rational predictions about the likely effect of such recognition. As two supporters of same-sex marriage put it, "whether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question …. There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them." William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 Future of Children 97, 110 (Fall 2005),

http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf (endorsing a "limited, localized experiment" at the state level).

In enacting DOMA, Congress compared the ancient and well-known benefits of traditional marriage with the near complete lack of information about the consequences of recognizing same-sex marriages and concluded that no basis had been identified to support such a major and unprecedented redefinition of such an important institution. 150 Cong. Rec. S2836 (daily ed. Mar. 22, 2004) (Sen. Cornyn) ("The institution of marriage is just too important to leave to chance…. The burden of proof is on those who seek to experiment with traditional marriage, an institution that has sustained society for countless generations."); *id.* S7880 (daily ed. July 9, 2004) (Sen. Hatch) ("The jury is out on what the effects on children and society will be …. [G]iven the uncertainty of a radical change in a fundamental institution like marriage, popular representatives should be given deference on this issue."); *id.* S7887 (Sen. Frist) (calling same-sex marriage "a vast untested social experiment for which children will bear the ultimate consequences"); *id.* S7888 (Sen. Sessions) ("I think anybody ought to be reluctant to up and change [the traditional definition of marriage]; to come along and say, well, you know, everybody has been doing this for 2000 years, but we think we ought to try something different."); *id.* S8089 (daily ed. July 14, 2004) (Sen. Smith) (expressing reluctance to "tinker[] with the foundations of our culture, our

civilization, our Nation, and our future"); 152 Cong. Rec. S5473 (daily ed. June 6, 2006) (Sen. Talent) ("[T]he evidence is not even close to showing that we can feel comfortable making a fundamental change in how we define marriage so as to include same-sex marriage within the definition."). Moreover, particularly in light of the traditional role of states serving as "laborator[ies] … [of] novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 309 (1932) (Brandeis, J., dissenting), Congress could reasonably decide to let states experiment, while the federal government continued to apply the traditional definition for federal law purposes. Congress' decision to neither attempt to override state law definitions for state purposes nor adopt novel state re-definitions for purposes of federal law clearly is a rational response to a change in the definition of a foundational social institution.

To be sure, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). In considering the definition of marriage, Congress recognized that marriage between man and woman "is deeply embedded in the history and tradition of this country" and "has become part of the fabric of our society," in a way that has produced countless immeasurable benefits. *Cf. id.* at 786, 792. DOMA thus was born not of a reflexive adherence to tradition but of an appreciation for these vast benefits and

a reluctance to change the institution of marriage in a way that would have unpredictable consequences for them. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("preserving the traditional institution of marriage" is a rational basis for "laws distinguishing between heterosexuals and homosexuals").

B. Common Federal-State Interests: Congress Rationally Sought to Encourage Responsible Procreation.

In addition to these uniquely federal rationales, DOMA also is supported by the rationales that justified the states' adoption of the traditional definition of marriage in the first place.

First, the traditional definition recognizes the close relationship between opposite-sex marriages and child-rearing. Until recent scientific advances, children could be conceived only though the union of one woman and one man, and this remains the nearly exclusive means by which new lives are brought into existence. Likewise, "[u]ntil a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E. 2d 1, 8 (N.Y. 2006). Although marriage fills other functions as well, its defining purpose is the creation of a social structure to deal with the inherently procreative nature of the male-female relationship—the word "matrimony" itself implicates parenthood. Marriage attempts to promote permanence and stability, which are vitally important to the welfare of the children of the marriage.

Congress specifically recognized this purpose of marriage in enacting DOMA, noting that "[s]imply put, government has an interest in marriage because it has an interest in children." House Rep. 13. This accords with the long tradition of our law, recognizing the tie between marriage and children.[12] Opposite-sex relationships have inherent procreative aspects that can produce unplanned offspring. For this reason, heterosexual relationships implicate the state interest in responsible procreation in a different way, and to a different degree, than do homosexual relationships, and therefore rationally may be treated differently by the government. Numerous courts have upheld states' traditional marriage laws on this basis.[13] Foreign governments have expressed the same view.[14]

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[12] *E.g.*, William Blackstone, *Commentaries on the Laws of England* *447 (citing Puffendorf that "[t]he duty of parents to provide for the maintenance of their children[] is a principle of natural law;" citing Montesqueiu for the proposition "that the establishment of marriage in all civilized states is built on this natural obligation"); *id*. *455 ("the main end of marriage" is "the protection of infants"); Institute for American Values, *Marriage and the Law: A Statement of Principles* 6, 18 (2006) (large group of family and legal scholars who "do not all agree substantively on … whether the legal definition of marriage should be altered to include same-gender couples," stating that "[m]arriage and family law is fundamentally oriented towards creating and protecting the next generation"). California law reflects the same principle. *Aufort v. Aufort*, 49 P.2d 620 (Cal. Ct. App. 1935) ("[P]rocreation of children is the most important end of matrimony.").

[13] *See Citizens for Equal Prot.*, 455 F.3d at 867-68; *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006).

[14] *See* French National Assembly, *Report Submitted on Behalf of the Mission of Inquiry on the Family and Rights of Children* 68 (No. 2832), *English translation at*

(*Continued* …)

The district court erred in rejecting the connection between procreation, childrearing, and marriage. DOMA supports and encourages responsible parenting by making opposite-sex couples eligible for federal benefits if they are married. The district court concluded that DOMA cannot promote responsible child-rearing unless the *denial* of marital benefits to same-sex couples makes *opposite*-sex couples better spouses or parents. *E.g.*, ER 37 ("Denying federal benefits to same-sex married couples has no rational effect on the procreation and child-rearing practice of opposite-sex … couples."). This is inconsistent with rational basis review, and with equal protection jurisprudence.

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http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf, 68 ("[I]t is not possible to consider marriage and filiation separately, since … marriage [is] built around children."); *id.* at 77 ("The institution of Republican marriage is inconceivable absent the idea of filiation and the sex difference is central to filiation. It corresponds to a biological reality—the infertility of same-sex couples …. Above all else, then, it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage."); *Shalk & Kopf v. Austria*, No. 30141/04 E.U. Ct. of H. R. 2010, ¶¶ 44, 63 (same-sex couple claimed that "the procreation and education of children was no longer a decisive element" of marriage; Austria and the United Kingdom opposed and the Court found no right to same-sex marriage); *Joslin v. New Zealand*, No. 902/1999, *in* Report of the Human Rights Comm. Vol. II, U.N. Doc. A/57/40, 214 (2002) (New Zealand argued, *inter alia*, "that marriage centres on procreation, and homosexuals are incapable of procreation;" and "that marriage is an optimum construct for parenting;" the Committee found no right to same-sex marriage).

In an equal protection challenge, a classification is rational if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974); *see Tigner v. Texas*, 310 U.S. 141, 147 (1980) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").[15] The question, therefore, is not whether the denial of benefits to relationships other than opposite-sex couples serves any particular government interest when considered in a vacuum. Rather, it is whether there is a rational reason for extending such benefits to opposite-sex couples that does not apply in the same way, or to the same degree, with respect to same-sex couples. If the district court's contrary view were the law—that is, if Congress could not rationally offer a benefit to one class of people but not to others unless the denial itself confers some *additional* benefit on the first class—then a vast host of government benefits would have to be either extended to virtually everyone, or else eliminated.[16]

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[15] Again, *Perry* is not to the contrary. There, this Court stated that "*Johnson* concerns decisions not to *add* to a legislative scheme a group that is unnecessary to the purposes of that scheme, but Proposition 8 *subtracted* a disfavored group from a scheme of which it already was a part." 671 F.3d at 1087. That distinction does not apply to DOMA.

[16] For instance, in *Regan v. Taxation With Representation*, 461 U.S. 540, 551 (1983), the Supreme Court held it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will

(*Continued* …)

1. DOMA Rationally Focuses on Opposite-Sex Couples in Subsidizing the Begetting and Raising of Children.

Opposite-sex relationships are unique in their inherent biological tendency to produce children: Opposite-sex couples can, and frequently do, conceive children regardless of their intentions or plans. The state thus has an interest in channeling potentially procreative heterosexual activity into the stable, permanent structure of marriage, for the sake of the children, especially unplanned children, that may result. Moreover, when a heterosexual relationship between unmarried individuals produces unplanned offspring, the government has an interest in encouraging marriage to provide a stable environment for the raising of children. Same-sex couples simply do not present this concern.

Unsurprisingly, only a tiny fraction of all children are raised in households headed by same-sex couples,[17] meaning that the overwhelming majority either are raised by opposite-sex couples or were conceived in an opposite-sex relationship that Congress rationally could desire to support and stabilize by offering marital

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subsidize lobbying by veterans' organizations," despite the obvious fact that offering a tax benefit to other charities would have little if any effect on the benefit to veterans' groups. The same could be said of most other government benefits.

[17] UCLA's Williams Institute estimates that "[a]s of 2005 … 270,313 of the U.S.'s children are living in households headed by same-sex couples," Adam P. Romero et al., *Census Snapshot* 2 (Dec. 2007), http://escholarship.org/uc/item/6nx232r4, or 0.37% of the 73,494,000 children in the United States that year. *See Living Arrangements of Children Under 18 Years Old: 1960 to Present*, U.S. Census Bureau, *available at* http://www.census.gov/hhes/families/data/children.html (download "Table CH-1") (number of children).

benefits to the parents. Similarly, opposite-sex couples continue to raise children in significantly greater proportions than same-sex couples.[18] And, in all events, same-sex couples do not raise the same issues with unplanned pregnancies.

Thus, the government can rationally limit an institution designed to facilitate child-rearing to relationships in which the vast majority of children are raised and which implicate unique concerns about unplanned pregnancies. Notably, the rationality of this interest can be determined without inquiring whether the traditional mother-father childrearing arrangement is in any sense "better" than any other. Therefore, while government may and does recognize other relationships in more limited fashions, Congress rationally chose to apply a special set of benefits and duties to traditional marriages.

The district court's apparent antipathy to DOMA,[19] however, led it to overlook basic facts about human biology, such that the court proclaimed that

[18] 2010 Census data indicate that only one in six same-sex couples are raising children. Daphne Lofquist et al., *Housholds and Families: 2010*, Census Br. C2010BR-14 (Apr. 2012), tbl. 3 (see "Same-sex partner preferred estimates" data), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf. This compares with the approximately 40% of opposite-sex couples (both married and unmarried) raising children. *Id.* ("Husband-wife households" and "Opposite-sex partner" data). Another Williams Institute scholar estimates that the proportion of same-sex couples raising children is falling over time, as "[d]eclines in social stigma toward [gay, lesbian and bisexual] people mean that more are coming out earlier in life and are becoming less likely to have children with different-sex partners" before starting a household with a same-sex partner. Gary J. Gates, *Family Focus on … LGBT Families* F2 (Winter 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf.

"there is simply no connection between" laws limiting marital benefits to opposite-sex couples and "the ability (or capacity) to become a parent." ER 37. Taken literally, this of course is obviously wrong: Conceiving a child still biologically requires a man and a woman. The fact that persons not in traditional marriages are legally *permitted* to assume parental rights and responsibilities for a child does not change this, nor make it irrational for Congress to offer special *encouragement* for biological mothers and fathers to marry.

Likewise, although the state has not attempted to *require* people to be able and willing to beget or raise children as a precondition of marriage, *see id.*, this does not vitiate the link between marriage and childrearing. Since only a man and a woman can beget a child together, logically, making those same parties the only ones eligible for marriage is a rational way of linking the two. *Cf. Nguyen v. INS*, 533 U.S. 53, 70 (2001) (even under heightened scrutiny, where a statute classifies based on a genuine biological difference, the courts have not "required the statute … be capable of achieving its ultimate objective in every instance"). This is particularly true where most opposite-sex couples' ability and willingness to raise children cannot be determined in advance without intolerable and possibly unconstitutional intrusions on their privacy—and even then could not be determined with much reliability in many cases.

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[19] *See also, e.g.*, Notice of Questions for Hrg., ECF No.86 (Dec. 16, 2010).

2. DOMA Rationally Encourages and Subsidizes the Raising of Children by Their Own Biological Mothers and Fathers.

One of the strongest presumptions known to our culture and law is that a child's biological mother and father are the child's natural and most suitable guardians and caregivers, and that this family relationship will not lightly be interfered with. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 760 n.11, 766 (1982).[20] Our tradition offers the same protections for an adoptive parent-child relationship, once it is formed—but the stringent standards imposed for eligibility to adopt, which never would be required as a condition of custody of one's own biological offspring, demonstrate the unique value we place on the biological parent-child relationship. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting the protected interest of "a man in the children he has sired and raised"); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (no fundamental liberty interest in adopting a child). And there is a sound logical basis for this bedrock assumption: Biological parents have a genetic stake in the success of their children that no one else does.

It is rational for government to encourage relationships that result in mothers and fathers jointly raising their biological children. By offering benefits to opposite-sex couples in enacting DOMA, and imposing the marital expectations of

[20] International law recognizes the same principle. *See* United Nations Convention on the Rights of the Child, art.7, 29 I.L.M. 1456, 1460 (Nov. 20, 1989) (a child has a right, "as far as possible, to know and be cared for by his or her parents").

fidelity, longevity, and mutual support, that is what Congress did. Because same-sex relationships are incapable of creating families of mother, father, and biological children, the legitimate state interest in promoting a family structure that facilitates the rearing of children by both biological parents is distinctively served by the traditional definition.

The district court simply rejected wholesale our society's preference for mothers and fathers to raise their own biological children, labeling it as a "bias" and astonishingly stating that "there is no … recognition of this distinction under federal or state law." ER 37. The notion that this axiom of American culture and family law is irrational—that the Constitution actually *prohibits* government from acting on the belief that children generally benefit from being raised by their own biological parents—should be rejected by this Court.

At Ms. Golinski's behest, the district court relied on social science research to attempt to prove its conclusion that a preference for parenting by a child's biological mother and father is irrational. The court stated "that same-sex parents are equally capable at parenting as opposite-sex parents," and that this has been "overwhelmingly demonstrated." ER 27. This was error.

Both the Eleventh Circuit and the New York Court of Appeals have rejected this constitutionalizing of the social science evidence. *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 824-26 (11th Cir. 2004); *Hernandez*, 855

N.E.2d at 7-8. And for good reason. It cannot be that the Constitution gives social scientists the final say, to the exclusion of the people and their legislators, on questions as complex and fundamental as what is good parenting and what is the optimal experience for children. Indeed, Ms. Golinski's expert admitted in this very case that developmental psychology involves "complex and nuanced questions" that "rarely" can be evaluated in a statistically rigorous fashion that permits conclusions to be generalized to the population at large. Decl. of Michael Lamb, N.D. Cal. ECF 136, ¶ 34; *cf. Craig v. Boren*, 429 U.S. 190, 204 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business.").

The level of empirical support needed for social-science researchers or groups to make policy recommendations[21] therefore obviously is far lower than that needed to make it unconstitutionally irrational for Congress to decline to adopt those recommendations. And the deficiencies in the research relied on by the district court—which have been noted by numerous respected commentators of all stripes—underscore just how important it is to leave the evaluation of competing social science to the politically accountable branches, rather than constitutionalizing anyone's version of "social statics." *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). To give just a few examples of

[21] *Cf.* Decl. of Michael Lamb, ECF 136, ¶ 32.

the limits of the social science that the district court constitutionalized, these observers have remarked that with rare exceptions, the studies:

(1) Feature such small sample sizes that they are highly unlikely to detect differences in average outcomes that might exist between children raised by same-sex couples and other children—with the result that any differences the studies *do* detect can be dismissed as statistically insignificant. In technical statistical terms, the studies are seriously "underpowered;"[22]

[22] *See* Margaret F. Brinig, *Promoting Children's Interests Through a Responsible Research Agenda*, 14 U. Fla. J.L. & Pub. Pol'y 137, 148 (Spring 2003); Robert Lerner and Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* 95-110 (2001), *available at* http://www.marriagewatch.org/publications/nobasis.pdf; Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting* 15-20, 22 (Oct. 2011), *available for download at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937762; Aff. of Steven Lowell Nock ¶¶ 100-107, 116-119, 130-31, *Halpern v. Atty. Gen. of Canada* (2001), no. 684/00 (Ont. Sup. Ct. J.), *available at* http://www.marriagewatch.org/Law/cases/Canada/ontario/halpern/aff_nock.pdf; Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 Demography 755 (Aug. 2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000058/?tool=pmcentrez ("The universally small sample sizes of the studies … has left room for … the argument that [they] would not have the statistical power to identify the effects of homosexual parents on childhood outcomes even if such effects did exist.") (attempting to remedy this defect regarding one narrow metric); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and their Children: A Review*, 26 Dev. & Behav. Pediatrics 224, 234-35 (June 2005); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 Fam. L.Q. 381, 401 (Fall 2006).

(2) Utilize non-random samples the results from which cannot be abstracted to the population at large, [23] and overrepresent highly-motivated, wealthy, well-educated same-sex parenting couples, who are likely to report better child outcomes for that reason;[24]

(3) Do not even seriously try to compare the outcomes of children of same-sex couples with the children of married heterosexual couples, but instead often contain no control group at all, or a control group of single heterosexual mothers or a mixture of single, cohabiting, and married heterosexual parents;[25] and

(4) Include very little study of children raised by gay male couples.[26]

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[23] Lerner & Nagai, *supra* n.22, 69-82; Brinig, *supra* n.22, 148 & n.54; Rosenfeld, *supra* n.22 (noting that "[m]ore recent scholarship" has moved toward sounder sampling); Marks, *supra* n.22, 3-6; Nock, *supra* n.22, ¶¶ 22-40, 82, 116, 130-31; Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation*, 3 S.Cal. Interdisc. L.J. 631, 642-44 (1994) (discussing hazards of nonrepresentative sampling).

[24] Lerner & Nagai, *supra* n.22, 74-75; Judith Stacy & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 Am. Soc. Rev. 159, 166 (2001); Tasker, *supra* n.22, 134 ("A representative sample … probably constitutes an unattainable goal at present."); Wald, *supra* n.22, 400-01 ("[T]he findings from most studies cannot be generalized beyond the study population ….").

[25] Brinig, *supra* n.22, 148-49 & n.55; Lerner & Nagai, *supra* n.22, 26-29, 34-42, 48-50; Marks, *supra* n.22, 6-9; Wald, *supra* n.22, 400; *see generally* Tasker, *supra* n.22.

[26] ER 60 ("Studies of children raised by same-sex parents have almost exclusively focused on families headed by lesbian mothers rather than gay fathers."); Marks,

(*Continued* …)

The state of this research was well summarized by two self-described supporters of same-sex marriage in 2005: "[T]hose who say the evidence shows that many same-sex parents do an excellent job of parenting are right. Those who say the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are also right." Meezan & Rauch, *supra* 40, at 104; *cf. Hernandez*, 855 N.E. 2d at 8 ("What [the studies] show, at most, is that rather limited observation has detected no marked differences.")

Thus, one need not conclusively agree or disagree with this research to see that it cannot dictate the limits on Congress' rational options in dealing with a contested and sensitive issue. Many states permit same-sex couples to raise children, and Congress has not interfered. But it still rationally could find a unique degree of government encouragement appropriate for arrangements where children are raised by the man and woman who brought them into the world.

3. DOMA Rationally Encourages Childrearing in a Setting with Both a Mother and a Father.

Even aside from the biological link between parents and children, biological differentiation in the roles of mothers and fathers makes it fully rational to encourage situations in which children have one of each. As the Supreme Court recognizes in other contexts, "[t]he two sexes are not fungible; a community made

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supra n.22, 5-6; Rosenfeld, *supra* n.22; Stacy & Biblarz, *supra* n.24, 166; Tasker, *supra* n.22, 230, 235.

up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

Common sense, and the experience of countless parents, informs us that children relate and react differently to mothers and fathers based on the typical differences between men and women in parenting style, size, and voice tone. Moreover, the different challenges faced by boys and girls as they grow to adulthood make it eminently rational to think that children benefit from having role models of both sexes in the home. The bald declaration of Ms. Golinski's expert that "empirical research … has demonstrated that father absence is not itself important to adjustment," Decl. of Michael Lamb, ECF 136, ¶ 24, and that children can substitute other adults in "society" for a parental role model of one sex or the other, *id.* ¶ 28, is not even close to sufficient to make it irrational for Congress to conclude otherwise.

Finally, Congress could also have rationally concluded that opposite-sex couples are more likely to remain together in committed relationships than are same-sex couples, as recent empirical evidence tends to suggest. *E.g.*, M. Kalmijn et al., *Income Dynamics in Couples and the Dissolution of Marriage and Cohabitation*, 44 Demography 159, 170 (2007); G. Andersson et al., *The*

Demographics of Same-Sex Marriages in Norway and Sweden, 43 Demography 79, 93 (2006).

V. ANY REDEFINITION OF MARRIAGE SHOULD BE LEFT TO THE DEMOCRATIC PROCESS

When it comes to same-sex marriage, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt*, 447 F.3d at 681. Fortunately, there is an alternative: Same-sex marriage is being actively debated in legislatures, in the press, and at every level of government and society across the country.

That is how it should be. These fora require participants on both sides to persuade those who disagree, rather than labeling them irrational or bigoted. Importantly, gay-rights supporters have ample and increasing clout in Congress and the Executive Branch. Congress' recent repeal of "Don't Ask, Don't Tell" is one prominent example. *See* Pub. L. No. 111-321, 124 Stat. 3515. And bills to repeal DOMA are pending in both houses of Congress, and have passed the Senate Judiciary Committee. *See* Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act, S. 598, 112th Cong. (2011).

By contrast, the courts can intervene in the debate only to cut it short, and only by denouncing the positions of the hundreds of Members of Congress who voted for DOMA, of the President who signed it, and of a vast swathe of the

American people as not just mistaken or antiquated, but as wholly irrational. That conclusion plainly is unwarranted as a matter of constitutional law, and judicially constitutionalizing the issue of same-sex marriage is unwarranted as a matter of sound social and political policy while the American people are so actively engaged in working through this issue for themselves. Instead, this Court should "permit[] this debate to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded with instructions to dismiss the complaint with prejudice.

Respectfully submitted,

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June 4, 2012

STATEMENT OF RELATED CASES

The House and its counsel know of no related cases pending in this Court.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 4, 2012.

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