Nos. 12-15388, 12-15409 (Consolidated)

United States Court of Appeals for the Ninth Circuit

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants,

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

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants,

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

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF INTERVENER-APPELLANT IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: June 11, 2012

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") is a nonprofit Illinois corporation founded in 1981. Eagle Forum has consistently defended traditional American values, including traditional marriage – defined as the union of husband and wife – and the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"). Accordingly, Eagle Forum has a direct and vital interest in the issues before this Court. Eagle Forum files this *amicus* brief with the consent of all parties.[1]

STATEMENT OF THE CASE

An employee of this Court, Karen Golinski ("Plaintiff"), began this case in an Employee Dispute Resolution Plan proceeding in this Court. Second Am. Compl. ¶47. As a result of that process, Chief Judge Kozinski – sitting in his administrative capacity – ordered the Executive defendants to allow Plaintiff to add her same-sex spouse to her family health plan, notwithstanding that federal law defines

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

"spouse" and "marriage" to apply only with respect to "a legal union between one man and one woman as husband and wife." 1 U.S.C. §7. He also awarded her back pay to cover the time when she paid for the additional insurance coverage as out-of-pocket costs. Second Am. Compl. ¶55. This action ensued, first as a mandamus action to enforce the Chief Judge's administrative orders and then, by amendment, via the current complaint. *Id.* ¶¶59-62. As now amended, Plaintiff's complaint pleads jurisdiction based in part on the "Little Tucker Act," 28 U.S.C. §1346(a)(2). *Id.* ¶¶11, 55. As is customary and for good reason, the complaint includes a general prayer for "such other and further relief as the Court may deem just and proper." *Id.* at 17:17. The District Court ruled for Plaintiff without addressing back pay, *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968 (N.D. Cal. 2012) ("*Golinski*"), and the Executive defendants and the intervener-defendant both appealed to this Court.

SUMMARY OF ARGUMENT

Plaintiff unmistakably pleaded, and the District Court unmistakably had, jurisdiction based in part on the Little Tucker Act (Section I). Although she also had a traditional action for equitable and

declaratory relief, 28 U.S.C. §1295(a)(2) requires that appeals of such "mixed" cases go to the U.S. Court of Appeals for the Federal Circuit, not the regional courts of appeals (Section I.C). As such, this Court lacks jurisdiction for these appeals and should transfer them to the Federal Circuit under 28 U.S.C. §1631 (Section I.D).

On the merits, the District Court failed to follow binding Circuit and Supreme Court precedent on the precise question presented here, *Baker v. Nelson,* 409 U.S. 810 (1972); *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982), and decisions in other areas do not undermine those two precedents such that district judges or three-judge panels may simply ignore them (Section II.A). Most significantly, under those precedents' rational-basis test, DOMA easily qualifies under both the reasonable procreation and childrearing and fiscal-prudence rationales (Sections II.B, II.D). Further, with respect to responsible procreation and childrearing, the rational-basis test does not allow courtroom fact-finding under the District Court's summary-judgment analysis (Section II.C); instead, Plaintiff bears the burden to negative every possible rationale that Congress may have had, and the required data simply do not yet exit.

ARGUMENT

I. BECAUSE THE DISTRICT COURT'S JURISDICTION RELIED IN PART ON THE LITTLE TUCKER ACT, APPELLATE JURISDICTION LIES IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

As summarized in the Statement of the Case, the District Court's jurisdiction over the entire dispute between Plaintiff and the defendants and intervener-defendant plainly relies in part on the Little Tucker Act. Indeed, Plaintiff specifically pleaded her complaint to that effect. Second Am. Compl. ¶11. In addition, she sought review under federal-question jurisdiction and the Administrative Procedure Act's waiver of sovereign immunity. *Id.* As explained in this Section, Congress authorized such "mixed" suits to begin in the U.S. District Courts, 28 U.S.C. §1346(a)(2), but required that appeals in all such cases go to the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. §1295(a)(2). Consequently, this Court lacks jurisdiction over this appeal: "'[i]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.'" *McGuire v. U.S.,* 550 F.3d 903, 913-14 (9th Cir. 2008) (*quoting Minnesota v. United States,* 305 U.S. 382, 388 (1939)). Under the circumstances, transfer to the Federal Circuit is the appropriate

action for this Court to take.

A. The Traditional Routes to Equitable and Declaratory Relief Do Not Provide a Waiver of Sovereign Immunity for Money Damages

Before analyzing the Little Tucker Act issues, *amicus* Eagle Forum first establishes that no other basis provides jurisdiction for the back-pay issue. Officer suits for *prospective* injunctive relief against ongoing violations of federal law can be an exception to sovereign immunity, *Ex parte Young,* 209 U.S. 123 (1908), but that exception does not allow money damages or even "retroactive payment of benefits … wrongfully withheld." *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Similarly, 5 U.S.C. §702 "eliminates the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer," *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. REP. NO. 94-996, 8 (1976)), but its express terms omit "money damages." 5 U.S.C. §702. As such, the routes to equitable and declaratory relief are foreclosed here as to monetary relief.

B. Other than the Little Tucker Act, the Routes to Monetary Relief Are Unavailable

To recover money damages, plaintiffs must proceed under a waiver of sovereign immunity for such damages. The Federal Tort

Claims Act ("FTCA") waives sovereign immunity for tort-related damages, but that waiver excludes "claim[s] based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. §2680(a). Falling outside FTCA's waiver of sovereign immunity forecloses tort damages. *Molzof v. U.S.,* 502 U.S. 301, 304-05 (1992) (before FTCA, "sovereign immunity … prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits").

In addition, a "*Bivens*" action covers *some* equal-protection violations, *Davis v. Passman,* 442 U.S. 228, 247-49 (1979), but only for individual-capacity defendants: "[A] Bivens action can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States,* 482 F.3d 1157, 1173 (9th Cir. 2007) (*quoting Daly-Murphy v. Winston,* 837 F.2d 348, 355 (9th Cir. 1987)). Plaintiff sued the federal officer defendant in his official capacity.

C. 28 U.S.C. §1295(a)(2) Requires Appeals in "Mixed" Little Tucker Act Cases to Go to the U.S. Court of Appeals for the Federal Circuit

For damage claims not sounding in tort, the Little Tucker Act provides district-court jurisdiction for nontax claims up to $10,000, and the Tucker Act provides jurisdiction for all amounts. 28 U.S.C. §§1346(a)(2), 1491(a)(1). As indicated, the relatively recent addition of §1295 vests the Federal Circuit with all appeals of non-tax district court cases with jurisdiction premised in part on the Little Tucker Act.[2]

For "mixed" injunctive and Little Tucker Act cases, the Federal Circuit has exclusive appellate jurisdiction "over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *U.S. v. Hohri,* 482 U.S. 64, 73 (1987) (emphasis in original). That specifically includes "mixed cases" with nontax Little Tucker Act claims coupled with claims typically resolved in regional courts of appeals. *Hohri,* 482 U.S. at 78; 28 U.S.C. §1295(a)(2).

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[2] Congress enacted 28 U.S.C. §1295 as part of the Federal Courts Improvement Act of 1982. *See* Pub. L. No. 97-164, Title I, §127(a), 96 Stat. 25, 37 (1982). One of the Federal Courts Improvement Act's purposes was "to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where congress determines there is a special need for nationwide uniformity." S.Rep. No. 97-275, at 2 (1981).

"That [the plaintiff] also seeks declaratory and injunctive relief on grounds other than the Little Tucker Act is of no moment." *Brant v. Cleveland Nat'l Forest Service,* 843 F.2d 1222, 1223-24 (9th Cir. 1988) (Kozinski, J.); *Banks v. Garrett,* 901 F.2d 1084, 1088 (Fed. Cir. 1990). Here, the District Court's jurisdiction was based – in part – on the Little Tucker Act, which is dispositive of the locus for an appeal.

One might protest that the District Court's judgment did not reach the issue of money damages or back pay, which makes the Little Tucker Act superfluous. That is not the law. By asserting the Little Tucker Act as a jurisdictional predicate, Second Am. Compl. ¶11, alleging the entitlement to back pay, *id.* ¶55, re-alleging her prior allegations in her contract-based count, *id.* ¶63, and seeking "such other and further relief as the Court may deem just and proper," *id.* at 17:17, Plaintiff pleaded a contractual entitlement to back pay. *Lockhart v. Leeds,* 195 U.S. 427, 436-37 (1904) (a complaint's "general prayer" for relief allows awarding relief not specifically pleaded); *Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 424, 455 (1997). In any event, the plain language of the jurisdiction for appellate review applies "if the jurisdiction of that court was based, in whole or in part, on section 1346

of this title." 28 U.S.C. §1295(a)(2).

Significantly, that plain language is not limited to jurisdiction for judgments, but applies instead to the underlying jurisdiction of the District Court *to entertain the action:*

> [S]ection 1295(a) makes the jurisdiction of the Federal Circuit dependent not on the claim currently before an appellate court but on the jurisdiction of the district court at the time the case was brought before the district court.

In re All Asbestos Cases, 849 F.2d 452, 453-54 (9th Cir. 1988). As such, this is a "mixed case," and this appeal belongs in the Federal Circuit. Moreover, because this Court lacks jurisdiction, it cannot reach the merits: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102 (1998).

D. This Court Should Transfer this Appeal to the U.S. Court of Appeals for the Federal Circuit

Although this Court lacks jurisdiction over this appeal, it does not follow that this Court must *dismiss* the appeal. The same statute that enacted §1295 also enacted the solution to this Court's lack of jurisdiction: the transfer provisions of 28 U.S.C. §1631:

> Whenever … an appeal … is noticed for or filed with … a [federal] court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Title III, §301(a), 96 Stat. at 55. In the event that this Court were to reach the merits, the Supreme Court "would have to vacate [this Court's] judgment and remand the case with directions to transfer the appeal pursuant to 28 U.S.C. §1631 to the Federal Circuit." *U.S. v. Mottaz,* 476 U.S. 834, 848 n.11 (1986). Accordingly, this Court should not waste its or the parties' resources without deciding the jurisdictional question.

If this Court finds that it lacks appellate jurisdiction under §1295, "[t]ransfer should be made freely to avoid loss of the right to appeal." 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED'L PRAC. & PROC. Juris. §3903.1 (2d ed. 1992 & Supp.); *Professional Managers' Ass'n v. United States,* 761 F.2d 740, 743 (D.C. Cir. 1985); *Cleveland Nat'l Forest Serv.,* 843 F.2d at 1224. Transfer to the Federal

Circuit would serve the interests of national uniformity under both DOMA and the Federal Courts Improvement Act and, in addition, would remove any unfairness implied by this Court sitting in judgment of one of its own employees.

II. IF IT HAS JURISDICTION, THIS COURT MUST REVERSE THE DISTRICT COURT BECAUSE DOMA DOES NOT VIOLATE EQUAL PROTECTION

The District Court failed to follow binding Circuit and Supreme Court precedent in several respects for equal-protection claims. If it has jurisdiction, this Court must reverse the District Court and remand with instructions to grant the House's motion to dismiss for failure to state a claim on which relief can be granted.

A. The District Court Did Not Follow Controlling Precedents from the Supreme Court or this Court

The District Court ignored controlling Supreme Court and Circuit precedent on the precise question presented here and then ventured unnecessarily into the question of whether *Lawrence v. Texas,* 539 U.S. 558 (2003) undermined *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563 (9th Cir. 1990), sufficiently to revisit Circuit precedent on the applicability of the rational-basis test. *Golinski,* 824 F.Supp.2d at 981-90. This Court should take the

opportunity to reiterate the high bar it sets for District Courts to ignore otherwise-binding Circuit precedent.

By way of background, where "a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (interior quotations omitted). This Court's requirements for when Circuit precedent "constitutes binding authority which must be followed unless and until overruled by a body competent to do so," *Gonzalez v. Arizona,* 677 F.3d 383, ___ n.4 (9th Cir. 2012) (*en banc*) (interior quotations omitted), are slightly less demanding, but stringent nonetheless:

> [There are] recognized exceptions to the law of the circuit rule. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*) (holding that where "the relevant court of last resort" has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable,"* then "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled")[.]

Id. (emphasis added). Significantly, "clearly irreconcilable" does not allow lower courts or three-judge panels to ignore law of the Circuit that merely has "sustained serious erosion by virtue of more recent decisions." *Golinski,* 824 F.Supp.2d at 983. Erosion is one thing; *clear irreconcilability* is another.

Working under the equal-protection component of the Due Process Clause, this Court already has held that Equal Protection does not require Congress to recognize same-sex marriage:

> Congress's decision to confer spouse status ... only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements.

Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982). That alone is dispositive, both on the merits and on the level of scrutiny.

Equally dispositive – but beyond this Court's authority to dispute – the Supreme Court also has determined that constitutional Equal Protection does not provide a right to same-sex marriage. *See* House Br. at 20-24 (discussing *Baker v. Nelson,* 409 U.S. 810 (1972)).[3]

[3] The Due Process Clause's equal-protection component at issue in *Adams* is equivalent to the Fourteenth Amendment's Equal Protection

Because the Supreme Court resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court must review the *Baker* jurisdictional statement and any other relevant aid to construction in order to ascertain what issues the Court's summary dismissal "presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). The *Baker* jurisdictional statement plainly presented (and *Baker* thus plainly decided) the question whether denying same-sex marriage violates Equal Protection. Taking the Supreme Court at its word, nothing has undermined *Baker* with respect to same-sex marriage. *Lawrence v. Texas,* 539 U.S. 558, 578 (2003) (*Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"). Under the circumstances, the clear command in *Agostini, supra,* is that this Court must "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions."

In holding DOMA unconstitutional, the First Circuit recently cited a trio of inapposite decisions – *U.S. Dept. of Agric. v. Moreno,* 413 U.S.

Clause at issue in *Baker*. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

528 (1973), *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985), and *Romer v. Evans,* 517 U.S. 620 (1996) – as establishing a heightened form of rational-basis review. *Massachusetts v. U.S. Dep't of Health & Human Serv.,* __ F.3d __, 2012 WL 1948017 (1st Cir. 2012). As explained below, none of these cases undermine *Baker* or *Adams.*

Both *Moreno* and *Cleburne Living Center* involved as-applied challenges by plaintiffs who were "collateral damage" to laws that could be validly applied to their intended targets. In *Moreno,* Congress amended the criteria for food-stamp eligibility to exclude households of unrelated people in an effort to avoid supporting "hippie communes" and as a result denied equal protection to the poor. 413 U.S. at 537-38. That says nothing against denying benefits to the law's actual targets: namely, educated young adults, with access to family money, who had simply "tuned out" for a lark, and – even worse – who could remain eligible for food stamps by altering their living arrangements. *Id.*

In *Cleburne Living Center,* the Court recognized four then-current, IQ-based classifications of mental retardation – ranging from 89 percent in the 50-70 range, 6 percent in the 35-50 range, with the remaining 5 percent split between the 20-35 and under-20 categories – and upheld

an as-applied challenge to a zoning ordinance by a group home consisting of residents in only the upper two classifications, who had none of the potential dangers associated with patients in the lower classifications. 473 U.S. at 442 n.9, 449. Again, that says nothing about requiring a special-use permit for an institution that would serve patients who present potential dangers to themselves and others.

Both *Moreno* and *Cleburne Living Center* sustained challenges against regulations that broadly – indeed, over-broadly – affected individuals beyond the regulation's intended and permissible scope. By contrast, DOMA has no unintended consequences: Congress intended DOMA to cover everyone that DOMA covers, and DOMA's primary goals apply to each DOMA-covered person.

The *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. By contrast, as applied to Plaintiff, DOMA does not repeal any rights that ever existed outside of a post-DOMA, state-law judgment to which

Plaintiff is not even a party.[4]

B. The Federal Government Can Limit Marriage Benefits to Opposite-Sex Couples to Support Responsible Procreation and Childrearing

The most widely recognized purpose of marriage is to provide a stable and loving structure for procreation and childrearing. As defined by DOMA, marriage serves that legitimate end. *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (tying marriage to "our very existence and survival"). Children born within a marriage have the uniquely valuable opportunity to know their own biological mother and father. Numerous reported decisions and common understanding clearly establish these social goals as both worthy and well served by marriage as defined by DOMA.

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820

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[4] In this respect, this litigation differs from this Court's recent decisions in *Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011), and *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012), where this Court invalidated state action that *withdrew* benefits previously accorded to same-sex couples under state law.

(11th Cir. 2004); *Maynard v. Hill,* 125 U.S. 190, 211 (1888) (marriage is "an institution regulated and controlled … for the benefit of the community," in which "the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); *Citizens for Equal Prot. v. Bruning,* 455 F.3d 859, 867 (8th Cir. 2006) ("the many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in steering procreation into marriage"). By contrast, same-sex marriage obviously cannot serve these goals.

Somewhat inconsistently, the District Court suggests that opposite-sex marriage gets no benefit from federal recognition – thereby revealing the lack of a rational basis for DOMA – whereas same-sex marriage needs that same recognition. *Golinski,* 824 F.Supp.2d at 998. Under rational-basis review, however, Congress certainly could reasonably believe that subsidizing and recognizing desired behavior (opposite-sex marriage) will lead to more of that behavior. That is reason enough for the rational-basis test.

The District Court argues that DOMA's allowing infertile opposite-sex couples to marry somehow disproves these rationales.

Golinski, 824 F.Supp.2d at 993. That argument is meritless under rational-basis review. First, unlike strict scrutiny, the rational-basis test does not require the state to narrowly tailor marriage to its legitimate purposes (*e.g.,* procreation or childrearing): "[r]ational basis review … is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and "[a] statute does not fail rational-basis review because it is not made with mathematical nicety or because *in practice it results in some inequality*." *Doe v. U.S.,* 419 F.3d 1058, 1063 (9th Cir. 2005) (interior quotations omitted, emphasis added); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

C. The District Court Impermissibly Engaged in Courtroom Fact-Finding on Legislative Facts

Because it applied the wrong equal-protection analysis, the District Court improperly awarded the Plaintiff summary judgment on the question of whether same-sex parenting is equal to opposite-sex

parenting by a child's biological parents. Specifically, the Court weighed the admittedly incomplete data on same-sex parenting against the House's failure to introduce sufficient rebuttal data to create a genuine dispute of material fact. *Golinski,* 824 F.Supp.2d at 991-93.

To prevail, however, a rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988) ("the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective") (interior quotations omitted). "The difficulty with applying [the clearly-erroneous] standard to 'legislative' facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies … has reached a [contrary] conclusion." *Lockhart v. McCree,* 476 U.S. 162, 170 n.3 (1986). It is enough, for example, that Congress may have considered marriage to have benefits for responsible procreation and childrearing:

> The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the

> classification, the legislative facts on which the classification is apparently based *rationally may have been considered to be true by the governmental decisionmaker,* and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Neither Plaintiff nor the District Court *negatives* the bases on which Congress acted and the other plausible bases on which it might have acted.

Significantly, "a legislative choice" like DOMA "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993) (same). Plaintiff could not prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Here, however, sufficient data simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage.

Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, Plaintiff here faces an *impossible* burden. There are no multigenerational, longitudinal studies that purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Plaintiff *never* will be able to negative the value of traditional husband-wife families for childrearing, Plaintiff clearly cannot prevail when the data *required by her theory of the case* do not yet exist. And yet those data are Plaintiff's burden to produce. Unlike legislators, Plaintiff cannot ask that we take her word (or her evidence) for it.

D. DOMA Provides a Permissible Federal Rule for the Rational Control of Federal Expenditures

In part, Congress premised DOMA on the need to preserve federal funds. H.R.Rep. No. 104–664, at 12 (1996), 1996 U.S.C.C.A.N. 2905, 2916 ("governmental interests advanced by [DOMA]" include "preserving scarce government resources"). Assuming *arguendo* that budgetary concerns were the *only* conceivable basis for legislative action, a plaintiff theoretically could avoid dismissal for failure to state a claim by denying "the very existence of a … shortage." *Lockary v.*

Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). Unlike the water shortage in *Lockary,* however, the federal government's available funds always will be limited when compared to all possible uses of public funds. Moreover, the exaction of each marginal unit of federal revenue operates as a brake on the economy and thus always comes at a cost.

While Plaintiff complains that – before DOMA – the Federal Government *typically* looked to state law to determine the validity of a marriage,[5] "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 988-89 (9th Cir. 1987) (interior quotations omitted). Moreover, the pre-DOMA federal posture was not a *rule of law* so much as mere *inaction.*

"Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require

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[5] It is not true that the Federal Government always has deferred to state or territorial family law. First, the Federal Government criminalized bigamy, *Reynolds v. U.S.,* 98 U.S. 145 (1879). Second, and much more recently, numerous federal benefit programs such as Social Security and the Employee Retirement Income Security Act retain rights in divorced spouses after state law has terminated the marriage and preempt inconsistent state rules in the interest of national uniformity. *See, e.g., Egelhoff v. Egelhoff,* 532 U.S. 141, 147-48 (2001).

resort to uniform federal rules." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 727-28 (1979). Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) (internal quotation omitted). Now that Congress has acted with a federal law for a federal program, this Court lacks authority to order the *federal* government to follow *state* law.

CONCLUSION

This Court lacks jurisdiction and should transfer these appeals to the Federal Circuit pursuant to 28 U.S.C. §1631. If it finds that it has jurisdiction, this Court must reverse the district court and remand with instructions to dismiss for failure to state a claim.

Dated: June 11, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 4,766 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: June 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2012, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the participants in the case were unregistered for CM/ECF use.

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