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-Appellants,

and

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

Intervenor-Defendant-Appellant.

Appeal From The United States District Court For The Northern District of California

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BRIEF OF *AMICI CURIAE* LEGAL MOMENTUM, CALIFORNIA WOMEN'S LAW CENTER, AND LEGAL VOICE IN SUPPORT OF PLAINTIFF-APPELLEE KAREN GOLINSKI

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CORPORATE DISCLOSURE STATEMENT

None of the *amici* has a parent corporation and no corporation owns 10% or more of any of *amici*'s stock.

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INTEREST OF *AMICI CURIAE*

A. Legal Momentum

Amicus Legal Momentum is the oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For more than 40 years, Legal Momentum has made historic contributions through litigation and public policy advocacy to advance economic and personal security for women. Legal Momentum's work extends across a wide range of areas related to discrimination, gender equity and gender bias. Legal Momentum continues to champion the rights of women and girls by working to eradicate harmful stereotypes and policies shaped by bias.

B. California Women's Law Center

Amicus California Women's Law Center ("CWLC"), founded in 1989, is dedicated to addressing the comprehensive and unique legal needs of women and girls. CWLC represents California women who are committed to ensuring that life opportunities for women and girls are free from unjust social, economic, legal and political constraints. CWLC's Issue Priorities on behalf of its members are gender discrimination, women's health, reproductive justice and violence against women. CWLC and its members are firmly committed to eradicating invidious discrimination in all forms. CWLC recognizes that women have historically been the target of invidious discrimination and unequal treatment under the law.

C. Legal Voice

Amicus Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislation, education, and the provision of legal information and referral services. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination, including gender stereotyping. To that end, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender individuals. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice presently serves on the governing board of Washington United for Marriage, a broad coalition working to secure and defend civil marriage for same-sex couples in Washington State.

D. Interests of *Amici* Curiae

Amici submit this brief[1] to urge the Court to apply heightened scrutiny to DOMA on what *amici* believe to be the obvious basis that it discriminates based on

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored any part of this brief or contributed money intended to fund this brief.

sex.[2] *Amici* are dedicated to ending sex discrimination and achieving full equality for women and girls. Each *amicus* has extensive knowledge concerning issues of discrimination based on sex and sex stereotypes. They have a particular interest in protecting women and men, including lesbians and gay men, from gender discrimination and gender-based stereotypes. For these reasons, *amici* have a strong interest in the present case and in ensuring that laws that discriminate on the basis of sex are subject to heightened scrutiny and are stricken where they do not satisfy such scrutiny.

INTRODUCTION AND SUMMARY OF ARGUMENT

Karen Golinski is the target of state-ordered discrimination. It is undisputed that Ms. Golinski is denied federal recognition of her marriage because she is a female married to a female. It is undisputed that if Ms. Golinski were male, her (his) marriage would be recognized. It is undisputed that if Ms. Golinski had married a male, her marriage would be recognized by the federal government. *See* S.E.R. 154. Thus, at core, the state strips Ms. Golinski of her rights because of her sex. Her dignity is diminished because of her sex. Her liberty is restricted because of her sex. Her freedom to enter into intimate associations is restricted because of

[2] To hold that Ms. Golinski is not the victim of sex discrimination would create a gaping exception to the court's sex discrimination jurisprudence. In the future, such a holding would allow statutes that discriminate against women to avoid the intermediate scrutiny applied to sex discrimination so long as the statute discriminates in some way against men, or so long as the statute can also be explained as sexual-orientation discrimination.

her sex. Her ability to maintain her property is restricted because of her sex. That Ms. Golinski is also discriminated against because of her sexual orientation in no way diminishes the sex discrimination she suffers. Such sex-based discrimination, while once endorsed by the laws of the United States, is no longer permitted.

This sex discrimination manifests itself in significant, damaging ways. Ms. Golinski, because she is female rather than male in these particular circumstances, is denied federal recognition of her marriage to her partner of 21 years (and wife of 4 years), Amy Cunninghis. Female federal employees across the country are prevented from enrolling their female spouses in their employee health plans because the employees are women.[3]

Appellant Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG"), in defending the Defense of Marriage Act ("DOMA"), argues that DOMA does not discriminate based upon Ms. Golinski's sex. BLAG does not deny that Ms. Golinski's relationship is not recognized because she is a female married to a female. Rather, BLAG contends this discrimination passes constitutional muster because males married to males are also denied federal recognition. In other words, BLAG asserts that because DOMA discriminates

[3] Indeed, a mere nine days after submitting enrollment forms for Ms. Cunninghis, the Administrative Office of the United States Courts denied the request because "Ms. Golinski and her spouse are both *women*." First Amended Complaint, ¶¶ 22-23 (emphasis added).

against both lesbian women and gay men, the discrimination is permissible. Sex discrimination, however, is not made constitutional because the other sex may also suffer discrimination in different circumstances. Surely, Ms. Golinski's harms are not diminished or excused (and her dignity restored) because a male colleague who is married to a male is also unable to obtain benefits.[4] The very argument is preposterous.

Stated differently, if Congress had passed a law barring women from working in certain federal government jobs Congress deemed "traditionally male" and, in the same statute, barred men from working in other jobs, constituting the same percentage of the federal workforce, that Congress deemed "traditionally female," this Court would recognize such a statute as a classification based on sex that is subject to heightened scrutiny when challenged on equal protection grounds.[5] If a female applicant to one of the prohibited jobs brought suit to

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[4] As Justice Kennedy has explained, the Equal Protection Clause is "concern[ed] with right of individuals, not groups." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors.").

[5] This analogy of course holds true in the race discrimination context as well. If a state law barred African Americans from certain schools, but also barred whites from other schools, this Court would hold that the law violates equal protection, no matter that both African-Americans and whites suffered

overturn the statute, no court would reject her request because the statute excludes men from an equal number of federal jobs.[6] In the arena of marriage, this is exactly what the proponents of DOMA advocate. Under DOMA, women are ineligible to have their marriages to certain persons recognized only because they are women; a man married to the same person would have his marriage recognized. This is sex discrimination, and it does not matter that the statute "equalizes" this treatment by placing restrictions on the class of persons a man can marry.[7]

ARGUMENT

I. Section 3 of DOMA is Unconstitutional

A. Section 3 Of DOMA Is Subject To Heightened Judicial Scrutiny Because It Discriminates On The Basis Of Sex.

It is well established that sex-based classifications require the application of heightened judicial scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (the Equal Protection Clause prohibits

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discrimination. *See Brown v. Board of Ed.*, 347 U.S. 483 (1954). The Supreme Court has held the same in the context of marriage. *See Loving v. Virginia,* 388 U.S. 1, 9 (1967) (holding that Virginia's anti-miscegenation law constituted unlawful racial discrimination even though it applied with equal force to blacks and whites).

[6] *See* note 13, *infra*.

[7] *Cf. Craig v. Boren*, 429 U.S. 190 (1976) (holding that a state statute that imposed limits on sale of certain alcohol to males under 21 and females under 18 was unconstitutional sex discrimination).

discrimination based on sex in the absence of an "exceedingly persuasive justification"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) ("In over 20 cases beginning in 1971 . . . we have subjected government classifications based on sex to heightened scrutiny."); *Hibbs v. HDM Department of Human Resources*, 273 F.3d 844, 855 (9th Cir. 2001) ("State-sponsored gender discrimination is subject to 'intermediate scrutiny' under the Equal Protection Clause."). And, an increasing number of federal and state courts have recognized that discrimination against gay people based on their forming a life partnership with a same-sex partner rather than a different-sex partner constitutes sex discrimination that is subject to heightened judicial scrutiny. *See In re Levenson*, 560 F.3d 1145, 1147, 1149 (9th Cir. Judicial Council 2009) (Reinhardt, J., for the Ninth Circuit's Standing Comm. on Federal Public Defenders) (finding that DOMA, as applied to preclude a federal defender's request for health benefits for his same-sex spouse, violated the Due Process Clause and that the claim was "likely" subject to "some form of heightened constitutional scrutiny"); *In re Balas*, 449 B.R. 567, 577-78 (Bankr. C.D. Cal. 2011) (opinion of twenty bankruptcy judges) ("DOMA is gender-biased because it is explicitly designed to deprive the Debtors of the benefits of other important federal law solely on the basis that these debtors are two people married to each other who happen to be men. . . . Spouses should be treated equally, whether of the opposite-sex variety or the same-sex

variety, under heightened scrutiny . . . ."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *aff'd on other grounds*, 671 F.3d 1052 (9th Cir. 2012) (stating, in the context of a challenge to California's Proposition 8 that, sexual orientation discrimination takes the form of sex discrimination where, "for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex" and is subject to heightened scrutiny); *Baehr v. Lewin*, 852 P.2d 44, 66-67 (Haw. 1993) (finding distinction between different-sex couples and same-sex couples to be a sex-based classification subject to heightened scrutiny); *Baker v. State*, 744 A.2d 864, 905-07 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (reasoning that Vermont's marriage laws imposed a sex-based classification that should be reviewed under heightened judicial scrutiny).[8]

[8] Neither *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-330 (9th Cir. 1979), nor *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75 (1997), is to the contrary. *DeSantis*, which predates DOMA, the Supreme Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and the more recent sex discrimination cases, including *United States v. Virginia*, 518 U.S. 515 (1996), did not even address a sex discrimination argument. Plaintiffs in *DeSantis* argued that Title VII of the Civil Rights Act protected them against employment discrimination based on "their homosexuality," (not based on their sex). 608 F.2d at 329. The Court rejected plaintiffs' charge that "in prohibiting employment discrimination on the basis of 'sex,' Congress meant to include discrimination on the basis of sexual orientation." *Id.* Rather, the Court explained that in passing Title VII, "Congress had only the traditional notions of 'sex' in mind," and "should not be judicially extended to

On its face, DOMA discriminates on the basis of sex. Indeed, Section 3 of DOMA uses sex-based language to classify by marital status, providing that, "[i]n determining the meaning of any act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one *man* and one *woman* as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7 (emphasis added). DOMA thus makes federal recognition of marital status dependent upon the sex of the partners in the marriage: A man who marries a woman has his marriage recognized under federal law, but if a woman were to marry that same woman, her marriage would not be recognized. Consequently, DOMA discriminates against Ms. Golinski and other women on the basis of their sex because it denies recognition of a marriage to another person (a woman) that would be recognized if only they were men. *See Virginia*, 518 U.S. at 532-33 (the Equal Protection

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include sexual preference such as homosexuality." *Id.* at 329-330. Consequently, *DeSantis* does not answer (or even consider) the question currently before this Court. Likewise, the Supreme Court's ruling in *Oncale* does not preclude this Court from ruling that DOMA discriminates against Ms. Golinski on the basis of her sex. That case only presented "the question whether workplace harassment can violate Title VII's prohibition against 'discrimination because of sex,' when the harasser and the harassed employee are of the same sex." 523 U.S. at 76 (internal citation and alterations omitted). The Supreme Court answered that Title VII does indeed cover same-sex harassment. The *Oncale* Court did not have reason to consider whether a statute such as DOMA, which treats one class of citizens (men married to women) better than another class of citizens (women married to women), constitutes prohibited sex discrimination.

Clause prohibits "differential treatment or denial of opportunity" based on a person's sex); *cf. Loving v. Virginia*, 388 U.S. 1, 9 (1967) (holding that Virginia's anti-miscegenation law constituted unlawful racial discrimination even though it applied with equal force to blacks and whites).

As the district court in this case recognized, "Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits *because of her sex*."[9] *Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012), *hearing en banc denied*, No. 12-15388, 2012 WL 1853884 (9th Cir. May 22, 2012) (emphasis added). By any measure, this is a sex-based classification. *See, e.g.*, *In re Levenson*, 560 F.3d at 1147, 1149 ("[T]he denial of benefits at issue here [as mandated by DOMA] was sex-based and can be understood as" sex discrimination); *Brause v. Bureau of Vital Statistics*, 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (prohibition on same-sex marriage is a sex-based classification); *cf. Li v. State*, No. 0403-03057, 2004

[9] Although the district court below explicitly recognized that DOMA employs a classification based on sex, it found that "DOMA also operates to restrict Ms. Golinski's access to federal benefits because of her sexual orientation; her desire to marry another woman arises only because she is a lesbian. Accordingly, the Court addresses the Equal Protection challenge on the basis of sexual orientation." *Golinski*, 824 F. Supp. 2d at 982 n.4.

WL 1258167 (Or. Cir. Ct. April 20, 2004) (finding that the Oregon marriage statute "impermissibly classif[ied] on the basis of gender" where "[a] woman is denied the benefits [of marriage] because her domestic partner is a woman; had her domestic partner been a man, then benefits would be available to them."). Accordingly, heightened judicial scrutiny applies.

The facial sex-based classification contained in DOMA bears resemblance to the race-based classifications soundly rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967). In *Loving*, Virginia argued that its anti-miscegenation statute treated the races equally because it burdened both blacks and whites. *Id.* at 8. That is, where there is equal burdening of both races, as in *Loving* (or both sexes as is the argument here), the state contended there could be no cognizable discrimination. *Id.* The Supreme Court disagreed.[10] *Id.* at 8-12. Although the anti-miscegenation statute at issue in *Loving* applied to both races, it denied individuals equal protection under the law by denying individuals the right to marry the spouse of their choice purely on the basis of race.[11] *Id.* at 11-

[10] Although the State of Virginia prohibited both Richard, who was white, and Mildred, who was black, from marrying each other, the Supreme Court recognized that predicating the right to marry on "distinctions drawn according to race" denied both Mildred and Richard the equality guaranteed to them by the Equal Protection Clause. *Id.* at 11.

[11] *Cf. Shelley v. Kraemer* 334 U.S. 1, 22 (1948) (rejecting the argument that, because state courts stood ready to enforce covenants barring ownership of property by white persons, state enforcement of restrictive covenants limiting land

12. Likewise, in this case, heightened judicial scrutiny applies where DOMA denies individuals the right to marry the spouse of their choice purely on the basis of sex.

Nor can DOMA's sex-based classification be excused because it applies equally to men and women. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). In *J.E.B. v. Alabama*, the Supreme Court struck down sex-based peremptory challenges made in jury *voir dire* notwithstanding the fact that sex-based peremptory challenges could be applied equally against men and women. *Id.* at 146. There, the dissent advanced an argument very similar to the "equal application" argument proffered by the proponents of DOMA, namely that "since all groups [in this context women and men] are subject to the peremptory challenge (and will be made the object of it, depending on the nature of the particular case) it is hard to see how any group is denied equal protection." *Id.* at 159 (dissenting

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ownership to Caucasians was not denial of equal protection, noting, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a law prohibiting cohabitation among unmarried interracial couples, specifically disapproving of the theory that a discriminatory law can be saved merely because it "applie[s] equally to those to whom it [is] applicable"); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (invalidating provision that identified candidates for office by race, rejecting argument that the "Act is nondiscriminatory because the labeling provision applies equally to Negro and white"); *Shaw v. Reno*, 509 U.S. 630, 650 (1993) ("racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"); *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (reaffirming that "equal application" does not justify classification based on suspect class).

opinion of Scalia, J.). That argument did not carry the day. As Justice Kennedy noted in his concurring opinion, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual…class." *Id.* at 152-53 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting)). To accept the "equal application" argument here is to do exactly what the guarantee of equal protection commands not be done—on the basis of her sex deprive Ms. Golinski of the right to have her marriage recognized because, as a group, men are prevented from having their marriages to men recognized.

In sum, the fact that DOMA's discriminatory restrictions apply to both sexes does not cure its constitutional deficiencies. Like *Loving*, and the many federal cases that comprise its progeny, this is a case about individuals—in this case, an individual who is denied recognition of her marriage to the spouse of her choice, expressly on the basis of her sex. This is the *sine qua non* of sex-based discrimination and must be subject to a heightened level of judicial scrutiny. DOMA does not survive such scrutiny (*see* Section C, *infra*.).

B. DOMA Cannot Be Distinguished From "Equally Applicable" Race Based Laws Because DOMA Perpetuates Sex Stereotypes Regarding the Role of Women Just As Those Laws Perpetuated Racial Segregation.

BLAG will no doubt attempt to distinguish *Loving* and the many other cases refusing to use the "equal application" theory to justify racial classifications by asserting that the discrimination in those cases was based on disapproval of racial mixing and was invidious, while here it is not. This purported distinction cannot withstand scrutiny. Just as an effort to forestall racial mixing was a key factor in the laws at issue in those cases, the perpetuation of gender stereotypes is one of the motives for, and results of, DOMA.

Considering the relationship of gender stereotypes to California's Proposition 8, the district court in *Perry* explained that, "the evidence shows that the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles." *Perry*, 704 F. Supp. 2d at 998. Today, "California has eliminated all legally mandated gender roles except the requirement that a marriage consist of one man and one woman." *Id*. The court concluded: "Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life."

As with California's Proposition 8, the legislative history of DOMA is replete with evidence that the statute was enacted with specific gender-stereotyped

objectives, based on impermissible stereotypes of the "traditional family" with its homemaker/caretaker mother and breadwinner father:

- "One of the most astounding things that I heard was in our committee, one member indicating that he did not really know the difference for legal purposes between a man and a woman or between a male and a female. I daresay, Mr. Speaker, that we all know that. And the fact of the matter is that *marriage* throughout the entire history of not only our civilization but Western civilization *has meant the legal union between one man and one woman*." 142 Cong. Rec. H. 7270, 7275 (July 11, 1996) (statement of Rep. Barr) (emphasis added);
- "As a father and an observer of this culture, I look ahead to the *future of my daughter and wonder what building a family will be like for her*. We need to protect our social and moral foundations. We should not be forced to send a message to our children that undermines the definition of marriage as the union between one man and one woman." 142 Cong. Rec. H. 7270, 7276 (July 11, 1996) (statement of Rep. Largent) (emphasis added);
- "We should not be forced to give public sanction to relationships that clearly fall outside the scope of our Nation's traditional understanding

of marriage as the legal union between one man and one woman as husband and wife. This act will protect the institution of marriage which has been and will remain the foundation of Western civilization." 142 Cong. Rec. H. 7480, 7493 (July 12, 1996) (statement of Rep. Weldon);

- "Allowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation." 142 Cong. Rec. H. 7480, 7495 (July 12, 1996) (statement of Rep. Lipinski);
- "Mr. President, throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society-a relationship worthy of legal recognition and judicial protection. The *purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere* in which a man and a woman pledge themselves exclusively to one another and who bring into being children for the fulfillment of their love for one another and for the greater good of the human community

at large." 142 Cong. Rec. S. 10100, 10109 (Sept. 10, 1996) (statement of Senator Byrd) (emphasis added);

- "Mr. President, the marriage bond as recognized in the Judeo-Christian tradition, as well as in the legal codes of the world's most advanced societies, is the cornerstone on which the society itself depends for its moral and spiritual regeneration as that *culture is handed down, father to son and mother to daughter*." 42 Cong. Rec. S. 10100, 10109 (Sept. 10, 1996) (statement of Senator Byrd) (emphasis added);
- "We must work to strengthen the American family, which is the bedrock of our society. And, marriage of a man and a woman is the foundation of the family." 142 Cong. Rec. H. 7490, 7493 (July 12, 1996) (statement of Rep. Weldon).

Even though DOMA restricts women and men alike (but in differing circumstances), the restriction is historically rooted in gender-based stereotypes, pursuant to which men were expected to marry women, and women men because of supposed complimentary characteristics, with men held up to strong, "masculine" ideals and in need of the "civilizing" influences of women and women

held to soft, "feminine" ideals and in need of the "protection" of men.[12] DOMA manifests a worldview that directs the federal government to privilege the union of "masculine" men with "feminine" women, for women (and their children) need the support and protection of men. Under DOMA, two women are unable to form an optimal familial relationship because they lack the indispensable masculine and paternal force of a husband. It is precisely these stereotypical expectations, and the outmoded stratification of the genders that they enforce, that the Equal Protection Clause prohibits.[13] Just as "the harm to blacks counts against the miscegenation

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[12] When DOMA's supporters trumpet it as promoting traditional marriage, they must surely be aware that, historically, one of the key elements of traditional marriage was that it bound a man and his wife, mandating hierarchical roles to the sexes based on gender. *See* Nancy Cott, Public Vows: A History of Marriage and the Nation (Harvard Univ. Press 2000), at 3. Indeed, the tie between traditional marriage and gender stereotypes appears in the jurisprudence of the Supreme Court. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (citing "[t]he natural and proper timidity and delicacy which belongs to the female sex" as reasons that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."); *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961), ("[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved for men, woman is still regarded as the center of home and family life.").

[13] In a line of cases spanning from *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (finding equal protection violation in rebuttable presumption of dependency of female military spouses which was based on "gross, stereotyped distinctions between the sexes"), to *Virginia*, 518 U.S. at 533 (finding equal protection violation in state military academy that excluded women because it "rel[ied] on overbroad generalizations about the different talents, capacities, or preferences of males and females"), the Supreme Court has made clear that classifications based on traditional gender stereotypes violate the federal

laws, then for the same reasons, the harm to women should count against antigay laws." Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights, 49 U.C.L.A. L. Rev. 519, 529 (2001).

C. Section 3 of DOMA Cannot Withstand Heightened Scrutiny.

"State-sponsored gender discrimination is subject to 'intermediate scrutiny' under the Equal Protection Clause. Such discrimination is thus unconstitutional unless it is substantially related to the achievement of an important governmental interest." *Hibbs*, 273 F.3d at 855. "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *see also Hibbs*, 273 F.3d at 855 ("This allocation of the burden of proof has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination."). DOMA cannot survive intermediate scrutiny, and its proponents have not even sought to establish otherwise.

Constitution's Equal Protection Clause. Notions about what men and women are like, what Justice Ginsburg has called "supposed inherent differences," have long been rejected as sex discrimination. *Virginia*, 518 U.S. at 533; *see also Hibbs v. HDM Department of Human Resources*, 273 F.3d 844, 865 (9th Cir. 2001) ("State actors controlling gates of opportunity…may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." (internal quotation marks and citation omitted)).

Here, the only conceivable governmental interest identified in support of DOMA's gender discrimination is that which is founded upon the sex stereotypes discussed above. That is, DOMA discriminates against women (marrying women) because those women are depriving their home of the perceived force and benefit of a male breadwinner. The Supreme Court has already rejected such justifications for sex discrimination. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) ("[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.").

Nor can DOMA be supported by any other rationale. Other than outdated gender stereotypes, why should a male who might be married to Ms. Golinski's spouse get federal recognition of his marriage when Ms. Golinski cannot? Can Appellants offer a public health or safety rationale for DOMA not based on generalized sex stereotypes? Can Appellants point to any facts that demonstrate that Ms. Golinski's sex alone merits differential treatment? *Cf. Craig*, 429 U.S. at 199 ("In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered

generalization actually comported with fact."). Without an "important government interest" or a "persuasive justification," DOMA must fail.

D. *Baker v. Nelson* Does Not Excuse DOMA's Sex-Based Discrimination.

BLAG has argued (incorrectly) that this case is governed by *Baker v. Nelson*, 409 U.S. 810 (1972). Brief of Intervenor-Defendant-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives, Dkt. 36, at 23 (asserting that, "this Court is obligated to follow *Baker*."). In *Baker*, the Supreme Court dismissed an appeal as of right from a Minnesota Supreme Court decision denying marriage status to a same-sex couple. *Id.* at 810. As a *per curiam* order dismissing an appeal for lack of a substantial federal question, *Baker* only "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided" by the dismissal of the appeal. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). The constitutionality of a federal statute, like DOMA Section 3, that distinguishes among couples who are already legally married in their own states was not presented and therefore not decided— necessarily or otherwise—in *Baker*.

Moreover, Baker pre-dates decades of case law teaching that laws that discriminate on the basis of sex will be reviewed to "determine whether the proffered justification is exceedingly persuasive," "serves important government objectives and that the discriminatory means employed are substantially related to

the achievement of those objectives." *Virginia*, 518 U.S. at 533. The application of heightened scrutiny is context-specific, and dependent on the actual motivation and tailoring of the challenged policy before the court. The Supreme Court had not yet determined that sex-based classifications should be tested under this standard when *Baker* was summarily affirmed, and that subsequent development vitiated any limited value *Baker* may once have had regarding sex discrimination claims.[14]

E. No Binding Authority Prevents This Court From Holding That Laws Discriminating On The Basis Of Sexual Orientation Are Subject To Heightened Scrutiny When Challenged On Equal Protection Grounds.

Amici submit that DOMA fails because it discriminates on the basis of sex and fails to survive heightened scrutiny. To the extent the Court disagrees and holds that DOMA discriminates not on the basis of Ms. Golinski's sex but only on the basis of her sexual orientation, *Amici* believe that this Court can and should, nonetheless, subject DOMA to heightened scrutiny.[15]

Contrary to Appellant's argument, this Court's decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), does not foreclose the

[14] *Amici* agree with Ms. Golinski that *Baker's* limited relevance for other claims, such as sexual orientation discrimination, also has been superseded by subsequent Supreme Court authority." *See* Plaintiff-Appellee's Brief (Dkt. 79), at 54-55.

[15] *See also* Plaintiff-Appellee's Brief (Dkt. 79), at 19-25 (explaining why classifications based on sexual orientation should be reviewed under heightened judicial scrutiny).

application of heightened judicial scrutiny to DOMA's sexual orientation-based classifications. *Witt* never confronted Ms. Golinski's argument that heightened judicial scrutiny applies to laws that discriminate on the basis of sexual orientation. Indeed, in *Witt*—a challenge to the "Don't Ask, Don't Tell" policy—the plaintiff did not dispute that *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997), which held that sexual orientation is not a suspect or quasi-suspect classification, was controlling as to the standard of equal protection scrutiny and simply preserved the issue for potential consideration by the *en banc* court. *See Witt*, 527 F.3d at 823-24 & n.4 (Canby, J., concurring in part and dissenting in part). Thus, in *Witt*, the panel had no need to confront the impact of the demise of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 567, on the continuing viability of *Philips*. Rather, the panel merely assumed *Philips* continued to set the proper standard of review. The Supreme Court's statement in *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993), *superseded by statute on other grounds as stated in Zappulla v. New York*, 391 F.3d 462, 466 (2d Cir. 2004), applies equally here: where courts "never squarely addressed the issue, and have at most assumed the applicability of the [given legal standard], we are free to address the issue on the merits."[16] *See also United States v. L. A. Tucker Truck Lines, Inc.*, 344

[16] *Brecht* is particularly instructive because, like this case, it also concerned whether a court was bound by a standard of review articulated in related, but not congruous, case law. At issue in *Brecht* was the standard for determining

U.S. 33, 38 (1952) (holding that where an issue was not "raised in briefs or argument nor discussed in the opinion of the Court . . . the case is not a binding precedent on this point"); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159 (9th Cir. 1976) (en banc) (holding that the court was not bound by prior decision where the briefing and opinion in that case failed to consider the issue presented in the instant case).

For this reason, among others, the district court below was correct when it found *Witt* inapplicable to determining whether heightened scrutiny should apply to the discriminatory provisions in DOMA. *Golinski*, 824 F. Supp. 2d at 985. There is no basis for this Court to reverse that holding. For the reasons articulated in the briefs submitted by Ms. Golinski and the Department of Justice, this Court, even if it views Section 3 of DOMA only as discriminating on the basis of sexual orientation, should subject that law to heightened scrutiny and find it unconstitutional. Nothing in *Witt* or the Supreme Court's precedent forecloses this outcome.

"harmless-error" when a habeas petition alleged a constitutional violation in the underlying trial court proceedings. *Brecht*, 507 U.S. at 623. The Court noted the authority that spelled out the standard that applied on direct review of a conviction and the fact that the Court itself had applied that standard to certain federal habeas cases. The Court then confronted the question of whether it was bound by *stare decisis* and concluded it was not. *Id.* at 630-31. The Court found *stare decisis* inapplicable "since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* [direct review] standard on habeas, we are free to address the issue on the merits." *Id.* at 631 (citation omitted).

II. Conclusion

For the reasons stated herein, *Amici* respectfully submit that section 3 of DOMA is an unconstitutional form of sex discrimination. The judgment below should be affirmed.

DATED: July 10, 2010

Respectfully submitted,

IRELL & MANELLA LLP
ALEXANDER F. WILES
MOEZ M. KABA

/s/ Alexander F. Wiles
Alexander F. Wiles

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because it is 6,162 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, in 14-point Times New Roman font.

/s/ Alexander F. Wiles
Alexander F. Wiles

Dated: July 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Alexander F. Wiles
Alexander F. Wiles

Dated: July 10, 2012