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

REPLY BRIEF OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN NO. 12-15388

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I. *Baker* and *Adams* Control This Case.

The Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), controls this case. Much of Ms. Golinski's brief consists of an effort to convince this Court that it should ignore binding precedent. As to *Baker*, Ms. Golinski brazenly argues that its "precedential force" has been "extinguished" (Br. 54) by cases such as *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). But neither Ms. Golinski nor this Court is entitled to make that call. Only the Supreme Court is. *Baker* was not overruled in *Romer*, *Lawrence*, or any case. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("preserving the traditional institution of marriage" is a "legitimate state interest"). Thus, *Baker* is controlling authority unless and until the Supreme Court says it is not. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (summary affirmances are decisions on the merits, and lower courts are "not free to disregard" them). The First Circuit correctly recognized that "*Baker* is binding precedent" and that "implying an overruling of *Baker*" is something a lower court is not "empowered to do." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 8, 9 (1st Cir. 2012), *petitions for cert. filed*, No. 12-13 (U.S. June 29, 2012), 2012 WL 2586935; No. 12-15 (U.S. July 3, 2012), 2012 WL 2586937. *See also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (*Baker* "is binding precedent upon this Court and Plaintiffs' case … must be dismissed.").

Ms. Golinski also attempts to distinguish *Baker*, but the effort fails. *Baker* stands for the proposition that a state may use the traditional definition of marriage for purposes of state law without violating equal protection. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870-871 (8th Cir. 2006). It follows that the federal government may use that same traditional definition for federal purposes without violating equal protection. It is no answer to say that the federal government "neither includes nor excludes couples from marriage." Golinski Br. 52. *Baker* held that the states are not required to recognize same-sex marriages. *See Massachusetts*, 682 F.3d at 8 (*Baker* forecloses arguments that "presume or rest on a constitutional right to same-sex marriage"). Because equal protection analysis is the same under the Fourteenth Amendment and the Fifth Amendment, *see* House Br. 22-23, *Baker* compels the conclusion that the federal government is not required to recognize same-sex marriages for federal purposes. *See McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (rejecting, based on *Baker*, a same-sex married couple's equal protection challenge to the denial of federal veteran's education benefits available to opposite-sex married couples).

Ms. Golinski also would have this Court brush aside *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). Ms. Golinski contends that *Adams*, like *Baker*, "is no longer good law." Br. 56. But *Adams* has never been overruled and thus remains the law of this Circuit. DOJ Br. 18 n.8. As the Justice Department

("DOJ") acknowledged to this Court, just two years ago, in another 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).

Moreover, two district courts within this Circuit have held that *Adams* is not only good law, it is controlling law as to DOMA. *See Lui v. Holder*, No. 11-1267 (C.D. Cal. Sept. 28, 2011) (ECF No. 38 at 4) ("To the extent that Plaintiffs [c]hallenge Section 3 of DOMA on equal protection grounds, that issue has been decided by *Adams*."); *Torres-Barragan*, No. 09-8564 (C.D. Cal. Apr. 30, 2010) (ECF No. 24 at 2) ("Plaintiffs argue that [DOMA] violates [equal protection] because [DOMA] defines marriage exclusively as [a] union between couples of opposite sex. The matter has already been addressed by the Ninth Circuit in *Adams v. Howerton*"). The *Lui* court correctly recognized that it "is not in a position to decline to follow *Adams* or critique its reasoning" since "the prerogative to overturn Ninth Circuit precedent rests not with this District Court, but with the *en banc* Ninth Circuit and the Supreme Court." *Lui, supra*, at 4, 5.

This Court held in *Adams* that Congress' decision to limit an immigration preference to opposite-sex spouses was rational "because homosexual marriages never produce offspring" and "because they are not recognized in most, if in any, of the states." 673 F.2d at 1043. Contrary to Ms. Golinski's assertions (Br. 56-57), both of those observations remain true today. As a matter of biology, a same-

sex couple, by themselves, cannot beget or conceive a child. And most of the states do not recognize same-sex marriage. Moreover, the *Adams* Court did not claim to list all the rational bases for the federal statute. *See* 673 F.2d at 1043 ("[W]e need not further probe and test the justifications for the legislative decision.") (quotation marks omitted).[1]

Adams holds that marriage benefits conferred by federal law may be limited to opposite-sex married couples. That holding controls this case unless and until *Adams* is overruled by this Court sitting *en banc*.

II. DOMA Is Not Subject to Heightened Scrutiny.

Ms. Golinski argues that this Court should apply heightened scrutiny to DOMA because it classifies based on sexual orientation, because it is a sex-based classification, and because it burdens substantive due process rights. Each argument is wrong.

A. Binding Circuit Precedent Holds That Sexual Orientation Classifications Are Reviewed Under the Rational Basis Test.

This Court held in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990), that "homosexuals do not constitute a

[1] Ms. Golinski is wrong to suggest (Br. 56) that *Adams* applied an extra-deferential, immigration-specific form of review. *Adams* applied ordinary rational basis review. *See* 673 F.2d at 1042 ("We hold that Congress' decision … has a rational basis …. There is no occasion to consider in this case whether some lesser standard of review should apply.").

suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment." That holding was reaffirmed in *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997), *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), and *Witt v. Department of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

Although DOJ disagrees with these holdings, it acknowledges that they are the law of this Circuit. *See* DOJ Br. 9-10, 17 ("*Witt* is binding on a panel of this Court"). That is, of course, why DOJ sought to bypass a panel in favor of initial *en banc* review, and why it more recently petitioned for certiorari before judgment. Because DOJ's brief starts from the premise that this Court's "precedent is incorrect and should be remedied" *en banc*, DOJ Br. 10, its brief is irrelevant since this panel must apply that precedent.

Unlike DOJ, Ms. Golinski views the standard of review to be applied in this case as an open question. She contends (Br. 15) that *High Tech Gays* is not binding because it relied in part on *Bowers v. Hardwick*, 478 U.S. 186 (1986). But *Witt*, 527 F.3d at 821, held that circuit precedent was "not disturbed" by the overruling of *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). Furthermore, as Ms. Golinski concedes (Br. 17), the holding of *High Tech Gays* was based on several considerations quite separate from *Bowers*. This Court explained that

(1) the Supreme Court "has never held homosexuality to a heightened standard of review," (2) homosexuality "is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes," and (3) "homosexuals are not without political power." 895 F.2d at 573, 574. Each of those observations was true then and is true now.

Ms. Golinski states (Br. 17) that *Witt* and *High Tech Gays* were national security cases, but this Court's unqualified holding that "homosexuals do not constitute a suspect or quasi-suspect class," 895 F.2d at 574, was not limited to the national security context. This Court expressly "agree[d] with the other circuits that have ruled on this issue," *id*., and no circuit, then or now, has ever held, as Ms. Golinski would have it, that heightened scrutiny applies to sexual orientation classifications except in national security cases. Indeed, this Court applied the rational basis test in *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012), which is not a national security case.[2]

Ms. Golinski also argues that *Witt* merely "presumed rational basis review

[2] Eleven Circuits—every one to have considered the issue—have rejected the application of heightened scrutiny to sexual orientation classifications. *See*, *e.g*., *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008) (collecting cases); *Lofton v. Sec'y of Dep't of Children & Family Servs*., 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (same). In *Massachusetts*, the First Circuit declined the invitation to apply "heightened scrutiny" to DOMA and to create "a new suspect classification for same-sex relationships." 682 F.3d at 8, 9.

applied, without squarely addressing the issue." Br. 18. But *Witt* said the following: "[Witt] argues that DADT [don't ask, don't tell] violates equal protection …. However, *Philips* clearly held that DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence* …. We thus affirm the district court's dismissal of Major Witt's equal protection claims." 527 F.3d at 821 (citation omitted). That clearly is a holding.

In sum, Ms. Golinski's wishful belief (Br. 14) that the standard of review for sexual orientation classifications "remains unsettled" in this Circuit simply ignores reality. Rational basis review is the settled test.[3]

B. DOMA Does Not Discriminate Based on Sex.

Ms. Golinski argues that DOMA should receive heightened scrutiny on the view that DOMA constitutes sex discrimination. Br. 25-26.[4] This argument also lacks merit because DOMA does not discriminate based on sex. *See Massachusetts*, 682 F.3d at 9 (declining "to employ the so-called intermediate scrutiny test used by [the] Supreme Court for gender discrimination"). On the contrary, DOMA treats women and men exactly the same. *See Wilson*, 354 F.

[3] For the reasons why Ms. Golinski's reliance (Br. 6) on a single line in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), is misplaced, see House Br. 29 n.8.

[4] Ms. Golinski raised her sex discrimination argument below, but the district court decided to analyze the equal protection issue in this case "on the basis of sexual orientation" only. ER 14 n.4.

Supp. 2d at 1307-08 ("DOMA does not discriminate on the basis of sex because it treats women and men equally."); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005) ("there is no sex-based classification" in DOMA), *vacated in relevant part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004). With but one exception, every state court of last resort that has decided the question has held that traditional marriage statutes do *not* discriminate based on sex. *See In re Marriage Cases*, 183 P.3d 384, 436-440 (Cal. 2009); *Conaway v. Deane*, 932 A.2d 571, 598-599 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 987-990 (Wash. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006); *Baker v. Vermont*, 744 A.2d 864, 880-881 n.13 (Vt. 1999); *Baker v. Nelson*, 191 N.W.2d 185, 186-187 (Minn. 1971). The lone exception is *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (two-judge plurality), and that decision was abrogated by constitutional amendment. *See* Haw. Const. art I, § 23.

In addition to the abrogated *Baehr* decision, Ms. Golinski relies upon the district-court opinion in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). The district

court's confused remarks regarding sex discrimination were dicta,[5] and this Court's *Perry* decision did not treat Proposition 8 as a sex-based classification. It applied the rational basis test and struck down Proposition 8 based on "the specific history of same-sex marriage in California." 671 F.3d at 1076. The *Perry* litigation thus provides no support for the claim that DOMA is subject to heightened scrutiny as a form of sex discrimination.

Ms. Golinski cites *In re Levenson*, 560 F.3d 1145 (Jud. Council 2009) (Reinhardt, J.). But *Levenson* specifically said that it was "not necessary to determine" whether sex discrimination "is at issue in the present proceeding." *Id*. at 1147.[6] Ms. Golinski also cites *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011). But *Balas*, a bankruptcy court decision, meets its match in another bankruptcy case, *Kandu*, which held that DOMA does *not* discriminate based on sex. 315 B.R. at 143.[7]

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[5] *Compare Perry*, 704 F. Supp. 2d at 996 (sexual orientation discrimination is "distinct from" sex discrimination) *with id*. (plaintiffs' sexual orientation discrimination claim "is equivalent to a claim of discrimination based on sex").

[6] In *Levenson*, Judge Reinhardt "was sitting not in his judicial capacity, but in his administrative capacity as an EDR [employment dispute resolution] hearing officer." *Golinski v. U.S. OPM*, 781 F. Supp. 2d 967, 973 (N.D. Cal. 2011).

[7] It should be noted that the DOMA issue in *Balas* was generated by DOJ's incoherent position that it will enforce but not defend DOMA. DOJ's own U.S. Trustee affirmatively created the constitutional issue by moving to dismiss, on the basis of DOMA, a joint bankruptcy petition filed by a same-sex couple; the U.S.

(*Continued* . . .)

Finally, *Loving v. Virginia*, 388 U.S. 1 (1967), does not remotely support Ms. Golinski's sex discrimination contention. Virginia's anti-miscegenation laws did not treat the races the same. Those laws "prohibit[ed] only interracial marriages involving white persons" because they were "designed to maintain White Supremacy." *Id*. at 11. In contrast, DOMA treats men and women exactly the same and is not premised on a view that one sex is superior to the other.

C. DOMA Does Not Burden Any Right of Substantive Due Process.

Ms. Golinski's argument (Br. 27) that DOMA impermissibly burdens a substantive due process right is clearly wrong. Same-sex marriage is not a fundamental right, as it is not "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (quotation marks omitted). "Until 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). To this day, the people of 41 states or their elected representatives have enacted constitutional amendments or statutes defining marriage as between one woman

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Trustee, having created the issue, then refused to defend the statute on the basis of the Attorney General's direction not to defend the statute; and no other party defended DOMA in that case.

and one man. Not surprisingly, numerous courts have held that same-sex marriage is not a fundamental right. *See, e.g.*, *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675-676 (Tex. App. 2010) (collecting cases); *Andersen*, 138 P.3d at 979 (finding the notion "that there is a fundamental right to marry a person of the same sex" to be "an astonishing conclusion, given the lack of any authority supporting it"); *Shahar v. Bowers*, 114 F.3d 1097, 1099 & n.2 (11th Cir. 1997) (en banc). Ms. Golinski cites no case to the contrary.

Even if this case involved a fundamental right (which it does not), DOMA does not "directly and substantially interfere" with the family life of same-sex couples or their ability to marry. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). DOMA defines marriage for purposes of federal law, but that "definition does not order or prevent any" couple from living together or marrying. *Id.* DOMA does not operate "by banning, or criminally prosecuting nonconforming marriages." *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977). Congress "did not penalize" same-sex couples; it "decided not to offer them a special inducement." *Alexander v. Fioto*, 430 U.S. 634, 640 (1977). DOMA does not prevent federal agencies from extending benefits to same-sex couples or their dependents on an otherwise lawful basis apart from marital status. *See* Presidential Memorandum, *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, 75 Fed. Reg. 32247 (June 2, 2010); *Whether the Defense of Marriage Act Precludes the Non-*

Biological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act, 2007 WL 5254330, at *1 (Op. O.L.C. Oct. 16, 2007). And DOMA "does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [DOMA's] definition." *Smelt*, 447 F.3d at 683.

III. DOMA Is Subject to Ordinary, Deferential Rational Basis Review—the Only Form of Such Review.

Ms. Golinski argues that, if rational basis review applies to DOMA, this Court should apply a "particularly searching" version of it. Br. 29. But no such form of review exists. The Supreme Court's cases recognize three, and only three, levels of equal protection review:

> [W]e apply different levels of [equal protection] scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Clark v. Jeter, 486 U.S. 456, 461 (1988) (citations omitted). There is no such thing as "particularly searching" rational basis review. DOMA is subject to ordinary, deferential rational basis review—which is the only form of such review.

Ms. Golinski relies (Br. 28-29) on three Supreme Court cases: *Romer*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *U.S. Department*

of Agriculture v. Moreno, 413 U.S. 528 (1973). None of those cases supports a deviation from the accepted three tiers of equal protection review.

In *Romer*, the Court applied the "conventional inquiry" that a "legislative classification [is valid] so long as it bears a rational relation to some legitimate end." 517 U.S. at 631-632; *see id*. at 635 ("[A] law must bear a rational relationship to a legitimate government purpose, and Amendment 2 does not.") (citation omitted). In *Cleburne*, the Court ruled that the Fifth Circuit had "erred in [applying] … a more exacting standard of judicial review than is normally accorded economic and social legislation." 473 U.S. at 442. The Court itself applied "[t]he general rule" that a classification is valid if it "is rationally related to a legitimate state interest." *Id*. at 440. In *Moreno*, too, the Court applied "traditional equal protection analysis," *i.e.*, the rational relationship test. 413 U.S. at 533.

Ms. Golinski also cites (Br. 29) the First Circuit's *Massachusetts* opinion. That court did invent and apply to DOMA "intensified scrutiny" (682 F.3d at 10)—a previously unknown form of review—but it erred in so doing. It erroneously derived its new test from the same three just-discussed Supreme Court cases upon which Ms. Golinski improperly relies. The House has petitioned the Supreme Court to review *Massachusetts*, in part based on the conflict between *Massachusetts* and those three Supreme Court decisions. *See* Pet. for Cert.,

Bipartisan Legal Advisory Grp. of the U.S. House of Reps. v. Gill (U.S. June 29, 2012) (No. 12-13), 2012 WL 2586935.

Ms. Golinski also invokes (Br. 29) Justice O'Connor's concurrence in *Lawrence*, but even if Justice O'Connor's test were applied, DOMA would pass it. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("preserving the traditional institution of marriage" is a "legitimate state interest").

Ms. Golinski argues that DOMA's alleged "intrusion into state family law" warrants "meaningful rational [basis] review." Br. 30. She cites *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). But those are Commerce Clause cases; they provide no support for engaging in "meaningful" rational basis review (whatever that means) under the equal protection component of the Fifth Amendment's Due Process Clause.

The *Massachusetts* court said its "closer than usual review" of DOMA was based on a "combin[ation]" of "equal protection and federalism concerns," 682 F.3d at 8, but that approach flies in the face of the Supreme Court's instruction that equal protection analysis is exactly the same whether federal or state action is being scrutinized. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). The invocation of purported federalism concerns to elevate the level of scrutiny under the equal protection clause is also misguided because the Constitution's equal protection guarantees exist to constrain governmental action,

not to protect the States. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Id*. at 227 (emphases in original).

Furthermore, DOMA in no way "intrudes" upon state family law. DOMA does not bar or invalidate any marriages or any benefits conferred by state law. DOMA merely defines the terms "marriage" and "spouse" for purposes of federal law and affects eligibility for federal benefits that turn on being married or a spouse. When spending federal funds, Congress—not the states—gets to define the statutory terms and set the eligibility criteria. *See Helvering v. Davis*, 301 U.S. 619, 645 (1937) (Cardozo, J.) ("When money is spent to promote the general welfare, the concept of welfare is shaped by Congress, not the states."). This case does not involve any coercion or commandeering of states or state officers into a federal program.

Finally, deferential rational basis review is especially warranted in this case because DOMA is a line-drawing statute. *See FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 315-316 (1993); House Br. 31-32. Ms. Golinski objects that DOMA is not a line-drawing statute because it allegedly "exclude[s] lesbian and gay couples alone." Br. 32. That is not correct. DOMA defines marriage, for federal purposes, as the legal union of one man and one woman. DOMA's definition of marriage thus does not extend to many kinds of relationships, even relationships involving opposite-sex persons—such as intimate, but not legally formalized relationships

(*e.g.*, a man and woman living together); state-recognized domestic partnerships; or any plural relationships (even if recognized as marriages, as in some foreign nations). In deciding which relationships would be treated as marriages for federal purposes, "Congress had to draw the line somewhere; it had to choose" which relationships would qualify. *Beach Commc'ns*, 508 U.S. at 316. Its decision to draw a federal line tracking the traditional definition of marriage deserves considerable deference.

IV. Ms. Golinski Has Not Negated Any of DOMA's Rational Bases.

The First Circuit in *Massachusetts* recognized that DOMA survives ordinary rational basis review, expressly concluding that "[u]nder such a rational basis standard, the *Gill* plaintiffs cannot prevail." 682 F.3d at 9. The court also noted that DOJ "conceded that rational basis review leaves DOMA intact." *Id*. *See id*. at 8 ("The federal defendants said that DOMA would survive such rational basis scrutiny"). The First Circuit's conclusion, and DOJ's concession, were correct.

On rational basis review, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (brackets and citation omitted). Ms. Golinski has failed to negative any of DOMA's rational bases.

Ms. Golinski does *not* argue that DOMA was motivated by bigotry or "animus" and thus violates equal protection based on motivation alone. Br. 50-51.

The First Circuit correctly rejected such an argument. *See Massachusetts*, 682 F.3d at 16 (disclaiming reliance "upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality" and noting that DOMA was "supported by large majorities in both Houses and signed by President Clinton").

A. DOMA Ensures a Uniform Federal Definition of Marriage and Avoids Inconsistency in Eligibility for Federal Marital Benefits.

DOMA rationally furthers uniformity in eligibility for federal benefits. DOMA prevents the situation in which same-sex couples who live in states that permit same-sex marriage could obtain federal marital benefits denied to same-sex couples in other states. *See* House Br. 11, 33-37; Br. of *Amici Curiae* U.S. Senators Orrin G. Hatch *et al*. 25-28 ("Senators Br.").

Ms. Golinski responds (Br. 33) that DOMA's definition tolerates inconsistencies in state law with respect to such matters as the validity of first-cousin marriages and the minimum age for marriage.[8] But Congress did not have to address such matters for DOMA to be rational. Congress could rationally decide that it was sufficient to define marriage for federal purposes as a legal union between one man and one woman. Congress was not required to address the other minor variations in state marriage law:

[8] Variation in "state treatment of interracial marriage" (Golinski Br. 33) is now a thing of the past. *See Loving v. Virginia*, *supra*.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (citations omitted) (quoted in *Beach Commc'ns*, 508 U.S. at 316).

B. DOMA Preserves the Public Fisc and Previous Legislative Judgments.

It was rational for Congress to conclude that DOMA would "preserve scarce government resources" since federal law "provides an array of material and other benefits to married couples," and such benefits "impose certain fiscal obligations on the federal government." H.R. Rep. No. 104-664, at 18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2922 ("House Report"). The First Circuit in *Massachusetts* cited cost savings as one reason why, if the "rational basis standard" is applied, challenges to DOMA "cannot prevail." 682 F.3d at 9. The court correctly found that Congress rationally could have believed "that broadening the definition of marriage will reduce tax revenues and increase social security payments." *Id*.

Ms. Golinski argues that Congress was not actually motivated by cost savings because the House rejected a proposed amendment "to analyze DOMA's budgetary impact." Br. 36. The argument is wrong for three reasons. First, on

rational basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. Second, and in any event, the House Report shows that Congress was concerned about conserving the fisc. *See* House Br. 11. Third, contrary to Ms. Golinski's claim, the defeated amendment was not a proposal to analyze DOMA's budgetary impact. The amendment would have required the General Accounting Office (as it was then known) to study the differences in the benefits available to married persons and domestic partners under federal, state, and foreign law. 142 Cong. Rec. H7503 (daily ed. July 12, 1996). The amendment was "not necessary" because the Chairman of the House Judiciary Committee had already agreed to ask the GAO for such a study of the differences in marital and domestic partner benefits under federal law,[9] and the amendment was "overly broad" in its proposed study of state law and foreign countries. *Id*. at H7504 (Rep. Hyde). Members also objected to the amendment because it would have tacked onto DOMA a federal definition of "domestic partnership." *Id*. at H7504, H7505 (statements of Rep. Canady and Rep. Hyde). That the House rejected this amendment hardly proves that Congress did not have a rational concern about saving money.

[9] *See* U.S. Gen. Accounting Office, OGC-97-16, *Defense of Marriage Act* (1997) (responding to Chairman Hyde's request).

Ms. Golinski points to a Congressional Budget Office ("CBO") report published in 2004 (eight years after DOMA's enactment) to argue that DOMA "actually *costs* the government money." Br. 36. The First Circuit properly disposed of this argument, explaining that "Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government." *Massachusetts*, 682 F.3d at 9. Furthermore, the cursory, nine-page CBO report appears to makes a critical analytical error: In claiming that many same-sex couples would become ineligible for federal means-tested benefits after their incomes were combined (as marriage would require), the report seemingly neglects to consider that many couples likely would avoid this financial hit simply by not marrying, thus depriving the government of those savings.

Ms. Golinski next argues that, even if DOMA saves money, it is illegitimate to do so by denying benefits to same-sex couples but not opposite-sex couples. Br. 36-37. But DOMA does not employ any suspect classification, and therefore conserving federal funds is a rational basis for the law, as the First Circuit found. *See Massachusetts*, 682 F.3d at 9; *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012) ("The City could not just 'cut checks' [to plaintiffs] without taking funding from other programs or finding additional revenue.") (alteration and citation omitted). Furthermore, DOMA does not burden any fundamental right.

See Part II-C, *supra*. Nor does DOMA deny "a benefit to a class of people previously offered the benefit." Golinski Br. 37 n.19. Because same-sex couples never were eligible for and never received federal marital benefits before DOMA, no such benefits were taken away from them. Cases involving the withdrawal of previously-conferred benefits—cases such as *Romer*, *Perry*, and *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011)—are thus inapposite.

Ms. Golinski contends that the goal of cost saving is "discontinuous with the breadth of the statute" because some of DOMA's consequences do not "save federal money" and because some of DOMA's cost savings are supposedly "haphazard[ ]" and "arbitrary." Br. 38. But Congress was not required to vary the federal definition of marriage depending on the context. Congress could rationally adopt a single, uniform definition to govern all federal law. In fact, the varying and unpredictable manner in which expanding the definition of marriage likely would impact the budgets of different federal agencies would itself be a rational reason for Congress to find such a change undesirable. Moreover, Congress could have rationally been motivated to save federal funds even if DOMA did not do so in all of its applications. *See Heller*, 509 U.S. at 321 (rational basis review permits "an imperfect fit between means and ends"); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (upholding rationality of federal classification although it was "both underinclusive and overinclusive"). Not even heightened scrutiny requires a

statute to accomplish its goals in all circumstances. *See Nguyen v. INS*, 533 U.S. 53, 70 (2001) ("None of our [intermediate scrutiny] equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.").

DOMA preserves prior legislative judgments as well as federal funds. *See* House Br. 37, 40. Prior Congresses that extended benefits based on marital status did so on the understanding that the benefits would go only to opposite-sex couples. Ms. Golinski is wrong to suggest (Br. 38) that past Congresses merely wanted to provide benefits based on any state-recognized marriage. Congress has always intended marriage to mean the legal union of one man and one woman. *See* House Br. 7-9; Senators Br. 19-24. Before the onset of same-sex marriage, Congress could rely on state definitions of marriage. Once certain state courts started to require their states to recognize same-sex marriage, Congress could no longer rely on state definitions and adopted DOMA to ensure that the traditional definition of marriage would apply for federal purposes.

C. DOMA Is a Rational Exercise of Caution.

Forced to decide whether to accede to an unprecedented change to our most important social institution—marriage—Congress rationally chose to retain within the federal sphere the time-honored definition of marriage. *See* House Br. 11-13, 40-43. Ms. Golinski claims that DOMA was a "hurried enactment" (Br. 39), but

that is neither true, *see* House Br. 9-14 (reviewing DOMA's extensive legislative history), nor relevant. Ms. Golinski complains (Br. 39) that DOMA was not enacted "as a temporary measure," but Congress' decision not to include a sunset clause in DOMA simply means that it believed such a significant change in federal marital eligibility should be brought about (if at all) by affirmative federal action rather than inaction. Ms. Golinski also misses the mark with her objection (Br. 39) that DOMA does not prohibit the states from recognizing same-sex marriage. Congress rationally could decline to change the federal definition of marriage while permitting the states to act as laboratories of change, if they saw fit. *See* House Br. 42.[10]

Finally, Ms. Golinski's assertions that the House's "argument seems to be that DOMA is justified by 'tradition[]' alone" and that "[t]he 'caution' rationale essentially is an argument that *someday* a rational basis may surface to justify DOMA," Br. 40, are woeful distortions. The House's argument is that Congress rationally could have decided that the institution of marriage is so important to our society that its traditional definition should not be changed at the federal level to include an untested institution, same-sex marriage, when the consequences of

[10] Ms. Golinski claims that, in contrast to DOMA, Congress did not react to "other, often dramatic, historic shifts" (Br. 40) in state marriage law, but she does not actually identify any such shifts. In any event, it was rational for the 104th Congress to enact DOMA regardless of what past Congresses did or did not do.

changing the definition in that way are still unknown and could be far-reaching.

D. DOMA Rationally Directs Benefits to Couples More Likely to Conceive and Raise Children.

DOMA rationally directs federal marital benefits to opposite-sex couples, whose relationships are inherently procreative and often result in unplanned pregnancies, and who are much more likely to raise children together than same-sex couples. *See* House Br. 47-49. Congress could have rationally concluded that opposite-sex relationships implicate the government interest in the conception and rearing of children in a special way and thus warrant the provision of government benefits and support tailored to such relationships alone. Because it is Ms. Golinski's burden to negative this rationale and her brief says nothing contrary to it, this rationale suffices to uphold DOMA.

E. DOMA Encourages Families in Which Children Are Raised by Their Biological Mothers and Fathers, and by Parents of Both Sexes.

Ms. Golinski proposes that this Court declare irrational one of the foundations of our family law and society: the centuries-old wisdom that children generally benefit from being raised by their own biological mothers and fathers, and that law and government should encourage and support that outcome. Likewise, she asks the Court to cast aside as irrational the deeply-rooted and intuitive conclusion that mothers and fathers are different kinds of parents, and that children benefit from having one of each. And she would do all this based on a

single expert witness relying on a body of preliminary social science studies. This Court should decline that invitation.

Ms. Golinski does not dispute that the extant research regarding the supposed equivalence of parenting by same-sex and opposite-sex couples (a) uses samples that are too small and unrepresentative to permit the results to be generalized beyond the group being studied, (b) does not attempt to compare childrearing by same-sex parents with that by married biological parents, and (c) amounts to only the barest beginnings of a study of parenting by gay fathers. *See* House Br. 53-54. Instead, Ms. Golinski simply repeats her expert's assertions that the studies were scientifically "appropriate." Br. 43. But the question is not whether the studies have value; it is whether they are so conclusive that it is irrational to disagree with their authors' policy conclusions—that is, to think that a child stands to benefit from being raised by his or her own biological parents, or that government should create special inducements and expectations for the opposite-sex relationships that can bring this about. The severe weaknesses in the research relied on by Ms. Golinski prevent her from making that showing.

Indeed, in just the last few weeks two significant studies undermining Ms. Golinski's social science theory have been published. *See* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Res. 752 (July 2012),

available at http://www.sciencedirect.com/science/article/pii/S0049089X12000610; Daniel Potter, *Same-Sex Parent Families and Children's Academic Achievement*, 74 J. Marriage & Fam. 556 (June 2012). Unlike virtually all of the previous studies in this area, the Regnerus study included a representative sample that was large enough to draw statistically powerful conclusions regarding comparative outcomes of people whose parents had homosexual relationships and those who were raised by their married biological mothers and fathers—and it discovered that the former group reported significantly worse outcomes on a large number of key indicators. Regnerus, *supra*, at 761-764. Although the Potter study used more limited sampling, it found that "children in same-sex parent families" scored similarly on academic tests to other children in "nontraditional families"—that is, "lower than their peers in married, 2-biological parent households." Potter, *supra*, at 556.[11]

Remarkably, after attempting to sweep under the rug the deficiencies in her research that have been pointed out by serious scholars, Ms. Golinski cites to a

[11] Professor Loren Marks has explained some of the deficiencies in Ms. Golinski's research. *See* House Br. 53-54. The court below unfairly dismissed his article as "an unpublished piece." ER 29. It has now been published in a peer-reviewed journal. *See* Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735 (July 2012), *available at* http://www.sciencedirect.com/science/article/pii/S0049089X12000580.

newspaper article disparaging the Regnerus study. Br. 44 n.24. Eighteen social scientists already have publicly defended the study against such "sensational criticism" in the media. Byron Johnson *et al.*, *A Social Scientific Response to the Regnerus Controversy* (June 20, 2012), http://www.baylorisr.org/2012/06/a-social-scientific-response-to-the-regnerus-controversy/. In any event, the study's alleged shortcoming—that adults raised from infancy by same-sex couples are so rare that it is impossible to obtain a large sampling of them, *see* Regnerus, *supra*, at 757, "despite significant efforts" to do so, *id.* at 766 —only highlights the fact that *all* of the research in this field is in its infancy. That fact underscores the rationality of Congress' decision to proceed with caution.

Ms. Golinski also maintains that there actually is no legal preference for the raising of children by their biological parents, pointing to federal benefits for adoption and childrearing regardless of biological ties, as well as the absence of any ban on childrearing by unmarried people. Br. 45-46. But of course, government and society can and do promote praiseworthy alternative parenting arrangements, when necessary, while still affirming that it is best for children to be raised by their biological mothers and fathers when possible.

Finally, Ms. Golinski repeats the district court's error: She claims that even if there are good reasons to believe that opposite-sex couples implicate government interests in responsible childrearing more heavily than do same-sex couples,

treating the two kinds of relationships differently can only be rational if denying benefits to same-sex couples *by itself* benefits opposite-sex couples. Br. 47-48. As the House has explained, this is not the case: Whether or not recognizing same-sex marriages would itself impact opposite-sex marriage, DOMA is rational because recognizing opposite-sex marriages furthers government interests in a way, and to a degree, that recognizing same-sex marriages does not. *See* House Br. 46.[12]

* * *

The precedents governing this case are clear, numerous, binding, and uniformly in favor of DOMA's constitutionality. That, of course, does not mean that the Constitution endorses what some regard as an injustice. It simply reinforces the fact that the Constitution entrusts this matter to its carefully designed political processes and to the wisdom and virtue of the people and their legislators. And far from being ignored or given unfair treatment in the political processes, gay rights are the subject of a great, nationwide, ongoing, and remarkably evenly matched political debate. In addition to being unnecessary and unsupported by precedent, then, judicial intervention would serve only to stunt the people's

[12] Contrary to Ms. Golinski's claim, the House has not argued that "DOMA must be upheld … as long as *different-sex* married couples are served by the marriage benefits and recognition *they* receive." Br. 49. Rather, DOMA is constitutional because Congress could rationally conclude that recognizing opposite-sex relationships as marriages would serve government interests to a degree that recognizing same-sex relationships would not.

consideration of this issue for themselves.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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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 July 17, 2012.

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