Nos. 12-15388 and 12-15409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,

Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, Case No. 10-00257

REPLY BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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BACKGROUND RELATED TO JURISDICTIONAL ISSUE

This case involves the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA") as applied to plaintiff Karen Golinski. Plaintiff is a staff attorney employed by this Court and is enrolled in the Federal Employees Health Benefits Plan ("FEHBP"). She is married under the laws of California to a woman and sought to enroll her spouse as an additional beneficiary under her FEHBP plan. Plaintiff's efforts were ultimately unsuccessful, as the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901–8914, when read in light of Section 3 of DOMA, prohibits the extension of FEHBP coverage to same-sex spouses.

Plaintiff brought this action against the Office of Personnel Management ("OPM"), which administers the FEHBA, asserting that Section 3 of DOMA is unconstitutional as applied to her, and that OPM incorrectly read FEHBA to deny her the benefits she sought for her spouse. SER 952-53.

On February 23, 2011, the Attorney General notified Congress of the President's and his determination that Section 3 of DOMA violates the equal protection component of the Fifth Amendment as applied to same-sex couples who are legally married under state law. Based on this decision, the President and the Attorney General determined that "the Department will cease defense of Section 3," but explained that "Section 3 will continue to be enforced by the Executive Branch." SER 1020-21. The Attorney General noted that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." SER 1020. The Attorney General stated that Department attorneys will "notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." SER 1021. The Attorney General also stated that he would "instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, [and] that Section 3 is unconstitutional under that standard." *Ibid.*; *but see* BLAG Ans. Br. 6

(incorrectly stating that "the Holder Letter said only that DOJ would not defend DOMA Section 3") (emphasis omitted).

The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") intervened in the district court for the purpose of defending Section 3 against plaintiff's equal protection challenge. BLAG Motion to Intervene, D. Ct. Doc. 103 (May 4, 2011). BLAG moved to dismiss plaintiff's equal protection claim. ER 7. The federal defendants moved to dismiss plaintiff's statutory claim but argued that Section 3 violates the Constitution's guarantee of equal protection.[1] *Ibid.*

On February 22, 2012, the district court held that Section 3 violates the equal protection component of the Due Process Clause. ER 44. BLAG filed a notice of appeal on February 24, 2012. ER 47. The federal defendants ultimately agree with the district court's constitutional ruling, but filed a notice of appeal on February 28, 2012, ER 45, to ensure that the requirements of *Diamond v. Charles*, 476 U.S. 54, 63–64 (1986), are satisfied and that a party with a constitutional stake in the litigation has appealed.

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[1] While opposing dismissal, the federal defendants filed a motion to dismiss plaintiff's equal protection claim to ensure the existence of a justiciable case or controversy for the district court to resolve. Def. Motion to Dismiss Pl's 2d Am. Compl., D. Ct. Doc. 118 (June 3, 2011). This is consistent with past practice in comparable situations where the Executive Branch declined to defend an Act of Congress.

BLAG initially moved to dismiss the government's appeal in April 2012. Doc. No. 21. This Court denied BLAG's motion "without prejudice to its raising the issue in its brief in that appeal." Doc. No. 22 at 2. BLAG has now filed a brief in that appeal arguing that the appeal by the Executive Branch defendants "should be dismissed because they fully prevailed below and, therefore, they are not aggrieved and their appeal is not necessary to enable the House to prosecute its earlier-filed appeal." BLAG Ans. Br. at 1.[2]

SUMMARY OF ARGUMENT

I. The Executive Branch defendants undeniably have standing to appeal under settled law, and therefore, there is no basis for dismissing the government's appeal. While the Executive Branch agrees with the constitutional ruling in the district court, it continues to enforce Section 3 of DOMA pending definitive judicial resolution of its constitutionality, and it was the Executive Branch defendants against whom judgment was entered. Because that judgment prevents the Executive Branch defendants from taking enforcement action they would otherwise take, they are aggrieved by the judgment and have standing to appeal.

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[2] On July 27, 2012, this Court vacated the oral argument scheduled for September 10, 2012, and ordered that "this case be held in abeyance pending resolution of the petition for a writ of certiorari before judgment pending before the United States Supreme Court." Doc. 147 at 1. Counsel for the government contacted the Clerk's Office and was informed that the government should file this reply brief because the briefing schedule had not been vacated.

The type of adverseness and individualized controversy envisioned by the Framers as a key component of Article III standing is manifestly present here. Because the Executive Branch defendants have standing to appeal, it is unnecessary for the Court to resolve the constitutional issues regarding BLAG's independent standing to pursue its own appeal (No. 12-15388). The Court should follow the Supreme Court's approach in *INS v. Chadha*, 462 U.S. 919 (1983), and resolve the case in its current consolidated posture. Should the Court address the question, however, BLAG lacks standing to appeal the judgment.

II. On the merits, although Section 3 of DOMA violates the equal protection component of the Due Process Clause, as the Executive Branch defendants have argued in their brief, this Court cannot affirm on the alternate basis that Section 3 violates plaintiff's substantive due process rights. The law, while discriminatorily excluding same-sex married couples from federal benefits such as FEHBA, does not implicate a substantive due process right because there is no such right to health benefits under the FEHBA.

ARGUMENT

I. There Is No Basis For Dismissal Of The Government's Appeal.

A. The Executive Branch Defendants Have Standing to Appeal.

The Executive Branch defendants undeniably have standing to appeal. While the President has determined that Section 3 is unconstitutional, he has "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." SER 1020. As federal entities charged with Section 3's enforcement, and against whom judgment was entered below, the Executive Branch defendants are the proper parties to invoke this Court's power to review the district court's judgment. *See INS v. Chadha*, 462 U.S. 919, 930-931 (1983) ("When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional," it may appeal that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional."); *United States v. Lovett*, 328 U.S. 303, 306-307 (1946) (reviewing constitutionality of a federal statute on the petition of the Solicitor General, even though the Solicitor General agreed with the lower court's holding that the statute was unconstitutional); *see also United States v. Lovett*, 327 U.S. 773 (1946) (granting Solicitor General's petition for a writ of certiorari).

While the government concurs substantively with the district court's conclusion that Section 3 is unconstitutional, the President has directed federal agencies to continue to enforce DOMA "unless and until . . . the judicial branch renders a definitive verdict against the law's constitutionality." SER 1020. As the Attorney General has explained, "this course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." SER 1020. The Executive Branch defendants' briefs in the district court on the constitutional issue did not alter the defendants' decision to comply with the Act, and the district court's order enjoining them from doing so thus prevented them from taking steps they otherwise would have taken.[3] They accordingly are "aggrieved" by the district court judgment for purposes of establishing standing to take an appeal. *See Chadha*, 462 U.S. at 930, 939. The Executive Branch defendants have suffered the same type of institutional injury that is always present when the federal government is a defendant. *See id.* at 939 ("INS's agreement with the Court of Appeals' decision that § 244(c)(2) is unconstitutional does not affect that agency's 'aggrieved' status for purposes of appealing that decision."); *id.* at 940 n. 12 (explaining that in *Bob Jones University v. United States*, 461

[3] The defendants permitted registration of plaintiff's spouse on plaintiff's health plan not because of the President's determination that Section 3 of DOMA is unconstitutional, but because the district court entered an order (which was not stayed) striking down Section 3 and "enjoining defendants . . . from interfering with the enrollment of Ms. Golinski's wife in her family health benefits plan." ER 44.

U.S. 574 (1983), the Court "found an adequate basis for jurisdiction in the fact that the government intended to enforce the challenged law against that party"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.") (quotation marks and citation omitted).

As the *Chadha* Court explained, even "prior to Congress' intervention" in that case, the Executive's decision to comply with the challenged law, despite its view that the law was unconstitutional, created "adequate Art. III adverseness." 462 U.S. at 939. Thus, the agency defendants, who absent the court's order would enforce Section 3 pursuant to the President's directive, are "aggrieved by a judgment or order of a district court" and therefore "may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). The agency defendants therefore have standing to appeal, and BLAG's motion to dismiss the government's appeal should be denied.[4]

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[4] As *Chadha* noted, the fact that an agency may agree with the substance of the judgment against it does not "affect that agency's 'aggrieved' status" for purposes of appeal or eliminate the Article III case or controversy. *See* 462 U.S. at 939. And courts frequently hear appeals in cases in which the parties agree on the substance of the issues; in some such cases, the courts appoint amici to present arguments supporting or undermining the lower court's judgment. *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (respondent agreed with petitioner that the lower court had erred, and (continued...)

In support of its argument, BLAG cites several cases for the unremarkable proposition that a party cannot appeal a ruling unless it is aggrieved. BLAG Ans. Br. at 15-16. But none of those cases address the situation presented here, and we have explained why the Executive Branch *is* aggrieved for purposes of that general principle. Indeed, BLAG recognizes that the case that is closest to being on point is *Chadha*. And as BLAG acknowledges, BLAG Ans. Br. at 16, *Chadha* held that the government was "aggrieved" for purposes of the statute conferring appellate jurisdiction on the Supreme Court even where, as here, the government agreed with the lower court that the statute in question was unconstitutional. *Chadha*, 462 U.S. at 930, 939.

BLAG argues, BLAG Ans. Br. at 16-17, that "aggrieved" meant something different in *Chadha*, because the appeal there was under 28 U.S.C. § 1252 (repealed), which permitted "[a]ny party" to appeal a judgment holding an Act of Congress unconstitutional, while appeal here is pursuant to 28 U.S.C. § 1291, which simply provides that the courts of appeals have jurisdiction to review the final decisions of the district courts. But BLAG provides no reasoned basis for treating a party's "aggrieved" status differently depending on the statutory basis for the court's jurisdiction. In both circumstances, the inquiry is "derived from the statutes granting appellate jurisdiction

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[4](...continued)
Supreme Court appointed special counsel to defend judgment under review); *cf. United States v. Lovett*, 328 U.S. 303 (Supreme Court allowed argument by amicus on behalf of Congress).

and the historic practices of the appellate courts." *Deposit Guaranty*, 445 U.S. at 333 (applying § 1291); *Chadha*, 462 U.S. at 930 (citing *Deposit Guaranty* in its application of § 1252). Moreover, *Chadha*'s analysis was not merely an exercise in statutory interpretation; the Court in that case also made clear that it considered the Executive Branch's role in that litigation to establish "adequate Art. III adverseness." 462 U.S. at 939. It is equally clear that the Executive Branch defendants in this case, who are charged with the enforcement of Section 3 of DOMA and who are prohibited by the judgment from doing so, retain a "stake in the appeal satisfying the requirements of Art. III." *Deposit Guaranty*, 445 U.S. at 334.

B. Dismissal Of The Executive Branch Defendants' Appeal Would Create An Unnecessary Obstacle To Resolving The Substantial Constitutional Questions In This Case.

1. If this Court recognizes the government's standing to appeal, it need not resolve whether BLAG independently has standing to appeal. By allowing the consolidated appeals to move forward, the Court can ensure that it will be able to resolve the substantive constitutional issues presented on the merits. By pursuing a separate appeal and by seeking consolidation, the government is not trying to "confuse the matters." BLAG Ans. Br. at 10. Rather, the government is simply taking appropriate steps to ensure that this case can ultimately be definitively resolved on the merits by a federal court, consistent with a recognition that the judiciary is "the final arbiter of the constitutional claims raised," and to provide BLAG "a full and fair opportunity to

participate in the litigation" by presenting argument on the constitutional issue. SER 1020-21.

On the other hand, BLAG's proposed disposition – dismissing the Executive Branch defendants' appeal and proceeding solely on BLAG's appeal – would unnecessarily raise the prospect of creating an obstacle to resolution of the constitutional issue on appeal. If this Court were to dismiss the government's appeal, but BLAG is mistaken about its independent standing, that mistake would necessarily lead this Court, or the Supreme Court, to dismiss the appeal on standing grounds without resolving the merits. Resolution of the constitutionality of Section 3 of DOMA would thus be delayed, confounding BLAG's stated desire to achieve a prompt determination on the merits. *See*, *e.g.*, Doc. No. 21, BLAG Response to Motion to Consolidate at 19. Because the presence of one party with standing ensures that the controversy before this Court is justiciable, *see Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 303–05 (1983), the federal defendants' appeal allows this Court to avoid those standing issues and is therefore not superfluous. BLAG's motion to dismiss that appeal should accordingly be denied.

2. Although the Court need not reach the question of BLAG's standing, if it does, it should hold that BLAG lacks standing to appeal. The Supreme Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), that an entity whose members were appointed by Congress could not be accorded a right to initiate litigation on behalf of the government,

applies equally to taking an appeal. As the Supreme Court explained in *Buckley*, the "discretionary power to seek judicial relief" is "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const., Art. II, § 3). And indeed, the Supreme Court has never held that Congress as a whole, much less a majority of an advisory group to the House of Representatives such as BLAG, has standing, on its own, to seek appellate review of a decision striking down an Act of Congress. The case relied upon most extensively by BLAG, *Chadha*, does not hold that Congress can pursue litigation on its own whenever a federal law is invalidated and the Executive Branch agrees the law is not constitutional. *Chadha*, rather, held that the Executive Branch's aggrieved status created "adequate Art. III adverseness," and that Congress's formal intervention to defend the constitutionality of the statute at issue placed the justiciability of the controversy "beyond doubt." *See* 462 U.S. at 939.

Moreover, even if Congress or one of its Houses might in some circumstance have a legally cognizable stake permitting it to seek review of a lower court judgment, *Chadha* is distinguishable from this case because *Chadha* involved "a separation of powers dispute [between] Congress" and the Executive Branch. 462 U.S. at 936. Here, Section 3 of DOMA is not being challenged as an encroachment of either the powers of the

President or Congress, and for this reason as well *Chadha* does not support congressional standing in these circumstances. *Cf. Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (holding that individual members of Congress did not have standing to challenge an Act of Congress).

This Court's decision in *Newdow v. U.S. Congress*, 313 F.3d 495 (9th Cir. 2002), is instructive. In *Newdow,* this Court considered a motion to intervene by the entirety of the Senate acting pursuant to a Senate resolution. *Id.* at 497. This Court denied the motion to intervene, holding that the Senate lacked standing. The Court explained that, when separation of powers issues are not at stake, Congress's "own 'powers and responsibilities' are not really under attack," and "[a] public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States." *Id.* at 499–500. In so doing, this Court distinguished *Chadha* and precedent of this Court granting intervention on the ground that "in each of these cases the courts were dealing with a statute addressing legislative action regarding allocation of authority within the government, as opposed to action applying that authority to the behavior of the citizenry in general," and that "[t]he issues were the kind that intimately affected Congress's own place within our constitutional scheme." *Id.* at 498. For that reason, this Court held that "concrete and particularized harm is lacking . . . because no harm beyond frustration of a general desire to see the law enforced as written has been shown here." *Id.*

BLAG urges a different result here because the President and Attorney General have determined that Section 3 of DOMA is unconstitutional and are not defending the constitutionality of that provision. But here, because the Executive Branch is continuing to enforce Section 3 of DOMA, at the President's direction, BLAG cannot even establish the "frustration of a general desire to see" Section 3 enforced. *Newdow*, 313 F.3d at 498. Rather, the Executive Branch *is* enforcing the law. BLAG's interest is, therefore, not enforcement of the law, but to see the law defended in court. *See* BLAG Ans. Br. at 3 (intervening because "DOJ abandon[ed] its constitutional responsibility" to defend the law). Such an interest is far afield from the sort of direct interest in the outcome of litigation that might give rise to standing.[5]

Diamond v. Charles, 476 U.S. 54 (1986), fully supports our position here. In *Diamond*, a state had declined to appeal an injunction entered against enforcement of a state law, but an intervenor had filed an appeal. *Id.* at 61. The Supreme Court held that it lacked jurisdiction even though the "State remains a party here under our" rules. *Id.* at 63. The Court explained that "[b]y not appealing the judgment below, the State

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[5] *See Barnes v. Kline*, 759 F.2d 21, 67 (D.C. Cir. 1985) (Bork, J., dissenting) (in *Chadha*, "Congress, though nominally a party, was in reality much more in the position of an *amicus curiae*" because "[n]o judgment could be entered against Congress"; thus,"Congress' intervention . . . merely heightened the 'concrete adverseness' of what was already a case-or-controversy" which is "a far cry from . . . saying that Congress suffers a judicially cognizable injury when its lawmaking powers are infringed"), *majority opinion vacated*, *Burke v. Barnes*, 479 U.S. 361 (1987).

indicated its acceptance of that decision," and "its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 63-64. The same concern would be present here were the appeal of the Executive Branch defendants to be dismissed. BLAG claims that *Diamond* is inapposite because it involved a criminal statute and a private party intervenor. Those asserted distinctions are immaterial. As the Court explained in *Diamond*, the "State's undoubted standing exists only if the State is in fact an appellant," and "in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Diamond*, 476 U.S. at 63. In sum, without an appeal by the party against whom judgment was entered – here, OPM and the other Executive Branch defendants – the district court's decision granting relief against OPM and the other federal defendants – but not BLAG – could not be reviewed.

Finally, as BLAG acknowledges, BLAG Ans. Br. at 12, the Court in *Chadha* found adversariness in part based on the participation of "the two Houses of Congress." 462 U.S. at 931 n.6. Here, on the other hand, neither House has intervened; rather, an advisory group for a single House has done so. *Cf. Byrd*, 521 U.S. at 829 (in finding no standing, explaining that "[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action"); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (finding standing when a majority of a state legislative body was suing as a bloc). The House may organize its internal affairs through

a committee – or advisory group – structure as it wishes, but it is far from clear that a congressional advisory group has a constitutional stake sufficient to take external action – such as pursuing the instant suit – without specific authorization by the House as a whole, even assuming that the House as a body would have standing.[6] This added layer of uncertainty as to BLAG's standing to pursue this appeal on its own militates even more strongly against dismissing the government's appeal.[7]

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[6] *See* House Rule II.8 (Office of General Counsel exists "for the purpose of providing . . . representation *to the House*") (emphasis added); *Watkins v. United States*, 354 U.S. 178, 201 (1957) (noting that the "more vague the committee's charter . . . the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress"); *Reed v. County Comm'rs of Delaware County, Pa.*, 277 U.S. 376, 389 (1928) (upholding dismissal of suit brought by a number of Senators to compel the production of evidence where suit was not expressly authorized by the full Senate and explaining that the "[a]uthority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose"); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 790-91 (5th Cir. 1979) (not allowing Chairmen of two subcommittees of the House of Representatives to intervene where they had failed to obtain authorization from the House); *Wilson v. United States*, 369 F.2d 198, 203 (D.C. Cir. 1966) (reading the contempt-of-Congress statute to require a vote of the full House before a witness could be found in contempt by a court, and expressing concern that committees might manipulate their processes in order to "insulate their actions on contempt matters from any further consideration within the legislative branch"); *see also* 2 U.S.C. § 288b(b), (c) (authorizing Senate "by a resolution adopted by the Senate" to "intervene or appear as amicus curiae").

[7] BLAG suggests that, unless it has independent standing, the Executive Branch might "ha[ve] the power effectively to preclude judicial determination of the constitutionality of an Act of Congress." BLAG Ans. Br. at 14. That suggestion provides no basis for ignoring the constraints of Article III. *Cf. United States v. Richardson*, 418 U.S. 166, 179 (1974) (rejecting the argument that a party should be found to have Article III standing because if that party does not have standing, no one would have (continued...)

II. Plaintiff's Substantive Due Process Challenge To DOMA Does Not Provide An Alternate Basis for Affirmance.

In her responsive brief, plaintiff argues that the district court judgment can be affirmed because "DOMA impermissibly burdens" her substantive due process rights. Pl. Br. at 27. While the deprivation she describes violates the equal protection component of the Fifth Amendment, as we have explained in our earlier briefing, plaintiff's substantive due process argument cannot prevail because in this case, DOMA works to prevent plaintiff from obtaining a federal benefit, and there is no substantive due process right to obtain such a federal benefit.

The Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks and citations omitted). Thus, the Supreme Court has held that it protects "the rights to marry, to have children, to direct the education and upbringing of one's children, to

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[7](...continued)
standing to challenge an Act of Congress). The Executive Branch's continued enforcement of Section 3 of DOMA pending authoritative judicial resolution of its constitutionality, thereby ensuring the continuing existence of a case or controversy for the courts to resolve, is, moreover, rooted in a recognition that the judiciary is the final arbiter of the constitutionality of the Acts of Congress. And because the Executive Branch has accordingly taken appropriate steps to invoke this Court's jurisdiction on appeal in this case, this case presents no occasion to address the hypothetical scenario BLAG raises.

marital privacy, to use contraception, to bodily integrity, and to abortion," *id.* at 720 (citations omitted), but has cautioned against expanding these rights, *see id.*; *see also Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Supreme Court has also required "a careful description of the asserted fundamental liberty interest," *Glucksberg*, 521 U.S. at 721 (quotations marks omitted), and this Court has explained that "a narrow definition of the interest at stake" is necessary. *Raich v. Gonzales*, 500 F.3d 850, 862-63 (9th Cir. 2007). Here, the specific right at issue is obtaining health benefits under a federal benefit program, the FEHBA. While denial of those benefits violates the equal protection component of the Due Process Clause in these circumstances, there is no substantive due process right to access to that health benefit program.

A holding based on substantive due process would require concluding that there is a substantive constitutional right to FEHBA benefits, without regard to the eligibility of other classes of persons to receive those benefits. *Cf. Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (declining to rule on equal protection grounds because it would leave open the possibility that the "prohibition would be valid if drawn differently" to ban sodomy for both same-sex and different-sex participants). But there is no such substantive right here. Instead, the Supreme Court "cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989).

Plaintiff claims that DOMA burdens her "constitutional liberty to build a family life together" with her same-sex spouse. Pl. Br. at 27. But the challenged denial of federal benefits does not affect whether plaintiff may marry under state law, or whether she and her spouse may remain together as a couple, enjoy familial privacy, or raise children in a manner that would undergird a substantive due process entitlement.

This case, in that respect, is unlike *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), upon which plaintiff relies. In *Moore*, the plaintiff was convicted of violating a city occupancy ordinance that prohibited one of her grandsons from living with her in her house. In *LaFleur*, pregnant school teachers were required take leave months before the expected birth of their children and were then ineligible to return to work until the beginning of the next school year following the date when their children attained the age of three months old. The Supreme Court found substantive due process violations in both *Moore* and *LaFleur* because the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." *Moore*, 431 U.S. at 499; *LaFleur*, 414 U.S. at 640. The city ordinance in *Moore* impinged on that liberty interest by "slicing deeply into the family itself" and "mak[ing it] a crime of a grandmother's choice to live with her grandson." *Moore*, 431 U.S. at 498-99. Similarly, the maternity leave regulations in *LaFleur* "act[ed] to penalize the pregnant teacher for deciding to bear a child," thus directly burdening the "right to be free from unwarranted governmental

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *LaFleur*, 414 U.S. at 640 (quotation marks omitted). Here, while there is unfairness in the unequal treatment for purposes of equal protection, there is no similar intrusion into plaintiff's family created by her spouse's ineligibility for FEHBA benefits.

Similarly inapposite are *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). *Lawrence* involved a due process challenge to a state statute criminalizing consensual same-sex sodomy and was "concerned with the autonomy of the person to make choices about intimate relationships free from governmental stigmatization or sanction." *Fleck and Associates, Inc. v. Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (quotation marks and citation omitted). In *Witt*, this Court applied heightened substantive due process scrutiny to the military's "Don't Ask, Don't Tell" policy because the Court concluded that the factual allegations in that case supported an inference of government "intrusion into the personal and private life of the individual." *Witt*, 527 F.3d at 817 (quoting *Lawrence*, 539 U.S. at 578) (emphasis omitted). Specifically, a military board in *Witt* had recommended that the plaintiff be discharged after an investigation into her private life to determine her sexual orientation. 527 F.3d at 810. In contrast, spousal eligibility for FEHBA, while a significant fringe benefit of employment, is at bottom discretionary on the part of the federal government. Thus, qualification for an employment benefit cannot be said

to intrude on the types of "personal choices" that are "central to personal dignity and autonomy" and "to the liberty protected by the [Fifth] Amendment" in the same way as the criminal prohibition of intimate conduct in *Lawrence*. *Lawrence*, 539 U.S. at 574 (quotation marks omitted).[8]

Accordingly, neither plaintiff nor her spouse possesses a fundamental right to receive FEHBA benefits. The proper way to evaluate and strike at the unfairness in Section 3 of DOMA is under the equal protection component of the Due Process Clause, rather than under principles of substantive due process.[9]

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[8] Even in cases where a financial burden is imposed based on family choices, substantive due process rights are rarely implicated. *See Bowen v. Gilliard*, 483 U.S. 587, 601-02 (1987) ("That some families may decide to modify their living arrangements in order to avoid the effect of the [welfare] amendment, does not transform the amendment into an act whose design and direct effect are to 'intrud[e] on choices concerning family living arrangements.'" (quoting *Moore*, 431 U.S. at 499)). *Cf. Califano v. Jobst*, 434 U.S. 47, 54 (1977) (loss of federal social security benefits upon marriage does not "interfere with the individual's freedom to make a decision as important as marriage"). Even if Section 3 of DOMA may impose financial burdens in some circumstances, here, FEHBA cannot be described as imposing a financial burden on plaintiff's decision to marry.

[9] Plaintiff also argues that DOMA Section 3 is a classification based on gender. Pl. Br. at 25. Given that Section 3 categorizes between two different classes of married couples – same sex and opposite sex – it is better analyzed as classifications based on sexual orientation.

CONCLUSION

For the foregoing reasons, dismissal of the government's appeal is not warranted and the alternative grounds for affirmance presented in plaintiff's responsive brief lack merit.

Respectfully submitted,

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JULY 2012

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced using Garamond 14-point font, and contains 5,555 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2012, 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. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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