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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 KAREN GOLINSKI)
14 Plaintiff,)
15 v.)
16 THE UNITED STATES OFFICE OF)
17 PERSONNEL MANAGEMENT, et al.)
18 Defendants.)
19 _____)

No. C 3:10-00257-JSW

**DEFENDANTS' BRIEF IN OPPOSITION
TO MOTIONS TO DISMISS**

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SUMMARY OF ARGUMENT

1
2 Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (“DOMA”), unconstitutionally
3 discriminates. It treats same-sex couples who are legally married under their states’ laws
4 differently than similarly situated opposite-sex couples, denying them the status, recognition, and
5 significant federal benefits otherwise available to married persons. Under well-established
6 factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to
7 heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.

8 The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications
9 based on sexual orientation, but it has established and repeatedly confirmed a set of factors that
10 guides the determination whether heightened scrutiny applies: (1) whether the group in question
11 has suffered a history of discrimination; (2) whether members of the group “exhibit obvious,
12 immutable, or distinguishing characteristics that define them as a group”; (3) whether the group
13 is a minority or is politically powerless; and (4) whether the characteristics distinguishing the
14 group have little relation to legitimate policy objectives or to an individual’s “ability to perform
15 or contribute to society.” *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v.*
16 *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Careful consideration of those factors
17 demonstrates that sexual orientation classifications should be subject to heightened scrutiny.

18 Although binding authority of this circuit holds that rational basis review applies to
19 sexual orientation classifications, *see, e.g., High Tech Gays v. Defense Industrial Security*
20 *Clearance Office*, 895 F.2d 563, 570 (9th Cir. 1990), we respectfully submit that this decision no
21 longer withstands scrutiny. To the extent *High Tech Gays* rested on inferences drawn from the
22 Supreme Court’s decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that rationale does not
23 survive the Supreme Court’s subsequent overruling of *Bowers* in *Lawrence v. Texas*, 539 U.S.
24 558 (2003). To the extent *High Tech Gays* considered the factors the Supreme Court has
25 identified as relevant to the inquiry, we respectfully submit that its consideration was incomplete
26 and ultimately incorrect.

27 Heightened scrutiny should be applied, and Section 3 of DOMA is unconstitutional under
28 that level of review.

INTRODUCTION AND BACKGROUND

1
2 Plaintiff Karen Golinski, a staff attorney with the U.S. Court of Appeals for the Ninth
3 Circuit, is enrolled in the Federal Employees Health Benefits Plan (“FEHBP”). 2d Am. Compl.
4 ¶¶ 18-19.¹ Since August 2008, Plaintiff has been married under the laws of California to a
5 spouse who, like Plaintiff, is a woman. *Id.* ¶ 17. After becoming married, Plaintiff sought to
6 have her wife enrolled as an additional beneficiary under her FEHBP plan. *Id.* ¶ 22. Plaintiff’s
7 efforts to have her wife enrolled as an additional beneficiary were ultimately unsuccessful, as the
8 FEHBA, 5 U.S.C. §§ 8901-8914, when read in light of Section 3 of the Defense of Marriage Act,
9 1 U.S.C. § 7 (“DOMA”), prohibits the extension of FEHBP coverage to same-sex spouses. In
10 pertinent part, DOMA provides:

11 In determining the meaning of any Act of Congress, or of any ruling, regulation, or
12 interpretation of the various administrative bureaus and agencies of the United States,
13 the word “marriage” means only a legal union between one man and one woman as
14 husband and wife, and the word “spouse” refers only to a person of the opposite sex
15 who is a husband or wife.

16 1 U.S.C. § 7.

17 After the completion of an administrative hearing process under the Ninth Circuit’s
18 Employee Dispute Resolution (“EDR”) Plan, Plaintiff brought the instant action on January 20,
19 2010.² Plaintiff’s First Amended Complaint was dismissed by this Court on March 16, 2011.
20 ECF No. 98. On April 14, 2011, Plaintiff filed her Second Amended Complaint, ECF No. 102,

21 ¹ The FEHBP was established pursuant to the Federal Employees Health Benefits Act, 5 U.S.C.
22 §§ 8901 *et seq.* (“FEHBA”), which created the FEHBP as a comprehensive health insurance
23 program for federal civilian employees, their family members, and others. FEHBA confers broad
24 authority on the United States Office of Personnel Management (“OPM”) to administer the
25 program and to promulgate regulations necessary to carry out the statute’s objectives, including
26 regulations prescribing “the manner and conditions under which an employee is eligible to
27 enroll.” 5 U.S.C. § 8913. FEHBA grants OPM authority to contract with “qualified carriers”
28 offering health insurance plans. 5 U.S.C. §§ 8902, 8903, 8906. The “employees” who may
participate in the FEHBP include employees of the Judiciary. 5 U.S.C. §§ 2105(a)(2),
8901(1)(A).

² A more detailed recitation of the factual and procedural history of this case is set forth in this
Court’s Order Granting Motion to Dismiss and Denying Motion for Preliminary Injunction of
March 16, 2011, at 2-5 and *passim*. ECF No. 98.

1 which now asserts that DOMA is unconstitutional as applied to her. It is to that constitutional
2 argument that this brief is addressed. Plaintiff also appears to assert that the Defendants
3 incorrectly or unreasonably read FEHBA to deny Plaintiff's request for the enrollment of her
4 wife as an additional beneficiary under the plan. As set forth in the memorandum in support of
5 Defendants' motion to dismiss, ECF No. 118-1, such claim should be dismissed to the extent it is
6 adequately asserted in the first instance.

7 Plaintiff's wife remains uncovered by Plaintiff's FEHBP plan.

8 STANDARD OF REVIEW

9
10 To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint "must
11 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its
12 face.'" *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic v.*
13 *Twombly*, 550 U.S. 544, 570 (2007)). Under *Iqbal* and *Twombly*, "[a] claim has facial
14 plausibility when the pleaded factual content allows the court to draw the reasonable inference
15 that the defendant is liable for the misconduct alleged." *Id.*

16 ARGUMENT

17 **I. DOMA VIOLATES EQUAL PROTECTION.**

18 The Constitution's guarantee of equal protection of the laws, applicable to the federal
19 government through the Due Process Clause of the Fifth Amendment, *see Bolling v. Sharpe*, 347
20 U.S. 497, 500 (1954), embodies a fundamental requirement that "all persons similarly situated
21 should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).
22 DOMA Section 3 is inconsistent with that principle of equality, as it denies legally married same-
23 sex couples federal benefits that are available to similarly situated opposite-sex couples.

24 For the reasons set forth below, heightened scrutiny, rather than rational basis review, is
25 the appropriate standard of review for classifications based on sexual orientation. Under that
26 more rigorous standard, Section 3 of DOMA cannot withstand constitutional muster.

1 **A. PLAINTIFFS' EQUAL PROTECTION CHALLENGE TO DOMA IS**
 2 **SUBJECT TO HEIGHTENED SCRUTINY UNDER SUPREME COURT**
 3 **PRECEDENT.**

4 As a general rule, legislation challenged under equal protection principles is presumed
 5 valid and sustained as long as the “classification drawn by the statute is rationally related to a
 6 legitimate state interest.” *Cleburne*, 473 U.S. at 440. “[W]here individuals in the group affected
 7 by a law have distinguishing characteristics relevant to interests the [government] has authority
 8 to implement,” courts will not “closely scrutinize legislative choices as to whether, how, and to
 9 what extent those interests should be pursued.” *Id.* at 441. Where, however, legislation classifies
 10 on the basis of a factor that “generally provides no sensible ground for differential treatment,”
 11 such as race or gender, the law demands more searching review and imposes a greater burden on
 12 the government to justify the classification. *Id.* at 440–41.

13 Such suspect or quasi-suspect classifications are reviewed under a standard of heightened
 14 scrutiny, under which the government must show, at a minimum, that a law is “substantially
 15 related to an important government objective.” *Clark v. Jeter*, 586 U.S. 456, 461 (1988). This
 16 more searching review enables courts to ascertain whether the government has employed the
 17 classification for a significant and proper purpose, and serves to prevent implementation of
 18 classifications that are the product of impermissible prejudice or stereotypes. *See, e.g.*,
 19 *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States v.*
 20 *Virginia (“VMI”)*, 518 U.S. 515, 533 (1996).

21 The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications
 22 based on sexual orientation.³ It has, however, established and repeatedly confirmed a set of

23 ³ In neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003),
 24 did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In
 25 both cases, the Court invalidated sexual orientation classifications under a more permissive
 26 standard of review without having to decide whether heightened scrutiny applied (*Romer* found
 27 that the legislation failed rational basis review, 517 U.S. at 634-35; *Lawrence* found the law
 28 invalid under the Due Process Clause, 539 U.S. at 574-75).

 Nor did the Court decide the question in its one-line per curiam order in *Baker v. Nelson*,
 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court
 decision denying marriage status to a same-sex couple, *id.* at 810. *Baker* did not concern the

1 factors that guide the determination of whether heightened scrutiny applies to a classification that
2 singles out a particular group. These include: (1) whether the group in question has suffered a
3 history of discrimination; (2) whether members of the group “exhibit obvious, immutable, or
4 distinguishing characteristics that define them as a discrete group”; (3) whether the group is a
5 minority or is politically powerless; and (4) whether the characteristics distinguishing the group
6 have little relation to legitimate policy objectives or to an individual’s “ability to perform or
7 contribute to society.” *See Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *Cleburne*, 473 U.S.
8 at 441–42.

9 Although there is substantial circuit court authority, including binding authority of this
10 circuit, holding that rational basis review generally applies to sexual orientation classifications,
11 *see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570 (9th Cir.
12 1990), most of these decisions fail to give adequate consideration to these enumerated factors.
13 Indeed, the reasoning of this line of case law traces back to circuit court decisions from the late
14 1980s and early 1990s, a time when *Bowers v. Hardwick*, 478 U.S. 186 (1986), was still the law.
15 The Supreme Court subsequently overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003),
16 and the reasoning of these circuit decisions no longer withstands scrutiny.

17 In *High Tech Gays*, for example, the Ninth Circuit considered a constitutional challenge
18 to the Department of Defense’s practice of conducting mandatory investigations of security
19 clearance applicants known or suspected to be gay. Without expressly relying on the deference
20 due to military judgments, *cf. Rostker v. Goldberg*, 453 U.S. 57, 70 (1981), the court concluded
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constitutionality of a federal law, like DOMA Section 3, that distinguishes among couples who
are already legally married in their own states, and was motivated by animus toward gay and
lesbian people. *See* Part I.B, *infra*. Moreover, neither the Minnesota Supreme Court decision,
Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the
plaintiffs’ jurisdictional statement raised whether classifications based on sexual orientation are
subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup.
Ct.), at 2; *see also id.* at 13 (repeatedly describing equal protection challenge as based on the
“arbitrary” nature of the state law). There is no indication in the Court’s order that the Court
nevertheless considered, much less resolved, that question.

1 that the challenged classification was subject only to rational basis review.⁴ To the extent that
2 conclusion rested on inferences drawn from the Supreme Court's decision in *Bowers*, see *High*
3 *Tech Gays*, 895 F.2d at 574, that rationale does not survive the overruling of *Bowers* in
4 *Lawrence*. And to the extent *High Tech Gays* considered the factors the Supreme Court has
5 identified as relevant to the inquiry, see *High Tech Gays*, 895, F.2d at 573–74, we respectfully
6 submit that its consideration was incomplete and ultimately incorrect for the reasons explained
7 below.⁵ Careful consideration of those factors demonstrates that classifications based on sexual
8 orientation should be subject to heightened scrutiny.

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13 ⁴ *High Tech Gays* and a number of cases in other circuits involved challenges to military policy
14 on homosexual conduct. See, e.g., *High Tech Gays*, 895 F.2d at 565; see also *Cook v. Gates*, 528
15 F.3d 42, 45 (1st Cir. 2008); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v.*
16 *Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en
17 banc); *Woodard v. United States*, 871 F.2d 1068, 1069 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*,
881 F.2d 454, 456 (7th Cir. 1989). Classifications in the military context, however, present
different questions from classifications in the civilian context, see, e.g., *Rostker v. Goldberg*, 453
U.S. 57, 66 (1981), and the military is not involved here.

18 ⁵ As noted above, other courts of appeals have held that classifications on the basis of sexual
19 orientation are not subject to heightened scrutiny, but the reasoning of these courts is similarly
20 flawed. Many of those courts relied in part or in whole on *Bowers*. See *Equality Found. v. City*
21 *of Cincinnati*, 54 F.3d 261, 266–67 & n. 2 (6th Cir. 1995); *Steffan*, 41 F.3d at 685; *Woodward*,
22 871 F.2d at 1076 (Fed. Cir. 1989); *Ben-Shalom*, 881 F.2d at 464; see also *Richenberg v. Perry*,
23 97 F.3d at 260 (citing to reasoning of prior appellate decision that were based on *Bowers*);
24 *Thomasson*, 80 F.3d at 928 (same). Other courts relied on the fact that the Supreme Court has
25 not recognized that gays and lesbians constitute a suspect or quasi-suspect class. *Cook*, 528 F.3d
26 at 61; *Johnson v. Johnson*, 358 F.3d 503, 532 (5th Cir. 2004). Though it is true that the Supreme
27 Court thus far has not yet recognized that gays and lesbians constitute a suspect class, see Note 3,
28 *supra*, the Supreme Court does not decide a question by failing to opine on it in dicta
unnecessary to the resolution of a case. Finally, the remaining courts to address the issue offered
no pertinent reasoning in so doing. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358
F.3d 804, 818 (11th Cir. 2004); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th
Cir. 1984).

1 **1. Gays and Lesbians Are a Quasi-Suspect or Suspect**
 2 **Class under the Relevant Factors Identified by the**
 3 **Supreme Court.**

4 **i. Gays and Lesbians Have Been Subject to**
 5 **a History of Discrimination.**

6 First, as the Ninth Circuit has previously recognized, gay and lesbian individuals have
 7 suffered a long and significant history of purposeful discrimination. *See High Tech Gays*, 895
 8 F.2d at 574 (“[W]e do agree that homosexuals have suffered a history of discrimination . . .”);
 9 *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 465–66 (7th Cir. 1989) (noting that
 10 “[h]omosexuals have suffered a history of discrimination and still do, though possibly now in
 11 less degree”). So far as we are aware, no court to consider this question has ever ruled otherwise.

12 Discrimination against gay and lesbian individuals has a long history in this country,
 13 *Bowers*, 478 U.S. at 192, from colonial laws ordering the death of “any man [that] shall lie with
 14 mankind, as he lieth with womankind” to state laws that, until very recently, have “demean[ed]
 15 the[] existence” of gay and lesbian people “by making their private sexual conduct a crime,”
 16 *Lawrence*, 539 U.S. at 578. In addition to the discrimination reflected in DOMA itself, as
 17 explained below, the federal government, state and local governments, and private parties all
 18 have contributed to this long history of discrimination.⁶

19 Discrimination by the Federal Government

20 The federal government has played a significant and regrettable role in the history of
 21 discrimination against gay and lesbian individuals.

22 For years, the federal government deemed gays and lesbians unfit for employment,

23 ⁶ We do not understand the Supreme Court to have called into question this well-documented
 24 history when it said in *Lawrence* that “it was not until the 1970’s that any State singled out
 25 same-sex relations for criminal prosecution,” 539 U.S. at 570, and that only nine States had done
 26 so by the time of *Lawrence*. The question before the Court in *Lawrence* was whether, as *Bowers*
 27 had asserted, same-sex sodomy prohibitions were so deeply rooted in history that they could not
 28 be understood to contravene the Due Process Clause. That the Court rejected that argument and
 29 invalidated Texas’s sodomy law on due process grounds casts no doubt on the duration and scope
 30 of discrimination against gay and lesbian people writ large.

1 barring them from federal jobs on the basis of their sexual orientation. *See Employment of*
2 *Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee
3 by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Congress), December 15,
4 1950 (“Interim Report”), at 9. In 1950, Senate Resolution 280 directed a Senate subcommittee
5 “to make an investigation in the employment by the Government of homosexuals and other
6 sexual perverts.” Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va.
7 L. Rev. 1551, 1565–66 (1993). The Committee found that from 1947 to 1950, “approximately
8 1,700 applicants for federal positions were denied employment because they had a record of
9 homosexuality or other sex perversion.” Interim Report at 9.

10 In April 1953, in the wake of the Senate investigation, President Eisenhower issued
11 Executive Order 10450, which officially added “sexual perversion” as a ground for investigation
12 and possible dismissal from federal service. Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953);
13 *see also* 81 Fed. Reg. 2489. The Order expanded the investigations of civilian employees for
14 “sexual perversion” to include every agency and department of the federal government, and thus
15 had the effect of requiring the termination of all gay people from federal employment. *See*
16 *General Accounting Office, Security Clearances: Consideration of Sexual Orientation in the*
17 *Clearance Process*, at 2 (Mar. 1995).

18 The federal government enforced Executive Order 10450 zealously, engaging various
19 agencies in intrusive investigatory techniques to purge gays and lesbians from the federal civilian
20 workforce. The State Department, for example, charged “‘skilled’ investigators” with
21 “interrogating every potential male applicant to discover if they had any effeminate tendencies or
22 mannerisms,” used polygraphs on individuals accused of homosexuality who denied it, and sent
23 inspectors “to every embassy, consulate, and mission” to uncover homosexuality. Edward L.
24 Tulin, Note, *Where Everything Old Is New Again—Enduring Episodic Discrimination Against*
25 *Homosexual Persons*, 84 Tex. L. Rev. 1587, 1602 (2006). In order to identify gays and lesbians
26 in the civil service, the FBI “sought out state and local police officers to supply arrest records on
27

1 morals charges, regardless of whether there were convictions; data on gay bars; lists of other
2 places frequented by homosexuals; and press articles on the largely subterranean gay world.”
3 Williams Institute, “Documenting Discrimination on the Basis of Sexual Orientation and Gender
4 Identity in State Employment,” ch. 5 at 7, *available at*
5 http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html
6 (“Williams Report”). The United States Postal Service (“USPS”), for its part, aided the FBI by
7 establishing “a watch list on the recipients of physique magazines, subscrib[ing] to pen pal clubs,
8 and initiat[ing] correspondence with men whom [it] believed might be homosexual.” *Id.* The
9 mail of individuals concluded to be homosexual would then be traced “in order to locate other
10 homosexuals.” *Id.* The end result was thousands of men and women forced from their federal
11 jobs based on the suspicion that they were gay or lesbian. It was not until 1975 that the Civil
12 Service Commission prohibited discrimination on the basis of sexual orientation in federal
13 civilian hiring. *See* General Accounting Office, *Security Clearances: Consideration of Sexual*
14 *Orientation in the Clearance Process* (1995) (describing the federal government’s restrictions on
15 the employment of gay and lesbian individuals).⁷

16 The history of the federal government’s discrimination against gays and lesbians extends
17 beyond the employment context. For decades, gay and lesbian noncitizens were categorically
18 barred from entering the United States, on grounds that they were “persons of constitutional
19 psychopathic inferiority,” “mentally defective,” or sexually deviant. *Lesbian/Gay Freedom Day*
20 *Comm., Inc. v. INS*, 541 F. Supp. 569, 571–72 (N.D. Cal. 1982) (quoting Ch. 29, § 3, 39 Stat.
21 874 (1917)). As the Supreme Court held in *Boutilier v. INS*, 387 U.S. 118 (1967), “[t]he
22 legislative history of [the Immigration and Nationality Act of 1952] indicates beyond a shadow
23 of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include

24
25 ⁷ Open military service by gays and lesbians was prohibited, first by regulation and then by
26 statute, 10 U.S.C. § 654 (2007), until the “Don’t Ask, Don’t Tell” Repeal Act, enacted last year,
27 111 P.L. 321, 124 Stat. 3515 (2010), and remains so pending completion of the repeal process
mandated by the Act.

1 homosexuals.” *Id.* at 120. This exclusion remained in effect until Congress repealed it in 1990.
2 See Pub. L. No. 101-649, 104 Stat. 4978 (1990).

3 Discrimination by State and Local Governments

4 Like the federal government, state and local governments have long discriminated against
5 gays and lesbians in public employment. By the 1950s, many state and local governments had
6 banned gay and lesbian employees, as well as gay and lesbian “employees of state funded schools
7 and colleges, and private individuals in professions requiring state licenses.” Williams Report,
8 ch. 5 at 18. Many states and localities began aggressive campaigns to purge gay and lesbian
9 employees from government services as early as the 1940s. *Id.* at 18–34.

10 This employment discrimination was interrelated with longstanding state law prohibitions
11 on sodomy; the discrimination was frequently justified by the assumption that gays and lesbians
12 had engaged in criminalized and immoral sexual conduct. See, e.g., *Childers v. Dallas Police*
13 *Dep’t*, 513 F. Supp. 134,138 (N.D. Tex. 1981) (holding that police could refuse to hire gays),
14 *aff’d without opinion*, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559
15 P.2d 1340, 1342 (Wash. 1977) (upholding the dismissal of a openly gay school teacher who was
16 fired based on a local school board policy that allowed removal for “immorality”); *Burton v.*
17 *Cascade Sch. Dist. Union High Sch., No.5*, 512 F.2d 850, 851 (9th Cir. 1975) (upholding the
18 dismissal of a lesbian teacher in Oregon, after adopting a resolution stating that she was being
19 terminated “because of her immorality of being a practicing homosexual”); *Bd. of Educ. v.*
20 *Calderon*, 110 Cal. Rptr. 916, 919 (1973) (holding that state sodomy statute was a valid ground
21 for discrimination against gays as teachers); see also *Baker v. Wade*, 553 F. Supp. 1121, 1128 n.9
22 (N.D. Tex. 1982) (“A school board member testified that [the defendant] would have been fired
23 [from his teaching position] if there had even been a suspicion that he had violated [the Texas
24 sodomy statute].”) *rev’d*, 769 F.2d 289 (5th Cir. 1985) (holding that challenged Texas
25 homosexual sodomy law was constitutional). Some of these discriminatory employment policies
26 continued into the 1990s. See *Shahar v. Bowers*, 114 F.3d 1097, 1105 & n.17, 1107–10 (11th

1 Cir. 1997) (en banc) (upholding Georgia Attorney General’s Office’s rescission of a job offer to
2 plaintiff after she mentioned to co-workers her upcoming wedding to her same-sex partner); *City*
3 *of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding unconstitutional Dallas Police
4 Department policy denying gays and lesbians employment).

5 Based on similar assumptions regarding the criminal sexual conduct of gays and lesbians,
6 states and localities also denied child custody and visitation rights to gay and lesbian parents.
7 *See, e.g., Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in
8 denial of custody to lesbian mother on ground that “homosexual conduct is . . . abhorrent,
9 immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s
10 God [and] an inherent evil against which children must be protected.”); *Pulliam v. Smith*, 501
11 S.E.2d 898, 903–04 (N.C. 1998) (upholding denial of custody to a gay man who had a same-sex
12 partner; emphasizing that father engaged in sexual acts while unmarried and refused to “counsel
13 the children against such conduct”); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997)
14 (holding that a trial court did not err in granting a father custody of his son on the basis that
15 people in town had rumored that the son’s mother was involved in a lesbian relationship);
16 *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that, although the Court had
17 previously held “that a lesbian mother is not per se an unfit parent,” the “[c]onduct inherent in
18 lesbianism is punishable as a Class 6 felony in the Commonwealth” and therefore “that conduct
19 is another important consideration in determining custody”); *Roe v. Roe*, 324 S.E.2d 691,692,694
20 (Va. 1985) (holding that father, who was in a gay relationship, was “an unfit and improper
21 custodian as a matter of law” because of his “continuous exposure of the child to his immoral
22 and illicit relationship”).

23 State and local law also has been used to prevent gay and lesbian people from associating
24 freely. Liquor licensing laws, both on their face and through discriminatory enforcement, were
25 long used to harass and shut down establishments patronized by gays and lesbians. *See William*
26 *N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet*, 1946–1961, 24 Fla. St.

1 U. L. Rev. 703, 762–66 (1997) (describing such efforts in New York, New Jersey, Michigan,
2 California, and Florida); *see also Irvis v. Scott*, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970)
3 (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting
4 lewdness, vagrancy, and disorderly conduct to harass gays and lesbians, often when gay and
5 lesbian people congregated in public. *See, e.g., Pryor v. Mun. Court*, 599 P.2d 636, 644 (Cal.
6 1979) (“Three studies of law enforcement in Los Angeles County indicate[d] that the
7 overwhelming majority of arrests for violation of [the ‘lewd or dissolute’ conduct statute]
8 involved male homosexuals.”); Steven A. Rosen, *Police Harassment of Homosexual Women and*
9 *Men in New York City, 1960–1980*, 12 Colum. Hum. Rts. L. Rev. 159, 162–63 (1982); Florida
10 State Legislative Investigation Committee (Johns Committee), *Report: Homosexuality and*
11 *Citizenship in Florida*, at 14 (1964) (“Many homosexuals are picked up and prosecuted on
12 vagrancy or similar non-specific charges, fined a moderate amount, and then released.”). Similar
13 practices persist to this day. *See, e.g., Calhoun v. Pennington*, No. 09-3286 (N.D. Ga.)
14 (involving September 2009 raid on Atlanta gay bar and police harassment of patrons); *Settlement*
15 *in Gay Bar Raid*, N.Y. Times (Mar. 23, 2011) (involving injuries sustained by gay bar patron
16 during raid by Fort Worth police officers and the Texas Alcoholic Beverage Commission).

17 Efforts to combat discrimination against gays and lesbians also have led to significant
18 political backlash, as evidenced by the long history of successful state and local initiatives
19 repealing laws that protected gays and lesbians from discrimination. *See also* Part I.A.1.iii.,
20 *infra*. A rash of such initiatives succeeded in the late 1970s. *See, e.g.,* Christopher R. Leslie, *The*
21 *Evolution of Academic Discourse on Sexual Orientation and the Law*, 84 Chi. Kent L. Rev. 345,
22 359 (2009) (Boulder, Colorado in 1974); Rebecca Mae Salokar, Note, *Gay and Lesbian*
23 *Parenting in Florida: Family Creation Around the Law*, 4 Fla. Int’l. U. L. Rev. 473, 477 (2009)
24 (Dade County, Florida in 1977); *St. Paul Citizens for Human Rights v. City Council of the City of*
25 *St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (St. Paul, Minnesota in 1978); *Gay rights*
26 *referendum in Oregon*, Washington Post, May 11 (1978), at A14 (Wichita, Kansas in 1978); *Why*

1 *tide is turning against homosexuals*, U.S. News & World Report (June 5, 1978), at 29 (Eugene,
 2 Oregon in 1978). The laws at issue in *Romer* and in *Equality Foundation v. City of Cincinnati*,
 3 54 F.3d 261 (6th Cir. 1995), are just two of a number of more recent examples from the 1990s.
 4 In fact, in May 2011, the Tennessee legislature enacted a law stripping counties and
 5 municipalities of their ability to pass local non-discrimination ordinances that would prohibit
 6 discrimination on the basis of sexual orientation, and repealing the ordinances that had recently
 7 been passed by Nashville and other localities.⁸ Similar responses have followed states' decisions
 8 to recognize same-sex marriages. *See infra* at 15.

9 Discrimination by Private Parties

10 Finally, private discrimination against gays and lesbians in employment and other areas
 11 has been pervasive and continues to this day.⁹ *See, e.g.*, Williams Report, ch. 5 at 8–9
 12 (explaining that private companies and organizations independently adopted discriminatory
 13 employment policies modeled after the federal government's, and as "federal employers shared
 14 police and military records on gay and lesbian individuals with private employers, these same
 15 persons who were barred from federal employment on the basis of their sexual orientation were
 16 simultaneously blacklisted from employment by many private companies"). The pervasiveness
 17 of private animus against gays and lesbians is underscored by statistics showing that gays and
 18 lesbians continue to be among the most frequent victims of all reported hate crimes. *See* H.R.
 19 Rep. 111-86, at 10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's
 20 sexual orientation—gay, lesbian, or bisexual—constituted the third highest category
 21

22 ⁸ *See* State of Tennessee, Public Chapter No. 278, available at
 23 <http://state.tn.us/sos/acts/107/pub/pc0278.pdf>.

24 ⁹ Private discrimination, as well as official discrimination, is relevant to whether a group has
 25 suffered a history of discrimination for purposes of the heightened scrutiny inquiry. *Frontiero v.*
 26 *Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]omen still face pervasive, although at
 27 times more subtle, discrimination in our educational institutions, in the job market and, perhaps
 28 most conspicuously, in the political arena.").

1 reported—1,265 incidents, or one-sixth of all reported hate crimes.”); Kendall Thomas, *Beyond*
2 *the Privacy Principle*, 92 Colum. L. Rev. 1431, 1464 (1992).

3 In sum, gays and lesbians have suffered a long history of discrimination based on
4 prejudice and stereotypes. That history counsels strongly in favor of heightened scrutiny, giving
5 courts ample reason to question whether sexual orientation classifications are the product of
6 hostility rather than a legitimate government purpose.

7 **ii. Gays and Lesbians Exhibit Immutable**
8 **Characteristics that Distinguish Them as**
9 **a Group.**

10 Over ten years ago, in considering whether gays and lesbians constituted a “particular
11 social group” for asylum purposes, the Ninth Circuit recognized that “[s]exual orientation and
12 sexual identity are immutable,” and that “[h]omosexuality is as deeply ingrained as
13 heterosexuality.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal
14 quotation marks omitted). *But see High Tech Gays*, 895 F.2d at 573 (stating that sexual
15 orientation is not immutable because “it is behavioral”). Sexual orientation, the Ninth Circuit
16 explained, is “fundamental to one’s identity,” and gay and lesbian individuals “should not be
17 required to abandon” it to gain access to fundamental rights guaranteed to all people.
18 *Hernandez-Montiel*, 225 F.3d at 1093.

19 That conclusion is consistent with the overwhelming consensus in the scientific
20 community that sexual orientation is an immutable characteristic. *See e.g.*, G.M. Herek, et al.
21 *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and*
22 *Bisexual Adults*, 7, 176–200 (2010), available at
23 <http://www.springerlink.com/content//fulltext.pdf> (noting that in a national survey conducted
24 with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95
25 percent of the gay men and 83 percent of lesbian women reported that they experienced “no
26 choice at all” or “very little choice” about their sexual orientation). There is also a consensus
27 among the established medical community that efforts to change an individual’s sexual

1 orientation are generally futile and potentially dangerous to an individual's well-being.¹⁰ See
2 Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on*
3 *Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), available at
4 <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> (“[E]fforts to change
5 sexual orientation are unlikely to be successful and involve some risk of harm.”); see also
6 Richard A. Posner, *Sex and Reason* 101 n.35 (1992) (describing “failure of treatment strategies
7 . . . to alter homosexual orientation”); Douglas Haldeman, *The Practice and Ethics of Sexual*
8 *Orientation Conversion Therapy*, 62 *J. Consulting & Clinical Psychol.* 221, 226 (1994)
9 (describing “lack of empirical support for conversion therapy”).

10 Furthermore, sexual orientation need not be a “visible badge” that distinguishes gays and
11 lesbians as a discrete group for the classification to warrant heightened scrutiny. As the Supreme
12 Court has made clear, a classification may be “constitutionally suspect” even if it rests on a
13 characteristic that is not readily visible, such as illegitimacy. *Mathews v. Lucas*, 427 U.S. 495,
14 504 (1976); see *id.* at 506 (noting that “illegitimacy does not carry an obvious badge, as race or
15 sex do,” but nonetheless applying heightened scrutiny). Whether or not gays and lesbians could
16 hide their identities in order to avoid discrimination, they are not required to do so. As the Court
17 has recognized, sexual orientation is a core aspect of identity, and its expression is an “integral
18 part of human freedom,” *Lawrence*, 539 U.S. at 562, 576–77.

19 **iii. Gays and Lesbians Are Minorities with**
20 **Limited Political Power.**

21 Third, gays and lesbians are a minority group,¹¹ *Able v. United States*, 968 F. Supp. 850,

22 ¹⁰ In fact, every major mental health organization has adopted a policy statement cautioning
23 against the use of so-called “conversion” or “reparative” therapies to change the sexual
24 orientation of gays and lesbians. These policy statements are reproduced in a 2009 publication of
25 the American Psychological Association, available at
<http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>.

26 ¹¹ It is difficult to offer a definitive estimate for the size of the gay and lesbian community in the
27 United States. According to an analysis of various data sources published in April 2011 by the

1 863 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998), that has historically lacked political
2 power. To be sure, many of the forms of historical discrimination described above have subsided
3 or been repealed. But efforts to combat discrimination have frequently led to successful
4 initiatives to scale back protections afforded to gay and lesbian individuals. *See also* Part
5 I.A.1.i., *supra*. As described above, the adoption of ballot initiatives specifically repealing laws
6 protecting gays and lesbians from discrimination (including the laws at issue in *Romer* and
7 *Equality Foundation v. City of Cincinnati*) are examples of such responses. In fact, “[f]rom 1974
8 to 1993, at least 21 referendums were held on the sole question of whether an existing law or
9 executive order prohibiting sexual orientation discrimination should be repealed or retained. In
10 15 of these 21 cases, a majority voted to repeal the law or executive order.” Robert Wintemute,
11 *Sexual Orientation and Human Rights* 56 (1995).

12 The strong backlash in the 1970s, 1980s, and 1990s to these civil rights ordinances has
13 been followed in the 2000s with similar political backlashes against same-sex marriage. In 1996,
14 at the time DOMA was enacted, only three states had statutes restricting marriage to opposite-sex
15 couples. National Conference of State Legislatures, *Same-Sex Marriage, Civil Unions and*
16 *Domestic Partnerships*, available at <http://www.ncsl.org/default.aspx?tabid=16430> (last updated
17 May 2011). Today, thirty-seven states have such statutes, and thirty states have constitutional
18 amendments explicitly restricting marriage to opposite-sex couples. *Id.*

19 California and Iowa are recent examples of such backlash. In May 2008, the California
20 Supreme Court held that the state was constitutionally required to recognize same-sex marriage.
21 *In re Marriage Cases*, 183 P.3d 384, 419 (Cal. 2008). In November 2008, California’s voters

22 _____
23 Williams Institute, there appear to be 8 million adults in the United States who are lesbian, gay or
24 bisexual, comprising 3.5 percent of the adult population. *See* Gary J. Gates, *How Many People*
25 *Are Lesbian, Gay, Bisexual, and Transgender?* available at
26 <http://www3.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf> (last
27 reviewed June 30, 2011). Ascertaining the precise percentage of gays and lesbians in the
28 population, however, is not relevant to the analysis, as it is clear that whatever the data reveal,
there is no dispute that gays and lesbians constitute a minority in the country.

1 passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex
2 couples. *See Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009). In November 2010, when three
3 Iowa state supreme court justices who had been part of a unanimous decision legalizing same-sex
4 marriage were up for reelection, Iowa voters recalled all of them. *See* A.G. Sulzberger, *Ouster of*
5 *Iowa Judges Sends Signal to Bench*, N.Y. Times (Nov. 3, 2010).

6 Beyond these state ballot initiatives, the relatively recent passages of anti-sodomy laws
7 singling out same-sex conduct, such as the Texas law the Supreme Court ultimately invalidated
8 in *Lawrence*, indicate that gays and lesbians lack the consistent “ability to attract the [favorable]
9 attention of the lawmakers.” *Cleburne*, 473 U.S. at 445.

10 This is not to say that the political process is closed entirely to gay and lesbian people.
11 But complete foreclosure from meaningful political participation is not the standard by which the
12 Supreme Court has judged “political powerlessness.” When the Court ruled in 1973 that gender-
13 based classifications were subject to heightened scrutiny, *Frontiero v. Richardson*, 411 U.S. 677
14 (1973), women already had won major political victories including a constitutional amendment
15 granting the right to vote and protection against employment discrimination under Title VII. As
16 *Frontiero* makes clear, the “political power” factor does not require a complete absence of
17 political protection, and its application is not intended to change with every political success.¹²

18 **iv. Sexual Orientation Bears No Relation to**
19 **Legitimate Policy Objectives or Ability to**
20 **Perform or Contribute to Society.**

21 Even where other factors might point toward heightened scrutiny, the Court has declined
22 to treat as suspect those classifications that generally bear on “ability to perform or contribute to
23 society.” *See Cleburne*, 473 U.S. at 441 (mental disability not a suspect classification) (internal

24 ¹² In determining that gender classifications warranted heightened scrutiny, the plurality in
25 *Frontiero* noted that “in part because of past discrimination, women are vastly underrepresented
26 in this Nation’s decision-making councils. There has never been a female President, nor a female
27 member of this court. Not a single woman presently sits in the United States Senate, and only 14
28 women hold seats in the House of Representatives.” 411 U.S. at 686 n. 17 (plurality opinion).

1 quotation omitted); *see also Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976) (age
2 not a suspect classification).

3 Sexual orientation is not such a classification. As the history described above makes
4 clear, prior discrimination against gay and lesbian people has been rested not on their ability to
5 contribute to society, but on the basis of invidious and long-discredited views that gays and
6 lesbians are, for example, sexual deviants or mentally ill. *See* Part I.A.1.i., *supra*. As the
7 American Psychiatric Association stated more than 35 years ago, “homosexuality per se implies
8 no impairment in judgment, stability, reliability or general social or vocational capabilities.”
9 Resolution of the Am. Psychiatric Ass’n (Dec. 15, 1973); *see also Minutes of the Annual Meeting*
10 *of the Council of Representatives*, 30 *Am. Psychologist* 620, 633 (1975) (reflecting a similar
11 American Psychological Association statement).

12 Just as a person’s gender, race, or religion does not bear an inherent relation to a person’s
13 ability or capacity to contribute to society, a person’s sexual orientation bears no inherent relation
14 to ability to perform or contribute. President Obama elaborated on this principle in the context of
15 the military when he signed the Don’t Ask, Don’t Tell Repeal Act of 2010:

16 [S]acrifice, valor and integrity are no more defined by sexual orientation than they are by
17 race or gender, religion or creed. . . . There will never be a full accounting of the heroism
18 demonstrated by gay Americans in service to this country; their service has been obscured
19 in history. It’s been lost to prejudices that have waned in our own lifetimes. But at every
20 turn, every crossroads in our past, we know gay Americans fought just as hard, gave just
21 as much to protect this nation and the ideals for which it stands.

22 White House, Remarks by the President and Vice President at Signing of the Don’t Ask, Don’t
23 Tell Repeal Act of 2010 (Dec. 22, 2010), *available at*
24 [http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-si](http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-don-t-ask-don-t-tell-repeal-a)
25 [gning-don’t-ask-don’t-tell-repeal-a](http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-don-t-ask-don-t-tell-repeal-a).

26 The Supreme Court has also recognized that, although opposition to homosexuality,
27 though it may reflect deeply held personal religious and moral views, it is not a legitimate policy
28 objective. *Lawrence*, 539 U.S. at 577 (“[T]he fact that a governing majority in a State has
traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law

1 prohibiting the practice.”); *Romer*, 517 U.S. at 633 (noting that a law cannot broadly disfavor
2 gays and lesbians because of “personal or religious objections to homosexuality.” (internal
3 quotation omitted)). Whether premised on pernicious stereotypes or simple moral disapproval,
4 laws classifying on the basis of sexual orientation rest on a “factor [that] generally provides no
5 sensible ground for differential treatment,” see *Cleburne*, 473 U.S. at 441, and thus such laws
6 merit heightened scrutiny.

7 **B. DOMA FAILS HEIGHTENED SCRUTINY.**

8 For the reasons described above, heightened scrutiny is the appropriate standard by which
9 to review classifications based on sexual orientation, including DOMA Section 3.¹³ In reviewing
10 a legislative classification under heightened scrutiny, the government must establish, at a
11 minimum, that the classification is “substantially related to an important government objective.”
12 *Clark*, 586 U.S. at 461. Moreover, under any form of heightened scrutiny, a statute must be
13 defended by reference to the “actual [governmental] purpose” behind it, not a different
14 “rationalization.” *VMI*, 518 U.S. at 535–36.

15 Section 3 fails this analysis.¹⁴ First, the legislative history demonstrates that the statute
16 was motivated in significant part by animus towards gays and lesbians and their intimate and
17 family relationships.¹⁵ Among the interests expressly identified by Congress in enacting DOMA
18

19 ¹³ The government takes no position on whether sexual orientation classifications should be
20 considered suspect, as opposed to quasi-suspect, and therefore whether DOMA should be subject
21 to intermediate or strict scrutiny.

22 ¹⁴ Though the government believes that heightened scrutiny is the appropriate standard of review
23 for Section 3 of DOMA, if this Court holds that rational basis is the appropriate standard, as the
24 government has previously stated, a reasonable argument for the constitutionality of DOMA
25 Section 3 can be made under that permissive standard.

26 ¹⁵ We note that some members of the majority in Congress that enacted DOMA have changed
27 their views on the law, and the legitimacy of its rationales, since 1996. See, e.g., Bob Barr, *No
28 Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), available at
[http://www.latimes.com/news/politics/newsletter/la-oe-barr5-2009jan05,
0,2810156.story?track=newslettertext](http://www.latimes.com/news/politics/newsletter/la-oe-barr5-2009jan05,0,2810156.story?track=newslettertext). In reviewing the statute under heightened scrutiny,

1 was “the government’s interest in defending traditional notions of morality.” H.R. Rep. No. 104-
2 664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (“H.R. Rep.”). The House Report
3 repeatedly claims that DOMA upholds “traditional notions of morality” by condemning
4 homosexuality and by expressing disapproval of gays and lesbians and their committed
5 relationships. *See, e.g.*, H.R. Rep. at 15–16 (“[J]udgment [opposing same-sex marriage] entails
6 both moral disapproval of homosexuality and a moral conviction that heterosexuality better
7 comports with traditional (especially Judeo-Christian) morality.”); *id.* at 16 (stating that same-sex
8 marriage “legitimizes a public union, a legal status that most people . . . feel ought to be
9 illegitimate” and “put[s] a stamp of approval . . . on a union that many people . . . think is
10 immoral”); *id.* at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a
11 collective moral judgment about human sexuality”); *id.* at 31 (favorably citing the holding in
12 *Bowers* that an “anti-sodomy law served the rational purpose of expressing the presumed belief .
13 . . that homosexual sodomy is immoral and unacceptable”).

14 The House Report also explicitly stated an interest in extending legal preferences to
15 heterosexual couples in various ways to “promote heterosexuality” and discourage
16 homosexuality. H.R. Rep. at 15 n.53 (“Closely related to this interest in protecting traditional
17 marriage is a corresponding interest in promoting heterosexuality. . . . Maintaining a preferred
18 societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . .”).
19 Thus, one of the goals of DOMA was to provide gays and lesbians with an incentive to abandon
20 or at least to hide from view a core aspect of their identities, which legislators regarded as
21 immoral and inferior.

22 This record evidences the kind of animus and stereotype-based thinking that the Equal
23 Protection Clause is designed to guard against. *Cf. Dep’t of Agriculture v. Moreno*, 413 U.S.
24 528, 534 (1973) (“If the constitutional conception of ‘equal protection of the laws’ means

25 _____
26 however, what is relevant are the views of Congress at the time of enactment, as evidenced by
27 the legislative record.

1 anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular
2 group cannot constitute a legitimate governmental interest.”); *see also Lawrence*, 539 U.S. at 580
3 (O’Connor, J., concurring) (“[The Supreme Court] ha[s] consistently held . . . that some
4 objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state
5 interests”). And even if Congress’s opposition to gay and lesbian relationships could be
6 understood as reflecting moral or religious objections, that would remain an impermissible basis
7 for sexual-orientation discrimination. *See supra* at 17-18; *Romer*, 517 U.S. at 633 (holding that
8 law cannot broadly disfavor gays and lesbians because of “personal or religious objections to
9 homosexuality”). Discouraging homosexuality, in other words, is not a governmental interest
10 that justifies sexual orientation discrimination.

11 Nor is there some other important governmental interest identified by Congress and
12 substantially advanced by Section 3 of DOMA, as required under heightened scrutiny. In
13 addition to expressing bare hostility to gay and lesbian people and their relationships, in enacting
14 Section 3, the House Report articulated an interest in “defending and nurturing the institution of
15 traditional, heterosexual marriage.” H.R. Rep. at 12. That interest does not support Section 3.
16 As an initial matter, reference to tradition, no matter how long established, cannot by itself justify
17 a discriminatory law under equal protection principles. *VMI*, 518 U.S. at 535 (invalidating
18 longstanding tradition of single-sex education at Virginia Military Institute). But even if it were
19 possible to identify a substantive and animus-free interest in protecting “traditional” marriage on
20 this record, there would remain a gap between means and end that would invalidate Section 3
21 under heightened scrutiny. Section 3 of DOMA has no effect on recognition of the same-sex
22 marriages Congress viewed as threatening to “traditional” marriage; it does not purport to defend
23 “traditional, heterosexual marriage” by preventing same-sex marriage or by denying legal
24 recognition to such marriages. Instead, Section 3 denies benefits to couples who are already
25 legally married in their own states, on the basis of their sexual orientation and not their marital
26 status. Thus, there is not the “substantial relationship” required under heightened scrutiny

1 between an end of defending “traditional” marriage and the means employed by Section 3.

2 The same is true of Congress’s interest in “promoting responsible procreation and
3 child-rearing,” which the House Report identified not as a separate rationale for DOMA Section
4 3, but as the basis for its larger interest in defending “the institution of traditional, heterosexual
5 marriage.” *See, e.g.*, H. Rep. at 12–13 (“At bottom, civil society has an interest in maintaining
6 and protecting the institution of heterosexual marriage because it has a deep and abiding interest
7 in encouraging responsible procreation and child-rearing.”); *id.* at 14 (“Were it not for the
8 possibility of begetting children inherent in heterosexual unions, *society would have no*
9 *particular interest* in encouraging citizens to come together in a committed relationship.”)
10 (emphasis added). Again, even assuming that Congress legislated on the basis of an independent
11 and animus-free interest in promoting responsible procreation and child-rearing, that interest is
12 not materially advanced by Section 3 of DOMA and so cannot justify that provision under
13 heightened scrutiny.

14 First, there is no sound basis for concluding that same-sex couples who have committed
15 to marriages recognized by state law are anything other than fully capable of responsible
16 parenting and child-rearing. To the contrary, many leading medical, psychological, and social
17 welfare organizations have issued policies opposing restrictions on lesbian and gay parenting
18 based on their conclusions, supported by numerous studies, that children raised by gay and
19 lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents. *See,*
20 *e.g.*, American Academy of Pediatrics, Coparent or Second-Parent Adoption by 16 Same-Sex
21 Parents (Feb. 2002), *available at*
22 <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339>; American
23 Psychological Association, Sexual Orientation, Parents, & Children (July 2004), *available at*
24 <http://www.apa.org/about/governance/council/policy/parenting.aspx>; American Academy of
25 Child and Adolescent Psychiatry, Gay, Lesbian, Bisexual, or Transgender Parents Policy
26 Statement (Oct. 2008), *available at*

1 [http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_](http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement)
2 [policy_statement](#); American Medical Association, AMA Policy Regarding Sexual Orientation,
3 *available at* [http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-](http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml)
4 [sections/glb-t-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml](#); Child Welfare
5 League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual
6 Adults, *available at* <http://www.cwla.org/programs/culture/glb-tqposition.htm>. For this reason
7 alone, no penalty or prohibition on same-sex marriage can be “substantially” related to an interest
8 in promoting responsible child-rearing.

9 Second, there is no evidence in the legislative record that denying federal benefits to
10 same-sex couples legally married under state law operates in any way to encourage responsible
11 child-rearing, whether by opposite-sex or same-sex couples, and it is hard to imagine what such
12 evidence would look like. In enacting DOMA, Congress expressed the view that marriage plays
13 an “irreplaceable role” in child-rearing. House Report at 14. But Section 3 does nothing to
14 affect the stability of heterosexual marriages or the child-rearing practices of heterosexual
15 married couples. Instead, it denies the children of same-sex couples what Congress sees as the
16 benefits of the stable home life produced by legally recognized marriage, and therefore, on
17 Congress’ own account, undermines rather than advances an interest in promoting child welfare.

18 Finally, as to “responsible procreation,” even assuming an important governmental
19 interest in providing benefits only to couples who procreate, Section 3 is not sufficiently tailored
20 to that interest to survive heightened scrutiny. Many state-recognized same-sex marriages
21 involve families with children; many opposite-sex marriages do not. And ability to procreate has
22 never been a requirement of marriage or of eligibility for federal marriage benefits; opposite-sex
23 couples who cannot procreate for reasons related to age or other physical characteristics are
24 permitted to marry and to receive federal marriage benefits. *Cf.* H.R. Rep. at 14 (noting “that
25 society permits heterosexual couples to marry regardless of whether they intend or are even able
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27

1 to have children” but describing this objection to DOMA as “not a serious argument”).¹⁶

2 In sum, the official legislative record makes plain that DOMA Section 3 was motivated in
3 substantial part by animus toward gay and lesbian individuals and their intimate relationships,
4 and Congress identified no other interest that is materially advanced by Section 3. Section 3 of
5 DOMA is therefore unconstitutional.

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21 ¹⁶ The House Report also identifies preservation of scarce government resources as an interest
22 underlying Section 3’s denial of government benefits to same-sex couples married under state
23 law. *See* H.R. Rep. at 18. In fact, many of the rights and obligations affected by Section 3, such
24 as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds, and
25 in other cases, exclusion of state-recognized same-sex marriages costs the government money by
26 preserving eligibility for certain federal benefits. But regardless of whether an interest in
27 preserving resources could justify Section 3 under rational basis review, it is clear that it will not
28 suffice under heightened scrutiny; the government may not single out a suspect class for
exclusion from a benefits program solely in the interest of saving money. *See Graham v.*
Richardson, 403 U.S. 365, 374–75 (1971) (holding that state may not advance its “valid interest
in preserving the fiscal integrity of its programs” through alienage-based exclusions).

CONCLUSION

For the reasons set forth above, Section 3 of DOMA fails heightened scrutiny, and this Court should deny the motions to dismiss Plaintiff's constitutional claim.

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