STATE OF MINNESOTA
IN COURT OF APPEALS
A11-08111

DOUGLAS BENSON, DUANE GAJEWSKI, THOMAS TRISKO, JOHN RITTMAN, JESSICA DYKHUIS, LINDZI CAMPBELL, AND SEAN CAMPBELL, MINOR CHILD,

Appellants

Relator,

v.

JILL ALVERSON, IN HER OFFICIAL CAPACITY AS THE HENNEPIN COUNTY LOCAL REGISTRAR

and

STATE OF MINNESOTA,

Respondents.

PRINCIPAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES AND LEGAL AUTHORITIES

TABLE OF CASES (CONTINUED)

TABLE OF CASES (CONTINUED)

TABLE OF CASES (CONTINUED)

TABLE OF CASES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF CONSTITUTIONAL

PROVISIONS AND STATUTES (CONTINUED)

TABLE OF OTHER SOURCES OF LAW

(CONTINUED)

CONCISE STATEMENT OF ISSUES

1. Date of appealable order: 8 March 2011

2. Date of Petition for Notice of Appeal: 2 May 2011

3. Jurisdiction for Appeal: Minn. R. Civ. App. P. 103.03(a) (appeal from final judgment) and 104.01 subd. 1 (appeal from final judgment within sixty (60) days).

4. Brief description of claims, defenses, issues litigated and result below:

Specific issues to be raised on appeal:

a. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to due process of law under Minn. Const. Art. I, § 7.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008)

3) *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) (Walker, Vaughn, J.)

4) *Loving v. Virginia*, 388 U.S. 1, 12 (1967)

b. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to equal protection of the law under Minn. Const. Art. I, § 2.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *State v. Russell*, 477 N.W.2d 886, 888 – 89 (Minn. 1991)

3) *In re Balas,* 2:11-bk-17831 TD (Bankr. C.D. Cal. June 13, 2011)

4) *Dragovich v. U.S.*, 10-cv-01564 (N.D. Cal. Jan. 18, 2011)

c. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to free exercise of conscience under Minn. Const. Art. I, § 16.**

Result below: The district court dismisses their claims in accordance with Minn. R. Civ. P. 12.02(e).

Standard for review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980)

2) *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)

3) *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 864 (Minn. 1992)

d. **Whether appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violate their constitutional rights to freedom of association under Minn. Const. Art. I, § 16.**

Result below:

Standard of review: *de novo*

1) *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29 (Minn. 1980)

2) *State by McClure v. Sports & Health Club*,

370 N.W.2d 844 (Minn. 1985)

3) *Lawrence v. Texas*, 539 U.S. 558 (2003)

4) *In re Guardianship of Sharon Kowalski,* 478 N.W.2d 790

(Minn. Ct. App. 1991), review denied, (Minn. Feb. 10, 1992)

e. **Whether appellants state claims that Minn. Stat. § 517.01, 517.03, and 517.04, comprising the Minnesota Defense of Marriage Act (MN DOMA, 1997 Laws of Minnesota Chapter 203, art. 10), violates the Single Subject Clause of Minn. Const. Art. IV, § 17.**

Result below: The district court dismisses their claim in accordance with Minn. R. Civ. P. 12.02(e).

1) Minn. Const. Art. IV, § 17

2) *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 295 (Minn. 2000)

3) *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 588 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005)

f. **Whether the district court erred in dismissing the state of Minnesota on the grounds of improper joinder.**

Result below: The district court dismisses the state on the grounds of improper joinder.

Standard of Review: ***de novo***

1) Minn. Stat. § 555.01

2) Minn. Stat. § 555.11

3) *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 588 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005)

4) *Doe v. Ventura*, 2001 WL 543734

(Minn. Fourth Dist. Ct. Hennepin County, May 15, 2001)

STATEMENT OF THE CASE

This case comes before the Court as a timely appeal from the 8 March 2011 entry of judgment by the Fourth Judicial District Court of Hennepin County, Mary S. DuFrense, J., dismissing per Minn. R. Civ. P. 12.02(e) the appellants' multiple state constitutional claims of equal protection, due process, single subject, freedom of association, and freedom of conscience and religious freedom. The appellants, Minnesota domiciliaries comprising three same-sex couples and the minor child of one couple, seek declaratory, equitable and mandamus relief from the Minnesota Defense of Act (MN DOMA)[1] and all provisions of Chapter 517 of Minnesota Statutes that deny recognition of them as married persons under Minnesota law, with the concomitant rights and benefits, and recognition of the minor child as a child of two lawfully married parents.

Messrs. Benson and Gajewski lawfully wed in Vermont and Ontario. Messrs. Trisko and Rittman wed in Manitoba and have married according to the rites of St. Mark's Episcopal church in Minneapolis. Ms. Dykhuis and Ms. Campbell are registered domestic partners in Duluth. Their minor child, Sean Campbell, was born during their marriage. They seek reversal, remand, and rejoinder of the state, for trial and award of declaratory, equitable, and mandamus relief, recognizing the three same-sex couples as married persons under Minnesota law, and the minor child as a child born of lawfully married parents.

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[1] 1997 Laws of Minnesota Chapter 203, art. 10, codified at Minn. Stat. §§ 517.01 and 517.03

THE FACTS[2]

1. Douglas Benson and Duane Gajewski[3]

Plaintiffs Douglas Benson ("Doug"), age 56, and Duane Gajewski (Duane), age 46, are a gay couple residing in Robbinsdale, Minnesota, in Hennepin County. Doug and Duane have been together as a same-sex couple in a loving, committed relationship since 1990. They were both born and raised in Duluth, St. Louis County.

Duane has a Bachelor's Degree from the College of St. Scholastica and a Master's Degree from the University of Minnesota, Duluth. He is an actuary. Doug has a Bachelor's Degree from the University of Minnesota, Duluth and is the Executive Director of a Minnesota non-profit. They met and began their life together as a loving, committed, same-sex couple in 1990, in Duluth. Doug and Duane are close to their families of origin and have been accepted and treated by their families as a married couple, as any of their heterosexual siblings and respective spouses are treated, from the beginning of their relationship.

Both Doug and Duane are community minded, founding the Northland Gay Men's Center in Duluth in 1992, with the goal of providing support and affirmation to gay men in a chemical-free environment while building community. The organization exists to this day. Doug and Duane have considered themselves

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[2] Appellants cite the First Amended Complaint by paragraph and line (1st Am. Cmplt., ¶ 15, l. 3, or 1st Am. Cmplt., Prayer for Relief #3)
[3] Am. Cmplt. ¶ 2

to be married since near the beginning of their relationship. Heterosexual friends have told the couple that their relationship serves as a model for their own marriages.

In 1993 Doug and Duane applied for a marriage license in St. Louis County to express their commitment to one another and challenge laws that kept them from experiencing the respect, recognition, security and obligations offered to different-sex couples through legal marriage. The application was rejected by the County Attorney. Publicity surrounding the application resulted in death threats to the couple, but this only served to strengthen their commitment to one another. During this period, Duane was a graduate student, Teaching Assistant at UMD, maintaining part time hours at his father's store while Doug provided the bulk of the family income at this time as a full time school bus driver with Duluth Public Schools.

In 1995 Duane was offered his first actuarial position in Montpelier, Vermont. Duane and Doug left their jobs and their hometown of Duluth so Duane could pursue his career. While in Vermont, Duane volunteered as the treasurer of the state's largest gay and lesbian rights organization. Doug took temporary positions as a bus driver and administrative assistant.

In 1998, the couple returned to Minnesota, in another career move for Duane. They bought a home in Robbinsdale under joint tenancy, where they have resided together for the past eleven years. The home purchase was their first. Doug was appointed, by the mayor of Robbinsdale, to the Robbinsdale Human

Rights Commission in 2000, where he served for seven years, including a term as chairman.

In the year 2000, when the State of Vermont became the first state in the union to institute "civil unions" for same-sex couples, Doug and Duane traveled to Vermont to take advantage of the opportunity to have their committed relationship recognized by government. They opted for a courthouse ceremony to make their marriage seem as official as possible, while knowing their "civil union" would not be legally recognized in their home state. In 2003, Doug and Duane drove to Thunder Bay, Ontario, Canada to get legally married, again in spite of knowing that their marriage would not be "officially" recognized when they got home.

Because Doug does not now have a paid position and is dependent on Duane for support, the couple's household operates as a traditional married couple where one stays at home. While Doug was working, he built up an IRA, but because the couple's marriage is not legally recognized, they are not allowed by law to continue contributing to Doug's IRA, whereas different-sex couples are allowed to contribute to the IRA of an unemployed spouse. Also, because the couple is not allowed to file a joint tax return, as any different-sex married couple would be allowed to, the couple pays thousands of dollars in extra taxes each year. Doug receives healthcare coverage through Duane's employer as Duane's "domestic partner," but because the couple's marriage is not legally recognized in Minnesota, the couple has to pay taxes on that coverage, whereas Duane's heterosexual coworkers do not have to pay taxes on their spouse's coverage. They

also worry that if one of them becomes hospitalized the other may not be able to visit and comfort the other in time of need and make necessary medical decisions.

The couple would like to have their marriage legally recognized so they can experience the same benefits and protections afforded any other married couple.

2. Thomas Trisko and John Rittman[4]

Plaintiffs Thomas Trisko ("Tom"), age 65, and John Rittman ("John"), age 68, are a gay couple residing in Minneapolis, Hennepin County, Minnesota. Tom and John have been together as a same-sex couple in a loving, committed relationship for 36 years.

Tom was born in Minneapolis and grew up in Hopkins and Saint Cloud. He is descended from families that have been citizens of Minnesota for seven generations since the mid-Nineteenth Century. Tom graduated with a BA in Economics from Saint John's University in Collegeville and with an MA in Political Science from the University of Minnesota. He also studied at Georgetown University in Washington, D.C. on a doctoral fellowship in Government. Tom has held positions such as Corporate Economist, Government Affairs Director, Finance Director and Chief Financial Officer at companies and non-profit organizations such as Dayton Hudson Corporation (now Target), Medtronic, Minnesota Multiple Sclerosis Society, and The Bridge for Runaway Youth. He retired in 2006. In retirement, he volunteers as the Treasurer of the

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[4] Am. Cmplt. ¶ 4

Wells Memorial Foundation and serves on the altar as a Eucharistic Minister at their church, Saint Mark's Episcopal Cathedral in Minneapolis. He has also served on the Finance Committees and/or as Treasurer of Philanthrofund Foundation, Calhoun Isles Condominium Association and the Twin Cities Gay Men's Chorus.

John was born and raised in Anderson, Indiana and graduated from Ball State University in Muncie, Indiana with a BA degree in Business Education and an MA degree in History. John served as an officer in the US Air Force after graduation at Wright Patterson AFB. He was posted to the University of Minnesota in 1972 where he was a professor of military history in the AFROTC program. After leaving the Air Force John worked as an engineering personnel recruiter for Rosemount Engineering in Eden Prairie. He returned to college to graduate as a Registered Nurse in 1985 and thereafter provided nursing services at facilities such as Mt. Sinai Hospital, Walker Methodist and the Courage Center.

In 1994, he became a nursing home, home health care and hospital Inspector for the Minnesota Department of Health. He retired in 2005. In retirement, he volunteers for the Twin Cities Gay Men's Chorus and OutFront Minnesota, as well as serving as an usher and on the Gay and Lesbian Ministry Committee at Saint Mark's Episcopal Cathedral.

Tom and John met December 21, 1973 at their apartment building in Roseville and have been committed to each other in a loving relationship ever since. They moved in together in March 1975 at Tom's condominium in Little Canada. They bought a townhouse together as joint tenants in Minneapolis in

1981 and bought their current home in southwest Minneapolis as joint tenants in 2000.

They registered as domestic partners with the City of Minneapolis in 1991 and the University of Minnesota in 1996. They were religiously married in their church, Saint Mark's Episcopal Cathedral in Minneapolis on May 1, 1999 in front of friends and relatives. They were legally married in Winnipeg, Manitoba, Canada on May 27, 2005.

Even with all this evidence of their commitment, when they are faced with stating on an official form whether they are "Married" or "Single," they don't know for sure which to choose when they are at home in Minnesota. Tom and John feel increasingly vulnerable as legally unmarried partners in their home state of Minnesota as they grow older. They are worried about the practical and dignitary harms they have suffered and may suffer in the future from being denied the right to marry in Minnesota. Although they have completed many partial measures such as Medical and Financial Powers of Attorney Wills, Beneficiary statements, etc. they still do not have the 515 legal protections, rights, obligations, cost/tax savings and benefits that come with marriage in Minnesota. When they travel, they must carry all these documents with them in case of accident, illness or death.

They have witnessed several of their friends have legal difficulties claiming the body of their deceased partner, participating in health care decisions, and

inheriting assets and pension benefits. This particularly concerns Tom who has no brothers or sisters, whose parents are deceased, and who has no close relatives.

Tom and John have known they were gay since childhood and have always felt like second class citizens in their own country because the federal and Minnesota Bill of Rights have not been interpreted to mean what they say when it comes to gay and lesbian citizens and couples. They have utilized every avenue open to them to demonstrate and legally cement their commitment to each other over the past 36 years. Legal marriage is the normal way to do this. Therefore, Tom and John wish to marry in Minnesota and have it recognized throughout the United States.

3. Jessica Dykhuis, Lindzi Campbell, and Sean Campbell[5]

Plaintiffs Jessica Dykhuis ("Jesse"), age 34, and Lindzi Campbell ("Lindzi"), age 32, are a lesbian couple residing in Duluth, St. Louis County, Minnesota. Jesse and Lindzi have been together as a same-sex couple in a loving, committed relationship for 2 years. Lindzi, a Twin Ports native – born and raised on Park Point - is a firefighter and Jesse, a Minneapolis transplant, is a Doula. Lindzi and Jesse live in Duluth's Lincoln Park neighborhood and are actively raising two sons Jackson (age 9) and Sean (born 10/19/2009) together. Lindzi and Jesse met in 2003 and have been in a same sex, committed, and loving relationship since 2007.

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[5] Am. Cmplt. ¶ 3

Jesse is the co-chair of the Duluth-Superior Pride committee and an avid gardener and music fan. Lindzi enjoys fundraising for the MDA and plays volleyball, hockey and broomball. The couple and their children go camping, hiking, kayaking and skiing throughout the State of Minnesota. Lindzi and Jesse are registered domestic partners in Duluth MN, although that status confers absolutely no rights to the couple.

Jesse currently lacks health insurance. Lindzi's employer does not extend its health coverage to domestic partners, only married couples. When Lindzi went into labor with Sean 6 weeks early, the couple had to hurriedly complete and have notarized piles of legal paperwork including durable power of attorney for health care and guardianship transfer designations between labor contractions to make sure Jesse had some amount of legal support for their relationship and her relationship to the baby, since the rights and protections of marriage are not afforded to same sex couples in Minnesota.

Lindzi and Jesse's parents and friends are very supportive of their relationship and honor their commitment as a couple. However, attending weddings of heterosexual friends and family is always bittersweet, as a couple Lindzi and Jesse are invited to and expected to celebrate in a tradition that they are unsure they will ever be able to participate in themselves.[6]

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[6] Jesse and Lindzi plan to wed in Iowa in August 2011.

ARGUMENT

SUMMARY OF ARGUMENT

The Minnesota Defense of Marriage Act, 1997 Laws of Minnesota Chapter 203, art. 10, codified at Minn. Stat. §§ 517.01 and 517.03[7] (hereinafter "MN DOMA"), unconstitutionally discriminates in defiance of the Minnesota Constitution's guarantees of equal protection,[8] due process,[9] freedom of conscience and exercise of religion,[10] and freedom of association.[11] MN DOMA treats same-sex couples, lawfully married in other states and jurisdictions or married in accordance with the rituals and dictates of their faiths, differently from similarly situated opposite-sex couples. In so doing, MN DOMA denies to same-sex couples and their children the status, recognition, and benefits of 1,138 federal and 515 Minnesota laws otherwise available to married persons and their children.

Applicable to the states as a minimum standard, settled federal law sets forth two major and two supporting factors that trigger heightened scrutiny of group classifications. The factors are (a) whether the group in question has suffered historically from discrimination, (b) whether the characteristics

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[7] Suffering injuries that include increased taxation, denial of health insurance benefits, denial of recognition of the solemnity of their religious vows, and recognition as a child born of lawfully married parents, appellants seek general and "as applied" relief under the Minnesota Constitution from all provisions of Chapter 517 prohibiting recognition of equality of marriages between two individuals of the same gender, but most especially against Minn. Stat. § 517.03 subd. 1(b) and secondarily against Minn. Stat. §§ 517.01 and 517.03 subd. 1(a)(3).

[8] Minn. Const. Art. I, § 2

[9] Minn. Const. Art. I, § 7

[10] Minn. Const. Art. I, § 16

[11] Minn. Const. Art. I, § 16

distinguishing the group have concrete connection to legitimate policy objectives or to an individual's "ability to perform or contribute to society[,]" *Bowen v. Gilliard*, 483 U.S. 587, 602 – 03 (1987), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), (c) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a group" -- traits that they cannot, or should not have to, change, and (d) whether the group is a political minority or politically vulnerable. This case demonstrates the need to apply heightened scrutiny to classification by sexual orientation.

Under heightened scrutiny and the discerning state constitutional equal protection rational basis test, the appellants state claims that MN DOMA is facially unconstitutional and unconstitutional as applied to them. They state claims that MN DOMA violates their state constitutional rights to due process. As a subset of a multi-subject bill, MN DOMA violates Minn. Const. Art. IV, § 17.

Moreover, the appellants state claims that MN DOMA, facially and as applied, violates state constitutional guarantees of freedom of conscience and free exercise of religion that are more expansive than those in the First Amendment, and state constitutional rights of freedom of association. The state constitutional guarantee of freedom of association includes the unalienable right to form a family, and the child's unalienable right to form a relationship with a parent. Appellants seek reversal and remand for trial, declaratory and equitable relief, and recognition as married persons in Minnesota.

DE NOVO REVIEW

Dismissal of the appellants' amended complaint per Minn. R. Civ. P. 12.02(e) requires *de novo* review of each claim. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010) (Rule 12.02(e) dismissal of MN Human Rights Act reprisal claim reviewed *de novo*; dismissal aff'd). The court considers only the pleadings in the complaint, accepting those as true, resolving all doubts in the nonmovant's favor, without being bound to accept labels and conclusory statements. Id., citing *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 – 35 (Minn. 2008) (reversing 12.02(e) dismissal of *de facto* takings claim), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (labels and conclusory statements in antitrust case).

"'[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.'" *Bahr* at 80, quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963) (claim stated for continuous trespass). "When constitutional violations are alleged, the defendant must demonstrate the *complete* frivolity of the complaint before dismissal under Rule 12.02 is proper." *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 33 (Minn. 1980) (reversal of Rule 12.02 dismissal of Due Process challenge to notice and hearing procedures under Chapter 171 of Minnesota Statutes; italics included by the Court). Pleadings that are "arguable on their merits" are, as a matter of law, not frivolous. *Anders v. California,* 387 U.S. 738, 744 – 45 (1967) (allowing

indigent *habeas* petitioner to proceed), *Christopher v. Harbury*, 536 U.S. 403, 416 (2002) (nonfrivolous claim equated to "arguable claim", defined as a quantum "more than hope"), *White v. Kautzky*, 494 F.3d 677, 680 (8th Cir. 2007) (nonfrivolous equated to "arguably meritorious").

Cases *infra* striking down, or otherwise neutralizing the United States DOMA, 1 U.S.C. § 7, on federal constitutional due process and equal protection grounds[12] show the appellants' state constitutional claims against Minnesota DOMA clearing the Rule 12.02(e) "complete frivolity" test by a wide margin.

STATE AS PROPERLY JOINED PARTY

To gain recognition of marriages solemnized outside Minnesota and within their own church, and to enjoy the rights and benefits that five hundred fifteen (515) Minnesota statutes confer upon married adults and their minor children,[13] the appellants seek declaratory relief in their facial and applied challenges to the Minnesota "Defense of Marriage Act" (MN DOMA), codified at Minn. Stat. §§ 517.01 and 517.03. With the Hennepin County Registrar exercising no jurisdiction or authority over these statutes or individuals married outside

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[12] *In re Levenson*, 587 F.3d 925, 931 – 32 (9th Cir. 2009), *Gill v. United States Office of Personnel Mgt.*, 699 F.Supp.2d 374, 387 (D. Mass. 2010), *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *Dragovich v. U.S.*, No. 10–01564, 2011 WL 175502, at *13, *14 (N.D. Cal. Jan. 18, 2011), *In re Balas*, 2:11-bk-17831-TD (Bankr. C.D. Cal. June 13, 2011)

[13] "The 515 Project", a Minnesota nonprofit corporation's work identifying 515 statutes placing different-sex spouses at an advantage over married same-sex spouses

Hennepin County, she is not a proper party to the appellants' MN DOMA claims. The state, however, IS a proper party.

Minnesota's Uniform Declaratory Judgments Act requires that "persons . . . who have or claim any interest which would be affected by the declaration" be joined as parties. Minn. Stat. § 555.11. The definition of persons under the Act does not include the State. Minn. Stat. § 555.13. However, there is absolutely *no* language in the Minnesota Declaratory Judgments Act that *prohibits* joining the state as a party. The language in Minn. Stat. § 555.11 is not exclusive. Simply because the Appellants are not *required* to join the State as a party does not mean that they are *prohibited* from joining the State as a party. Declaratory judgments are proper when there is a "genuine conflict in tangible interests between parties with adverse interests." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270 (Minn. Ct. App. 2001).

Minnesota case law conclusively demonstrates that the State may be joined as party in declaratory judgment actions. See *Unbank Co., LLP v. Merwin Drug Co., Inc.*, 677 N.W.2d 105, 106 (Minn. Ct. App. 2004) (challenge to validity of competitor's currency exchange license; "[A]n administering state board has an interest in the act it administers that is affected by a declaratory judgment . . . and . . . a declaration of rights cannot be made when that entity is not a party to the action.") Thus, under the rule in *Unbank*, a state administrate agency, and by extension the State, may be a necessary party in a declaratory judgment action.

Minnesota courts authorize the state's joinder under the Minnesota Uniform Declaratory Judgments Act. See *Red Lake Band of Chippewa Indians* v. *State*, 248 N.W.2d 722 (Minn. 1976) (seeking declaratory judgment that band is "state" or "territory and possession of the United States" within the meaning of Minnesota's automobile registration statutes), *Studor Inc. v. State*, 781 N.W.2d 403 (Minn. Ct. App. 2010) (seeking declaratory judgment that the state's statutory ban on air-admittance valves in plumbing systems is unconstitutional; state as named defendant), *Ruter v. State*, 695 N.W.2d 389 (Minn. Ct. App. 2005) (seeking declaratory judgment to revoke disability benefits and receive regular retirement annuity), *Unity Church of St. Paul v. State*, 694 N.W.2d 585 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005) (seeking declaratory judgment that Minnesota's Personal Protection Act of 2003 is unconstitutional; state as the *only* named defendant). And a case with a significant bearing to this case, *Doe v. Ventura*, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila, J.), is the successful declaratory judgment action striking down Minnesota's sodomy law, Minn. Stat. § 609.293 (2000), as unconstitutional in its application to private, consensual, noncommercial sex between consenting adults, regardless of the adults' genders. The state is a named defendant with the Governor and Attorney General.

Allowing the appellants to join the State as a defendant will not result in the State becoming a party in all cases in which a constitutional claim is made. Declaratory judgments are only proper when there is a "genuine conflict in

tangible interests between parties with adverse interests." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270 (Minn. Ct. App. 2001).

Cases challenging U.S. DOMA, 1 U.S.C. § 7, on federal constitutional grounds see the United States and its several agencies and departments named as defendants against prayers for monetary, equitable, and declaratory relief.[14] In the instant case, the appellants seek declaratory and equitable relief from MN DOMA – as well as the right to obtain marriage licenses in Hennepin County. The appellants challenge MN DOMA and the obstacle it poses to the appellants' enjoyment of 515 separate laws that confer tangible benefits upon married couples and their families, and relieve the injuries the appellants face in taxation, inheritance, powers of attorney, health care, and child rearing, amongst other matters.

Contrary to the state's claims, joinder here does not require the state's joinder as a necessary party in all state constitutional issues. The facts require the state's joinder here. Joining the state follows settled Minnesota law authorizing joinder of the state in matters that unjustly classify same-sex couples in comparison to different-sex couples. *Doe v. Ventura*, MC 01-149, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila,

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[14] *Gill v. U.S. Office of Personnel Mgt., 699 F.Supp.2d 374 (D. Mass. 2010), Massachusetts v. U.S. Dep't of Health & Human Services and U.S. Dep't of Veterans Affairs,* 698 F.Supp.2d 234 (D. Mass. 2010), *Dragovich v. U.S. Dep't of Treasury,* 10-cv-1564, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011), *Windsor v. U.S.,*10-cv-8435 (S.D.N.Y. 2010), *Golinski v. U.S. Office of Personnel Mgt.,* 3:10-cv-257 (N.D. Cal. 2010)

J.).The Court should reverse the judgment of the district court, remand, and rejoin the state as a defendant.

BAKER V. NELSON DEFANGED AND DISTINGUISHED

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), neither binds nor informs this Court's resolution of appellants' state constitutional challenge to MN DOMA.

Resting on its interpretation of the Book of Genesis for its holding, the *Baker* Court turns aside an early bid by a same-sex couple seeking to marry under Minnesota law. *Baker*, 191 N.W.2d at 186. Under a now-repealed statute mandating appellate jurisdiction. the U.S. Supreme Court summarily dismisses *Baker* "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

Summary dismissal has extraordinarily narrow precedential value. Summary dispositions bind only the precise legal questions and the facts set forth in the jurisdictional statement. *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979), *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Summary dispositions do not signal the Court's adoption of a lower court's reasoning. *Mandel*, 432 U.S. at 176, *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, Anthony, J., concurring) ("We do not endorse the reasoning of the [lower court] when we order summary affirmance."). *Baker's* summary affirmance presents, at best, "a slender reed" on which future decisions may rest. *Morse v. Republican Party of Va.,* 517 U.S. 186, 203 n. 21 (1996), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 – 85 n. 5 (1983).

The appellants present different claims from those before the *Baker* Court. Messrs. Benson and Gajewski seek recognition in Minnesota of their marriage under the laws of Vermont[15] and Ontario. Messrs. Trisko and Rittman seek recognition of the marriage under the laws of Manitoba. They also seek recognition of their marriage in their home Episcopal church in Minneapolis. Ms. Dykhuis and Ms. Campbell seek recognition of their registered domestic partnership as a marriage in Minnesota.[16] Sean Campbell seeks legal recognition of his relationship with both his parents, Jessie and Lindzi. MN DOMA thwarts their pursuit. MN DOMA injures them.

The appellants challenge MN DOMA under the equal protection, due process, freedom of conscience, and freedom of association provisions of Minn. Const. Art. I, §§ 2, 7, and 16, with reference to the Remedies Clause at Minn. Const. Art. I, § 8. The appellants challenge MN DOMA on the additional ground that it violates the Single Subject Clause at Minn. Const. Art. IV, § 17. *Baker*, in contrast, addresses a challenge to the existing state marriage licensing statute on due process, equal protection, and privacy grounds under the United States Constitution. *Baker*, 191 N.W.2d at 186 – 87. Neither U.S. DOMA nor MN DOMA exist in *Baker's* time.

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[15] civil union, now treated as a marriage under Vermont law

[16] These appellants plan to wed in Iowa in August. As a result, they will pose the same challenge to MN DOMA as the four other adult appellants – Minnesota's withholding recognition of a marriage duly solemnized in another lawful jurisdiction.

Moreover, the appellants challenge the Hennepin County Registrar's refusal to issue marriage licenses under the Minnesota Constitution's equal protection, due process, freedom of conscience, and freedom of association provisions at Minn. Const. Art. I, §§ 2, 7, and 16[17]. *Baker* says nothing on the Minnesota Constitution. The trial court finds troubling *Baker's* failure to address freedom of conscience under the state constitution. District Court Order and Memorandum, p. 11 *Baker's* failure to address freedom of association and the unalienable right to form a family under Minn. Const. Art. I, § 16 is especially significant in view of the recognition of these very rights under Minn. Const. Art. I, 16 in *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 14 N.W.2d 400 (1944), a case only twenty-seven years older than *Baker* and which remains good law today. Furthermore, *Baker* does not address the rights of minor children of same-sex parents. Thus, the appellants' principal claims have nothing to do with *Baker*. *Baker* does not have binding effect in this case. See *Smelt v. County of Orange*, 374 F.Supp.2d 861, 873 (C.D. Cal. 2005) (stating the court "[could not] conclude *Baker* necessarily decided the questions raised by the constitutional challenge to DOMA), aff'd in part and vacated in part on other grounds, 447 F.3d 673 (9th Cir. 200); *In re Kandu*, 315 B.R. 135, 137 – 38 (Bankr. W.D. Wash. 2004) (rejecting *Baker*'s application to DOMA challenge as case concerns "subsequently enacted federal legislation" with its own history); see also *In the Matter of the Marriage of*

[17] Noting Minn. Const. Art. I, § 8's Remedies Clause

J.B. & H.B., 326 S.W.3d 654, 671 – 72 (Tex. App. 2010) (finding *Baker* "did not control the disposition" of equal protection challenge to state law that precluded adjudication of married same-sex couple's divorce, a "distinguishable" matter presenting different legal issues). Notwithstanding the state's protests to the contrary, and notwithstanding the district court's reluctance to rule contrary to *Baker* in spite of its stated misgivings,[18] *Baker* does not determine the outcome of this case. In addressing the claims of same-sex couples lawfully married in other jurisdictions, this court may grant the appellants relief from MN DOMA, regardless of *Baker.*

[18] Trial Court Order and Memorandum, p. 11 (noting absence of discussion on state constitutional religious freedom in *Baker.*

POINT I

APPELLANTS STATE CLAIMS UNDER THE EQUAL PROTECTION CLAUSE AT MINN. CONST. ART. I, § 2.

The appellants state claims for relief under the Equal Protection Clause of Minn. Const. Art. I, § 2.[19]

A. FEDERAL TESTS AS A MINIMUM FLOOR FOR ART. I, § 2

1. **Heightened Scrutiny**

Applicable to the states as a minimum standard,[20] settled federal law sets forth two major and two supporting factors that trigger heightened scrutiny of group classifications. The factors are (a) historical discrimination, (b) concrete connection between the group's distinguishing characteristics and legitimate policy objectives, or to an individual's "ability to perform or contribute to society[,]", (c) existence of obvious, immutable, or distinguishing characteristics defining the group -- traits that they cannot, or should not have to, change, and (d) political minority or politically vulnerable status of the group. *Bowen v. Gilliard*, 483 U.S. 587, 602 – 03 (1987), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Suspect or quasi-suspect classifications of such groups require, at minimum, proof of the law's "substantial relationship to an important

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[19] Am. Cmplt. "Count III," ¶¶ 26 – 33, ¶¶ 41 – 45, Prayer for Relief 1 – 3, 5

[20] *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (recognizing right to privacy in Minn. Constitution), citing *State v. Fuller*, 374 N.W.2d 722, 726 – 27 (Minn. 1985)

government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (children born out of wedlock as quasi-suspect class).

Heightened scrutiny enables courts to discern whether government imposes classifications for significant and just purposes, and to prevent use of classifications that arise from impermissible prejudices or stereotypes. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality; affirmative action in municipal contracting), *U.S. v. Virginia ("VMI"),* 518 U.S. 515, 533 (1996) (striking down restrictions against admission of women). Heightened scrutiny requires defense of the statute by reference to the "actual [governmental] purpose" behind it, not a different "rationalization" or hypothetical created for the courthouse. *VMI*, 518 U.S. at 535 – 36. Restated, Section 3 of U.S. DOMA at 1 U.S.C. § 7 must rise or fall on Congress' actual justifications for the law.

Citing pervasive, longstanding discrimination at national and local levels by the public and private sector, the President and the Attorney General concede that classifications on the basis of sexual orientation merits heightened scrutiny, and that Section 3 of U.S. DOMA is unconstitutional under heightened scrutiny. Feb. 23, 2011 Letter to Speaker of the U.S. House of Representatives John Boehner from Attorney General Eric Holder Re Defense of Marriage Act, p. 2 (Attorney General Letter)[21]:

First and most importantly, there is, regrettably, a significant history

[21] Addendum, p. 25, Appendix p. LXIV, Defendants' (United States Office of Personnel Mgt. et al.) Brief in Opposition to Motion to Dismiss, *Golinski v. U.S.*, 3:10-00257-JSW (N.D. Cal. July 1, 2011)

> of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

At footnote 3, the Attorney General adds, "In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation[,]" citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985) (heightened scrutiny warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue).

Citing Judge Richard Posner's *Sex and Reason 101* (1991) and Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515 (2010), the Government concedes sexual orientation to be an immutable trait, regarding it as unfair to force gays and lesbians to hide their sexual orientation to avoid discrimination.[22]

Citing Colorado's Amendment 2 at issue in *Romer v. Evans*, 517 U.S. 620 (1996), the Texas sodomy statute criminalizing same-sex sodomy only in *Lawrence*, the bans on gays and lesbians in the military, and the absence of federal protection against sexual orientation employment discrimination, the Government concedes the limited political power, and significant political

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[22] Attorney General Letter, p. 3, ¶ 1

vulnerability, of gays and lesbians. The Government adds that, while gays and lesbians are not totally powerless in view of the repeal of Don't Ask, Don't Tell, total powerlessness is not the test, citing the heightened scrutiny accorded gender-based classifications, notwithstanding the Nineteenth Amendment and Title VII.[23]

Citing the repeal of "Don't Ask, Don't Tell", *Lawrence*, *Romer*, and "evolutions... in social science regarding sexual orientation", the Government finds sexual orientation to have "no relation to ability to perform or contribute to society."[24]

The Government adds that circuit court authority subjecting sexual orientation classification to rational basis review does not survive the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986), in *Lawrence v. Texas*, 538 U.S. 558 (2003).[25] Going further, the Government notes its disavowal of Congress' stated reasons for passage of U.S. DOMA – "responsible procreation and child-rearing" and moral disapproval of homosexuality in the favor of "traditional Judeo-Christian" heterosexuality".[26] In citing the legislative history of U.S. DOMA, the Government states, "The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection

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[23] Id. at p. 3, ¶ 2
[24] Id. at ¶ 3
[25] Id. at ¶ 4
[26] Id. at ¶ 4, pp. 3 – 4 nn. 6 – 7, citing H.R. Rep. No. 104-664 at pp. 13,15 - 17

Clause is designed to guard against."[27] In conclusion, the Government finds Section 3 of U.S. DOMA unconstitutional under heightened scrutiny as applied to legally married same-sex couples.[28]

2. **Flunking Federal Rational Basis**

Section 3 of U.S. DOMA flunks the deferential federal rational basis test. See *Gill v. Office of Personnel Mgt.,* 699 F.Supp.2d 374, 388 – 89 (D. Mass. 2010) (finding no rational basis in the stated purposes of U.S. DOMA: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources", citing H.R. Rep. 104-664, pp. 12 – 18. See also *Perry v. Schwarznegger*, 704 F.Supp.2d 921, 998 (N.D. Cal. 2010) (Walker, Vaughan, J.) (striking down on rational basis grounds stated bases for CA Proposition 8:

> (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.)

Finding these to be *post-hoc* justifications, the court holds Prop. 8 to rest on a sincere belief, that heterosexual couples are morally superior as couples and as parents than homosexual couples, a private prejudice, an argument based on

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[27] Id. at p. 4, p. 4, n. 7, and p. 5, ¶ 1 (citations omitted)

[28] Id. at p. 5, ¶ 2

"tradition"[29], and a moral judgment unenforceable under law.[30] In accord, *In re Balas*, 2:11-bk-17831 TD (Bankr. E.D. Cal. June 13, 2011) (no rational basis to prevent lawfully married same-sex couple to file joint Chapter 13 petition), *Dragovich v. U.S. Treasury Dep't*, 10-cv-01564 CW (N.D. Cal. Jan. 18, 2011) (Wilkin, Claudia, J.) (motion to dismiss challenge to U.S. DOMA § 3 denied).

The justifications for MN DOMA are the same as those for U.S. DOMA. As § 3 of U.S. DOMA flunks the rational basis and heightened scrutiny equal protection tests, and as § 3 cannot defeat same-sex litigants at the federal Rule 12(b)(6) stage, so, too, must MN DOMA fail. Accordingly, the appellants state claims for relief against MN DOMA that merit reversal and remand for trial and all appropriate declaratory and equitable relief.

B. EQUAL PROTECTION OF MINNESOTA LAW

The Minnesota Supreme Court prescribes a more stringent rational basis test than the federal test. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (striking down Minnesota sentencing disparity between possession of powdered cocaine and crack cocaine for lack of rational basis under Minn. Const. Art. I, § 2). Under the Minnesota rational basis test:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or

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[29] See Sholem Aleichem and Jerome Robbins, *Fiddler on the Roof* "Tradition!"
[30] Id. at 1022.

> relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Russell at 888.

Under Minnesota's stricter rational basis test, the Minnesota Supreme Court is "unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires." *Id.* at 889. Thus, Minn. Const. Art. I, § 2 requires the same close, i.e., "substantial" relationship between the legislative means and actual stated purpose of the examined law as the heightened scrutiny test for equal protection under U.S. Const. amend V[31] and XIV, so long as the statute's purpose is "legitimate", in contrast to heightened scrutiny's demand for an "important government objective."[32] The Court's test demands discovery outside the four corners of the complaint. *Russell* at 888 – 89 (examination of chemical composition of crack and powdered cocaine with anecdotal testimony of State witnesses to strike down disparate sentencing). In examination of data outside the four corners of the complaint, the court goes beyond Minn. R. Civ. P. 12.02(e). Id., *Kahn v. Griffin*, 701 N.W.2d 815, 833 – 34 (Minn. 2005) (examination of election and redistricting data outside pleadings to answer "no" to certified question at *summary judgment* whether Minn. Const. Art. I, § 2 provides greater protections to right to vote than Fourteenth Amendment).

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[31] *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Equal Protection Clause applied to federal government in Fifth Amendment)
[32] *Clark v. Jeter*, 486 U.S. 456, 461 (1988)

MN DOMA has the same stated purposes as U.S. DOMA – promotion of heterosexuality over homosexuality, and the raising of children of heterosexual marriage in accordance with claimed "Judeo-Christian" principles.[33] Advancement of one perceived moral code over others does not constitute a legitimate, let alone, important government objective. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992). Noting the deeply held beliefs by many "condemning homosexual conduct as immoral", *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), holds that the majority may not use the power of the State to enforce its moral views over all society: "'Our obligation is to define the liberty of all, not to mandate our own moral code.' [citing *Planned Parenthood*, supra]".

That which serves no legitimate purpose under national law serves no legitimate purpose under Minnesota law. MN DOMA does not survive heightened scrutiny.[34] MN DOMA flunks the federal rational basis test. In so flunking federal law, MN DOMA flunks the more discerning Minnesota rational basis

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[33] *Benson et al. v. Alverson et al.,* 27-CV-10-11697 (Minn. Fourth Dist. Ct., Hennepin County, Nov. 26, 2010), Order Denying Motion of Minnesota Family County (MFC) to Intervene per Minn. R. Civ. P. 24.01 and 24.02, pp. 3 – 4 (identifying Minnesota Family Council as principal proponent and organizer for MN DOMA in 1997, citing Affidavit of MFC President Tom Prichard), Prichard Aff., ¶¶ 12 – 23 (raising children of heterosexual marriage as goal)

[34] Minnesota's own legal and political history show gays and lesbians to have suffered, and to suffer now, from political vulnerability. See *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul*, 289 N.W.2d 402, 404 (Minn. 1979) (concerning repeal of clauses of St. Paul Human Rights Ordinance prohibiting sexual orientation discrimination), 1990 unsuccessful attempt to repeal reenacted clauses prohibiting sexual orientation discrimination in St. Paul City Ordinance, and HF 1613, 2011 referendum for 2012 general election, to amend Minnesota Constitution to define marriage as that civil contract between one man and one woman only.

test.[35] Concomitantly, classifications drawn between married couples of different sexes and married couples of the same sex do not survive Minn. Const. Art. I, § 2's minimal scrutiny. Thus, the appellants state claims for declaratory and equitable relief against MN DOMA, and all other provisions of Chapter 517 that wrongfully disadvantage same-sex marriages in favor of different-sex marriages. The court should reverse and remand the district court's Rule 12.02(e) dismissal for discovery, trial, and suitable relief.

POINT II

APPELLANTS STATE CLAIMS UNDER THE DUE PROCESS CLAUSE AT MINN. CONST. ART. I, § 7.

The appellants state claims under the Due Process Clause at Minn. Const. Art. I, § 7.

Due process protects individuals from arbitrary governmental intrusion into life, liberty, or property. *Washington v. Glucksberg*, 521 U.S. 702, 719 – 20 (1997). Infringement of a fundamental right violates Fourteenth Amendment substantive due process rights unless the infringement serves a compelling state interest by narrowly tailored means. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Fundamental rights may not be submitted to the vote of a plurality; their existence does not turn on the results of elections. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Jehovah's Witnesses not compelled to

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[35] *Russell*, 477 N.W.2d at 888 - 89

recite Pledge of Allegiance on account of fundamental right of free exercise of religion).

Freedom to marry is a fundamental right. *Zablocki*, 434 U.S. at 384, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965):

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 – 40 (1974) (marriage and family life), *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (freedom to marry as vital personal right; miscegenation statute struck down).

Minn. Const. Art. I, § 16, stating, "[t]he enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people[,]" enshrines the right to form a home and establish family relations *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 224 – 25, 14 N.W.2d 400, 405 (1944) (case of pauper family disseised from freehold; claim against town board members stated; $150 awarded at jury against individual town board members). The Due Process Clause at Minn. Const. Art. I, § 7 is coextensive with U.S. Const. amend. V and XIV. *Sartori v. Harnischfager Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

Messrs. Benson and Gajewski are a married couple under Vermont and Ontario law. Messrs. Trisko and Rittman are duly married under the laws of

Manitoba and solemnized in accordance with the rites of St. Mark's Episcopal Church of Minneapolis. Ms. Dykhuis and Ms. Campbell are registered domestic partners in Duluth.[36] They seek recognition from Minnesota, that their respective unions are "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. They seek recognition of an old right – the freedom to marry – not a new right. *Perry v. Schwarznegger*, 704 F.Supp.2d 921, 993 (N.D. Cal. 2010) (Proposition 8, banning same-sex marriages after approval of same by California Supreme Court, struck down on due process and equal protection grounds as unlawful infringement of fundamental freedom to marry). They are married.

Minn. Stat. § 517.03 subd. 1 prohibits certain marriages in Minnesota, in addition to same-sex marriage: bigamy and marriages between close relatives. Id. The only marriages duly solemnized in other states and foreign jurisdictions that Minn. Stat. § 517.03 subd. 1(b)[37] explicitly refuses to recognize are marriages between two persons of the same gender. Contrary to the appellees' representations, MN DOMA impairs the fundamental rights of marriage that the adult appellants respectively enjoy as same-sex couples, duly married under law and solemnized, in the case of Messrs. Trisko and Rittman, according to their religious faith. The interests the state seeks to protect in MN DOMA are not legitimate, and are thus not compelling. *Zablocki*, 434 U.S. at 388, *Sartori*, 432

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[36] They will wed in Iowa in August.
[37] Added in MN DOMA in 1997

N.W.2d at 453. Accordingly, the appellants state claims against MN DOMA and the remaining Chapter 517 prohibitions against marriage equality. The court should reverse the judgment of the district court, and remand for further proceedings and suitable declaratory and equitable relief, striking down MN DOMA and ordering the Registrar to issue marriage licenses to the appellants.

POINT III

MN DOMA VIOLATES THE MINN. CONST. ART. IV, § 17 SINGLE SUBJECT CLAUSE.

The appellants state claims that MN DOMA violates the Minn. Const. Art. IV, § 17 Single Subject Clause.

Article IV, § 17 of the Minnesota Constitution provides that that "[n]o law shall embrace more than one subject, which shall be expressed in its title." The purpose of the Single Subject Clause is to "prevent what is called "log-rolling legislation" or "omnibus bills," by which a number of different and disconnected subjects are united in one bill, and then carried through by a combination of interests." *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891).

To satisfy the Single Subject Clause, "All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject." *Id.* at 924. The Minnesota Supreme Court further clarified this standard by stating that legislation satisfies the Single Subject

Clause when the "common thread which runs through the various sections . . . is indeed a mere filament." *Blanch v. Suburban Hennepin Regional Park Dist.*, 449 N.W.2d 150, 155 (Minn. 1989).

After a long period of liberally construing the Single Subject Clause, in the last decade the Minnesota Supreme Court has adopted a more stringent approach. In *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 295 (Minn. 2000), the court addressed the issue of whether an amendment to the state's prevailing wage law enacted as part of an omnibus tax bill related to tax relief and reform violated the Single Subject Clause. There, the appellants assert that the prevailing wage amendment is germane to the subject of tax relief because it purposes to overturn a prior Minnesota Supreme Court decision impacting tax relief. *Id.* at 302. The Minnesota Supreme Court rejects the appellants' reasoning as "strained" and strikes down the amendment as a violation Single Subject Clause. *Id.* The court reasons that the "clear wording" of the Clause does not permit the "inclusion of such disparate provisions in one bill". *Id.*

More recently, in *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 595 (Minn. Ct. App. 2005), appeal dismissed, (Minn. June 9, 2005), the court addresses the issue of whether the Personal Protection Act ("PPA", or "concealed-carry"), legislation relating to handguns permits, enacted as part of a natural resources bill violates the Single Subject Clause. The appellant -- the state -- argues the PPA does not violate the Single Subject Clause because it is not a tiny section of an immense omnibus bill and because it receives extensive legislative

attention in both the House and the Senate. *Id.* at 596. The court rejects these and strikes down the PPA as a violation of the Single Subject Clause. *Id.* at 600. The court holds the proper inquire was whether the challenged law is germane to a single subject. *Id.* at 596. Because natural resources and handguns are "two disparate subjects" that "lack a legitimate connection to one another," the PPA violates the Single Subject Clause. *Id.* at 595.

Sen. Samuelson introduces S.F. 1908 on the thirty-eighth day of the session on 14 April 1997. S.F. 1908 states that it is:

> A bill for an act relating to the operation of state government services; appropriating money for the operation of the departments of human services and health, the veterans home board, the health related boards, the disability council, the ombudsman for families, and the ombudsman for mental health and mental retardation; including provisions for agency management; children's programs; basic health care programs; medical assistance and general assistance medical care; long-term care; state-operated services; mental health and health department...[38] (emphasis added)

At birth, S.F. 1908 contains no provisions addressing same-sex marriage.[39]

On 16 May 1997, the sixty-first day of the session, the Conference Committee adds the provisions that become MN DOMA, codified at Minn. Stat. §§ 517.01, 517.03, and 517.04.[40] The Conference Committee Report on S.F. No.

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[38] Journal of the Senate, 80th Session, April 14th, 1997, pp. 1850 - 1851

[39] Id.

[40] Journal of the Senate, 80th Session, Friday May 16, 1997, pp. 3307, 3526 – 27, 3545 ("So the bill, as amended by the Conference Committee, was repassed and its title was agreed to.") The only apparent connection – a fig leaf, not a filament – between the original bill and the multispecies creature reaching Governor Carlson is the provision codified at Minn. Stat. § 517.03 subd. 2 requiring the Commissioner of Human Service's consent to the marriage of a mentally retarded person committed to the Commissioner's

1908 contains no description of the bill's effect on marriage.[41] Only in the final version of Chapter 203 does the phrase "changing provisions for marriage" appear for the first time, between "creating a demonstration project for persons with disabilities" and "accelerating state payments."[42]

Human services, aid to disabled individuals, long-term care facility funding, welfare reform, and same-sex marriage are widely disparate subjects that lack a legitimate connection to one another. As conceded by the national government, "responsible procreation" and child-rearing are disavowed as legitimate purposes to support U.S. DOMA.[43] This court struck down the original concealed-carry law as a misplaced graft on an unrelated spending bill. *Unity Church*, 694 N.W.2d at 595, 600. If the state continues to argue the existence of a filament to survive Single Subject scrutiny, the state must also answer why it is not a proper party to this lawsuit, when the bill establishing MN DOMA appropriates state monies and tasks three state departments – Human Services, Health, and Veterans Affairs – with new duties. The state cannot have its cake, and cower outside the courthouse while eating it.

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guardianship. Thus, a mentally retarded ward of the state may marry anyone of the opposite sex, subject to the Commissioner's consent, but a fully competent person may neither marry, nor have his or her existing marriage to, a person of the same sex recognized in Minnesota.

[41] Id. at p. 3307

[42] https://www.revisor.mn.gov/laws/?id=203&doctype=Chapter&year=1997&type=0

[43] Holder Letter, p. 3, ¶ 4, n. 5 "As the Department has explained in numerous, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised

One can receive human services regardless of whether one is married. One can be denied a marriage license regardless of whether one receives human services. One may marry whether one desires children, already has children, or is physically capable of having children. The inclusion of the Minnesota DOMA into a large funding bill is emblematical of the gross logrolling that Minnesota's constitutional Framers forbid. The legislative history of Chapter 203 and S.F. 1908 exposes the MN DOMA provisions as a transgenetic, eleventh-hour graft. Minnesota's DOMA, Minn. Stat. § 517.03 subd. 1(b) therefore violates the Single Subject Clause.

The appellants spell out facts, not mere conclusions that support their Single Subject Clause claim against MN DOMA. They make extensive citations outside the corners of the pleadings. They specify the declaratory and equitable relief they seek. (Am. Compl. 17-18.) Their claim that Minnesota's DOMA violates the Single Subject Clause is legally sufficient and plausible, and survives Minn. R. Civ. P. 12.02(e) scrutiny. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010). The court should reverse and remand the appellants' Single Subject Clause claim against MN DOMA.

POINT IV

APPELLANTS STATE CLAIMS FOR VIOLATION OF THEIR FREEDOM OF ASSOCIATION RIGHTS AT MINN. CONST. ART. I, § 16.

MN DOMA violates the appellants' clearly established freedom of

association rights at Minn. Const. Art. I, § 16.

Thiede v. Town of Scandia Valley, 217 Minn. 218, 224 – 25, 14 N.W.2d 400, 405 (1944), sets forth the full meaning of the unenumerated, but altogether real, inherent, and primordial rights that Minn. Const. Art. I, § 16:

> The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations – all under equal and impartial laws which govern the whole community and each member thereof. [citations omitted] ... The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions. "These instruments measure the power of rules, but they do not measure the rights of the governed." [citations omitted]
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> ...
>
> The Constitution of Minnesota specifically recognizes the right to "life, liberty or property" (art. I, § 7), but does not attempt to enumerate all "the rights or privileges secured to any citizen thereof" (see art. I, § 2). It, however, significantly provides: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people." (Art. I, § 16).

Twenty-one years later, *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965), in striking down the Connecticut law prohibiting the sale of contraceptives to married individuals, finds the freedom to marry as a freedom of association, within the right to privacy discerned within "the penumbra" of the Bill of Rights" "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life..." Reaffirming the right to terminate a pregnancy as a Fourteenth

Amendment Due Process liberty interest, the Court states,

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... [citations omitted] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).[44] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (same, following *Casey* and overruling *Bowers v. Hardwick* 478 U.S. 186 (1986), "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."). In accord, *Lawrence*, 539 U.S. at 604 – 05 (Scalia, J., dissenting, acknowledging that majority opinion sweeps away all constitutional objections to marriage equality regardless of sexual orientation, and acknowledging procreation as no basis for marriage restrictions).

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), ignores *Thiede* and Minn. Const. Art. I, § 16, without interpretation of the Minnesota Constitution to guide or frustrate any future Court.

State by McClure v. Sport & Health Club, 370 N.W.2d 844, 850 (Minn.

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[44] citation to U.S. Const. amend. IX, id. at 848 – 49: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."

1984), appeal dismissed, 478 U.S. 1015 (1986), finds freedom of association within Minn. Const. Art. I, § 16. In so doing, the Court upholds the finding of religious and marital status discrimination against Sport & Health Club's claims of infringement of the owners' freedom of association and conscience. The district court's finding of no freedom of association in the Minnesota Constitution is misplaced. Order, pp. 14 – 15.

Citing *Thiede* and *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (privacy), *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989), recognizes the fundamental right of a child to establish a relationship with a parent, whether the child is born in or out of wedlock. *Baker* offers no analysis of the right to establish family relations under the Minnesota Constitution.

Doe v. Ventura, 2001 WL 543734 (Minn. Fourth Dist. Ct., Hennepin County, May 15, 2001) (Pierce, Delila, J.), a declaratory action against the state, strikes down on state constitutional privacy grounds Minn. Stat. § 609.293's criminal prohibition against sodomy, as applied to consensual, noncommercial relations between two consenting adults. *Doe*, 2001 WL 543734 at *7 - *9:

> Plaintiffs assert, appeals to natural or theological ethics cannot constitutionally be used to legitimate laws that simply do not advance public welfare.... The Court finds Plaintiffs' reasoning persuasive and, accordingly, declares Minn. Stat. § 609.293 to be unconstitutional, as applied...

The state does not appeal *Doe*. As a result, *Doe* is binding precedent throughout the state. *Devescovi v. Ventura*, 195 F.Supp.2d 1146, 1149 (D. Minn. 2002) (Davis, Michael, C.J.).

In re Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991), review denied (Minn. Feb. 10, 1992), finds a "family of affinity" in the same-sex couple of Sharon Kowalski and Karen Thompson as it names Karen Thompson as the guardian of the brain-injured Kowalski. While reversing the district court's award of guardianship to Karen Tomberlin, this court affirms the district court's finding Kowalski and Thompson a "family of affinity"[45] under the Minnesota Constitution's right to privacy. *Kowalski*, 478 N.W.2d at 797.

The right of familial association is a right that Minn. Const. Art. I, § 16 protects as a pre-constitutional inherent right. *Baker* leaves the right undisturbed. The state constitutional right of association finds reaffirmation in *Sports & Health Club*, *Gray*, *Johnson*, and *Devescovi*. *Kowalski* rests upon this Minn. Const. Art. I, § 16 family association right within the right to privacy, and specifically recognizes Kowalski and Thompson as a family of affinity. The appellants, including minor child Sean Campbell, state claims for violation of their right to familial association that merit remand and suitable declaratory and equitable relief at trial.

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[45] Affinity: "2. Relationship by marriage. 3. Any familial relation resulting from a marriage." (Black's Law Dictionary, 9th Ed., 2010)

POINT V

APPELLANTS STATE CLAIMS FOR VIOLATION OF THEIR FREEDOM OF CONSCIENCE AND FREE EXERCISE OF RELIGION AT MINN. CONST. ART. I, § 16.

MN DOMA and Chapter 517 prohibitions against marriage equality regardless of gender or sexual orientation violate the appellants' freedom of conscience and religious freedom rights under Minn. Const. Art. I, § 16.

Minn. Const. Art. I, § 16[46] provides greater protection to freedom of conscience and free exercise of religious beliefs, and greater restrictions upon government support of any religious establishment or belief system, than the First Amendment. *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (Popovich, Peter, C.J.) (striking down Minn. Stat. § 169.522 as applied to Amish; contrast First Amendment prohibitions against free exercise of religion with Art. I, § 16 prohibitions against infringement or interference), *Hill-Murray Federation of Teachers, St. Paul, Minnesota v. Hill-Murray High School, Maplewood, Minnesota*, 487 N.W.2d 857, 865 (Minn. 1992) (Keith, Sandy, C.J.) (upholding

[46] ... The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state...

certification of collective bargaining unit against Art. I, §16 challenge). The provision has its origins in the 1777 New York Constitution and the Northwest Ordinance of 1787. *Hershberger*, 462 N.W.2d at 399, nn. 2 – 3 (Simonett, John, J., concurring) (N.Y. Const. of 1777, art. XXXVIII, Northwest Ordinance of 1787, art. I), Francis H. Smith, The Debates and Proceedings of the Minnesota Constitutional Convention Including the Organic Act of the Territory 279, 281 (1857), cited in, Nicholas Dranias, Reclaiming Minnesota's Territorial Birthright: Why the Northwest Ordinance Restricts the State's Power of Eminent Domain to Public Exigencies, http://works.bepress.com/nicholas_dranias/2, pp. 5 – 6 (January 2009). The provision restricts state interference except in cases of "licentiousness" or "practices inconsistent with the peace or safety of the state," and only then when the state demonstrates that alternative means cannot assure public safety. *Hershberger*, 462 N.W.2d at 397 – 98,[47] *Hill-Murray*, 487 N.W.2d at 865.[48] Art. I, § 16 prohibitions against compelled support of religious establishment or practices apply the *Lemon v. Kurtzman*, 403 U.S. 602, 612 – 13 (1973) tests of secular vs. sectarian purpose, inhibition or promotion of religion in primary effect, and entanglement between state and religion. *Hill-Murray*, 487 N.W.2d at 863.

Baker fails to address freedom of conscience or establishment of religion

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[47] equating "compelling state interest" and "least restrictive alternatives" to state test
[48] four-part test: sincere religious belief; whether state regulation burdens religious belief; whether state interest is compelling; and whether regulation applies least restrictive means

under the state constitution. The district court's reluctance to dismiss comes through most clearly on this point. Order, p. 11: "Defendants contend that *Baker v. Nelson* disposes of Plaintiffs' Freedom of Conscience claim. This Court cannot fully agree." *Doe, Devescovi,* and *Lawrence* obliterate claims that marriage equality promotes licentiousness or acts "inconsistent with the peace or safety of the state".[49] Thus, Minn. Stat. MN DOMA and Minn. Stat. §§ 517.01 and 517.03 run afoul of Art. I, § 16. *Hershberger*, 462 N.W.2d at 397 – 98. *Lawrence* identifies the religious motivation of those opposing same-sex marriage and supporting criminal sodomy statutes. *Lawrence*, 539 U.S. at 571. *Varnum v. Brien*, 763 N.W.2d 862, 904 – 05 (Iowa 2009), strikes down Iowa's statutory ban on same-sex marriage as a violation of the Iowa Constitution's equal protection, establishment of religion, and free exercise of religion clauses:

> Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government *avoids* them.... The statute at issue in this case does not prescribe a definition of marriage for religious institutions. Instead, the statute declares, "Marriage is a civil contract" and then regulates that civil contract. [citation omitted]. Thus, in pursuing our task in this case, we proceed as civil judges, far removed from the theological debate of religious clerics... This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation.

Messrs. Trisko and Rittman solemnize their marriage at St. Mark's Episcopal Church in Minneapolis. The district court wishes them well, and says in

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[49] *Hershberger*, 462 N.W.2d at 397 – 98, Minn. Const. Art. I, § 16

the breath that marriages between two people of different sexes are more equal than theirs. Order, pp. 13 – 14. The district court's holding flies in the face of Art. I, § 16, which prohibits any infringement or interference with free exercise of religion and conscience, *Hershberger* at 397: "Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution." The district court errs.

Art. I, § 16 prohibits playing favorites between religions and sects. Whereas the Missouri Synod prohibits same-sex marriage, the Evangelical Lutheran Church of America (ELCA) leaves the decision to respective congregations. Whereas the Roman Catholic Church and Church of Jesus Christ of Latter-Day Saints prohibits same-sex marriage, the Episcopal Church, the United Church of Christ, and the Society of Friends (i.e., Quakers) sanctify marriages regardless of the spouses' genders. Whereas Orthodox Jewish congregations currently prohibit same-sex marriages, the Conservative movement leaves it up to individual congregations while ordaining rabbis regardless of sexual orientation, and the Reform, Reconstructionist, and Jewish Renewal movements sanctify same-sex marriages.[50]

During debates over the 2011 anti-marriage equality amendment, HF 1613, Rep. Steve Simon (DFL-St. Louis Park) addresses the "nature vs. nurture" issue

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[50] *Varnum*, 763 N.W.2d at 905, n. 31

in sexual orientation, asking amendment proponents to address its effect on their moral argument. He then asks rhetorically, "How many more gay people does G-d have to create before we can decide whether G-d wants to have them around?"[51] On 20 May 2011, Rev. Bradlee Dean, a minister with a record of calling for the jailing of gays or worse, delivers the invocation in the Minnesota House of Representatives on the day of the vote on HF 1613. In his invocation of "Jesus Christ" in his "non-denominational" prayer, and his implied criticism of President Obama for "not acknowledging" Jesus, Dean brings down such outrage in the chambers that Speaker of the House Zellers reconvenes the House from the beginning, leads the Pledge of Allegiance a second time, calls on the regular House Chaplain to give the invocation, and then apologizes to the House:

> As Speaker of the House, I take responsibility for this mistake. I am offended at the presence of Bradlee Dean on the floor of the Minnesota House of Representatives. I denounce him, his actions and his words. He does not represent my values or the values of this state.[52]

Art. I, § 16 enshrines the paramount purpose of Minnesotans to create a state which compels no one to contribute to organized faiths contrary to their own values, which allows unfettered freedom of conscience so long as it neither infringes nor interferes with the peace and safety of others, and which creates a common platform, on which men and women peaceably may question, worship, or

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[51]http://www.minnpost.com/minnclips/2011/05/05/28044/rep_steve_simons_gay_marriage_speech_goes_viral/?utm_source=MinnPost+email+newsletters&utm_campaign=41d95e86b1-5_6_2011_MinnPost_Daily5_6_2011&utm_medium=email

[52]http://www.minnpost.com/stories/2011/05/20/28497/legislative_firestorm_erupts_over_bradlee_deans_prayer

refrain from worshipping or recognizing, Spirit, Deity, Higher Powers, or G-d, and on which they marry whom they choose, without religious restriction, to fulfill marriage's secular purposes of commitment, mutual caring, intimacy, and peaceful co-existence and pursuit of happiness and meaning in the home and community.[53]

MN DOMA and Minn. Stat. §§ 517.01 and 517.03 frustrate Art. I, § 16's purpose by imposition of one moral code at the expense of "the liberty of all", and without enactment of reasonable and lesser restrictive means. *Lawrence*, 539 U.S. at 539, *Hershberger*, 462 N.W.2d at 399. HF 1613, "the marriage amendment", intends wholesale evisceration of Art. I, § 16's inalienable, primordial rights, and invites wholesale civil strife, of which the 20 May 2011 events on the House floor are but a minor trailer to a major tragedy. The district court's misgivings as to *Baker's* effect on Art. I, § 16 is well-founded, but its ultimate decision is misplaced. The appellants state claims for violation of their rights of freedom of conscience under Minn. Const. Art. I, § 16. The court should reverse the district court, and remand for discovery, trial and declaratory and equitable relief for these married couples, parents, and minor child.

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[53] *Thiede*, 217 Minn. at 224 – 25, 14 N.W.2d at 405, *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 850. Those who claim that marriage equality will force ministers to perform gay marriages against their will and religious beliefs, establish tax-supported "gay churches", or interfere with the free exercise of conscience of same-sex marriage opponents need only examine A8354, the New York Assembly statute enshrining marriage equality by Gov. Cuomo's 24 June 2011 signature. In addressing the sincere concerns of fence-sitters, New York creates a statutory scheme that meets the four-part *Hershberger* test for same-sex marriage proponents, and same-sex marriage opponents, without running afoul of Art. I, § 16's "Establishment Clause".

CONCLUSION

The United States DOMA[54] flunks the rational basis and heightened scrutiny tests under the United States Constitution's Fifth and Fourteenth Amendment Due Process and Equal Protection Clauses. Minnesota's DOMA[55] fails the discerning rational basis test of Minn. Const. Art. I, § 2. MN DOMA fails the stringent Single Subject Test of Minn. Const. Art. IV, § 17.

The Curia[56] has no place in the Capitol. The State has no place in the pulpit. The government has no place in the adult bedroom. Minnesota DOMA runs hard aground on the bedrock of Freedom of Conscience and Freedom of Association enshrined at Minn. Const. Art. I, § 16.

Baker v. Nelson is a dying, distinguishable derelict, bereft of any analysis of the Minnesota Constitution or statutes yet to come into existence, and not relied upon by federal courts in rulings on U.S. DOMA. *Baker* poses no obstacle to the appellants' state constitutional claims against MN DOMA. To the extent *Baker* thwarts prospective same-sex marriages in Minnesota, *Baker* must be overruled on state constitutional freedom of conscience and freedom of association grounds.

The Minnesota Court of Appeals should REVERSE the decision of the district court, find that the state is a properly joined party, find that the appellants state claims that Minn. Stat. §§ 517.01, 517.03, and 517.04, the embodiment of

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[54] 1 U.S.C. § 7
[55] Laws of Minnesota Chapter 203, art. 10, codified at, Minn. Stat. § 517.03 subd. 1(b)
[56] Seat of power of the Roman Catholic Pope

Minnesota DOMA, violate the Equal Protection, Due Process, Freedom of Association and Assembly, and Freedom of Conscience Clauses of Minn. Const. Art. I, §§ 1, 2, 7, 8, and 16, find that the appellants state claims that the 1997 Minnesota Defense of Marriage Act (DOMA), 1997 Laws of Minnesota Chapter 203, art. 10, violates the Single Subject Claus of Minn. Const. Art. IV, § 17, and remand the matter for discovery, trial, and all declaratory, equitable, and mandamus relief to recognize the appellants as married persons under Minnesota law, and to recognize the minor child as the minor child of married parents.

10 July 2011

Respectfully submitted:

PETER J. NICKITAS LAW OFFICE, LLC

/s/ *Peter J. Nickitas*

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CERTIFICATE OF WORD COUNT

I, Peter J. Nickitas, attorney for appellants hereby certify in accordance with Minn. R. App. P. 132.01 that this principal brief has 12,714 words, that the typeface is Times New Roman 13 point, that this brief is the product of a 13 inch MacBook operating Mac OSX 10.6 Snow Leopard and Microsoft Word 2008, and this brief is free of all known viruses.

10 JULY 2011

/s/ *Peter J. Nickitas*

Peter J. Nickitas

ADDENDUM

ADDENDUM TABLE OF CONTENTS

STATE OF MINNESOTA DISTRICT COURT

FILED

COUNTY OF HENNEPIN 2011 MAR -7 AM 11:51 FOURTH JUDICIAL DISTRICT

BY DEPUTY
HENN CO. DISTRICT COURT ADMINISTRATOR

Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Plaintiffs,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar, and the State of Minnesota,

Defendants.

ORDER

Court File No. 27 CV 10-11697

The above-entitled matter came duly on for hearing before Judge Mary S. DuFresne on December 10, 2010.

APPEARANCES:

Peter Nikitas, Esq., appeared for Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman.

Dan Rogan, Assistant Hennepin County Attorney, appeared for Jill Alverson.

Alan Gilbert, Solicitor General for the State of Minnesota, appeared for the State.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

IT IS ORDERED:

1. The State of Minnesota is **DISMISSED** from this lawsuit. The caption of this case shall be amended to read:

Douglas Benson, Duane Gajewski, Jessica Dykjuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman,

Plaintiffs,

vs.

Jill Alverson, in her official capacity as the Hennepin County Local Registrar,

Defendant.

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2. Defendants' joint motion to dismiss the Complaint is **GRANTED**. The Complaint is hereby **DISMISSED WITH PREJUDICE**.

3. The attached Memorandum of Law is hereby incorporated into this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Mary S. DuFresne

Dated: March 7, 2011

Mary S. DuFresne
Judge of District Court

MEMORANDUM OF LAW

FACTS

Plaintiffs are three same-sex couples and the minor child of one couple. (Cmplt. ¶ 1). The three couples each sought a marriage license from Hennepin County. The County denied the couples' applications for licenses presumably pursuant to the State's Defense of Marriage Act, which prohibits marriage between persons of the same sex. *See* Minn. Stat. §§ 517.01, 517.03, Subd. 1(4) (2010) (the State's "DOMA"). Plaintiffs filed suit against Jill Alverson, the Hennepin County Local Registrar, asking the Court to declare the State's DOMA unconstitutional. Hennepin County filed a motion to dismiss based on Plaintiffs' alleged failure to join an indispensible party, namely, the State of Minnesota. Plaintiffs then served this action on Minnesota's attorney general and joined the State as a party to the case. Defendants now jointly move for dismissal of this case on the merits. Additionally, the State argues that it is not a proper party to this suit.

ISSUES

Is the State of Minnesota a proper party to this suit? Have Plaintiffs stated a claim upon which relief may be granted in claiming that the State's DOMA violates certain constitutional principles?

ANALYSIS

1. The State is not a proper party to this lawsuit.

Plaintiffs argue that the State is a proper party, relying on three theories: 1) the State is a proper party pursuant to the Uniform Declaratory Judgments Act, 2) the local registrar is controlled by the State Registrar, and 3) the State is the creator and enforcer of all laws, including 515 separate laws that Plaintiffs allege discriminate against same-sex couples, creating a legal interest in this lawsuit.

The Uniform Declaratory Judgments Act, Minnesota Statutes Chapter 555, grants Courts the authority to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Minn. Stat. § 555.01 (2010). Thus, the defendants in this case may not object to Plaintiffs' Complaint solely on the ground that it prays for declaratory relief. *See id.* The Act is clear about which parties must be joined in an action for declaratory relief:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

Minn. Stat. § 555.11. Here, the State's Attorney General must be served with a copy of the proceeding and is entitled to be heard. The State need not and should not be a party to the case.

Plaintiffs have not demonstrated that the State has or claims any interest which would be affected by the prayed-for declaration. In *Clark v. Pawlenty*, the Petitioner sued then-Governor Tim Pawlenty and the Secretary of State seeking an election ballot correction. *See* 755 N.W.2d 293 (Minn. 2008). Specifically, the petitioner requested that the "incumbent" designation, be removed from alongside Justice Lorie Gildea's on statewide election ballots. *See id.* at 298. The *Clark* Court concluded that Governor Pawlenty was not a proper party to the lawsuit because he had no authority over the creation or preparation of the election ballots. *Id.* at 299. The Governor's role in this context was to appoint judges and justices between election periods. The Petitioner did not seek to bar the Governor from filling judicial vacancies in the future. *Id.* In contrast, the Secretary of State was a proper defendant because he provided the challenged ballot information to all 87 county auditors. *Id.* The Court also

observed that this was an office for which voting is conducted statewide and for which the secretary of State provided the challenged ballot information to all county auditors. *See id.*

In this case, the State of Minnesota, generally, is not the entity that creates or prepares marriage licenses. Minnesota Statutes Section 517.07 requires marrying couples to obtain a marriage license from the local registrar of any county within Minnesota. The local registrars maintain data on marriages and report that data to the state registrar. *See* Minn. Stat. § 144.223. This report, however, takes place *after* the marriage has been solemnized.

In sum, the relief that Plaintiffs seek would be provided by the local registrar, and not the State of Minnesota. The State is not a necessary party to this action and the Court will grant the State's motion to dismiss. The Local Registrar also seeks dismissal, arguing that it is not in a position to defy Minnesota's Defense of Marriage Act. Like the Secretary of State in *Clark*, the Local Registrar is the office that would provide the relief that Plaintiffs seek. Without a doubt, the Local Registrar is the correct Defendant in this case.

II. The law requires dismissal of this case on its merits.

Plaintiffs filed the instant case challenging the State's Defense of Marriage Act (DOMA). The State's DOMA is contained in Minnesota Statutes Sections 517.01 and 517.03. The State's DOMA provides that lawful marriage may be contracted only between persons of the opposite sex and that marriages between persons of the same sex are prohibited. *See* Minn. Stat. §§ 517.01, 517.03, Subd. 1(4)(a). Marriages entered into by persons of the same sex that are recognized in another state or foreign jurisdiction are void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this State. Minn. Stat. § 517.03(a)(4)(b). The DOMA became State law in 1997. Plaintiffs challenge the State law, arguing that it violates Plaintiffs' rights to due process, equal protection, religious freedom, and freedom of association. Plaintiffs also contend that the DOMA violates the

single-subject clause because the DOMA was enacted as part of a larger bill arguably encompassing many topics.

A claim is sufficient against a motion to dismiss based on failure to state a claim upon which relief can be granted if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). The only factual information presented is that which is disclosed by the pleadings as a whole. *Id.* The Court may, however, consider an entire written contract when the complaint refers to the contract and the contract is central to the claims alleged. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). The Court must accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff. *Pullar v. Indep. Sch. Dist.* No. 701, 582 N.W.2d 273, 275-76 (Minn. Ct. App. 1998). At this stage of litigation, it is immaterial whether the plaintiff can prove the facts alleged. *See Martens v. Minnesota Min. & Mfg.*, 616 N.W.2d 732, 739-40 (Minn. 2000). "Because of the minimal formal requirement of notice pleadings and the liberal interpretation of pleadings under the rules, a motion to dismiss for [failure to state a claim upon which relief can be granted] will rarely be granted." David F. Herr & Roger S. Haydock, *Minnesota Practice* § 12.9 (2008).

A. *Baker v. Nelson* clearly disposes of Counts I and III of the Complaint.

The first count of the Complaint alleges a violation of the due process provision of Article I, Section 7 of the Minnesota Constitution. This provision reads,

> No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law....

The third count of the Complaint alleges a violation of Article I, Section 2 of the Minnesota Constitution, which reads as follows:

> No member of this state shall be disfranchised or deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

The Minnesota Supreme Court held that the prohibition against same-sex marriage in Minnesota does not offend the due process or equal protection clauses of the United States Constitution in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). This, of course, is binding precedent on this Court and this Court is not free to ignore it. Plaintiffs argue that the instant lawsuit should be analyzed as though this precedent is not binding because Plaintiffs bring their lawsuit under the Minnesota State Constitution rather than Federal law. This argument is unavailing.

"It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 827 (Minn. 2005) *quoting State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985). The highest court of this state is the "first line of defense for individual liberties within the federalist system." *Kahn*, 701 N.W.2d at 828 *citing Fuller*, 374 N.W.2d at 726. When the state Supreme Court reaches "a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of Minnesota's citizens under the state constitution, [the high court] does not hesitate to interpret the state constitution to independently safeguard those rights." *Kahn*, 701 N.W.2d at 828.

In *Baker v. Nelson*, a same-sex couple sued the Hennepin County Registrar after the Registrar denied the couple a marriage license on the sole basis that the individuals were of the same sex. Much the same as the Plaintiffs in this case, the *Baker* plaintiffs argued that Minnesota's law prohibiting same-sex marriage violated the couple's fundamental right to marry. The *Baker* Court discussed the effect of *Loving v. Virginia*, in which the United States Supreme Court struck down Virginia's statute prohibiting interracial marriages. In response to

Loving, the *Baker* Court stated, "But in commonsense and in constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." 291 Minn. at 315, 191 N.W.2d at 314.

In response to *Baker*, Plaintiffs argue that thirty years have passed since *Baker* and legal issues related to sexual orientation are now "substantial federal questions." Certainly, the Minnesota Supreme Court is free to overrule its opinion in *Baker v. Nelson*. Until such time, however, *Baker* remains binding precedent on this Court. Furthermore, Plaintiffs have not demonstrated that this Court has any authority to ignore *Baker* and afford same-sex couples greater or different protections than the federal constitution provides. A fair reading of *Baker* demonstrates that the Minnesota Supreme Court was not sympathetic to the *Baker* plaintiffs' claims. The Supreme Court has not reached "a clear and strong conviction that there is a principled basis for greater protection" of same-sex couples under the State Constitution. This Court has no reason to believe that the result in *Baker* would have been different had the *Baker* plaintiffs alleged violations of the Minnesota Constitution. The law in the State of Minnesota is that a ban on same-sex marriage is constitutional and this Court "...must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Minn. R. Jud. Conduct 2.2 at cmt. 2. Certainly, the Court cannot ignore the *Baker* opinion on the basis that "times have changed." Times may have changed, but the law has not.

B. Senate File No. 1908 encompassed a single subject.

Count II of the Complaint alleges a violation of Minnesota's single-subject constitutional provision. The relevant section reads, "No law shall embrace more than one subject, which shall be expressed in its title." Minn. Const. Art. IV, § 17. This provision has two purposes. *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N.W. 923, 924 (1891). The first is to prevent so-called "log-rolling legislation" or "omnibus bills," by which a number of

different and disconnected subjects are united in one bill, and then carried through by a combination of interests. *Id.* The second is "to prevent surprise and fraud upon the people and the legislature by including provisions in a bill whose title gives no intimation of the nature of the proposed legislation, or of the interests likely to be affected by its becoming a law." *Id.* The term "subject," however, in the constitutional provision, is to be given a broad and extended meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. *Id.* "All that is necessary is that act should embrace some one general subject." *Id.* A common thread that is only a mere filament will still pass constitutional muster. *See Assoc. Builders and Contracters v. Ventura*, 610 N.W.2d 293, 302 (Minn. 2000). In *Associated Builders*, an amendment to the prevailing wage law providing that prevailing wages must be paid in all construction or remodeling projects of educational facilities exceeding $100,000 was found to violate the single-subject clause because the amendment bore no relation to its bill: the 1997 omnibus tax bill relating to tax relief and reform. ***See, generally, id.*** Yet in *Townsend v. State*, the Supreme Court held that an amendment to the Postconviction Relief Act contained in a bill entitled, "An act relating to public safety...[and] imposing criminal and civil penalties" did not violate the single-subject clause. 767 N.W.2d 11, 14 (Minn. 2009). In *Townsend*, the Petitioner challenged an amendment which added a time requirement for postconviction relief petitions and provided that petitions may not be based on grounds that could have been raised on direct appeal. *Id.* at 13. The Court concluded that the post-conviction amendment related to public safety as well as criminal and civil penalties. *Id.* "Although it is certainly a wide-ranging bill, the various sections 'fall under some one general idea.'" *Id.* at 13-14, *quoting Johnson*, 47 Minn. at 577, 50 N.W. at 924.

The challenged bill in this case is entitled:

> A bill for an act relating to human services; appropriating money; changing provisions for health care, long-term care facilities, children's programs, child support enforcement, continuing care for disabled persons; creating a demonstration project for persons with disabilities; changing provisions for marriage; accelerating state payments; making technical amendments to welfare reform....

Senate File No. 1908 (May 17, 1997). The bill takes in a number of considerations, but these considerations cannot be said to be of separate subjects in the Constitutional sense. The general subject is that of families and children. While some of the issues may be connected to the general subject by only a mere filament, this is all that is required.

Furthermore, were this Court to find otherwise and strike down the 1997 DOMA as offensive to the single subject constitutional provision, the opinion in *Baker v. Nelson* would remain and the Count could still deny same-sex couples marriage licenses. In some ways, the DOMA is duplicative of *Baker*. The Court cannot make a finding that the 1997 DOMA violates the single-subject provision of Minnesota's constitution.

C. The DOMA does not unconstitutionally interfere with or infringe upon religious freedoms.

Count IV of the Complaint alleges a violation of the freedom of conscience provision of the Minnesota Constitution. In the Complaint, Plaintiffs include three affidavits from religious leaders indicating that each church supports same-sex marriage and performs same-sex marriage ceremonies in the church. Plaintiffs argue they are not fully able to exercise their religion because even if they marry in their church, the marriage is not recognized by the State.

The relevant constitutional provision reads,

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the

> state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Minn. Const. Art. I, § 16. Minnesota's Constitution provides greater protection of religious liberties to its citizens than the Federal Constitution. *See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992). "Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, [Minnesota's Freedom of Conscience provision] precludes even an *infringement* on or an *interference* with religious freedom." *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). "Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution." *Id.* Minnesota's Constitution confers affirmative rights in the area of religious worship, while the federal provision merely attempts to restrain governmental action. *Id. quoting* Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 Hamline L. Rev. 51, 67 (1984).

Defendants contend that *Baker v. Nelson* disposes of Plaintiffs' Freedom of Conscience claim. This Court cannot fully agree. In *Baker*, the Minnesota Supreme Court did not address any issues concerning religious freedom. The *Baker* Court may have been referring to religious freedom issues, among other issues, in footnote two of the opinion, which reads, "We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution." 291 Minn. at 312, 191 N.W.2d at 186, n.2. Considering that the Minnesota Supreme Court has not offered guidance on the issue of religious freedom as it relates to same-sex marriage, and that the Minnesota Constitution offers greater protection of religious freedom than the federal provision, this Court opines that it may not be bound by existing precedent relating to

Plaintiffs' freedom of conscience claim. The Court must still resolve the question of whether Plaintiffs have stated a claim upon which relief may be granted.

To determine whether government action violates an individual's right to religious freedom, this Court asks: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means. *Hill-Murray*, 487 N.W.2d at 865.

As to the first question, for purposes of evaluating this motion to dismiss, the Court concludes that Plaintiffs have properly alleged sincerely held beliefs that same-sex marriages are allowed or encouraged within certain faiths and denominations. "It is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes." *Hill-Murray*, 487 N.W.2d at 865 *citing Serbian & Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). "It is, however, proper for the courts to inquire as to whether a belief is held in good faith." *Id. citing In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963). Plaintiffs have properly alleged that their beliefs at issue are held in good faith.

The second question asks whether state action burdens the exercise of religious beliefs. Here, Plaintiffs ask the Court to accept the allegation that the State's refusal to acknowledge a same-sex marriage infringes on or interferes with the Plaintiffs' religious freedoms. To help determine what exactly constitutes a burden on the exercise of religious beliefs, the Court will examine one of the leading, on-point cases on the subject of burdens on religious freedoms. In *Hill-Murray Federation of Teachers v. Hill-Murray High School*, the employer, a religious institution, contended it was exempt from compliance with the Minnesota Labor Relations Act, which requires the parties to endeavor in good faith to reach an agreement with respect to rates of pay, rules or working conditions in the place of employment. 487 N.W.2d at 866. The

employer argued that negotiations about conditions of employment would lead to negotiations about religion, which would compel the school to negotiate and compromise its doctrinal positions. *Id.* The Minnesota Supreme Court found this interference was "remote" and an insufficient basis to exempt the employer from regulatory laws of the State. *See id.* The Court held that matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore non-negotiable. *Id.* Terms and conditions of employment that are not doctrinally related are negotiable and the Minnesota Labor Relations Act did not excessively burden the employer's religious beliefs. *Id.* The employer retained the power to hire employees who met their religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth. *Id.* The employer did not establish that "this minimal interference excessively burden[ed] their religious beliefs." *Id.*

The situation is similar here. With the DOMA intact, Churches retain the power to perform religious ceremonies sanctioning same-sex relationships as well as the freedom to reject same-sex relationships. Plaintiffs retain the ability to participate in same-sex marriage ceremonies. Plaintiffs have the ability to fully exercise their religious freedoms, without interference or infringement. The State, on the other hand, retains its ability to withhold approval of certain religious ceremonies, without an effect on religious freedoms. For one example, the State may hold regular business hours on any number of religious holidays without running afoul of the freedom of conscience clause. The State's choice to recognize opposite-sex marriages performed in churches, but not same-sex marriages is a decision within the purview of the State's power to prohibit certain marriages without unconstitutionally interfering in religious freedoms. The Court is unable to conclude that any state action has burdened the exercise of religious beliefs through the enactment and enforcement of the State

DOMA. Plaintiffs have failed to state a claim upon which relief can be granted because they have not properly alleged that state action burdens the exercise of religious beliefs. Count IV of the Complaint must be dismissed.

D. *Baker v. Nelson* compels dismissal of Plaintiffs' freedom of association claim.

The Complaint's final count alleges the State's DOMA violates the Plaintiff's constitutional right to freedom of association. "Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs." *Metro. Rehab. Svs., Inc. v. Westberg*, 386 N.W.2d 698, 700 (Minn. 1986) *citing NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170 2 L.Ed.2d 1488 (1958). This is referred to as "freedom of expressive association." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3250 (1984). Freedom of association also encompasses "freedom of intimate association." *See id.* Freedom of intimate association affords "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* "The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those relationships that attend the creation and sustenance of a family..." *Id.* One of these relationships is marriage. *Id., citing Zablocki v. Redhail*, 434 U.S. 374, 383-386, 98 S.Ct. 673, 679-681, 54 L.Ed.2d 618 (1978).

Freedom of association is not mentioned in the text of either the federal of state constitution. *Metro. Rehab. Svs.*, 386 N.W.2d at 700. In federal courts, the right has been recognized as a derivative of first amendment guarantees. *See id.* Plaintiffs bring this claim under our State Constitution. No cases indicate that the right of freedom of association is independently recognized under the State constitution. Unlike protections for religious

freedom, case law does not establish that the State provides any greater protections for freedom of association than the federal Constitution. The Court observes that in *Baker v. Nelson,* the Court summarily disposed of all first amendment claims without discussion. 291 Minn. at 312, 191 N.W.2d at 186, n.2. Freedom of Association comes under the purview of the First Amendment. Furthermore, the Court must observe that the *Baker* Court opined that marital restrictions "based upon the fundamental difference in sex," did not invoke constitutional protections. *See id.* at 315, 187. Were this Court to conclude that Plaintiffs could be entitled to relief under a freedom of association theory, this would be in direct contravention of the clear holding in *Baker.* The Court must dismiss Count Five of the Complaint.

CONCLUSION

The State of Minnesota is not a proper party to this action and is dismissed from this lawsuit. Bearing in mind that a statute is presumed constitutional, the Court has concluded that the bill which encompassed the State DOMA does not violate the single-subject clause of the State Constitution, and that Plaintiffs have failed to demonstrate that the State DOMA infringes on or interferes with religious freedoms. As to the remaining counts, this Court is compelled to dismiss the instant action on the merits based upon binding precedent set forth in *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). Same-sex marriage will not exist in this State unless and until the Minnesota Supreme Court overrules its own decision in *Baker*, or the State Legislature repeals the State DOMA.

M.S.D.

STATE OF MINNESOTA COUNTY OF HENNEPIN Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman, Plaintiffs, v. Jill Alverson, in her official capacity as the Hennepin County Local Registrar and State of Minnesota Defendants.	DISTRICT COURT FOURTH JUDICIAL DISTRICT Court File No. 27 CV 10 11697 Case Type: Other Civil **NOTICE OF APPEAL**

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
Saint Paul, Minnesota 55155

Please take notice that the above-named plaintiffs appeals to the Court of Appeals of the State of Minnesota from (a) entry of judgment dated 8 March 2011 on an order (i) granting defendants' motion to dismiss all plaintiffs' claims pursuant to Minn. R. Civ. P. 12.02(e) and (ii) granting defendant State of Minnesota's motion to dismiss on the grounds of misjoinder;

Dated: 2 MAY 2011

Respectfully submitted:

PETER J. NICKITAS LAW OFFICE, LLC
/s/ *Peter J. Nickitas*

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STATE OF MINNESOTA COUNTY OF HENNEPIN Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman, Plaintiffs, v. Jill Alverson, in her official capacity as the Hennepin County Local Registrar and State of Minnesota Defendants.	DISTRICT COURT FOURTH JUDICIAL DISTRICT Court File No. 27 CV 10 11697 Case Type: Other Civil **NOTICE OF APPEAL**

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/s/ *Peter J. Nickitas*

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Preamble

We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution

ARTICLE I

BILL OF RIGHTS

Section 1. **Object of government.** Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Sec. 2. **Rights and privileges.** No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Sec. 3. **Liberty of the press.** The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.

Sec. 4. **Trial by jury.** The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members.

[Amended, November 8, 1988]

Sec. 5. **No excessive bail or unusual punishments.** Excessive bail

shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Sec. 6. **Rights of accused in criminal prosecutions.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.

[Amended, November 8, 1988]

Sec. 7. **Due process; prosecutions; double jeopardy; self-incrimination; bail; habeas corpus.** No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion.

Sec. 8. **Redress of injuries or wrongs.** Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Sec. 9. **Treason defined.** Treason against the state consists only in levying war against the state, or in adhering to its enemies, giving

them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

Sec. 10. **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Sec. 11. **Attainders, ex post facto laws and laws impairing contracts prohibited.** No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

Sec. 12. **Imprisonment for debt; property exemption.** No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

Sec. 13. **Private property for public use.** Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Sec. 14. **Military power subordinate.** The military shall be subordinate to the civil power and no standing army shall be maintained in this state in times of peace.

Sec. 15. **Lands allodial; void agricultural leases.** All lands within the state are allodial and feudal tenures of every description with

all their incidents are prohibited. Leases and grants of agricultural lands for a longer period than 21 years reserving rent or service of any kind shall be void.

Sec. 16. **Freedom of conscience; no preference to be given to any religious establishment or mode of worship.** The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

517.01 MARRIAGE A CIVIL CONTRACT.

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

History: *(8562) RL s 3552; 1941 c 459; 1977 c 441 s 1; 1978 c 772 s 1; 1997 c 203 art 10 s 1*

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History: *(8562) RL s 3552; 1941 c 459; 1977 c 441 s 1; 1978 c 772 s 1; 1997 c 203 art 10 s 1*

517.04 PERSONS AUTHORIZED TO PERFORM MARRIAGES.

Marriages may be solemnized throughout the state by an individual who has attained the age of 21 years and is a judge of a court of record, a retired judge of a court of record, a court administrator, a retired court administrator with the approval of the chief judge of the judicial district, a former court commissioner who is employed by the court system or is acting pursuant to an order of the chief judge of the commissioner's judicial district, the residential school administrators of the Minnesota State Academy for the Deaf and the Minnesota State Academy for the Blind, a licensed or ordained minister of any religious denomination, or by any mode recognized in section 517.18.

History: *(8565) RL s 3555; 1978 c 772 s 3; 1981 c 101 s 1; 1986 c 444; 1Sp1986 c 3 art 1 s 82; 1987 c 377 s 10; 1987 c 384 art 1 s 55; 1991 c 85 s 1; 1995 c 129 s 1; 2009 c 129 s 3*

§ 7. Definition of "marriage" and "spouse

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

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., NW, Rm 7261
Washington, DC 20530

Tel: (202) 353-8253
Fax: (202) 514-8151

February 24, 2010

VIA ELECTRONIC FILING

Margaret Carter
Clerk of the United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: Massachusetts v. HHS et al., No. 10-2204
Hara et al. v. OPM et al., Nos. 10-2207, and 10-2214

Dear Ms. Carter:

Please see the attached letters relating to the above-captioned cases.

Respectfully submitted,

/s/ Benjamin S. Kingsley
Benjamin S. Kingsley
Attorney, Appellate Staff
Civil Division, Room 7261
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2011, I caused a copy of the foregoing to be filed electronically with the Court using the Court's CM/ECF system, and also caused four paper copies to be delivered to the Court by hand delivery within two business days. I also hereby certify that the participants in the case will be served via the CM/ECF system.

/s/ Benjamin S. Kingsley
Benjamin S. Kingsley
Benjamin.S.Kingsley@usdoj.gov
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U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

February 24, 2011

VIA ECF

Margaret Carter
Clerk of the United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: Litigation Involving Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7

Dear Ms. Carter:

The President and Attorney General have recently made a determination regarding the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. Pursuant to the attached letter, the Attorney General and President have concluded: that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation; that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department will cease its defense of Section 3 in such cases.

The following cases involving Section 3 of DOMA are pending in this jurisdiction:

Massachusetts v. HHS et al. (1st Cir. No. 10-2204)
Hara et al. v. OPM et al. (1st Cir. Nos. 10-2207 and 10-2214)

Further, as the Attorney General explained in the attached letter, we hereby "notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." In addition, we "will remain parties to the case and continue to represent the interests of the United States throughout the litigation."

Respectfully submitted,

Tony We
Assistant Attorney General

Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans,* 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.,* Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia* , 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President 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. 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.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

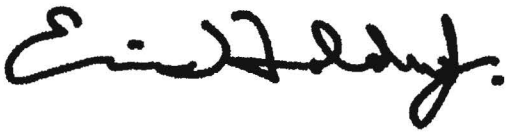
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General

APPENDIX

APPENDIX TABLE OF CONTENTS

STATE OF MINNESOTA COUNTY OF HENNEPIN Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko and John Rittman, Plaintiffs, v. Jill Alverson, in her official capacity as the Hennepin County Local Registrar and State of Minnesota Defendants.	DISTRICT COURT FOURTH JUDICIAL DISTRICT Court File No. 27 CV 10 11697 Case Type: Other Civil **AMENDED COMPLAINT**

Plaintiffs Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, minor child of Lindzi Campbell and Jessica Dykhuis, Thomas Trisko, and John Rittman, Plaintiffs, for their Complaint against Defendant Jill Alverson, in her official capacity as Hennepin County Local Registrar ("Registrar"), state and allege as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Douglas Benson, Duane Gajewski, Jessica Dykhuis, Lindzi Campbell, Sean Campbell, Thomas Trisko, and John Rittman, are six gay and lesbian Minnesotans who comprise three committed, same-sex couples. Plaintiff Sean Campbell is the minor child of Lindzi Campbell and Jessica Dykhuis. Plaintiffs bring this action to challenge Defendant's wrongful and unconstitutional denial of their applications for marriage licenses in

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Hennepin County solely because each of the plaintiff couples are comprised of individuals of the same sex.

2. Plaintiffs Douglas Benson ("Doug"), age 56, and Duane Gajewski (Duane), age 46, are a gay couple residing in Robbinsdale, Minnesota, in Hennepin County. Doug and Duane have been together as a same-sex couple in a loving, committed relationship for 19 years. **[BIOGRAPHICAL INFORMATION]** Duane Gajewski (46) and Doug Benson (56) were both born and raised in Duluth, St. Louis County, now living in Robbinsdale, Hennepin County. Duane has a Bachelor's Degree from the College of St. Scholastica and a Master's Degree from the University of Minnesota, Duluth. He is an actuary. Doug has a Bachelor's Degree from the University of Minnesota, Duluth and is the Executive Director of a Minnesota non-profit. They met and began their life together as a loving, committed, same-sex couple in 1990, in Duluth. Doug and Duane are close to their families of origin and have been accepted and treated by their families as a married couple, as any of their heterosexual siblings and respective spouses are treated, from the beginning of their relationship. They attend family holiday gatherings, as a couple, with their families, hectically traveling between celebrations to spend time with both families. The couple's basset hound, Simon, is a favorite with the men's nieces and nephews at celebrations. Both Doug and Duane are community minded, founding the Northland Gay Men's Center in Duluth in 1992, with the goal of providing support and affirmation to gay men in a chemical-free environment while building community. The organization exists to this day. Doug and

Duane have considered themselves to be married since near the beginning of their relationship. Heterosexual friends have told the couple that their relationship serves as a model for their own marriages. In 1993 Doug and Duane applied for a marriage license in St. Louis County to express their commitment to one another and challenge laws that kept them from experiencing the respect, recognition, security and obligations offered to different-sex couples through legal marriage. The application was rejected by the County Attorney. Publicity surrounding the application resulted in death threats to the couple, but this only served to strengthen their commitment to one another. During this period, Duane was a graduate student, Teaching Assistant at UMD, maintaining part time hours at his father's store while Doug provided the bulk of the family income at this time as a full time school bus driver with Duluth Public Schools. In 1995 Duane was offered his first actuarial position. It was in Montpelier, Vermont. Duane and Doug left their jobs and their home town so Duane could pursue his career. While in Vermont, Duane volunteered as the treasurer of the state's largest gay and lesbian rights organization. Doug took temporary positions as a bus driver and administrative assistant. In 1998, the couple returned to Minnesota, in another career move for Duane. They bought a home in Robbinsdale under joint tenancy, where they have resided together for the past eleven years. The home purchase was their first. Doug was appointed, by the mayor of Robbinsdale, to the Robbinsdale Human Rights Commission in 2000, where he served for seven years, including a term as chairman. In the year 2000, when

the State of Vermont became the first state in the union to institute "civil unions" for same-sex couples, Doug and Duane traveled to Vermont to take advantage of the opportunity to have their committed relationship recognized by government. They opted for a courthouse ceremony to make their marriage seem as official as possible, while knowing their "civil union" would not be legally recognized in their home state. Because of the long distance, none of either Doug's or Duane's family members were able to attend. Doug's sister, Christine, surprised the couple by picking up the tab for their reception at a Montpelier restaurant, via telephone. In 2003, Doug and Duane drove to Thunder Bay, Ontario, Canada to get legally married, again in spite of knowing that their marriage would not be "officially" recognized when they got home. Because Doug does not now have a paid position and is dependent on Duane for support, the couple's household operates as a traditional married couple where one stays at home. While Doug was working, he built up an IRA, but because the couple's marriage is not legally recognized, they are not allowed by law to continue contributing to Doug's IRA, whereas different-sex couples are allowed to contribute to the IRA of an unemployed spouse. Also, because the couple is not allowed to file a joint tax return, as any different-sex married couple would be allowed to, the couple pays thousands of dollars in extra taxes each year. Doug receives healthcare coverage through Duane's employer as Duane's "domestic partner," but because the couple's marriage is not legally recognized in Minnesota, the couple has to pay taxes on that coverage, whereas Duane's heterosexual coworkers do not have to pay taxes on their spouse's

coverage. They also worry that if one of them becomes hospitalized the other may not be able to visit and comfort the other in time of need and make necessary medical decisions. The couple would like to have their marriage legally recognized so they can experience the same benefits and protections afforded any other married couple.

3. Plaintiffs Jessica Dykhuis ("Jesse"), age 34, and Lindzi Campbell ("Lindzi"), age 32, are a lesbian couple residing in Duluth, Minnesota, in St. Louis County. Jesse and Lindzi have been together as a same-sex couple in a loving, committed relationship for 2 years. Lindzi Campbell (age 32) and Jesse Dykhuis (age 34) are a lesbian couple residing in Duluth MN where Lindzi, a Twin Ports native – born and raised on Park Point - is a firefighter and Jesse, a Minneapolis transplant, is a Doula. Lindzi and Jesse live in Duluth's Lincoln Park neighborhood and are actively raising two sons Jackson (age 9) and Sean (born 10/19/2009) together. Lindzi and Jesse met in 2003 and have been in a same sex, committed, and loving relationship since 2007. Jesse is the co-chair of the Duluth-Superior Pride committee and an avid gardener and music fan. Lindzi enjoys fundraising for the MDA and plays volleyball, hockey and broomball. The couple and their children go camping, hiking, kayaking and skiing throughout the State of Minnesota. Lindzi and Jesse are registered domestic partners in Duluth MN, although that status confers absolutely no rights to the couple. Jesse is currently without health insurance and Lindzi's employer does not extend its health coverage to domestic partners, only married couples. When Lindzi went into labor with Sean 6 weeks early, the

couple had to hurriedly complete and have notarized piles of legal paperwork including durable power of attorney for health care and guardianship transfer designations between labor contractions to make sure Jesse had some amount of legal support for their relationship and her relationship to the baby since the rights and protections of marriage are not afforded to same sex couples in Minnesota. Lindzi and Jesse's parents and friends are very supportive of their relationship and honor their commitment as a couple. However, attending weddings of heterosexual friends and family is always bittersweet, as a couple Lindzi and Jesse are invited to and expected to celebrate in a tradition that they are unsure they will ever be able to participate in themselves.

4. Plaintiffs Thomas Trisko ("Tom"), age 65, and John Rittman ("John"), age 68, are a gay couple residing in Minneapolis, Minnesota, in Hennepin County. Tom and John have been together as a same-sex couple in a loving, committed relationship for 36 years. Tom was born in Minneapolis and grew up in Hopkins and Saint Cloud. He is descended from families that have been citizens of Minnesota for seven generations since the mid-Nineteenth Century. Tom graduated with a BA in Economics from Saint John's University in Collegeville and with an MA in Political Science from the University of Minnesota. He also studied at Georgetown University in Washington, D.C. on a doctoral fellowship in Government. Tom has held positions such as Corporate Economist, Government Affairs Director, Finance Director and Chief Financial Officer at companies and non-profit organizations such as Dayton Hudson Corporation (now Target), Medtronic, Minnesota Multiple Sclerosis Society, and

The Bridge for Runaway Youth. He retired in 2006. In retirement, he volunteers as the Treasurer of the Wells Memorial Foundation and serves on the altar as a Eucharistic Minister at their church, Saint Mark's Episcopal Cathedral in Minneapolis. He has also served on the Finance Committees and/or as Treasurer of Philanthrofund Foundation, Calhoun Isles Condominium Association and the Twin Cities Gay Men's Chorus. John was born and raised in Anderson, Indiana and graduated from Ball State University in Muncie, Indiana with a BA degree in Business Education and an MA degree in History. John served as an officer in the US Air Force after graduation at Wright Patterson AFB. He was posted to the University of Minnesota in 1972 where he was a professor of military history in the AFROTC program. After leaving the Air Force John worked as an engineering personnel recruiter for Rosemount Engineering in Eden Prairie. He returned to college to graduate as a Registered Nurse in 1985 and thereafter provided nursing services at facilities such as Mt. Sinai Hospital, Walker Methodist and the Courage Center. In 1994, he became a nursing home, home health care and hospital Inspector for the Minnesota Department of Health. He retired in 2005. In retirement, he volunteers for the Twin Cities Gay Men's Chorus and OutFront Minnesota, as well as serving as an usher and on the Gay and Lesbian Ministry Committee at Saint Mark's Episcopal Cathedral.

Tom and John met December 21, 1973 at their apartment building in Roseville and have been committed to each other in a loving relationship ever since. They moved in together in March 1975 at Tom's condominium in Little Canada.

They bought a townhouse together as joint tenants in Minneapolis in 1981 and bought their current home in southwest Minneapolis as joint tenants in 2000. They registered as domestic partners with the City of Minneapolis in 1991 and the University of Minnesota in 1996. They were religiously married in their church, Saint Mark's Episcopal Cathedral in Minneapolis on May 1, 1999 in front of friends and relatives. They were legally married in Winnipeg, Manitoba, Canada on May 27, 2005. Even with all this evidence of their commitment, when they are faced with stating on an official form whether they are "Married" or "Single," they don't know for sure which to choose when they are at home in Minnesota. Tom and John feel increasingly vulnerable as legally unmarried partners in their home state of Minnesota as they grow older. They are worried about the practical and dignitary harms they have suffered and may suffer in the future from being denied the right to marry in Minnesota. Although they have completed many partial measures such as Medical and Financial Powers of Attorney Wills, Beneficiary statements, etc. they still do not have the 515 legal protections, rights, obligations, cost/tax savings and benefits that come with marriage in Minnesota. When they travel, they must carry all these documents with them in case of accident, illness or death. They have witnessed several of their friends have legal difficulties claiming the body of their deceased partner, participating in health care decisions, and inheriting assets and pension benefits. This particularly concerns Tom who has no brothers or sisters, whose parents are deceased, and who has no close relatives. Tom and John have known they were gay since childhood and have

always felt like second class citizens in their own country because the federal and Minnesota Bill of Rights have not been interpreted to mean what they say when it comes to gay and lesbian citizens and couples. They have utilized every avenue open to them to demonstrate and legally cement their commitment to each other over the past 36 years. Legal marriage is the normal way to do this. Therefore, Tom and John wish to marry in Minnesota and have it recognized throughout the United States.

5. Defendant Jill Alverson is the Local Registrar of Hennepin County, a county located in the State of Minnesota. In her capacity as such, Ms. Alverson is charged by Minn. Stat. § 517.07 with the authority to issue marriage licenses in Hennepin County, or to appoint designees to carry out this task.

5.1. The State of Minnesota is a state within the United States of America under Article IV, § 3 and the Eleventh and Fourteenth Amendments of the United States Constitution, governed by the Constitution of the State of Minnesota, adopted in 1857 and re-ratified in 1974.

6. The District Court of the State of Minnesota has jurisdiction over all of the claims set forth in this Complaint because it raises questions related to the constitutionality of a Minnesota statute. Venue is appropriate in Hennepin County because the events giving rise to Plaintiffs' claims occurred in Hennepin County.

FACTUAL ALLEGATIONS

7. The legal status of being married or unmarried determines numerous rights, obligations, and legal statuses under Minnesota law.

8. Pursuant to Minn. Stat. § 517.01, before a valid civil marriage can take place in Minnesota, a couple must obtain a marriage license. Such licenses are issued in each individual county by the county's local registrar. Minn. Stat. § 517.07.

9. To obtain a marriage license, a couple must fill out and submit to the registrar an application containing the information specified in Minn. Stat. § 517.08 and must pay an application fee.

10. The qualifications required by Minnesota law for a couple to be eligible to marry are set forth in Minn. Stat. §§ 517.01-.03. These include restrictions on bigamy, marriages between close relatives, marriages involving minors, and marriages involving developmentally disabled persons. The law also requires that the marriage be solemnized by a minister, judge, or other person authorized to solemnize marriages pursuant to Minn. Stat. § 517.04.

11. Pursuant to Minn. Stat. §§ 517.01 & 517.03, subd. 1(a)(4), Minnesota law also prohibits marriages between persons of the same sex.

12. On or about March 6, 2009, Plaintiffs Douglas Benson and Duane Gajewski appeared in person at the office of the Hennepin County local registrar and submitted an application for a marriage license and the required application fee. Except for the fact that they are of the same sex, Plaintiffs Douglas Benson and Duane Gajewski are otherwise qualified to marry under Minnesota law. An agent or employee of the Registrar refused to permit

Plaintiffs Douglas Benson and Duane Gajewski to apply for a marriage license solely because they are of the same sex.

13. On or about March 6, 2009, Plaintiffs Jessica Dykhuis and Lindzi Campbell appeared in person at the office of the Hennepin County local registrar and submitted an application for a marriage license and the required application fee. Except for the fact that they are of the same sex, Plaintiffs Jessica Dykhuis and Lindzi Campbell are otherwise qualified to marry under Minnesota law. An agent or employee of the Registrar refused to permit Plaintiffs Jessica Dykhuis and Lindzi Campbell to apply for a marriage license solely because they are of the same sex.

14. On or about March 6, 2009, Plaintiffs Thomas Trisko and John Rittman appeared in person at the office of the Hennepin County local registrar and submitted an application for a marriage license and the required application fee. Except for the fact that they are of the same sex, Plaintiffs Thomas Trisko and John Rittman are otherwise qualified to marry under Minnesota law. An agent or employee of the Registrar refused to permit Plaintiffs Thomas Trisko and John Rittman to apply for a marriage license solely because they are of the same sex.

15. The Registrar and her agents and employees denied the Plaintiff couples the opportunity to apply for and obtain marriage licenses solely because each Plaintiff wished to marry a person of the same sex.

16. By denying the Plaintiff couples to right to marry solely because they are of the same sex, Minnesota law violates the due process, equal

protection, freedom of conscience, and freedom of peaceful association provisions contained in Article I, Sections 7, 2, and 16 of the Minnesota Constitution.

COUNT I

VIOLATION OF DUE PROCESS PROVISION OF ARTICLE I, SECTION 7 OF THE MINNESOTA CONSTITUTION

17. Plaintiffs hereby incorporate the allegations contained in all previous paragraphs as though those allegations were fully set forth herein.

18. Article I, Section 7 of Minnesota Constitution contains a Due Process Clause which provides that "no person shall . . . be deprived of life, liberty, or property without due process of law."

19. Among the personal interests protected by Minnesota's Due Process Clause are the fundamental right to marry the person of one's choice and the fundamental right to privacy concerning a person's intimate choices of a deeply personal nature, such as one's choice of a spouse.

20. As a result of the Registrar's enforcement of Minnesota law prohibiting same sex marriage, the Plaintiff couples have been denied their right to marry and their right to privacy under the Due Process Clause contained in the Minnesota Constitution.

21. The Plaintiff couples have been denied their fundamental due process rights through the Registrar's refusal to grant them marriage licenses solely because they wish to marry a person of the same sex.

22. There exists no compelling governmental interest which justifies Minnesota's statutory prohibition on same sex marriage.

23. There exists no rational basis or legitimate government purpose for Minnesota's statutory prohibition on same sex marriage.

COUNT II

VIOLATION OF SINGLE SUBJECT PROVISION AT

ARTICLE IV, SECTION 17 OF THE MINNESOTA CONSTITUTION

24. Plaintiffs hereby incorporate the allegations contained in all previous paragraphs as though those allegations were fully set forth herein.

25. The State's Defense Of Marriage Act, Laws of Minnesota 1997, Chapter 203, Article 10, which prohibits marriages between persons of the same-sex and the recognition of same-sex marriages performed in other states or foreign jurisdictions is void because it was passed in violation of the "single subject" requirement of the Minnesota Constitution at Minn. Const. Art. IV, Section 17.

COUNT III

VIOLATION OF
EQUAL PROTECTION PROVISION
OF ARTICLE I, SECTION 2 OF THE MINNESOTA CONSTITUTION

26. Plaintiffs hereby incorporate the allegations contained in all previous paragraphs as though those allegations were fully set forth herein.

27. While the Minnesota Constitution does not contain an explicit Equal Protection Clause, Minnesota Courts have declared that Article I, Section

2 of the Minnesota Constitution should be construed to embody the notion of equal protection.

28. Minnesota's statutory prohibition on marriages between persons of the same sex impermissibly discriminates against individuals in same sex relationships because they wish to marry a person of the same sex.

29. Minnesota's statutory prohibition on marriages between persons of the same sex draws impermissible distinctions based on a person's sex and a person's sexual orientation.

30. Minnesota's statutory prohibition on marriages between persons of the same sex also discriminates against the children of same sex couples, denying these children the legitimacy, security, and legal protections available to children whose parents are married.

31. There exists no compelling governmental interest which justifies Minnesota's statutory prohibition on same sex marriage.

32. There exists no rational basis or legitimate government purpose for Minnesota's statutory prohibition on same sex marriage.

33. As a result of the Registrar's enforcement of Minnesota law prohibiting same sex marriage, the Plaintiff couples have been denied their right to equal protection under the Minnesota Constitution.

COUNT IV

VIOLATION OF FREEDOM OF CONSCIENCE PROVISION

OF ARTICLE I, SECTION 16 OF THE MINNESOTA CONSTITUTION

34. Plaintiffs hereby incorporate the allegations contained in all previous paragraphs as though those allegations were fully set forth herein.

35. The statutory prohibition on same-sex marriage favors religions that refuse to marry same-sex couples while disfavoring religions that strongly believe in providing this sacrament to their parishioners.

36. The statutory prohibition on same-sex marriage infringes the nonviolent, peaceful exercise of freedom of conscience of persons whose deeply held spiritual belief, deeply held religious beliefs, and/or faith communities approve or sanctify same-sex marriages, in violation of Article I, Section 16 of the Minnesota Constitution, where there is no rational basis for such infringement and where there is no compelling state interest that the state prohibition is narrowly tailored to serve.

COUNT V

VIOLATION OF

FREEDOM OF ASSOCIATION PROVISIONS OF ARTICLE I,

SECTIONS 1, 2, AND 16 OF THE MINNESOTA CONSTITUTION

37. Plaintiffs hereby incorporate the allegations contained in all previous paragraphs as though those allegations were fully set forth herein.

38. The statutory prohibition on same-sex marriage infringes the nonviolent, peaceful exercise of freedom of association of persons whose deeply held spiritual belief, deeply held religious beliefs, and/or faith communities approve or sanctify same-sex marriages, in violation of Article I, Section 16 of the Minnesota Constitution.

39. The statutory prohibition on same-sex marriage infringes upon the nonviolent, peaceful freedom of familial association rights of Jessica Dykhuis and Lindzi Campbell to raise Sean Campbell in a two-parent, caring committed family household, where there is no rational basis for such infringement and where there is no compelling state interest that the state prohibition is narrowly tailored to serve.

40. The statutory prohibition on same-sex marriage infringes upon the nonviolent, peaceful freedom of familial association rights of Sean Campbell, to be raised in a home with two caring, committed parents who love him unconditionally, and who are caring and committed unto each other, where there is no rational basis for such infringement and where there is no compelling state interest that the state prohibition is narrowly tailored to serve.

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

41. Plaintiffs hereby incorporate the allegations contained in all previous paragraph as though those allegations were fully set forth herein.

42. A real and genuine dispute exists between the parties relative to the constitutionality of Chapter 517 of Minnesota Statutes, inasmuch as Chapter 517 seeks to forbid marriage between two otherwise qualified persons solely because they are of the same sex.

43. The Court has authority to construe the rights and obligations of the parties under the Uniform Declaratory Judgment Act, Minn. Stat. § 555.01, *et seq.*

44. This matter is also appropriate for injunctive relief pursuant to Rule 65 of the Minnesota Rules of Civil Procedure.

45. Absent injunctive relief, the Plaintiff couples will suffer irreparable harm for which there is no adequate remedy at law, namely the continued stigma and humiliation of being unable to marry their chosen partners and the continued denial of the myriad of legal protections offered to married couples under Minnesota law.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. Declaring that Minnesota's prohibitions on marriages by same sex couples, including those prohibitions contained in Minnesota Statutes, Chapter 517, are invalid and unconstitutional under Minnesota Constitution Article I, Sections 1, 2, 7, and 16;

2. Declaring that same sex couples otherwise qualified to marry each other pursuant to Minnesota law, including the Plaintiff couples, may not be denied marriage license applications, marriage licenses, or marriage certificates, or in any other way prevented from exercising their right to civil marriage by virtue of their decision to marry a partner of the same sex;

3. Declaring that any further provision of Minnesota law relating to who may marry, who is a spouse, husband, or wife, who receives the benefits and/or obligations of marriage, and similar provision are to be interpreted in a gender-neutral manner, without distinction between opposite sex couples and same sex couples.

4. Entry of Declaratory Judgment under Chapter 555 of the Minnesota Statutes that the Minnesota Defense of Marriage Act, Laws of Minnesota 1997, Chapter 203, Article 10 is unconstitutional under Minnesota Constitution Article IV, Section 17.

5. Injunction against further operation and enforcement of the Minnesota Defense of Marriage Act.

6. Enjoining the Registrar to stop refusing to accept applications for marriage from same sex couples and to grant marriage licenses to otherwise qualified same sex couples, including the Plaintiff couples named in this lawsuit, and to in all other respects recognize the validity of marriages between persons of the same sex;

7. Issuing a Writ of Mandamus requiring the Registrar to immediately issue valid marriage licenses to the Plaintiff couples upon receipt of their completed marriage application;

8. Awarding to Plaintiffs their reasonable attorney's fees, costs, and disbursements incurred herein.

9. For such other and further relief as the Court deems just and proper.

PETER J. NICKITAS LAW OFFICE, L.L.C.

/s/ *Peter J. Nickitas*

Date: 15 June 2010

By: _____

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ATTORNEY FOR PLAINTIFFS

ACKNOWLEDGMENT

The undersigned hereby acknowledges that pursuant to Minn. Stat. 549.211, monetary and other sanctions may be imposed if the Court should find that the undersigned has violated Minn. Stat. 549.211, Subd. 2, by presenting a position which is unwarranted or for an improper purpose, as more fully defined in that statute.

/s/ *Peter J. Nickitas*

Dated: 15 June 2010

By:_____
Peter J. Nickitas (212313)

444003

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: Gene Douglas Balas and Carlos A. Morales, Joint Debtors	Case No. 2:11-bk-17831 TD Chapter 13 MEMORANDUM OF DECISION Date: June 13, 2011 Time: 2:00 p.m. Location: 255 E. Temple Street Courtroom 1345 Los Angeles, CA 90012

INTRODUCTION

This case is about equality, regardless of gender or sexual orientation, for two people who filed for protection under Title 11 of the United States Code (Bankruptcy Code). Like many struggling families during these difficult economic times, Gene Balas and Carlos Morales (Debtors), filed a joint chapter 13 petition on February 24, 2011. Although the Debtors were legally married to each other in California on August 20,

XXII

2008,[1] and remain married today, the United States Trustee (sometimes referred to simply as "trustee") moved to dismiss this case pursuant to Bankruptcy Code § 1307(c) (Motion to Dismiss), asserting that the Debtors are ineligible to file a joint petition based on Bankruptcy Code § 302(a) because the Debtors are two males. The issue presented to this court is whether the Debtors, who are legally married and were living in California at the time of the filing of their joint petition, are eligible to file a "joint petition" as defined by § 302(a). As the Debtors state, "[T]he only issue in this Bankruptcy Case is whether some legally married couples are entitled to fewer rights than other legally married couples, based solely on a factor (the gender and/or sexual orientation of the parties in the union) that finds no support in the Bankruptcy Code or Rules and should be a constitutional irrelevancy." Debtors' Opp. 5:24–28. In this court's judgment, no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple.

BACKGROUND

It is undisputed that the Debtors are a lawfully married California couple[2] who were married at the time they filed their bankruptcy petition. The Debtors have undertaken a lifelong commitment to each other, and wish to have their marital relationship accorded treatment in this court equal to the treatment of opposite-sex

[1] Motion, 3:17–18; Marriage Certificate, Ex. 3 to the United States Trustee's Request for Judicial Notice.

[2] The court takes judicial notice that approximately 18,000 same-gender couples were legally wed in California prior to the November 2008 passage of California Proposition 8 and most of them may well remain validly married for all purposes under California law. Thus, the Debtors would seem to be members of a significant segment of California citizens of the United States. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D.Cal. 2010).

married couples.[3] The Debtors came to this court seeking to restructure and repay their debts under chapter 13 of the Bankruptcy Code following numerous episodes of illness, hospitalization and extended periods of unemployment. The Debtors filed their bankruptcy petition jointly pursuant to § 302(a) which allows the filing of a joint petition by any eligible individual "and such individual debtor's spouse." It is undisputed that each Debtor is an individual and is eligible to be a debtor in this court and to file a voluntary petition for relief.

All trustee objections to confirmation were satisfied by the Debtors at the May 17 hearing on the Motion to Dismiss, and the Debtors' proposed plan of reorganization currently is eligible for confirmation but for the pending Motion to Dismiss.

The House Bipartisan Legal Advisory Group, acting through the United States Trustee, at the last minute orally requested a short continuance of the May 17 hearing in order to determine whether to intervene in this case to address the issues. Debtors consented and the court granted the request; yet, there have been no further pleadings and no challenge from the government to any issue raised by the Debtors. The government's non-response to the Debtors' challenges is noteworthy.

JURISDICTION AND VENUE

The court has jurisdiction over this bankruptcy case pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Motion to Dismiss and objections to plan confirmation that were filed concurrently herein are core matters under 28 U.S.C. §§ 157(b)(2)(A) & (L) that the court may hear and determine pursuant to 28 U.S.C. § 157(b)(1).

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[3] *See* declarations of Balas and Morales, Debtors' Opp. 36-51.

XXIV

DISCUSSION

The United States Trustee brought this Motion to Dismiss pursuant to § 1307(c) as the Bankruptcy Code basis for dismissal. Section 1307(c) provides, in relevant part:

> . . . on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, *for cause*, including –
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
> (3) failure to file a plan timely under section 1321 of this title;
> (4) failure to commence making timely payments under section 1326 of this title;
> (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
> (6) material default by the debtor with respect to a term of a confirmed plan;
> (7) revocation of the order of confirmation under section 1330 of this title; and denial of confirmation of a modified plan under section 1329 of this title;
> (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
> (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521;
> (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521; or
> (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. § 1307(c) (emphasis added).

The Motion to Dismiss is not based on any of the eleven causes for dismissal listed in § 1307(c). Instead, the "cause" asserted by the United States Trustee is that

XXV

the joint petition was filed by two men. Although § 302(a) explicitly allows any qualified individual and such individual's spouse to file a joint petition, the federal Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (Sept. 21, 1996) *codified in pertinent part* at 1 U.S.C. § 7 (herein referred to as "DOMA"), defines the term "spouse" for the purpose of applying federal law, as "a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. DOMA elaborates:

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

Id.

The United States Trustee cites two cases to support his position that this case should be dismissed "for cause" under § 1307(c). The first is *In re Jephunneh Lawrence & Assoc. Chartered*, 63 B.R. 318, 321 (Bankr. D.C. 1986), where the court determined that a joint petition was improperly filed by a corporation and its sole shareholder. The second is *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985), where the court held that two debtors who cohabitated but had never been legally married were not entitled to file a joint petition. The decisions are neither binding on this court nor pertinent to the Debtors in this case who are two people legally married to each other. The United States Trustee provides no relevant bankruptcy case law that is controlling on this court or that supports the trustee's position. Instead, it is clear that the Motion to Dismiss simply asks for this case to be dismissed for cause under § 1307(c) based on DOMA unless the Debtors consent to "voluntarily sever their joint petition by a date certain." Motion to Dismiss 4:17–18.

A decision announced in *In re Somers*, No. 10–38296, 2011 WL 1709839, at *5 (Bankr. S.D.N.Y. May 4, 2011), on the other hand, determined that there was insufficient cause to dismiss the Debtors' joint chapter 7 bankruptcy case under the "only for cause" provision of § 707(a) based on DOMA.[4] The same result was reached in *In re Ziviello-Howell*, Ch. 7 Case No. 11-22706, *Civil Minutes*, Docket No. 44 (Bankr. E.D. Cal. May 31, 2011) (McManus, J.) (attached to Debtors' Reply as Tab G) (denying a motion to dismiss a joint chapter 7 case filed by two women married to each other because the court in exercise of its discretion determined from the record in the case that there was no "cause" for dismissal under § 707(a)). Similarly here, cause does not exist under § 1307(c). No creditor has sought dismissal. The trustee has cited no failure by the Debtors in performing their obligations under § 1307(c). The trustee seeks dismissal solely because the Debtors are a same-sex married couple, in violation of DOMA's definition of "spouse" as the statute applies to Bankruptcy Code § 302(a).

The Debtors have asserted that the equal protection component of the Fifth Amendment "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("all persons similarly circumstanced shall be treated alike.")) Debtors' Opp. 6:1-5.

Debtors assert:

> As a lawfully wedded couple, the Debtors are constitutionally indistinguishable from opposite-gender married couples who enjoy the rights and responsibilities attendant to joint bankruptcy petitions. DOMA's irrational insistence to the contrary "is not within our constitutional tradition," as it violates "the principles that government and each of its parts remain open on impartial terms to

[4] *Somers* is now on appeal.

> all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). DOMA, as the U.S. Trustee seeks to apply it in this Bankruptcy Case, is inconsistent with the Constitution's guarantee of equal treatment. The Motion to Dismiss should be denied and the Confirmation Objection should be overruled.

Debtors' Opp. 6:5-12.

In response, the court must begin its consideration of the issues with the presumption that a duly enacted act of Congress is constitutional. The Debtors' burden in challenging DOMA's constitutionality is a heavy one, as is the burden on this court in considering the Debtors' position.

The court must consider Debtors' challenge to DOMA in the context of the straightforward facts of this case and by analyzing the claims made by the Debtors. In that regard, the court finds particularly helpful the thoughtful words of Justice Jackson, concurring in a unanimous decision upholding a municipal ordinance on due process grounds in *Railway Exp. Agency v. New York,* 336 U.S. 106, 112–13 (1949), where he elucidated his view of the distinction between the function of due process versus the function of equal protection under constitutional analysis:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and

> unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that law be equal in operation.

Railway Exp. Agency, 336 U.S. 106 at 112–13.

From the standpoint of this court, the foregoing principles require careful judicial scrutiny not only of the Debtors' claim of right to file their joint bankruptcy petition but also of DOMA as applied to these Debtors who are seeking bankruptcy relief on an equal basis with other married debtors filing jointly under § 302(a). The court has carefully scrutinized the Motion to Dismiss and Debtors' Opposition. The court's examination and conclusions follow.

Sexual orientation. With respect to the question of discrimination on the basis of sexual orientation, Debtors have stated that the issue is: "whether under the constitution legally married couples who are heterosexual may be granted more rights than legally married couples who are gay." Debtors' Opp. 14:11–12. Debtors believe they should not be singled out for differential treatment by DOMA; rather, that "[b]eing similarly circumstanced, they are entitled to be treated alike." Debtors' Opp. 14:15 (internal quotation marks omitted).

Debtors offer strong authority for their position that the Fifth Amendment, like the Fourteenth, "includes an equal protection component" and that the Fifth Amendment in this respect "mirrors the Fourteenth Amendment." Debtors' Opp. 14: 2–16 & n. 8 (citing extensive case law). Debtors cite Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 583 (2003), noting that "While it is true that the law applies only to

conduct, the conduct targeted by [the statute at issue] is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." Again, in 2010, the Supreme Court rejected the claim that discrimination against gay and lesbian individuals is no more than discrimination on the basis of "conduct" when it said, "Our decisions have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010).

Heightened scrutiny. The Debtors urge that heightened scrutiny of classifications based on sexual orientation is warranted and should be applied in this case, citing a letter from United States Attorney General Eric H. Holder, Jr., to Speaker of the House of Representatives John Boehner, dated February 23, 2011 (the Holder Letter), attached to Debtors' Opposition as Tab A. The Holder Letter concludes, in part:

> After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional.

Holder Letter at 5. In determining the appropriate level of scrutiny, the Holder Letter cites and discusses four factors that should be considered:

> (1) whether the group in question has suffered a history of discrimination; (2) whether individuals exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's ability to perform or contribute to society.

XXX

Holder Letter at 2 (internal quotation marks omitted) (citing *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987) and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985)).

The court incorporates here a portion of the Debtors' Opposition, page 22, line 7, through page 24, line 17, mostly verbatim but paraphrased in places, as follows:

The Holder Letter demonstrates that DOMA cannot withstand heightened scrutiny. "Under heightened scrutiny, 'a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.'" Holder Letter at 4 (quoting *United States v. Virginia*, 518 U.S. 515, 535–36 (1996)). "In other words, under heightened scrutiny, the United States cannot defend [DOMA] by advancing hypothetical rationales, independent of the legislative record;" rather, the government is limited to "invoking Congress' actual justification for the law." Holder Letter at 4. The Holder Letter states that those actual justifications are indefensible. *Id.* at 4–5 & n.7. The legislative record underlying DOMA is filled with "precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against." *Id.* at 4 (citing *City of Cleburne,* 473 U.S. at 448 (1985) (finding that "mere negative attitudes, or fear" are not permissible bases for discriminatory treatment); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the rationale that a statute was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.")); *Dragovich v. U.S.*, No. 10–01564, 2011 WL 175502, at *12 (N.D. Cal. Jan. 18,

2011) ("The animus toward, and moral rejection of, homosexuality and same-sex relationships are apparent in the Congressional record.")[5]

In addition to a close examination of the actual motivations and justifications for DOMA (rather than merely imagining hypothetical rationales), heightened scrutiny is distinct from rational basis review insofar as the "analysis is as-applied rather than facial." *Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). Thus, when the Ninth Circuit in *Witt* applied heightened scrutiny to the "Don't Ask, Don't Tell" law that discriminated against gay and lesbian members of the armed services, the court refused the government's invitation to limit its inquiry to whether the military's policy "has some hypothetical, post-hoc rationalization in general," such as "unit cohesion" or "troop morale." *Id.* Instead, the Ninth Circuit's heightened scrutiny review required the government to demonstrate that "a justification exists for the application of the policy *as applied to Major Witt*." *Id.* (emphasis added). *See In re Golinski I,* 587 F.3d 901, 904 (9th Cir. 2009) (describing the holding in *Witt* as requiring the military's policy "to survive heightened scrutiny as applied to each service member discharged"). The case was remanded to the district court for trial on whether application of "Don't Ask, Don't Tell" "specifically to Major Witt significantly furthers the government's interest and whether

[5] The supposed governmental interest offered in support of DOMA fails even the lowest standard of constitutional scrutiny (rational basis), and thus necessarily could not meet a heightened standard. *See In re Levenson I*, 560 F.3d 1145, 1149–51 (9th Cir. 2009); *In re Levenson II*, 587 F.3d 925, 931-33 (9th Cir. 2009); *Dragovich v. U.S.*, No. 10–01564, 2011 WL 175502, at *13, *14 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

less intrusive means would achieve substantially the government's interest." *Witt*, 527 F.3d at 821.[6]

As in *Witt*, heightened scrutiny should be the standard in this case; the requisite analysis should be "as-applied rather than facial." *See id.* at 819. Thus, the question the court must focus on is whether dismissing the Debtors' bankruptcy case pursuant to DOMA "advances an important governmental interest." *See id.* at 821.

Following the direction of the Ninth Circuit in *Witt*, the court here discerns no valid, defensible governmental interest advanced by dismissing the Debtors' bankruptcy case or requiring, as the Motion to Dismiss suggests, that the Debtors consent [under the duress of DOMA] to "voluntarily sever their joint petition by a date certain." *See* Motion to Dismiss 4:17–18. The Debtors are lawfully married and are otherwise fully qualified to be joint debtors pursuant to § 302(a) of the Bankruptcy Code. The court concludes that dismissal of the bankruptcy case will not advance any of the following governmental interests:

- Encouraging responsible procreating and child-bearing (the Debtors have no children, and even if they did, there is no basis in the evidence or authorities to conclude that Debtors' joint bankruptcy filing would affect Debtors' children (if any, later) differently from children in other "traditional" joint bankruptcy cases);

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[6] On remand, and after a full trial on the merits, the district court held that "the suspension and discharge of Margaret Witt did not significantly further the important government interest in advancing unit morale and cohesion," and ordered Major Witt reinstated. *Witt v. Dep't of Air Force*, 739 F. Supp. 2d 1308, 1315–17 (W.D. Wash. 2010) ("The evidence before the Court is that Major Margaret Witt was an exemplary officer. She was an effective leader, a caring mentor, a skilled clinician, and an integral member of an effective team. Her loss within the squadron resulted in a diminution of the unit's ability to carry out its mission. Good flight nurses are hard to find.").

XXIII

- Defending or nurturing the institution of traditional heterosexual marriage (the Debtors are already married to each other, and allowing them to proceed jointly in this bankruptcy case cannot have the slightest cognizable effect on anyone else's marriage);
- Defending traditional notions of morality (the Debtors' joint bankruptcy filing is in no sense discernible to the court to be a validly challengeable affront to morality, traditional or otherwise, under the Fifth Amendment); or
- Preserving scarce resources (no governmental resources are implicated by the Debtors' bankruptcy case different from the resources brought to bear routinely in thousands upon thousands of joint bankruptcy cases filed over the years).

See Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (discussing the reasons Congress offered for passing DOMA but noting that those reasons were disavowed by the government "[f]or purposes of [the Gill] litigation").

The court hereby adopts the Holder Letter and the Debtors' Opposition (as discussed above). Both succinctly and cogently analyze the issues on this Motion to Dismiss. The court concludes that the Attorney General's and Debtors' analyses are sound and consistent with the legislative history of DOMA and present a sensible view of the standards that this court should apply to its constitutional analysis.

Discrimination against lesbians and gay men. The Debtors have demonstrated through additional authoritative case law that lesbians and gay men have experienced a history of discrimination. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (acknowledging that "homosexuals

have suffered a history of discrimination"); *Witt*, 527 F.3d at 824–25 (noting that homosexuals have "experienced a history of purposeful unequal treatment"); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (pointing out the difficulty in denying that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981–82 (N.D. Cal. 2010) (acknowledging extensive evidence of public and private discrimination against gays and lesbians in California and throughout the United States). *See*, *Perry,* 704 F. Supp. 2d at 991–1003, (illustrating the extent and depth of the trial evidence considered and discussed by the district court in that court's conclusions of law).[7]

Sexual orientation is a "defining and immutable characteristic." Debtors cite important precedent determining that sexual orientation is recognized as a defining and immutable characteristic. *Hernandez-Montiel v. Immigration and Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (finding that "Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), overruled in part on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (agreeing with *Hernandez-Montiel* and acknowledging that homosexuality is "a fundamental aspect of . . . human identity. . . ."); *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

[7] The district court's decision is now on appeal to the United States Court of Appeals for the Ninth Circuit.

Lesbians and gay men face significant political obstacles. Debtors' evidence and the authorities cited establish conclusively that lesbians and gay men face significant political obstacles. *Romer*, 517 U.S. 620 (1996) (overturning a Colorado state constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination); *Lawrence*, 539 U.S. 558 (overturning a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct); *Strauss v. Horton*, 46 Cal.4th 364 (2009) (upholding California's Proposition 8 prohibiting same-sex marriage against a state constitutional challenge); *Lofton v. Sec'y of Dep't of Children & Family Servs*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida statute barring same-sex couples from adopting); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding Nebraska state constitutional amendment establishing that two persons of the same sex could not unite in a "civil union, domestic partnership, or other similar same-sex relationship"); *Perry*, 704 F. Supp. 2d at 943 (crediting expert testimony that "gays and lesbians possess less power than groups [traditionally] granted judicial protection").

Sexual orientation is irrelevant to an individual's ability to contribute to society. The Debtors demonstrate persuasively through significant case law the important contributions that gays and lesbians have made to our society. *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (*en banc*) (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (internal quotation marks omitted); *Perry,* 704 F. Supp. 2d at 1002 (concluding that "by every available metric, opposite-sex couples are not better than their same-sex

counterparts; instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal").

Gender discrimination. The Debtors in their Opposition have presented to the court persuasive decisional authority supporting the proposition that DOMA violates standards of due process and equal protection as established under the Fifth Amendment.

In *Reed v. Reed*, 404 U.S. 71, 74 (1971), the Supreme Court unanimously struck down an Idaho statute as a violation of the equal protection clause of the Fourteenth Amendment, concluding that an "arbitrary preference established in favor of males by . . . the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction."

In *Orr v. Orr*, 440 U.S. 268, 278–79 (1979), the Supreme Court struck down an Alabama statute authorizing the imposition of alimony obligations on husbands but not on wives, thereby disallowing differential treatment on the basis of sex, under the equal protection clause of the Fourteenth Amendment. The Debtors' argument is persuasive that DOMA's discrimination here against a same-sex married couple warrants the same scrutiny and result.

In *Califano v. Westcott*, 443 U.S. 76, 83–84 (1979), where a federal program provided unemployment benefits to men but not women, the Supreme Court found the law to be gender-biased where it denied benefits on the basis of the gender of a qualifying parent, a wage earner who happened to be a woman and not a man. Similarly here, this court concludes that DOMA is gender-biased because it is explicitly designed to deprive the Debtors of the benefits of other important federal law solely on

the basis that these debtors are two people married to each other who happen to be men. Further, *nothing* about the Debtors' gender affects their fitness for bankruptcy protection available to opposite-sex marital partners. Spouses should be treated equally, whether of the opposite-sex variety or the same-sex variety, under heightened scrutiny and the principles announced by the Supreme Court and other lower court rulings discussed above.

These views have found significant recent added support in the Ninth Circuit on issues specifically affecting the Debtors in this case. For example, in *Perry,* 704 F. Supp. 2d at 996, the district court recognized that "[s]exual orientation discrimination can take the form of [prohibited] sex discrimination." Findings of prohibited sex discrimination were made in *In re Levenson I*, 560 F.3d 1145, 1147 (9th Cir. 2009); *Perry*, 704 F. Supp. 2d at 921; *see also In re Golinski*, 587 F.3d 956, 957 (9th Cir. 2009) (*Golinski II*).

Rational basis review. The goals of DOMA, according to its congressional proponents, include "encouraging responsible procreation and child-bearing," "defending and nurturing traditional heterosexual marriage," "defending traditional notions of morality," and "preserving scarce resources." Debtors' Opp. 27:20–23; *see* Debtors' Opp. 24:18–32:10. Debtors cite prior judicial determinations that DOMA does not withstand even a rational basis review with respect to these governmental interests. *In re Levenson I*, 560 F.3d at 1149–51; *In re Levenson II*, 587 F.3d 925, 931–33 (9th Cir. 2009); *Dragovich* No. 10–01564, 2011 WL 175502, at *13, *14; *Gill*, 699 F. Supp. 2d at 397. *See* Debtors' Opp. 21:18–24:17. The Debtors assert that as to each of these issues no judicial determination has fallen on the side of upholding the

EXHIBIT

constitutionality of DOMA. Debtors' Opp. 1:24–2:1–13. The United States Trustee has not cited any authoritative or persuasive decisional authority supporting the constitutional validity of DOMA as applied to the Debtors.

The interests asserted by Congress do not support DOMA's validity. "The House report on DOMA identified three interests advanced by the statute: the government's interest in defending and nurturing the institution of traditional heterosexual marriage; the government's interest in defending traditional notions of morality; and the government's interest in preserving scarce government resources." *See Levenson II*, 587 F.3d at 932 (citing H.R. Rep. No. 104–664, at *12–*18) (internal quotation marks omitted). For the reasons stated above, none of these interests stands up to any level of scrutiny.

For example, the joint petition of the Debtors will have no effect on procreation or child-bearing. It would not appear to be fair or rational for the court to conclude that allowing the Debtors to file a joint bankruptcy petition will in any way harm any marriage of heterosexual persons. Creditors in Debtors' bankruptcy case have not filed any support for the Motion to Dismiss this case; creditors in this case, as in other cases, simply hope to be paid what they are owed. Beyond that, no creditor's notion of morality concerning a same-sex marriage or what any such creditor may think about homosexuality or the question of human sexual orientation has any valid bearing on the creditor's rights in this case.

This court can conceive of no fair, just and rational basis to conclude that DOMA will contribute to the achievement of the goal of preserving scarce government

resources and finds no basis in the evidence or record in this case to credit such a proposition.

Although individual members of Congress have every right to express their views and the views of their constituents with respect to their religious beliefs and principles and their personal standards of who may marry whom, this court cannot conclude that Congress is entitled to solemnize such views in the laws of this nation in disregard of the views, legal status and living arrangements of a significant segment of our citizenry that includes the Debtors in this case. To do so violates the Debtors' right to equal protection of those laws embodied in the due process clause of the Fifth Amendment.

This court cannot conclude from the evidence or the record in this case that any valid governmental interest is advanced by DOMA as applied to the Debtors. Debtors have urged that recent governmental defenses of the statute assert that DOMA also serves such interests as "preserving the status quo," "eliminating inconsistencies and easing administrative burdens" of the government. None of these *post hoc* defenses of DOMA withstands heightened scrutiny. *See* Debtors' Opp. 32:11–34:15. In the court's final analysis, the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land in regard to state-sanctioned same-sex marriage in disregard of the personal status and living conditions of a significant segment of our pluralistic society. Such a view is not consistent with the evidence or the law as embodied in the Fifth Amendment with respect to the thoughts expressed in this decision. The court has no doubt about its conclusion: the Debtors have made their case persuasively that DOMA deprives them of the equal protection of the law to which they are entitled. The court is of the

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opinion that the Debtors have met their high burden of overcoming the presumption of the constitutionality of DOMA.

CONCLUSION

The Debtors have demonstrated that DOMA violates their equal protection rights afforded under the Fifth Amendment of the United States Constitution, either under heightened scrutiny or under rational basis review. Debtors also have demonstrated that there is no valid governmental basis for DOMA. In the end, the court finds that DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment.

No one expressed the Debtors' view as pertinent to this simple bankruptcy case more eloquently and profoundly than Justice William O. Douglas in the concluding paragraph of his opinion for the majority in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965):

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not in political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

Upon consideration of the pleadings and all other materials filed in this case, and for good cause shown, the court finds that the Debtors satisfy every legal requirement to pursue their joint petition as filed pursuant to § 302(a). For the reasons stated herein and in the Debtors' Opposition to the Motion and Debtors' supporting authorities, the Motion to Dismiss Debtors' chapter 13 case based on § 1307(c) is denied.

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IT IS SO ORDERED.

June 13, 2011

United States Bankruptcy Judge

Chief Judge, United States Bankruptcy Court

United States Bankruptcy Judge

United States Bankruptcy Judge

United States Bankruptcy Judge

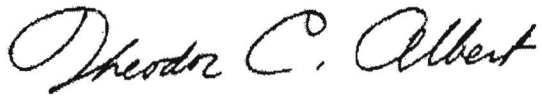
United States Bankruptcy Judge

United States Bankruptcy Judge

United States Bankruptcy Judge

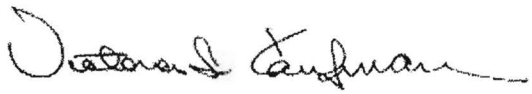
United States Bankruptcy Judge

United States Bankruptcy Judge

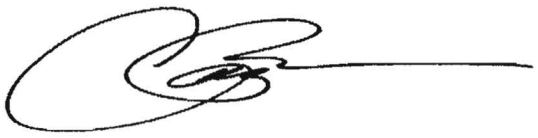


United States Bankruptcy Judge

United States Bankruptcy Judge

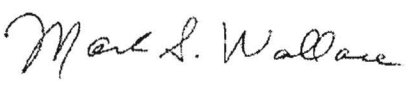


United States Bankruptcy Judge



United States Bankruptcy Judge

United States Bankruptcy Judge



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NOTE TO USERS OF THIS FORM:

1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
3) Category I. below: The United States trustee and case trustee (if any) will always be in this category.
4) Category II. below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) ***MEMORANDUM OF DECISION*** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of ***6/13/11***, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Kathy A Dockery (TR)
efiling@CH13LA.com

Peter M Lively on behalf of Debtor Gene Balas
PeterMLively2000@yahoo.com, PeterMLively2000@yahoo.com

Robert J Pfister on behalf of Debtor Gene Balas
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Hatty K Yip on behalf of U.S. Trustee United States Trustee (LA)
hatty.yip@usdoj.gov

M Jonathan Hayes on behalf of Interested Party Courtesy NEF
jhayes@polarisnet.net

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Joint Debtors
Gene Douglas Balas
Carlos A. Morales
5702 Lindenhurst Ave.
Los Angeles, CA 90036

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

Legal research tools

MICHAEL DRAGOVICH; MICHAEL GAITLEY; ELIZABETH LITTERAL; PATRICIA FITZSIMMONS; CAROLYN LIGHT; and CHERYL LIGHT; on behalf of themselves and all others similarly situated, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY GEITHNER,
in his official capacity as Secretary of the Treasury, United States Department of the Treasury; INTERNAL REVENUE SERVICE;
DOUGLAS SHULMAN, in his official capacity as Commissioner of the Internal Revenue Service;
BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM;
and ANNE STAUSBOLL, in her official capacity as Chief Executive Officer, CalPERS, Defendants.

No. 10-01564 CW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DATED: January 18, 2011

ORDER DENYING FEDERAL DEFENDANTS' MOTION TO DISMISS (Docket No. 25)

Plaintiffs bring a constitutional challenge to section three of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, and section 7702B(f) of the Internal Revenue Code (I.R.C.), 26 U.S.C. § 7702B(f), which interfere with their ability to participate in a state-maintained plan providing long-term care insurance. Long-term care insurance provides coverage when a person needs assistance with basic activities of living due to injury, old age, or severe impairments related to chronic illnesses, such as Alzheimer's disease. Enacted on August 21, 1996, as part of the Health Insurance Portability and Accountability Act (HIPAA),

Page 2

section 7702B(f) provides favorable federal tax treatment to qualified state-maintained long-term care insurance plans for state employees. 26 U.S.C. § 7702B(f). Section 7702B(f) disqualifies a state-maintained plan from this favorable tax treatment if it provides coverage to individuals other than certain specified relatives of state employees and former employees. § 7702B(f)(2). The provision's list of eligible relatives does not include registered domestic partners, but does include spouses. 26 U.S.C. § 7702B(f)(2)(C); 26 U.S.C. § 152(d)(2)(A)-(G)). One month later, section three of the DOMA amended the United States Code to define, for federal law purposes, the term "spouse" to mean solely "a person of the opposite sex who is a husband or wife, " and "marriage" to mean only "a legal union between one man and one woman as husband and wife." 1 U.S.C § 7.

Plaintiffs are three California public employees and their same-sex spouses, who are in long-term committed relationships legally recognized in California as both marriages and registered domestic partnerships. California

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Public Employees' Retirement System (CalPERS) provides retirement and health benefits, including long-term care insurance, to many of the state's public employees, retirees, and their families. CalPERS has refused to make available its Long-Term Care (LTC) Program to the same-sex spouses of the public employee Plaintiffs.

Plaintiffs contend that section three of the DOMA and I.R.C. § 7702B(f) violate the Fifth and Fourteenth Amendment

Page 3

guarantees of equal protection and substantive due process.[1]Plaintiffs have named both Federal and State Defendants. Federal Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1), on grounds that this Court lacks subject matter jurisdiction because Plaintiffs do not have standing. In addition, Federal Defendants move to dismiss Plaintiffs' action under Federal Rule of Civil Procedure 12(b)(6) for failure to state claims for violations of equal protection and substantive due process. State Defendants have answered the complaint and do not join the motion to dismiss.

BACKGROUND

I. Facts Alleged in the Complaint

On a motion to dismiss under Rule 12(b)(6), the Court must take as true the facts alleged in Plaintiffs' complaint. The following summarizes the facts alleged.

A. Long-term care insurance and the CalPERS LTC Program

Pursuant to California law, Defendant CalPERS Board of Administration offers public employees and their families the opportunity to purchase long-term care insurance during periodic open enrollment periods. Cal. Gov't. Code § 2166(a).

Long-term care insurance has advantages which health and disability insurance, Medicare and MediCal generally do not offer. The official guide explaining the CalPERS LTC Program states that

Page 4

"Medicare, Medigap and health insurance may cover very limited long-term care, " and such plans "were designed to pay for hospital and doctor care--not extended, personal care." Pls.' Compl. at 1 38. The CalPERS guide further warns, "Medi-Cal only pays for long-term care after [an individual has] exhausted most of [his or her] own assets and income." Id. at ¶ 38. Furthermore, long and short term disability insurance policies generally only "replace lost income due to disability" and "most long-term care is paid directly by individuals and their families." Id. Accordingly, the insurance offered by the CalPERS LTC Program provides control over where and how an individual receives care, allows an individual to preserve assets for other uses, and helps reduce the high financial and emotional cost of long-term care. Id. at ¶ 5. The CalPERS LTC Program, and long-term care insurance in general, are an important option for individuals and families to safeguard their financial and emotional well-being.

B. I.R.C. § 7702B

XLIX

As noted above, the United States has provided important tax benefits for long-term care insurance policies. 26 U.S.C. § 7702B. Premiums for qualified long-term care contracts are treated as medical expenses and may be claimed as itemized deductions. 26 U.S.C. § 77 02B(a)(4); 26 U.S.C. § 213(a), (d)(1)(D), (d)(10). Benefits received under a qualified long-term care insurance contract are excludable from gross income. 26 U.S.C. § 7702B(a)(2), (d); 26 U.S.C. § 104(a)(2).

Congress enacted these provisions because of the critical role of long term care insurance in protecting families. "The

Page 5

legislation... provides tax deductibility for long term care insurance, making it possible for more Americans to avoid financial difficulty as the result of chronic illness." 142 Cong. Rec. S3578-01 at *3608 (Statement of Sen. McCain) (Apr. 18, 1996); see also, Joint Committee on Taxation, "Description of Federal Tax Rules and Legislative Background Relating to Long-Term Care Scheduled for a Public Hearing Before the Senate Committee on Finance on March 27, 2001, " at 2001 WL 36044116 (provisions to grant tax advantages for long-term care plans were adopted "to provide an incentive for individuals to take financial responsibility for their long-term care needs.").

A state-maintained long-term care insurance program provides its beneficiaries the same favorable federal tax treatment if the program meets the requirements of I.R.C. § 7702B(b) and is offered only to the state's current and former employees, their spouses, and certain relatives. Id. § 7702B(f). Eligible relatives include children, grandchildren, brothers, sisters, stepbrothers, stepsisters, fathers, mothers, stepfathers, stepmothers, grandparents, nephews, nieces, aunts, uncles, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law, and sisters-in-law. See I.R.C. §§ 7702B(f)(2)(C)(iii); 152(d)(2)(A)-(G).

Registered domestic partners are not included on the list of eligible relatives, 26 U.S.C. §§ 7702(B)(f)(1)-(2), 152(d)(2)(A)-(G), and because the DOMA's federal definition of spouse does not include same-sex spouses, 1 U.S.C. § 7, a state cannot allow same-sex couples to participate in its long-term care plan if it wishes

Page 6

the plan to qualify for favorable tax treatment. The CalPERS LTC Program is a qualified plan under § 7702B and, as such, does not permit same-sex spouses or registered domestic partners of state employees to enroll.

In their answer to Plaintiffs' complaint, California Defendants CalPERS and CalPERS Chief Executive Officer Stausboll state that "they have no choice but to follow federal tax law." CalPERS Ans. at 11 10-11.

C. Plaintiff Couples and their California Status

As noted earlier, Plaintiffs are current California public employees--Michael Dragovich, Elizabeth Litteral, and Carolyn Light--and their same-sex spouses. Plaintiffs legally married during the window of time that California allowed civil marriage for same-sex couples, following the state supreme court's decision in In re Marriage Cases, 43 Cal. 4th 757 (2008) (holding that the denial of the right to marry to same-sex couples violated the state

constitution, and that strict scrutiny review applies to laws burdening persons based on sexual orientation). Although Proposition 8 subsequently amended the California Constitution to prohibit civil marriage for same-sex couples, Plaintiffs' marriages remain valid under California law. Strauss v. Horton, 46 Cal. 4th 364, 474 (2009)("[W]e conclude that Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the marriages of same-sex couples that occurred prior to the adoption of Proposition 8. Those marriages remain valid in all respects.").

In addition to being legally married, Plaintiff couples are registered domestic partners, pursuant to California Family Code

Page 7

§ 297. Since January 1, 2005, California law has provided,

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

Cal. Fam. Code § 297.5(a). However, section (g) of the same statute specifically exempts CalPERS' federally qualified LTC Program from the general requirement that public agencies treat registered domestic partners as spouses. Cal. Fam. Code § 297.5(g).

Plaintiff couples wish to enroll in the CalPERS LTC Program. Plaintiff Michael Dragovich has purchased long-term care coverage for himself through the CalPERS LTC Program since 1997. In December, 2008, after marrying his long-time partner Michael Gaitley, Dragovich called the program's toll-free number to request enrollment materials for his spouse. The program representative informed Dragovich that same-sex spouses were ineligible to enroll in the program, and the restriction was based on federal law. Following this telephone call, Dragovich's attorney wrote a letter to CalPERS on his behalf, objecting to the exclusion by CalPERS based on sexual orientation. The Assistant Chief Counsel for CalPERS responded with a letter explaining that the program "is a tax-qualified plan for IRS purposes" and

> must meet certain IRS provisions, including providing enrollment to certain persons such as employees, former employees, their spouses, and others within a specified relationship. Within this context, the federal Defense of Marriage Act (DOMA) currently recognizes a spouse to mean only a "person of the opposite sex." The enrollment of a same-sex spouse into the [LTC Program]

Page 8

> would therefore make the plan non-compliant with IRC provisions based on DOMA and jeopardize the plan's tax-qualified status.

At the time the lawsuit was filed, Plaintiffs Elizabeth Litteral and Patricia Fitzsimmons had been in a committed relationship for over seventeen years, and were raising a fourteen year old daughter. They registered as domestic partners in 2006, and married legally in 2008. Litteral has been employed with the University of California San Francisco Medical Center since 1995. Plaintiff Litteral has not purchased long-term care coverage through CalPERS,

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nor has either of them purchased coverage through a private insurer. They seek to join the CalPERS Program, because the premiums are lower than those charged by private carriers of individual policies.

Plaintiff Carolyn Light became an public employee at the University of California San Francisco Medical Center in 2005. She and Cheryl Light registered as California domestic partners in October, 2006, and legally married in June, 2008. They are planning to have children. They consider long-term care coverage necessary for financial planning as a family though, like Plaintiffs Litteral and Fitzsimmons, they have not purchased any long-term care insurance privately or through CalPERS.

CalPERS suspended enrollment in the LTC Program in 2009. California Government Code § 21661(a) requires CalPERS to open enrollment periodically. Historically, CalPERS has opened enrollment annually, beginning each April. CalPERS has stated that it may hold open enrollment in 2011.

Page 9

II. Facts Submitted by Declaration

In addition to the facts plead in the complaint, Plaintiffs have submitted declarations providing details about the CalPERS LTC Program, and their intent and efforts to participate in it. Plaintiffs may furnish affidavits or other evidence necessary to satisfy their burden of establishing subject matter jurisdiction. Colwell v. Department of Health and Human Services, 558 F.3d 1112, 1121 (9th Cir. 2009). Thus, in considering Federal Defendants' motion to dismiss under Rule 12(b)(1), the Court takes account of these additional facts.

The CalPERS LTC Program offers a number of advantages over private insurance. A market comparison chart produced by CalPERS indicates that CalPERS' Program is the lowest cost long-term care insurance plan compared to six other similar policies included in the comparison. Center Dec., Ex. D. The program guarantees that coverage is inflation protected and premiums cannot be increased due to changes in age or health. Id. at Ex. B. Furthermore, only the CalPERS Board of Administration can approve a premium increase. Id.

Plaintiffs affirmed their intent and financial ability to participate in the CalPERS LTC Program as soon as they are permitted. Michael Dragovich Dec. ¶¶ 27-28; Carolyn Light Dec. ¶¶ 13-14; Patricia Fitzsimmons Dec. ¶¶ 13-14. Dragovich attested that enrolling his spouse, Gaitley, in a long-term care policy is a necessary step in their financial planning. Dragovich Dec. at ¶ 7. He tried to enroll Gaitley in the CalPERS LTC Program in 2007, prior to their marriage, when he and Gaitley were solely recognized

Page 10

as registered domestic partners. Dragovich Dec. at ¶ 9. A CalPERS representative informed him then that domestic partners were not eligible for enrollment in the plan. Id. at ¶ 10. As noted above, in 2008, after marrying Gaitley, Dragovich again contacted CalPERS to request an application for the LTC Program. Id. at ¶ 11. After a CalPERS representative informed Dragovich that same-sex spouses were also ineligible due to federal law, he asked the representative to provide him with an application anyway. Id. at ¶ 12-14. Dragovich was told, however, that CalPERS would not furnish a program

application for a same-sex spouse. Id. at ¶ 15. On March 14, 2009, Dragovich made an additional attempt to secure an application for the LTC Program online through the CalPERS website. Id. at Ex. A. CalPERS responded that applications were not available, but his name would be added to a mailing list for such materials. Though there was no open enrollment period for the LTC Program in 2009, during that year CalPERS made available a special, alternate application process for enrollment. Center Dec., Ex. E. Nonetheless, Dragovich never received an application to enroll his spouse. Dragovich Dec. ¶ 18.

By correspondence, and at a public meeting of the CalPERS Board, Plaintiffs' counsel inquired about the exclusion and prospects for its elimination prior to initiating the lawsuit. Dragovich Dec., Ex. C; Center Dec., Ex. C. CalPERS declined to commit to changing the policy. Dragovich Dec., Ex. D; Center Dec., Ex. C.

As a component of her family's financial planning, Fitzsimmons has researched the cost and benefits of long-term care plans

Page 11

offered by several private insurers, and the CalPERS LTC Program, and believes that the CalPERS Program offers a greater value to herself and her spouse, Litteral. Fitzsimmons Dec. at ¶¶ 5-8.

Fitzsimmons and Carolyn Light state that they have not applied for long-term care insurance for their spouses through the CalPERS LTC Program, because they understand that same-sex spouses and registered domestic partners are not eligible. Fitzsimmons Dec. at ¶ 9; Carolyn Light Dec. at ¶ 6. Carolyn Light specifically attributed her knowledge about the exclusion to Dragovich, and Dragovich confirmed that he spoke with her about his efforts to enroll his spouse in the LTC Program. Id. at ¶ 8; Dragovich Dec. at ¶ 21. Plaintiffs Carolyn Light and Litteral do not explain why they did not purchase long-term insurance for themselves through the CalPERS Program during prior open enrollment periods. Carolyn Light has stated that CalPERS' refusal to recognize her marriage or registered domestic partnership with Cheryl Light has evidenced disrespect towards her family, and caused her anxiety about her family status. Carolyn Light Dec. at ¶ 10.

LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed to lack subject matter jurisdiction until

Page 12

the contrary affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.

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1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "In support of a motion to dismiss under Rule 12(b)(1), the moving party may submit affidavits or any other evidence properly before the court... It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." Colwell, 558 F.3d at 1121 (internal citations omitted); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). The court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction. Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987).

Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true

Page 13

and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, " are not taken as true. Ashcroft v. Iqbal, _ U.S. _, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

I. Subject Matter Jurisdiction--Standing

Federal Defendants move to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction, arguing that Plaintiffs do not have standing to pursue their claims.

In Lujan v. Defenders of Wildlife, the Supreme Court explained

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. 555, 560-61 (1992)(internal citations and quotation marks omitted).

"Because plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury." Bras v. California Public Utilities Com'n, 59 F.3d 869, 833 (9th Cir. 1995), cert. denied, 516 U.S. 1084 (1996).

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Page 14

A. Injury in Fact

Federal Defendants assert that Plaintiffs have not adequately demonstrated injury in fact, because they have failed to apply for the LTC Program. "Plaintiffs must demonstrate 'a personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

CalPERS refused to furnish an application to Dragovich for Gaitley. Carolyn Light learned about the exclusion of same-sex couples through Dragovich. Fitzsimmons also stated that she and her spouse were aware of the policy prohibiting same-sex spouses from enrollment in the LTC Program. CalPERS made the exclusion abundantly clear in its written and oral communications. Moreover, the DOMA and the I.R.C. plainly result in the exclusion of same-sex spouses and registered domestic partners. The Ninth Circuit has consistently held that standing does not require exercises in futility. See, e.g., Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1981); Taniguchi v. Ashcroft, 303 F.3d 950, 957 (9th Cir. 2002); see also Black Faculty Ass'n of Mesa College v. San Diego Community College Dist., 664 F.2d 1153, 1156 (9th Cir. 1981) ("We recognize that an individual need not always file and perfect an application for a position to have standing...") (internal citation omitted).

In a number of cases, courts have found the plaintiffs to have standing in spite of the absence of any formal application under a

Page 15

challenged program or law. In Taniguchi, the petitioner challenged the constitutionality of a provision that excluded her from a waiver of deportation, though she never actually applied for the waiver. 303 F.3d at 950. The Ninth Circuit held that "the [challenged] statute unambiguously precludes Taniguchi, as [a lawful permanent resident] convicted of an aggravated felony, from the discretionary waiver. To apply for the waiver would have been futile on Taniguchi's part and, therefore, does not result in a lack of standing." Id. at 957. Contrary to Federal Defendants' suggestion, the Ninth Circuit did not include in its reasoning that the petitioner had already suffered an injury due to her deportation.

In Desert Outdoor Advertising, Inc. v. City of Moreno Valley, the plaintiffs challenged a local ordinance that conditioned permits for signs and billboards on compliance with certain requirements. 103 F.3d 814 (9th Cir. 1996). The Ninth Circuit held that the plaintiffs established standing, though they had never applied for a permit for their signs. "Applying for a permit would have been futile because: (1) the City brought state court actions against [the plaintiffs] to compel them to remove their signs; and (2) the ordinance flatly prohibited [the plaintiffs'] off-site signs[.]" Id. at 818.

The Ninth Circuit has denied standing where the absence of an application rendered the policy and the legal dispute ambiguous. In Madden v. Boise State University, 976 F.2d 1219 (9th Cir. 1992), the plaintiff brought a disability discrimination suit based on a dispute with the University over the

LV

availability of free

Page 16

disabled parking. After the University told him that no free permits for disabled parking were available, the plaintiff filed a complaint with the U.S. Department of Education, Office of Civil Rights. In response to the OCR investigation finding the University's parking policy out of compliance with federal law, the University voluntarily took remedial measures, installing nine additional disabled parking spaces, three of which were designated free of charge to disabled persons who did not wish to pay the fee for a general disabled parking permit. The plaintiff, nevertheless, sued the University without submitting a formal application for a parking permit or otherwise requesting relief from the parking permit fee. As a result, the court was "left somewhat at sea" about the nature of the "real dispute." Id. at 1221. There is no such ambiguity here.

Federal Defendants also argue that Plaintiffs lack injury because they failed to seek long-term care insurance elsewhere. The CalPERS LTC Program, however, offers a number of advantages over private policies, including lower rates, inflation protection, and restrictions on premium increases. Furthermore, Federal Defendants mischaracterize the injury as the inability to obtain insurance. The injury is the denial of equal access to the CalPERS LTC Program. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group... [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Ne. Fla. Chapter of

Page 17

Assoc'd Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993); see also Gratz v. Bollinger, 539 U.S. 244, 261-62 (2003).

In an equal protection challenge to a purportedly discriminatory program, the Ninth Circuit has applied an "able and ready" standard to determine whether a plaintiff is in a position to compete on an equal basis for a program benefit. Carroll v. Nicotiana, 342 F.3d 934, 941-42 (9th Cir. 2003) (citing Bras v. California Pub. Util. Comm'n., 59 F.3d 869, 873 (9th Cir. 1995)). A plaintiff sufficiently alleges injury when a discriminatory policy has interfered with the plaintiff's otherwise equal ability to compete for the program benefit. In Carroll, a case upon which Federal Defendants rely, the court found that the plaintiff, who alleged discrimination in a state-run business loan program, had done "essentially nothing to demonstrate that he is in a position to compete equally" with other loan applicants. Id. at 942. The plaintiff presented no work history or experience in entrepreneurial endeavors to bolster the bona fides of his business loan application, and failed to respond to the defendant's request for more information to complete his application. Id. at 942-43.2

Unlike Carroll, there is no evidence here that Plaintiffs would be unable to compete on an equal basis for the LTC Program once CalPERS agrees to furnish applications. Dragovich, Carolyn

Page 18

LVI

Light and Fitzsimmons are current public employees. Plaintiffs have attested to their willingness and financial ability to pay the premiums associated with coverage through the CalPERS Program. Id. at 942 ("[T]he intent of the applicant may be relevant to standing in an equal protection challenge.") (citing Gratz, 539 U.S. at 261).

Nor is it dispositive that state employee Plaintiffs Carolyn Light and Litteral could have enrolled themselves in the CalPERS LTC Program in earlier years. They have not alleged that the CalPERS has barred them from individual enrollment in the LTC Program. Rather, through their spouses' participation in the LTC Program, they seek equal treatment and greater financial security for themselves and their families.

B. Causation

Next, Federal Defendants contest the causal connection between Plaintiffs' injury and the DOMA and I.R.C. § 7702B. Standing requires that the alleged injury "fairly can be traced to the challenged action" and is not the result of an independent action by some third party. Allen v. Wright, 468 U.S. 737, 759 (1984). Federal Defendants contend that Plaintiffs' harm from lacking long-term care insurance is attributable to Plaintiffs' failure to purchase the coverage from private insurers. However, again, this argument misunderstands the nature of the injury alleged, namely Plaintiffs' inability to be considered on an equal basis as other California public employees and their spouses who apply for the CalPERS LTC Program. See Ne. Fla. Chapter of Assoc'd Gen. Contractors, 508 U.S. at 666.

Page 19

C. Redressability

Finally, Federal Defendants argue that Plaintiffs' alleged injury is not redressable by the relief they have requested. The redressability element of standing is satisfied only where the plaintiff shows "a likelihood that the requested relief will redress the alleged injury." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103 (1998).

Federal Defendants contend that it is not clear that the CalPERS plan would be available to Plaintiffs, even if they prevailed, because enrollment is currently closed. This contention, like Federal Defendants' other arguments, misconstrues the injury Plaintiffs have alleged. Furthermore, CalPERS has opened an alternate, special application process even after suspending open enrollment in the LTC Program. Thus, CalPERS apparently can accept and enroll program participants though open enrollment periods have been suspended. Furthermore, CalPERS must, by law, periodically allow enrollment into its LTC Program. Cal. Govt. Code § 21661(a) ("The long-term care insurance plans shall be made available periodically during open enrollment periods determined by the [CalPERS] board."). Unless the contested policies are changed, Plaintiffs will not be able to participate in the next open enrollment period.

With respect to Plaintiffs' registered domestic partner status, Federal Defendants make an additional redressability argument that California law independently precludes registered domestic partners from participating in the CalPERS LTC Program. As noted earlier, California Family Code § 297.5(g) exempts the

LVII

Page 20

CalPERS LTC Program from the statute's prohibition of discriminating against couples and individuals based on their status as registered domestic partners, as opposed to spouses. The statute does not require CalPERS to exclude same-sex spouses or registered domestic partners from its LTC Program; it merely exempts the agency if it does. The provision's legislative history makes clear that the exception was created to protect the LTC Program's tax-qualified status under federal law. See Senate Appropriations Committee, Bill Summary, AB 205 (August 21, 2003).

Because Plaintiffs have satisfied Article III standing requirements, Federal Defendants' challenge to the Court's subject matter jurisdiction fails.

II. Failure to State a Claim

In addition to challenging the Court's subject matter jurisdiction, Federal Defendants move to dismiss Plaintiffs' action for failure to state a claim for equal protection and substantive due process.

A. Equal Protection

Equal protection is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "[T]he Constitution 'neither knows nor tolerates classes among citizens.'" Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The principle embodies a commitment to neutrality where the rights of persons are at stake. Id.

Yet courts must balance this mandate with the "practical

Page 21

necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer, 517 U.S. at 631. The equal protection guarantee preserves a measure of power for states and the federal government to create laws that classify certain groups. Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 271-72 (1979). Certain classifications, such as those based on race, are presumptively invalid. Id. at 272. Courts apply heightened scrutiny to laws burdening protected classes, while laws that do not burden a protected class are subject to rational basis review. Romer, 517 U.S. at 631; Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 312-314 (1976). Under the rational basis test, a law must be rationally related to the furtherance of a legitimate state interest. Romer, 517 U.S. at 631.

Because the Court finds that Plaintiffs state a claim under the rational basis standard, the question of whether Plaintiffs are members of a protected class need not be resolved here. Under the rational basis test legislative enactments are accorded a strong presumption of validity. Id. A court may "hypothesize the motivations of the... legislature to find a legitimate objective promoted by the provision under attack." Shaw v. Or. Pub. Employees' Ret. Bd., 887 F.2d 947, 948-49 (9th Cir. 1989) (internal quotation omitted). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Comm., 508 U.S. 307, 313 (1993). On the other hand, the rational

LVIII

basis test is not a "toothless" test. Mathews v. De

Page 22

Castro, 429 U.S. 181, 185 (1976). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." Gill v. Office of Personnel Management, 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (quoting Romer, 517 U.S. at 633).

Federal Defendants disavow the governmental interests identified by Congress in passing the DOMA, and instead assert a post-hoc argument that the DOMA advances a legitimate governmental interest in preserving the status quo of the states' definitions of marriage at the time the law was passed in 1996. At that time, no state extended the right to marry to same-sex couples. According to Federal Defendants, preserving the status quo allows states to resolve the issue of same-sex marriage for themselves, and provides uniformity in the federal allocation of marriage-related rights and benefits.

Section three of the DOMA, however, alters the status quo because it impairs the states' authority to define marriage, by robbing states of the power to allow same-sex civil marriages that will be recognized under federal law. Federal Defendants concede that section three of the DOMA effected a departure from the federal government's prior practice of generally accepting marriages recognized by state law. Federal Defendants' Mot. to Dismiss at 21. In considering the legislation, Congress recognized the longstanding disposition of the federal government to accept state definitions of civil marriage, noting, "The determination of who may marry in the United States is uniquely a function of state

Page 23

law." HR. Rep. 104-664 (House Report) at 2. Thus, section three of the DOMA was a preemptive strike to bar federal legal recognition of same-sex marriages should certain states decide to allow them, rather than a law that furthered the status quo, which gave the states authority to define marriage for themselves. See Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) (holding that the "DOMA plainly intrudes on a core area of state sovereignty--the ability to define the marital status of its citizens" and violates the Tenth Amendment.)

Indeed, CalPERS' exclusion of same-sex spouses from its LTC Program is an example of the restraint on states' authority to extend legal recognition to same-sex marriages. CalPERS has made clear that its exclusion is an effort to comply with federal requirements for tax benefits. Plaintiffs have adequately stated a claim that there is no relationship between section three of the DOMA and its purported government interest--to maintain the status quo while allowing states to decide the definition of marriage.

As noted above, Federal Defendants disavow the actual reasons expressed by Congress for the DOMA. Nonetheless, those reasons-promoting procreation, encouraging heterosexual marriage, preserving governmental resources, and expressing moral disapproval--likewise would not justify granting Federal Defendants' motion to dismiss.

The DOMA's definition of marriage does not bear a relationship to

LIX

encouraging procreation, because marriage has never been contingent on having children. See Lawrence, 539 U.S. at 605

Page 24

(Scalia, J., dissenting) (observing, "what justification could there possibly be for denying the benefits of marriage to homosexual couples... [s]urely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."); Goodridge v. Dept. of Public Health, 440 Mass. 309, 332 (2003) ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."). The exclusion of same-sex couples from the federal definition of marriage does not encourage heterosexual marriages. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."). Furthermore, the preservation of resources does not justify barring some arbitrarily chosen group of individuals from a government program. Plyler v. Doe, 457 U.S. 202, 229 (1982).

Nor does moral condemnation of homosexuality provide the requisite justification for the DOMA's section three. The "bare desire to harm a politically unpopular group" is not a legitimate state interest. Romer, 517 U.S. at 634-35; City of Cleburne, 473 U.S. at 446-47; Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973). In Romer the Supreme Court struck down a Colorado law, which it found "made a general announcement that gays and lesbians shall not have any particular protections from the law." The Court

Page 25

reasoned that the law "impos[ed] a broad and undifferentiated disability on a single named group, " 517 U.S. at 632, yet was "inexplicable by anything but animus[.]" Id. at 635.

The animus toward, and moral rejection of, homosexuality and same-sex relationships are apparent in the Congressional record. The House Report on the pending DOMA bill stated, "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails [a] moral disapproval of homosexuality..." H.R. Rep. 104-664, at 15-16. The report further adopted the view that "'[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people... feel ought to be illegitimate.'" Id. at 16 (alteration and omission in original).

In sum, Plaintiffs have sufficiently stated a claim that section three of the DOMA bears no rational relationship to a legitimate governmental interest. The section does not preserve the status quo of the states' authority to define marriage because it instead impairs their customary and historic authority in the realm of domestic relations. The Act's contemporaneous justifications have been found not to constitute legitimate government interests. Because neither Federal Defendants' current justification, nor the actual contemporaneous reasons, for the exclusion of same-sex couples from the federal definition of marriage can be found as a matter of law to be

LX

rationally based on a legitimate government interest, Plaintiffs have asserted a cognizable claim for an equal protection violation.

Page 26

B. Substantive Due Process

In addition to their equal protection claim, Plaintiffs assert that section three of the DOMA and § 7702B of the I.R.C. infringe "their fundamental liberty and privacy interests in marital and familial relationships" in violation of their substantive due process rights. Compl. at ¶ 59.

The substantive due process right "provides heightened protection against interference with certain fundamental rights and liberty interests..." William v. Glucksberg, 521 U.S. 702, 720 (1997) (recognizing "a long line of cases" holding that the Bill of Rights protects "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.") (internal citations omitted).

When the government infringes a "fundamental liberty interest, " the strict scrutiny test applies, and the law will not survive constitutional muster "unless the infringement is narrowly tailored to serve a compelling state interest." Id. at 721. Where no fundamental right is burdened by a challenged law, the law is scrutinized under the rational basis standard; it must be rationally related to a legitimate government interest. Id. at 728; Heller v. Doe, 509 U.S. 312, 319-320 (1993).

Courts have invoked substantive due process in striking down laws burdening family life, including household occupancy restrictions, see Moore v. East Cleveland, 431 U.S. 494 (1977), and mandatory maternity leave, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974). More recently, decisions by the Supreme

Page 27

Court and the Ninth Circuit have made clear that government intrusion into a same-sex relationship may violate substantive due process rights, though the precise nature of the liberty interest has not been decided. See Lawrence, 539 U.S. at 578 (holding that same-sex couples have the constitutional right to engage in intimate relationships "without the intervention of the government"); Witt, 527 F.3d at 812 ("We cannot reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review."). Lawrence invalidated laws criminalizing same-sex intimacy, which amounted to a substantial government intrusion into same-sex relationships through the threat of criminal prosecution and related stigma. In Witt, the Ninth vacated the district court's dismissal of the plaintiff's substantive due process challenge of her discharge under the military's "Don't Ask Don't Tell" policy. The court held that "[w]hen the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in Lawrence, " the law is reviewed with heightened scrutiny. 527 F.3d at 819 (citing Sell v. United States, 539 U.S. 166 (2003)). The court remanded the case to the district court for further development of the factual record and application of the heightened scrutiny test it articulated in its decision.

LXI

Plaintiffs contend that by "burdening [their] ability and autonomy to engage in financial and long-term care planning with [their] lawful spouses and domestic partners, Defendants are violating the fundamental liberty and privacy interests in marital and familial relationships..." Compl. at ¶ 70. Federal

Page 28

Defendants, however, characterize the laws as imposing an incidental economic burden which does not amount to an infringement on any fundamental right. Federal Defendants cite Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983), where the plaintiffs challenged under the First Amendment the denial of tax exemption to organizations engaged in lobbying. The Court reasoned that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." Id. at 549. Similarly, the Supreme Court has ruled that the denial of food stamps to households with striking workers did not infringe the strikers' right of association, even though denying such benefits made it harder for strikers to maintain themselves and their families. Lyng v. International Union, United Auto, Aerospace and Agr. Implement Workers of America, 485 U.S. 360, 368 (1998).

As discussed above in connection with their equal protection claims, Plaintiffs have sufficiently stated a claim that the laws at issue here do not bear a rational relationship to a legitimate governmental interest. Thus, the Court need not address whether a fundamental right or protected liberty interest is burdened. Plaintiffs have stated a cognizable claim for violation of their rights to substantive due process.

Page 29

CONCLUSION

Federal Defendants' motion to dismiss Plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a claim is denied.

Plaintiffs' class certification motion shall be filed on January 20, 2010, and heard on February 24, 2010.

IT IS SO ORDERED.

Dated: 1/18/2011

CLAUDIA WILKEN
United States District Judge

Notes:

1. While the Fourteenth Amendment equal protection guarantee does not directly apply to the United States, courts have interpreted the Fifth Amendment's Due Process Clause as imposing on the United States the same principles of equal protection established in the Fourteenth Amendment. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-18 (1995).

2. Carroll also considered an equal protection challenge to a second program, which leased homesteads. Id. at 943. However, contrary to Federal Defendants' suggestion, the court did not hold that the plaintiff was injured only because he had properly submitted an application. No party disputed the existence of an injury with respect to the homestead program, and the court simply reiterated the district court's finding.

LXII

LXIII

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI

Plaintiff,

v.

THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.

Defendants.

No. C 3:10-00257-JSW

DEFENDANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

LX
~~R~~VI

STATUTES

LXV

SUMMARY OF ARGUMENT

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

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

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

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

INTRODUCTION AND BACKGROUND

Plaintiff Karen Golinski, a staff attorney with the U.S. Court of Appeals for the Ninth Circuit, is enrolled in the Federal Employees Health Benefits Plan ("FEHBP"). 2d Am. Compl. ¶¶ 18-19.[1] Since August 2008, Plaintiff has been married under the laws of California to a spouse who, like Plaintiff, is a woman. *Id.* ¶ 17. After becoming married, Plaintiff sought to have her wife enrolled as an additional beneficiary under her FEHBP plan. *Id.* ¶ 22. Plaintiff's efforts to have her wife enrolled as an additional beneficiary were ultimately unsuccessful, as the FEHBA, 5 U.S.C. §§ 8901-8914, when read in light of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), prohibits the extension of FEHBP coverage to same-sex spouses. In pertinent part, DOMA provides:

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

1 U.S.C. § 7.

After the completion of an administrative hearing process under the Ninth Circuit's Employee Dispute Resolution ("EDR") Plan, Plaintiff brought the instant action on January 20, 2010.[2] Plaintiff's First Amended Complaint was dismissed by this Court on March 16, 2011. ECF No. 98. On April 14, 2011, Plaintiff filed her Second Amended Complaint, ECF No. 102,

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[1] The FEHBP was established pursuant to the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901 *et seq.* ("FEHBA"), which created the FEHBP as a comprehensive health insurance program for federal civilian employees, their family members, and others. FEHBA confers broad authority on the United States Office of Personnel Management ("OPM") to administer the program and to promulgate regulations necessary to carry out the statute's objectives, including regulations prescribing "the manner and conditions under which an employee is eligible to enroll." 5 U.S.C. § 8913. FEHBA grants OPM authority to contract with "qualified carriers" 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.

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

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

STANDARD OF REVIEW

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

ARGUMENT

I. DOMA VIOLATES EQUAL PROTECTION.

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

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

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

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

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

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

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

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

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

In *High Tech Gays*, for example, the Ninth Circuit considered a constitutional challenge to the Department of Defense's practice of conducting mandatory investigations of security clearance applicants known or suspected to be gay. Without expressly relying on the deference 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.

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

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[4] *High Tech Gays* and a number of cases in other circuits involved challenges to military policy on homosexual conduct. *See, e.g.*, *High Tech Gays*, 895 F.2d at 565; *see also Cook v. Gates*, 528 F.3d 42, 45 (1st Cir. 2008); *Richenberg v. Perry*, 97 F.3d 256, 258 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en 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.

[5] As noted above, other courts of appeals have held that classifications on the basis of sexual orientation are not subject to heightened scrutiny, but the reasoning of these courts is similarly flawed. Many of those courts relied in part or in whole on *Bowers*. *See Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2 (6th Cir. 1995); *Steffan*, 41 F.3d at 685; *Woodward*, 871 F.2d at 1076 (Fed. Cir. 1989); *Ben-Shalom*, 881 F.2d at 464; *see also Richenberg v. Perry*, 97 F.3d at 260 (citing to reasoning of prior appellate decision that were based on *Bowers*); *Thomasson*, 80 F.3d at 928 (same). Other courts relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect or quasi-suspect class. *Cook*, 528 F.3d at 61; *Johnson v. Johnson*, 358 F.3d 503, 532 (5th Cir. 2004). Though it is true that the Supreme Court thus far has not yet recognized that gays and lesbians constitute a suspect class, *see* Note 3, *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. Gays and Lesbians Are a Quasi-Suspect or Suspect Class under the Relevant Factors Identified by the Supreme Court.

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

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

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

Discrimination by the Federal Government

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

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

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

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

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

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

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

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

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

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

Discrimination by State and Local Governments

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

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

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

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

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

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

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

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

Discrimination by Private Parties

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

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

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

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

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

ii. Gays and Lesbians Exhibit Immutable Characteristics that Distinguish Them as a Group.

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

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

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

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

iii. Gays and Lesbians Are Minorities with Limited Political Power.

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

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

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

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

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

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

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Williams Institute, there appear to be 8 million adults in the United States who are lesbian, gay or bisexual, comprising 3.5 percent of the adult population. *See* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender? available at* http://www3.law.ucla.edu/williamsinstitute/pdf/How-many-people-are-LGBT-Final.pdf (last reviewed June 30, 2011). Ascertaining the precise percentage of gays and lesbians in the 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.

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

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

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

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

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

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

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

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

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

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

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

The Supreme Court has also recognized that, although opposition to homosexuality, though it may reflect deeply held personal religious and moral views, it is not a legitimate policy 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

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

B. DOMA FAILS HEIGHTENED SCRUTINY.

For the reasons described above, heightened scrutiny is the appropriate standard by which to review classifications based on sexual orientation, including DOMA Section 3.[13] In reviewing a legislative classification under heightened scrutiny, the government must establish, at a minimum, that the classification is "substantially related to an important government objective." *Clark*, 586 U.S. at 461. Moreover, under any form of heightened scrutiny, a statute must be defended by reference to the "actual [governmental] purpose" behind it, not a different "rationalization." *VMI*, 518 U.S. at 535–36.

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

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

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

[15] We note that some members of the majority in Congress that enacted DOMA have changed their views on the law, and the legitimacy of its rationales, since 1996. *See, e.g.*, Bob Barr, *No 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. In reviewing the statute under heightened scrutiny,

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

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

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

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

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

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

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between an end of defending "traditional" marriage and the means employed by Section 3.

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

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

http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Medical Association, AMA Policy Regarding Sexual Orientation, *available at* http://www.ama-assn.org/ama/ pub/about-ama/our-people/member-groups-sections/glbt-advisorycommittee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, *available at* http://www.cwla.org/ programs/culture/glbtqposition.htm. For this reason alone, no penalty or prohibition on same-sex marriage can be "substantially" related to an interest in promoting responsible child-rearing.

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

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

XCII

to have children" but describing this objection to DOMA as "not a serious argument").[16]

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

[16] The House Report also identifies preservation of scarce government resources as an interest underlying Section 3's denial of government benefits to same-sex couples married under state law. *See* H.R. Rep. at 18. In fact, many of the rights and obligations affected by Section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds, and in other cases, exclusion of state-recognized same-sex marriages costs the government money by preserving eligibility for certain federal benefits. But regardless of whether an interest in preserving resources could justify Section 3 under rational basis review, it is clear that it will not 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).

XCIII

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.

Dated: July 1, 2011

Respectfully Submitted,

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XCIV

Mr. Morse introduced--

S.F. No. 1907: A bill for an act relating to the organization and operation of state government; appropriating money for environmental, natural resource, and agricultural purposes; providing for regulation of certain activities and practices; providing for accounts, assessments, and fees; amending Minnesota Statutes 1996, sections 17.03, by adding a subdivision; 17.101; 17.116, subdivisions 2 and 3; 17.4988; 17.76; 18.79, by adding a subdivision; 18C.421, subdivisions 1 and 4; 18C.425, subdivisions 1, 2, 3, and 6; 18C.531, subdivision 2; 18C.551; 25.31; 25.32; 25.33, subdivisions 1, 5, 6, 9, 20, and by adding subdivisions; 25.35; 25.36; 25.37; 25.38; 25.39; 25.41, subdivision 6; 28A.08, subdivision 3; 32.103; 32.394, subdivisions 8, 8a, 8b, and 8d; 35.71, subdivision 5; 35.824; 41A.09, subdivision 3a; 84.027, by adding a subdivision; 84.0273; 84.82, subdivision 3; 85.015, by adding a subdivision; 85.052, subdivision 3; 85.053, subdivisions 1 and 4; 85.055, subdivision 1, and by adding a subdivision; 88.79, by adding a subdivision; 92.06, subdivisions 1 and 4; 92.16, subdivision 1; 94.10, subdivision 2; 97A.015, by adding a subdivision; 97A.028, subdivisions 1 and 3; 97A.075, subdivision 1; 97A.405, subdivision 2; 97A.415, subdivision 2; 97A.475; 97B.667; 97B.715, subdivision 1; 97B.721; 97B.801; 97C.305, subdivision 1; 97C.501, subdivision 2; 97C.801; 97C.835, by adding a subdivision; 103F.378, subdivision 1; 115A.932, subdivision 1; 115B.02, subdivision 16, and by adding a subdivision; 115B.17, subdivisions 14, 15, and by adding subdivisions; 115B.175, subdivisions 2 and 6a; 115B.412, subdivision 10; 115B.48, subdivisions 3 and 8; 115B.49, subdivision 4; 116.07, subdivisions 4d and 7; 116.92, by adding a subdivision; 116C.834, subdivision 2; 116O.09, subdivisions 2, 5, and 9; 168.1291; 216B.2423, by adding a subdivision; 216C.41, subdivision 1; 223.17, subdivision 3; 236.02, subdivisions 1 and 2; 300.11, by adding a subdivision; 308A.101, by adding a subdivision; 308A.201, by adding a subdivision; 347.33, subdivision 3; 394.25, subdivision 2, and by adding a subdivision; 446A.02, subdivision 6; 462.357, subdivision 1; 477A.12; and 477A.14; Laws 1995, chapter 220, section 19; and Laws 1996, chapter 463, section 7, subdivision 24; proposing coding for new law in Minnesota Statutes, chapters 4; 17; 25; 92; 94; 115; and 116; repealing Minnesota Statutes 1996, sections 18C.541, subdivision 6; 25.34; 115A.908, subdivision 3; 115B.223; 115B.224; 116.991; 116.992; and 296.02, subdivision 7a; Laws 1995, chapter 220, section 21.

Referred to the Committee on State Government Finance.

Mr. Samuelson introduced--

S.F. No. 1908: A bill for an act relating to the operation of state government services; appropriating money for the operation of the departments of human services and health, the veterans home board, the health related boards, the disability council, the ombudsman for families, and the ombudsman for mental health and mental retardation; including provisions for agency management; children's programs; basic health care programs; medical assistance and general assistance medical care; long-term care; state-operated services; mental health and developmentally disabled; MinnesotaCare; child support enforcement; assistance to families; health department; amending Minnesota Statutes 1996, sections 13.99, by adding a subdivision; 16A.124, subdivision 4b; 62D.04, subdivision 5; 62E.14, by adding a subdivision; 103I.101, subdivision 6; 103I.208; 103I.401, subdivision 1; 144.057, subdivision 1; 144.0721, subdivision 3; 144.121, subdivision 1, and by adding subdivisions; 144.125; 144.2215; 144.226, subdivision 1, and by adding a subdivision; 144.394; 144A.071, subdivisions 1, 2, and 4a; 144A.073, subdivision 2; 144A.46, subdivision 5; 153A.17; 157.15, by adding subdivisions; 157.16, subdivision 3; 245.03, subdivision 2; 245.4882, subdivision 5; 245.493, subdivision 1, and by adding a subdivision; 245.652, subdivisions 1 and 2; 245.98, by adding a subdivision; 245A.04, subdivisions 3 and 3a; 246.02, subdivision 2; 252.025, subdivisions 1, 4, and by adding a subdivision; 252.28, by adding a subdivision; 252.32, subdivisions 1a, 3, 3a, 3c, and 5; 254.04; 254B.02, subdivisions 1 and 3; 254B.04, subdivision 1; 254B.09, subdivisions 4, 5, and 7; 256.01, subdivision 2, and by adding a subdivision; 256.025, subdivisions 2 and 4; 256.045, subdivisions 3, 3b, 4, 5, 7, 8, and 10; 256.476, subdivisions 2, 3, 4, and 5; 256.82, subdivision 1, and by adding a subdivision; 256.871, subdivision 6; 256.935; 256.969, subdivision 1; 256.9695, subdivision 1; 256B.037, subdivision 1a; 256B.04, by adding a subdivision; 256B.056, subdivisions 4 and 5; 256B.0625, subdivisions 13 and 15; 256B.0626; 256B.0627, subdivision 5, and by adding a

subdivision; 256B.064, subdivisions 1a, 1c, and 2; 256B.0911, subdivisions 2 and 7; 256B.0912, by adding a subdivision; 256B.0913, subdivisions 10, 14, 15, and by adding a subdivision; 256B.0915, subdivision 3, and by adding a subdivision; 256B.19, subdivisions 1, 2a, and 2b; 256B.421, subdivision 1; 256B.431, subdivision 25, and by adding subdivisions; 256B.433, by adding a subdivision; 256B.434, subdivisions 2, 3, 4, 9, and 10; 256B.48, subdivision 6; 256B.49, subdivision 1, and by adding a subdivision; 256B.69, subdivisions 2, 3a, 5, 5b, and by adding subdivisions; 256D.03, subdivisions 2, 2a, 3b, and 6; 256D.36; 256F.11, subdivision 2; 256G.02, subdivision 6; 256G.05, subdivision 2; 256I.05, subdivision 1a, and by adding a subdivision; 326.37, subdivision 1; 393.07, subdivision 2; 466.01, subdivision 1; 469.155, subdivision 4; 471.59, subdivision 11; 626.556, subdivisions 10b, 10d, 10e, 10f, 11c, and by adding a subdivision; 626.558, subdivisions 1 and 2; and 626.559, subdivision 5; Laws 1995, chapter 207, articles 6, section 115; and 8, section 41, subdivision 2; proposing coding for new law in Minnesota Statutes, chapters 144; 145A; 157; 252; 256B; and 257; repealing Minnesota Statutes 1996, sections 144.0721, subdivision 3; 144.1222, subdivision 3; 145.9256; 256.026; 256.82, subdivision 1; 256B.041, subdivision 5; 256B.0625, subdivision 13b; 256B.0911, subdivision 4; 256B.19, subdivision 1a; and 469.154, subdivision 6; Minnesota Rules, part 9505.1000.

Referred to the Committee on Human Resources Finance.

Mr. Beckman introduced--

S.F. No. 1909: A bill for an act relating to community development; appropriating money for community development and certain agencies of state government with certain conditions; establishing and modifying certain programs; regulating certain activities and practices; setting and modifying fees; defining terms; requiring studies and reports; amending Minnesota Statutes 1996, sections 60A.23, subdivision 8; 65B.48, subdivision 3; 79.255, by adding a subdivision; 116J.01, subdivision 5; 116J.553, subdivision 2; 116J.554, subdivision 1; 116L.04, subdivision 1, and by adding a subdivision; 176.181, subdivision 2a; 268A.15, subdivisions 2, 6, and by adding subdivisions; 394.25, by adding a subdivision; 446A.04, subdivision 5; 446A.081, subdivisions 1, 4, and 9; 462.357, by adding a subdivision; and 462A.206, subdivisions 2 and 4; proposing coding for new law in Minnesota Statutes, chapters 116J; 116L; 268; and 366; repealing Minnesota Statutes 1996, sections 116J.990, subdivision 7; and 462A.206, subdivision 5.

Referred to the Committee on Human Resources Finance.

MOTIONS AND RESOLUTIONS - CONTINUED

RECESS

Mr. Moe, R.D. moved that the Senate do now recess subject to the call of the President. The motion prevailed.

After a brief recess, the President called the Senate to order.

APPOINTMENTS

Mr. Moe, R.D. from the Subcommittee on Committees recommends that the following Senators be and they hereby are appointed as a Conference Committee on:

H.F. No. 117: Ms. Junge, Mr. Oliver and Ms. Wiener.

S.F. No. 1: Messrs. Samuelson, Stevens, Mses. Berglin, Kiscaden and Mr. Hottinger.

Mr. Moe, R.D. moved that the foregoing appointments be approved. The motion prevailed.

S.F. No. 1905 was read the third time, as amended by the Conference Committee, and placed on its repassage.

The question was taken on the repassage of the bill, as amended by the Conference Committee.

The roll was called, and there were yeas 41 and nays 24, as follows:

Those who voted in the affirmative were:

Anderson	Hanson	Kelly, R.C.	Novak	Stumpf
Beckman	Higgins	Laidig	Pappas	Ten Eyck
Belanger	Hottinger	Langseth	Piper	Terwilliger
Berglin	Janezich	Lessard	Pogemiller	Vickerman
Cohen	Johnson, D.E.	Marty	Price	Wiger
Dille	Johnson, D.H.	Metzen	Sams	
Flynn	Johnson, D.J.	Moe, R.D.	Samuelson	
Foley	Johnson, J.B.	Morse	Scheid	
Frederickson	Junge	Murphy	Solon	

Those who voted in the negative were:

Berg	Kleis	Limmer	Ourada	Scheevel
Betzold	Knutson	Lourey	Pariseau	Spear
Day	Krentz	Neuville	Robertson	Stevens
Fischbach	Larson	Oliver	Robling	Wiener
Kiscaden	Lesewski	Olson	Runbeck	

So the bill, as amended by the Conference Committee, was repassed and its title was agreed to.

MOTIONS AND RESOLUTIONS - CONTINUED

S.F. No. 1908 and the Conference Committee Report thereon were reported to the Senate.

CONFERENCE COMMITTEE REPORT ON S.F. NO. 1908

A bill for an act relating to the operation of state government services; appropriating money for the operation of the departments of human services and health, the veterans home board, the health related boards, the disability council, the ombudsman for families, and the ombudsman for mental health and mental retardation; including provisions for agency management; children's programs; basic health care programs; medical assistance and general assistance medical care; long-term care; state-operated services; mental health and developmentally disabled; MinnesotaCare; child support enforcement; assistance to families; health department; amending Minnesota Statutes 1996, sections 13.99, by adding a subdivision; 16A.124, subdivision 4b; 62D.04, subdivision 5; 62E.02, subdivision 13; 62E.14, by adding a subdivision; 103I.101, subdivision 6; 103I.208; 103I.401, subdivision 1; 144.0721, subdivision 3; 144.121, subdivision 1, and by adding subdivisions; 144.125; 144.2215; 144.226, subdivision 1, and by adding a subdivision; 144.3351; 144.394; 144A.071, subdivisions 1, 2, and 4a; 144A.073, subdivision 2; 145.925, subdivision 9; 153A.17; 157.15, by adding subdivisions; 157.16, subdivision 3; 245.03, subdivision 2; 245.4882, subdivision 5; 245.493, subdivision 1, and by adding a subdivision; 245.652, subdivisions 1 and 2; 245.98, by adding a subdivision; 246.02, subdivision 2; 252.025, subdivisions 1, 4, and by adding a subdivision; 252.28, by adding a subdivision; 252.32, subdivisions 1a, 3, 3a, 3c, and 5; 254.04; 254B.02, subdivisions 1 and 3; 254B.04, subdivision 1; 254B.09, subdivisions 4, 5, and 7; 256.01, subdivision 2, and by adding a subdivision; 256.025, subdivisions 2 and 4; 256.045, subdivisions 3, 3b, 4, 5, 7, 8, and 10; 256.476, subdivisions 2, 3, 4, and 5; 256.82, subdivision 1, and by adding a subdivision; 256.871, subdivision 6; 256.935; 256.969, subdivision 1; 256.9695, subdivision 1; 256B.037, subdivision 1a; 256B.04, by adding a subdivision; 256B.056, subdivisions 4, 5, and 8; 256B.0625, subdivisions 13 and 15; 256B.0626; 256B.0627, subdivision 5, and by adding a subdivision; 256B.064, subdivisions 1a, 1c, and 2; 256B.0911, subdivisions 2 and 7; 256B.0912, by adding a subdivision; 256B.0913, subdivisions 10, 14, 15, and by adding a subdivision; 256B.0915, subdivision 3, and by adding a subdivision; 256B.19, subdivisions 1, 2a, and 2b; 256B.421, subdivision 1; 256B.431, subdivision 25, and by adding a subdivision; 256B.433, by

XCVII

commissioner shall distribute the amount of funds requested by the county up to the amount of the county's allocation or an amount consistent with the grant and proportionate to that county.

The county board shall approve the letter of intent. The letter of intent shall include: an agreement to use the funds for the purpose intended by the grant; a brief description of the services to be provided; the outcomes, indicators, and measures the services are intended to provide; and assurances that the county will follow all applicable laws and rules associated with the use of the grant funds.

Subd. 2. [FUTURE FUNDING.] The commissioners of the departments of human services; children, families, and learning; and economic security may withhold future funding if a determination is made that the county has not met the requirements of the program funded by the alternative funding process. The commissioners shall first provide the county with an appeal process and a 60-day notice of intent to reduce or end funding received under subdivision 1.

Subd. 3. [REPORT.] The children's cabinet shall provide to the legislature a report by January 15, 1999, on the feasibility of using the alternative funding process for counties with less than 30,000 population.

Subd. 4. [SERVICE DELIVERY PLAN.] Pine county and the other counties using this alternative application process for grants may annually update their service delivery plan to reflect changes in the approved budget or services delivered in lieu of submitting a biennial community social services plan, a local service unit plan, a family services collaborative plan, or a grant application, and other plan document requirements of the departments of human services; children, families, and learning; and economic security. The service delivery plan must be an ongoing planning document that incorporates the major requirements of the plans it replaces.

Subd. 5. [SUNSET.] This section expires on June 30, 2001.

Sec. 23. [REPORT; ALTERNATE RATES FOR NURSING FACILITIES.]

Before implementing any incentive-based payments under section 12, the commissioner shall report to the chairs of the senate health and family security committee and the house health and human services committee by January 15, 1998, on the plan to develop additional incentive-based payments for nursing facilities under the 1997 amendments to Minnesota Statutes, section 256B.434, subdivision 4.

Sec. 24. [EFFECTIVE DATE.]

Section 16, amending Minnesota Statutes 1996, section 518.17, subdivision 1, is effective the day following final enactment.

ARTICLE 10

MARRIAGE PROVISIONS

Section 1. Minnesota Statutes 1996, section 517.01, is amended to read:

517.01 [MARRIAGE A CIVIL CONTRACT.]

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

Sec. 2. Minnesota Statutes 1996, section 517.03, is amended to read:

517.03 [PROHIBITED MARRIAGES.]

Subdivision 1. [GENERAL.] (a) The following marriages are prohibited:

~~(a)~~ (1) a marriage entered into before the dissolution of an earlier marriage of one of the parties becomes final, as provided in section 518.145 or by the law of the jurisdiction where the dissolution was granted;

~~(b)~~ (2) a marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood or by adoption;

~~(c)~~ (3) a marriage between an uncle and a niece, between an aunt and a nephew, or between first cousins, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures; ~~provided, however, that~~ and

(4) a marriage between persons of the same sex.

(b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.

Subd. 2. [MENTALLY RETARDED PERSONS; CONSENT BY COMMISSIONER OF HUMAN SERVICES.] Mentally retarded persons committed to the guardianship of the commissioner of human services and mentally retarded persons committed to the conservatorship of the commissioner of human services in which the terms of the conservatorship limit the right to marry, may marry on receipt of written consent of the commissioner. The commissioner shall grant consent unless it appears from the commissioner's investigation that the marriage is not in the best interest of the ward or conservatee and the public. The court administrator of the district court in the county where the application for a license is made by the ward or conservatee shall not issue the license unless the court administrator has received a signed copy of the consent of the commissioner of human services.

Sec. 3. Minnesota Statutes 1996, section 517.08, subdivision 1a, is amended to read:

Subd. 1a. Application for a marriage license shall be made upon a form provided for the purpose and shall contain the following information:

(1) the full names of the parties~~,~~ and the sex of each party;

(2) their post office addresses and county and state of residence~~,~~;

(3) their full ages~~,~~;

(4) if either party has previously been married, the party's married name, and the date, place and court in which the marriage was dissolved or annulled or the date and place of death of the former spouse~~,~~;

(5) if either party is a minor, the name and address of the minor's parents or guardian~~,~~;

(6) whether the parties are related to each other, and, if so, their relationship~~,~~;

(7) the name and date of birth of any child of which both parties are parents, born before the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated~~,~~;

(8) address of the bride and groom after the marriage to which the court administrator shall send a certified copy of the marriage certificate~~,~~; and

(9) the full names the parties will have after marriage.

Sec. 4. Minnesota Statutes 1996, section 517.20, is amended to read:

517.20 [APPLICATION.]

Except as provided in section 517.03, subdivision 1, paragraph (b), all marriages contracted

and 13; 518.5512, subdivision 2, and by adding subdivisions; 518.575; 518.68, subdivision 2; 518C.101; 518C.205; 518C.207; 518C.304; 518C.305; 518C.310; 518C.401; 518C.501; 518C.603; 518C.605; 518C.608; 518C.611; 518C.612; 518C.701; 548.091, subdivisions 1a, 2a, 3a, and by adding subdivisions; 550.37, subdivision 24; 626.556, subdivisions 10b, 10d, 10e, 10f, 11c, and by adding a subdivision; 626.558, subdivisions 1 and 2; and 626.559, subdivision 5; Laws 1995, chapter 207, article 6, section 115; article 8, section 41, subdivision 2; Laws 1997, chapter 7, article 1, section 75; Laws 1997, chapter 85, article 1, sections 7, subdivision 2; 8, subdivision 2; 12, subdivision 3; 16, subdivision 1; 26, subdivision 2; 32, subdivision 5; 33; and 75; article 3, sections 28, subdivision 1; and 42; Laws 1997, chapter 105, section 7; proposing coding for new law in Minnesota Statutes, chapters 13B; 62J; 145A; 157; 252; 256; 256B; 256J; 257; 325F; 518; 518C; and 552; repealing Minnesota Statutes 1996, sections 145.9256; 252.32, subdivision 4; 256.026; 256.74, subdivisions 5 and 7; 256.82, subdivision 1; 256.979, subdivision 9; 256B.057, subdivisions 2a and 2b; 256B.0625, subdivision 13b; 256B.501, subdivision 5c; 256F.05, subdivisions 5 and 7; 469.154, subdivision 6; 518.5511, subdivisions 5, 6, 7, 8, and 9; 518.611; 518.613; 518.645; 518C.9011; and 609.375, subdivisions 3, 4, and 6; Minnesota Rules, part 9505.1000."

We request adoption of this report and repassage of the bill.

Senate Conferees: (Signed) Don Samuelson, Ember R. Junge, Sheila M. Kiscaden, Dallas C. Sams

House Conferees: (Signed) Lee Greenfield, John Dorn, Thomas Huntley, Fran Bradley, Barb Vickerman

Mr. Samuelson moved that the foregoing recommendations and Conference Committee Report on S.F. No. 1908 be now adopted, and that the bill be repassed as amended by the Conference Committee. The motion prevailed. So the recommendations and Conference Committee Report were adopted.

S.F. No. 1908 was read the third time, as amended by the Conference Committee, and placed on its repassage.

The question was taken on the repassage of the bill, as amended by the Conference Committee.

The roll was called, and there were yeas 54 and nays 12, as follows:

Those who voted in the affirmative were:

Beckman	Johnson, D.E.	Laidig	Neuville	Samuelson
Belanger	Johnson, D.H.	Langseth	Novak	Scheevel
Berg	Johnson, D.J.	Larson	Oliver	Solon
Berglin	Johnson, J.B.	Lesewski	Olson	Stevens
Day	Junge	Lessard	Ourada	Stumpf
Dille	Kelley, S.P.	Limmer	Pariseau	Ten Eyck
Fischbach	Kelly, R.C.	Lourey	Price	Terwilliger
Frederickson	Kiscaden	Metzen	Robertson	Vickerman
Hanson	Kleis	Moe, R.D.	Robling	Wiener
Hottinger	Knutson	Morse	Runbeck	Wiger
Janezich	Krentz	Murphy	Sams	

Those who voted in the negative were:

Anderson	Flynn	Marty	Piper	Scheid
Betzold	Foley	Pappas	Pogemiller	Spear
Cohen	Higgins			

So the bill, as amended by the Conference Committee, was repassed and its title was agreed to.

RECONSIDERATION

Mr. Johnson, D.E. moved that the vote whereby S.F. No. 1905 was passed by the Senate on May 16, 1997, be now reconsidered. The motion prevailed. So the vote was reconsidered.

A8354-2011 Text

S T A T E O F N E W Y O R K

8354

2011-2012 Regular Sessions

I N ASSEMBLY

June 14, 2011

Introduced by M. of A. O'DONNELL, GOTTFRIED, GLICK, TITONE, KELLNER, BRONSON, J. RIVERA, SILVER, FARRELL, SAYWARD, LENTOL, NOLAN, WEISEN BERG, ARROYO, BRENNAN, DINOWITZ, HOYT, LIFTON, MILLMAN, CAHILL, PAULIN, REILLY, BING, JEFFRIES, JAFFEE, ROSENTHAL, KAVANAGH, DenDEKK ER, SCHIMEL, HEVESI, BENEDETTO, SCHROEDER, J. MILLER, LAVINE, LANCMAN, LINARES, MOYA, ROBERTS, SIMOTAS, ABINANTI, BRAUNSTEIN -- Multi-Spon sored by -- M. of A. AUBRY, BOYLAND, BROOK-KRASNY, CANESTRARI, COOK, DUPREY, ENGLEBRIGHT, LATIMER, V. LOPEZ, LUPARDO, MAGNARELLI, McENENY, MORELLE, ORTIZ, PRETLOW, RAMOS, N. RIVERA, P. RIVERA, RODRIGUEZ, RUSSELL, SWEENEY, THIELE, TITUS, WEPRIN, WRIGHT, ZEBROWSKI -- (at request of the Governor) -- read once and referred to the Committee on

C.1

Judiciary

AN ACT to amend the domestic relations law, in relation to the ability to marry

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. This act shall be known and may be cited as the "Marriage Equality Act".

S 2. Legislative intent. Marriage is a fundamental human right. Same sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex. It is the intent of the legislature that the marriages of

CM

same-sex and
different-sex couples be treated equally in all respects under the law.
The omission from this act of changes to other provisions of law shall
not be construed as a legislative intent to preserve any legal
distinction between same-sex couples and different-sex couples with
respect to marriage. The legislature intends that all provisions of law
EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[ ] is old law to be omitted.
LBD12066-04-1

which utilize gender-specific terms in reference to the parties to a
marriage, or which in any other way may be inconsistent with this act,
be construed in a gender-neutral manner or in any way necessary to
effectuate the intent of this act.

S 3. The domestic relations law is amended by adding two new sections
10-a and 10-b to read as follows:

S 10-A. PARTIES TO A MARRIAGE. 1. A MARRIAGE THAT IS OTHERWISE VALID
SHALL BE VALID REGARDLESS OF WHETHER THE PARTIES TO THE MARRIAGE ARE OF
THE SAME OR DIFFERENT SEX.
2. NO GOVERNMENT TREATMENT OR LEGAL STATUS, EFFECT, RIGHT, BENEFIT,
PRIVILEGE, PROTECTION OR RESPONSIBILITY RELATING TO MARRIAGE, WHETHER
DERIVING FROM STATUTE, ADMINISTRATIVE OR COURT RULE, PUBLIC POLICY,
COMMON LAW OR ANY OTHER SOURCE OF LAW, SHALL DIFFER BASED ON THE PARTIES
TO THE MARRIAGE BEING OR HAVING BEEN OF THE SAME SEX RATHER THAN A
DIFFERENT SEX. WHEN NECESSARY TO IMPLEMENT THE RIGHTS AND RESPONSIBIL
ITIES OF SPOUSES UNDER THE LAW, ALL GENDER-SPECIFIC LANGUAGE OR TERMS
SHALL BE CONSTRUED IN A GENDER-NEUTRAL MANNER IN ALL SUCH SOURCES OF
LAW.

S 10-B. APPLICATION. 1. NOTWITHSTANDING ANY OTHER PROVISION OF LAW,
PURSUANT TO SUBDIVISION NINE OF SECTION TWO HUNDRED NINETY-TWO OF THE
EXECUTIVE LAW, A CORPORATION INCORPORATED UNDER THE BENEVOLENT ORDERS
LAW OR DESCRIBED IN THE BENEVOLENT ORDERS LAW BUT FORMED UNDER ANY OTHER

LAW OF THIS STATE OR A RELIGIOUS CORPORATION INCORPORATED UNDER THE
EDUCATION LAW OR THE RELIGIOUS CORPORATIONS LAWS SHALL BE DEEMED TO BE
IN ITS NATURE DISTINCTLY PRIVATE AND THEREFORE, SHALL NOT BE REQUIRED TO
PROVIDE ACCOMMODATIONS, ADVANTAGES, FACILITIES OR PRIVILEGES RELATED TO
THE SOLEMNIZATION OR CELEBRATION OF A MARRIAGE.

2. A REFUSAL BY A BENEVOLENT ORGANIZATION OR A RELIGIOUS CORPORATION,
INCORPORATED UNDER THE EDUCATION LAW OR THE RELIGIOUS CORPORATIONS LAW,
TO PROVIDE ACCOMMODATIONS, ADVANTAGES, FACILITIES OR PRIVILEGES IN
CONNECTION WITH SECTION TEN-A OF THIS ARTICLE SHALL NOT CREATE A CIVIL
CLAIM OR CAUSE OF ACTION.

3. PURSUANT TO SUBDIVISION ELEVEN OF SECTION TWO HUNDRED NINETY-SIX OF
THE EXECUTIVE LAW, NOTHING IN THIS ARTICLE SHALL BE DEEMED OR CONSTRUED
TO PROHIBIT ANY RELIGIOUS OR DENOMINATIONAL INSTITUTION OR ORGANIZATION,
OR ANY ORGANIZATION OPERATED FOR CHARITABLE OR EDUCATIONAL PURPOSES,
WHICH IS OPERATED, SUPERVISED OR CONTROLLED BY OR IN CONNECTION WITH A
RELIGIOUS ORGANIZATION FROM LIMITING EMPLOYMENT OR SALES OR RENTAL OF
HOUSING ACCOMMODATIONS OR ADMISSION TO OR GIVING PREFERENCE TO PERSONS

OF THE SAME RELIGION OR DENOMINATION OR FROM TAKING SUCH ACTION AS IS
CALCULATED BY SUCH ORGANIZATION TO PROMOTE THE RELIGIOUS PRINCIPLES FOR
WHICH IT IS ESTABLISHED OR MAINTAINED.

S 4.

Section 13 of the domestic relations law, as amended by chapter
720 of the laws of 1957, is amended to read as follows:

S 13. Marriage licenses. It shall be necessary for all persons
intended to be married in New York state to obtain a marriage license
from a town or city clerk in New York state and to deliver said license,
within sixty days, to the clergyman or magistrate who is to officiate
before the marriage ceremony may be performed. In case of a marriage
contracted pursuant to subdivision four of section eleven of this chap
ter, such license shall be delivered to the judge of the court of record
before whom the acknowledgment is to be taken. If either party to the
marriage resides upon an island located not less than twenty-five miles

from the office or residence of the town clerk of the town of which such island is a part, and if such office or residence is not on such island such license may be obtained from any justice of the peace residing on

such island, and such justice, in respect to powers and duties relating to marriage licenses, shall be subject to the provisions of this article governing town clerks and shall file all statements or affidavits received by him while acting under the provisions of this section with the town clerk of such town. NO APPLICATION FOR A MARRIAGE LICENSE SHALL BE DENIED ON THE GROUND THAT THE PARTIES ARE OF THE SAME, OR A DIFFERENT, SEX.

S 5. Subdivision 1 of section 11 of the domestic relations law, as amended by chapter 319 of the laws of 1959, is amended and a new subdivision 1-a is added to read as follows:

1. A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical

Culture in the city of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the city of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Nassau county, or of the Riverdale-Yonkers Ethical Society having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union; PROVIDED THAT NO CLERGYMAN OR MINISTER AS DEFINED IN SECTION TWO OF THE RELIGIOUS CORPORATIONS LAW, OR SOCIETY FOR ETHICAL CULTURE LEADER SHALL BE REQUIRED TO SOLEMNIZE ANY MARRIAGE WHEN ACTING IN HIS OR HER CAPACITY UNDER THIS SUBDIVISION.

1-A. A REFUSAL BY A CLERGYMAN OR MINISTER AS DEFINED IN SECTION TWO OF THE RELIGIOUS CORPORATIONS LAW, OR SOCIETY FOR ETHICAL CULTURE LEADER TO SOLEMNIZE ANY MARRIAGE UNDER THIS SUBDIVISION SHALL NOT CREATE A CIVIL CLAIM OR CAUSE OF ACTION.

S 6. This act shall take effect on the thirtieth day after it shall have become a law.

A8354-2011 Actions

- Jun 24, 2011: SIGNED CHAP.95
- Jun 24, 2011: DELIVERED TO GOVERNOR
- Jun 24, 2011: RETURNED TO ASSEMBLY
- Jun 24, 2011: PASSED SENATE
- Jun 24, 2011: MESSAGE OF NECESSITY
- Jun 24, 2011: ORDERED TO THIRD READING CAL.1545
- Jun 15, 2011: DELIVERED TO SENATE
- Jun 15, 2011: PASSED ASSEMBLY
- Jun 15, 2011: MESSAGE OF NECESSITY - 3 DAY MESSAGE
- Jun 15, 2011: ORDERED TO THIRD READING RULES CAL.320
- Jun 15, 2011: RULES REPORT CAL.320
- Jun 15, 2011: REPORTED
- Jun 15, 2011: REPORTED REFERRED TO RULES
- Jun 14, 2011: REFERRED TO JUDICIARY

A8354-2011 Votes

VOTE: FLOOR VOTE: - Jun 24, 2011

Ayes (33): Adams, Addabbo, Alesi, Avella, Breslin, Carlucci, Dilan, Duane, Espaillat, Gianaris, Grisanti, Hassell-Thompson, Huntley, Kennedy, Klein, Krueger, Kruger, McDonald, Montgomery, Oppenheimer, Parker, Peralta, Perkins, Rivera, Saland, Sampson, Savino, Serrano, Smith, Squadron, Stavisky, Stewart-Cousins, Valesky

Nays (29): Ball, Bonacic, DeFrancisco, Diaz, Farley, Flanagan, Fuschillo, Gallivan, Golden, Griffo, Hannon, Johnson, Lanza, Larkin, LaValle, Libous, Little, Marcellino, Martins, Maziarz, Nozzolio, O'Mara, Ranzenhofer, Ritchie, Robach, Seward, Skelos, Young, Zeldin

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