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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KAREN GOLINSKI,

Plaintiff,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, and JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,

Defendants.

Case No. 3:10-cv-0257-JSW

PLAINTIFF'S REPLY TO BIPARTISAN LEGAL ADVISORY GROUP'S SUPERSEDING OPPOSITION TO HER MOTION FOR SUMMARY JUDGMENT

Date: December 16, 2011
Time: 9:00 a.m.
Dept.: Courtroom 11
Judge: Hon. Jeffrey S. White

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SUMMARY OF ARGUMENT

The Ninth Circuit recently upheld an order preliminarily enjoining an Arizona law, agreeing that the law likely violates equal protection by denying family health coverage to same-sex life partners. *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011). DOMA's denial of equal spousal health coverage is similarly unjustified.

BLAG cannot escape heightened scrutiny by relying on *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), a case whose reasoning has been significantly undermined. Because lesbians and gay men contribute equally to society, but have traditionally been subjected to discrimination, laws targeting them are constitutionally suspect. Though BLAG points to limited legislative gains, Plaintiff's unrebutted expert testimony demonstrates that gay people still face significant political barriers and remain vulnerable to the majoritarian political process. BLAG's assertion that sexual orientation is not immutable does not alter that analysis. Immutability has never been a requirement for heightened scrutiny, but the evidence on which BLAG relies only confirms that, for the overwhelming majority of gay people, sexual orientation is the type of core trait one should not be forced to change in order to escape discrimination. DOMA is subject to heightened scrutiny because it discriminates on the basis of sexual orientation and sex and burdens the fundamental interest in family autonomy.

DOMA, however, cannot survive even rational basis review, let alone heightened scrutiny. Though BLAG insists that DOMA is an act of "caution," state marriage law has gone through many other unprecedented, contested changes, such as the development of no-fault divorce, without federal intervention. BLAG identifies no legitimate basis to single out the marriages of same-sex couples for special "caution." Nor can DOMA be justified as encouraging "responsible procreation." Overwhelming evidence establishes that same-sex parents are just as capable as heterosexual parents. BLAG cannot cite a single empirical study to the contrary. And, regardless, there is no rational basis to believe that denying rights to same-sex couples will cause more heterosexuals to marry or have children. To the contrary, by denying federal recognition to the relationships of numerous same-sex married couples that are raising children, DOMA harms those children and *undermines* the connection between marriage and childrearing.

1 **LEGAL STANDARD**

2 On summary judgment, once the moving party has met its initial burden, the opposing
3 party must demonstrate "specific facts . . . from which a reasonable jury could return a verdict in
4 its favor." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001)
5 (citations omitted). It is not enough to show "some metaphysical doubt as to the material facts,"
6 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), or "[a] scintilla of
7 evidence or evidence that is merely colorable or not significantly probative." *Addisu v. Fred*
8 *Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). That Rule 56 standard governs regardless of
9 the level of scrutiny applicable here. *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 590-91 (9th
10 Cir. 2008) (under rational basis review, "our circuit has allowed plaintiffs to rebut the facts
11 underlying defendants' asserted rationale for a classification, to show that the challenged
12 classification could not reasonably be viewed to further the asserted purpose").[1]

13 BLAG does not dispute the material facts regarding the discrimination suffered by
14 Ms. Golinski. Nor does it present any evidence supporting its factual assertions about DOMA.
15 Plaintiff's expert testimony demonstrates that DOMA carries all the hallmarks of a law subject to
16 heightened scrutiny. (Dkt. 142 at 5-10.) Ms. Golinski also introduced expert testimony showing
17 that, even if the Court were to apply rational basis review, DOMA could not rationally be deemed
18 to promote "responsible procreation" and childrearing, or indeed any legitimate governmental
19 interest at all. (*Id.* at 12-14.) BLAG admits that "discovery [is] complete in this matter"
20 (Dkt. 168-3 ¶ 3), but offers no rebuttal expert testimony, or any other admissible evidence, on *any*
21 material issues. Instead, BLAG merely cites a handful of articles outside the record that do not
22 rebut or undermine Plaintiff's undisputed expert evidence. If this case were to proceed to trial,
23 BLAG would have no evidence to present. *See* Fed. R. Civ. P. 26(a)(2) and 37(c)(1).

24

25 [1] *See also Romer v. Evans*, 517 U.S. 620, 632-33 (1996) ("even in the ordinary equal
26 protection case calling for the most deferential of standards," challenged law must be "narrow
enough in scope and grounded in a sufficient factual context" to ascertain "some relation between
27 the classification and the purpose it served"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-
38 (1973) (examining closely whether an exclusion regarding unrelated household members
28 constituted a rational effort to minimize fraud in the program's administration).

BLAG's approach appears to be a calculated effort to shield its assertions from the adversarial process of expert disclosure and deposition, where such arguments have fared poorly in the past. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944-52 (N.D. Cal. 2010) (finding testimony offered by proponents of Proposition 8 on similar topics to be unreliable). For example, in *Perry*, the Proposition 8 proponents initially designated Professor Loren Marks, upon whom BLAG relies here (Dkt. 174 at 24), as an expert, but withdrew him after plaintiffs filed a *Daubert* challenge objecting to his qualifications to testify about child adjustment. *Id*. (*See* Reply Declaration of Rita Lin ("Lin Decl.") Ex. A.)[2] BLAG's attempt to short-circuit that process here betrays a fundamental lack of evidence supporting its position.

ARGUMENT

I. *HIGH TECH GAYS* POSES NO BARRIER TO SUBJECTING DOMA TO HEIGHTENED SCRUTINY, WHICH IS THE CORRECT LEVEL OF REVIEW FOR LAWS THAT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION.

Heightened scrutiny applies to DOMA's unabashed discrimination on the basis of sexual orientation. BLAG incorrectly asserts that *High Tech Gays* requires application of only rational basis review. As the Ninth Circuit emphasized in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), district courts are not governed by earlier appellate precedent that has been "undercut by higher authority to such an extent that it has been effectively overruled by such higher authority." *Id.* at 899. Plaintiff already has explained how *High Tech Gays*' reasoning has been undercut by the Supreme Court. (Dkt. 133 at 8-9, 12; Dkt. 154 at 2-4.) BLAG's invocation of non-binding district court decisions, including one *vacated* on this very point, does not justify

[2] Though BLAG cites Professor Marks as criticizing the research on child adjustment described by Plaintiff's experts, Professor Marks admitted in deposition in *Perry* that his "primary research interest" is in "faith and families," and that he does not "study the specific concept of child adjustment." (Lin Decl. Ex. B, Marks Dep. at 53:21-54:17, Oct. 30, 2009.) He has "never conducted any original research on families headed by lesbian or gay parents" or "published writings or articles in the press discuss[ing] children raised by lesbian or gay parents." (*Id.* at 58:3-12.) He further admitted that he formed his beliefs about "the ideal family structure" before doing any research and, indeed, before graduating from college. (*Id.* at 275:5-22.)

disregarding that Supreme Court authority.[3] (Dkt. 174 at 5.) And, contrary to BLAG's assertion, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), did not analyze this question. Since *Lawrence* overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), no federal appellate court has examined meaningfully the appropriate level of review (Dkt. 133 at 9 n.4), and the question thus remains open.[4]

A. There Is a Long History of Discrimination Against Lesbians and Gay Men.

BLAG expressly does not dispute that lesbians and gay men have been subjected to a history of discrimination (Dkt. 174 at 6); nor could it. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (a party "would be hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *High Tech Gays*, 895 F.2d at 573; Dkt. 145 at 6-13.[5] BLAG misleadingly quotes from Plaintiff's expert historian to quibble about the precise vintage of the discrimination, but does not deny that this crucial prong of the heightened scrutiny analysis is met.[6]

B. Sexual Orientation Bears No Relation to the Ability to Contribute to Society.

BLAG conflates the second factor for determining if heightened scrutiny applies to laws targeting gay people—which asks the broad question whether sexual orientation overall bears a relation to the ability to contribute to society—with the specific question whether DOMA itself furthers any legitimate government goals. (Dkt. 174 at 7.) BLAG's argument goes to whether

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[3] For example, *Lui v. Holder*, No. 2:11-cv-01267-SVW (JCGx) (C.D. Cal. Sept. 28, 2011), recognized that its ruling arose in the immigration context and distinguished non-immigration DOMA challenges. Slip Op. at 5 n.7. Plaintiff also has explained why *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), upon which *Lui* relies, is not controlling. (*See* Dkt. 133 at 7-8.)

[4] Contrary to BLAG's representation, *Diaz* is the latest Ninth Circuit opinion to leave this question open. 656 F.3d at 1012 ("We do not need to decide whether heightened scrutiny might be required.").

[5] BLAG has elsewhere admitted that, for much of the twentieth century, gay people have been subjected to significant discrimination. (Lin Decl., Exs. C & D, at Nos. 22-27.)

[6] Plaintiff's expert, Professor Chauncey, testified at his deposition that there was a long history of hostility to the behavior that would come to be identified with gay people, and twentieth century discrimination drew on that history of vilification. (Lin Decl., Ex. E, Chauncey Dep. at 53:11-25, July 12, 2011.) Professor Chauncey also was clear that this discriminatory treatment continues to the present day. (*Id.* at 29:14-30:5.)

DOMA can survive equal protection scrutiny (which DOMA cannot), not to the level of scrutiny applicable to *any* classification based on sexual orientation. Heightened scrutiny indicia are tested with respect to the general characteristics of the targeted group, not with respect to any particular law. *See*, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (finding "that the sex characteristic frequently bears no relation to ability to perform or contribute to society," not with respect to the challenged statutes, but as a general matter). BLAG leaves unchallenged the scientific consensus that sexual orientation "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." (Dkt. 142 at 7 (quoting the American Psychological Association); *see also* Peplau Decl., Dkt. 137 ¶¶ 11-12, 29-33.)

C. Sexual Orientation Is a Fundamental, Enduring Aspect of One's Identity.

Immutability of a trait is not a prerequisite for heightened scrutiny, as demonstrated by the application of such scrutiny to discrimination based on religion, legitimacy, and alienage.[7] Regardless, BLAG introduces no dispute of material fact that sexual orientation is indeed a core, defining aspect of one's identity. BLAG admits that sexual orientation is "a significant component of one's personality" (Lin Decl., Ex. F at No. 8) and "stable in many people" (*Id.* Exs. C & D at No. 50).[8] These are the very characteristics the Ninth Circuit has cited in holding that the "sexual identities" of gay people "'are so fundamental to their human identities that they

[7] Though BLAG asserts that heightened scrutiny *requires* a showing of immutability and political powerlessness (Dkt. 174 at 5-6), the case law contradicts that view. (Dkt. 142 at 6-7; Dkt. 133 at 14 n.13.) *See, e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (focusing on history of discrimination and ability to contribute to society as most important factors and holding that heightened scrutiny is appropriate where a group has been "saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment, *or* relegated to . . . a position of political powerlessness") (internal quotation marks and citation omitted) (emphasis added). BLAG makes no attempt to distinguish that case law. Instead, the sole authority on which BLAG relies undercuts its point. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that close family members "do not exhibit obvious, immutable, ***or*** distinguishing characteristics that define them as a discrete group; and they are not a minority ***or*** politically powerless") (emphasis added); *High Tech Gays*, 895 F.2d at 573 (same).

[8] BLAG further admits that "[m]ost adults are attracted to and form relationships with members of only one sex" (*id.*, Exs. C & D at No. 53); "[t]he significant majority of adults exhibit a consistent and enduring sexual orientation" (*id.*, No. 54); there is an "absence of evidence for the effectiveness" of efforts "to change a person's sexual orientation" (*id.*, No. 55); "[n]o major mental health professional organization has approved interventions to change sexual orientation" (*id.*, No. 56); and "it likely would be psychologically harmful to force lesbians or gay men" to deny a core part of their identity (*id.*, No. 58).

should not be required to change them.'" *See Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005), quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093-94 (9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). BLAG claims that the authorities on which it relies conflict with *High Tech Gays* (Dkt. 174 at 7-8), but, as Plaintiff already has explained, the Supreme Court definitively has rejected *High Tech Gays*' reasoning (Dkt. 154 at 4-5). *Compare High Tech Gays*, 895 F.2d at 573 ("Homosexuality is not an immutable characteristic; it is behavioral . . . ."), *with Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (rejecting attempt to characterize gay people only by their behavior). *Christian Legal Society* renders *High Tech Gays* unsound on this point, and *Hernandez-Montiel* and *Karouni* control instead.

BLAG claims that the terms "lesbian" and "gay" do not "describe a particular class." (Dkt. 174 at 9.) But surely the Supreme Court understood the class of people it considered in *Romer*, *Lawrence*, and *Christian Legal Society*—and so did Congress when it targeted gay people for differential treatment under DOMA. (*See* Dkt. 133 at 2-3, quoting from DOMA's legislative history.) BLAG's point that newborns do not exhibit a sexual orientation also is inapposite. Of what constitutional significance is the fact that sexual orientation is not plain on the face of an infant, when most people come to understand their sexual orientation during adolescence? (Dkt. 174 at 9; Lin Decl. Ex. G, Peplau Dep. at 25:18-23, June 17, 2011; Further Peplau Decl. ¶ 7.) BLAG attempts to compensate for its failure to introduce its own expert evidence by selectively quoting from three articles (Dkt. 174 at 9-10)—with the result that Professor Diamond, the author of two of them, has submitted a declaration describing how BLAG misrepresents her work. (Diamond Decl. ¶¶ 6-13.) Both Professors Diamond and Peplau clarify that the third article BLAG cites, by Nigel Dickson (Dkt. 174 at 10), does not conflict with their conclusions about the immutability of sexual orientation. (Diamond Decl. ¶ 12; Further Peplau Decl. ¶ 6.)[9] Even the

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[9] BLAG cites an article discussed at Professor Peplau's deposition suggesting that some percentage of gay people report having choice with respect to their sexual orientation (Dkt. 174 at 9; Dkt. 175-2, Ex. B), but Professor Peplau testified that what these respondents meant was unclear, and that they could have been reporting that they chose to accept rather than try to suppress their same-sex attractions. (Lin Decl. Ex. G, Peplau Dep. at 101:2-18.)

statistics BLAG misleadingly quotes demonstrate that for the vast majority of gay people, sexual orientation is a fundamental, core trait of the type protected under heightened scrutiny standards from discriminatory government treatment. *See Karouni*, 399 F.3d at 1173.

D. Lesbians and Gay Men Remain a Politically Vulnerable Minority.

Though BLAG relies heavily on *High Tech Gays*, subsequent Supreme Court decisions have so eroded *High Tech Gays*' analysis of political powerlessness as to render it unsound. 895 F.2d at 574. Even when decided, *High Tech Gays* could not be reconciled with the Supreme Court's analysis of race- and sex-based classifications. (Dkt. 133 at 12-13; *see also* Dkt. 145 at 16.) But since then, the Supreme Court has noted that lesbians and gay men constitute a "politically unpopular group," *Romer*, 517 U.S. at 634 (quotation marks and citation omitted), and reaffirmed the application of heightened scrutiny for race- and sex-based classifications despite further political progress achieved by those groups. *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

BLAG introduces nothing to rebut the evidence from Plaintiff's expert Professor Segura, showing that a pervasive lack of formal anti-discrimination protections and modest successes in remediating existing discrimination—at least some of which remain dependent on the whim of a governing majority and subject to reversal—demonstrate that lesbians and gay men continue to suffer discrimination "unlikely to be soon rectified by legislative means," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). (Segura Decl., Dkt. 138 ¶¶ 23-44.) Though BLAG cites some examples of lesbians' and gay men's purported political power, those exceptions simply prove the rule. As Professor Segura explained, the repeal of "Don't Ask, Don't Tell" faced long delays and virulent opposition, and even now, some presidential candidates and House majority members have vowed to reinstate that law. (*Id.* ¶¶ 23, 32.) BLAG offers nothing to rebut that testimony.[10] BLAG's reference to marriage rights offered to

[10] By its own terms, the DOJ's position on DOMA is not a political calculation, but an assessment of the constitutionality of DOMA. (Dkt. 133 at 1 n.1.) Though BLAG cites a letter from a gay advocacy group to the President on the topic, that letter was sent nearly two *years* before the President announced his current position. (Lin Decl. Ex. H, Segura Dep. at 166:16-

(Footnote continues on next page.)

same-sex couples in a handful of states and second-class statuses offered in some others (Dkt. 174 at 13, 15) runs headlong into BLAG's earlier acknowledgment that "[u]ndeniably . . . same-sex marriage jurisdictions remain a small minority in this country." (Dkt. 119-1 at 17.) California had been one of them, and despite spending (marginally) more money (Dkt. 174 at 15), the gay community was powerless to stave off a substantial margin of voter approval for Proposition 8. Because Plaintiff's expert does not rely "on the extreme assumption that in no place, at no time" have gay people "won any outcome" (Segura Decl., Dkt. 138 ¶ 21), BLAG introduces no dispute of material fact.[11]

II. DOMA DISCRIMINATES BASED ON PLAINTIFF'S SEX.

BLAG admits that Plaintiff would qualify for spousal coverage if she were a man but is denied that important compensation as a woman. (Lin Decl., Ex. I, RFA No. 1.) That is sex discrimination. *Perry*, 704 F. Supp. 2d at 996. BLAG's principal response is to argue that "DOMA was intended to distinguish between same-sex and opposite-sex *relationships*," and "therefore does not discriminate on the basis of sex" itself. (Dkt. 174 at 18 (emphasis in original).) Plaintiff already has demonstrated that this argument contravenes Supreme Court precedent. (Dkt. 133 at 16; Dkt. 142 at 10.) *Loving v. Virginia*, 388 U.S. 1 (1967), explains that a classification prohibiting interracial *relationships* discriminates based on race. *Id.* at 2 (prosecution based on a marriage); *see also McLaughlin v. Florida*, 379 U.S. 184, 195-96 (1964) (statute unconstitutionally prohibited an individual from cohabiting with a partner of another race). The same principles apply here. *See Frontiero*, 411 U.S. at 678-79 (overturning a statute that discriminated by virtue of female servicemember's marriage). BLAG's only response is that *Loving* overturned a law premised on white supremacy. (Dkt. 174 at 18.) But *Loving* made clear

(Footnote continued from previous page.)

167:13, July 8, 2011.) Moreover, BLAG's intervention in this litigation confirms the continued political strength of those seeking to block any repeal of DOMA.

[11] On this issue too BLAG already has admitted a number of relevant facts: "lesbians and gay men continue to face obstacles to rectifying their unequal treatment in the United States through the political process" (Lin Decl., Ex. F at No. 9); "[l]ike other minority groups, gay men and lesbians often must rely on judicial decisions to secure equal rights" (Lin Decl., Exs. C & D at No. 32); and "[t]he fact that sexual orientation is not a visible trait has undermined gay men and lesbians' ability to mobilize and exercise meaningful political power" (*id.* at No. 79).

that even a neutral, "even-handed" state purpose could not excuse discrimination, 388 U.S. at 12 n.11, and rejected "the notion that the mere 'equal application' of a statute . . . is enough to remove the classification[]" from the ambit of equal protection. *Id.* at 8. BLAG cannot escape that DOMA prohibits equal coverage for Ms. Golinski by virtue of the fact that she is a woman, rather than a man, married to a woman.

III. DOMA INFRINGES ON PLAINTIFF'S FAMILY AUTONOMY.

BLAG cannot dispute that the courts long have recognized "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977), and that gay people possess an equal liberty interest in such personal spheres. *Lawrence*, 539 U.S. at 574. BLAG's primary argument appears to be that Plaintiff's claim does not merit heightened review. (Dkt. 174 at 19-20.) BLAG ignores, however, the binding authority that answers this question. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 818-19 (9th Cir. 2008) (holding that *Lawrence* requires heightened scrutiny of laws burdening same-sex relationships).

A law need not bar a family relationship or tear it asunder to intrude in a manner warranting heightened scrutiny. A penalty that burdens only a government privilege can impermissibly infringe. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (mandatory maternity leave "can constitute a heavy burden"); *In re Golinski*, 587 F.3d 901, 904 (9th Cir. 2009) (Kozinski, C.J., EDR proceeding) (Plaintiff's monthly cost for private insurance exceeded the "small fine" at issue in *Lawrence*). Indeed, the claim that DOMA does not burden such a relationship is particularly disingenuous when that is exactly what DOMA seeks to do by repudiating Plaintiff's marriage for *all* federal purposes (Golinski Decl., Dkt. 143 ¶¶ 14-16). *See* H.R. Rep. No. 104-664 at 12, 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, at *2916, *2920 (DOMA was intended to convey "moral disapproval of homosexuality," and Congress was not "supportive of (or even indifferent to) the notion of same-sex 'marriage'"). Regardless, DOMA cannot survive the rational basis review that is required, at a minimum, to decide any due process claim. *See Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1192 (N.D. Cal. 2011).

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IV. EVEN IF RATIONAL BASIS REVIEW APPLIED, THE UNDISPUTED EVIDENCE ESTABLISHES THAT DOMA DOES NOT RATIONALLY ADVANCE ANY LEGITIMATE GOVERNMENT INTEREST.

3 In *Diaz*, the Ninth Circuit recently held that a state law granting health coverage to
4 spouses of heterosexual state employees while denying such coverage to same-sex life partners
5 likely violates equal protection. 656 F.3d at 1014-15. The court determined that it need not
6 evaluate whether heightened scrutiny applied because the challenged law "was not rationally
7 related to furthering [legitimate government] interests." *Id.* at 1015. In so holding, the Ninth
8 Circuit affirmed the district court's conclusion that "denial of benefits to same-sex domestic
9 partners cannot promote marriage." *Id.* at 1014; *see also Collins v. Brewer*, 727 F. Supp. 2d 797,
10 806 (D. Ariz. 2010) (rejecting the state's argument that the law "would further the 'long-standing
11 and well-recognized government interest in favoring marriage'"). That reasoning applies with
12 equal force here, and confirms the conclusions of three district courts that have held DOMA fails
13 rational basis review. (Dkt. 133 at 20.)

14
A. Rational Basis Scrutiny Should Be Particularly Searching Here.

15 The Supreme Court has repeatedly emphasized that "a more searching form of rational
16 basis review" applies to a law, such as DOMA, that targets a "politically unpopular group" or
17 "inhibits personal relationships." *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring)
18 (collecting cases). (*See also* Dkt. 133 at 18-19 (collecting cases).) Offering no authority to the
19 contrary, BLAG baldly asserts that "[r]ational basis is rational basis." (Dkt. 174 at 20.) Then, in
20 an about-face, BLAG cross-references the argument in its motion to dismiss reply brief that a *less*
21 stringent version of rational basis should apply because DOMA involves "line-drawing."
22 (Dkt. 150 at 17-19.) In addition to undermining its own assertion that there is supposedly only
23 one form of rational basis scrutiny, BLAG fundamentally misconstrues what constitutes "line-
24 drawing." As explained in the principal case on which BLAG relies, line-drawing measures are
25 those where "differences between the eligible and the ineligible are differences in degree rather
26 than differences in the character of their respective claims." *Mathews v. Diaz*, 426 U.S. 67, 83-84
27 (1976). *Mathews* found that Congress rationally required five years of continuous residency for
28 Medicare eligibility, though the line could just as easily have been drawn at six years or four. *Id.*

1 at 69. DOMA does not involve such "differences in degree" along a continuum. Congress
2 accepted without question all the various lines states have drawn around marriage (such as age of
3 eligibility to marry), but carved out a *single* exception to the otherwise unitary class of valid state-
4 law marriages in order to exclude lesbian and gay couples alone. That is a deliberate act of
5 exclusion, not just line-drawing. As such, it is subject to *more*, not less, searching review.

6 **B. DOMA Cannot Be Justified as a Rational Act of "Caution."**

7 DOMA fails any level of rational basis scrutiny, let alone the searching review required.
8 Though BLAG asserts that DOMA can be justified as an exercise in "caution" about what a
9 future with married same-sex couples might hold (Dkt. 174 at 21), BLAG identifies no reason
10 why this evolution in state marriage law could legitimately be viewed with any greater "caution"
11 than other controversial changes over the years. At best, this is an argument that, some day, a
12 rational basis may surface to justify DOMA, even if none exists today. Nothing in equal
13 protection law, however, permits the government to single out a disfavored group for
14 discrimination today, based solely on the hope that a legitimate excuse might materialize
15 tomorrow. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 390-94 (D. Mass. 2010).
16 Indeed, the Supreme Court has rejected that view. In *Romer*, the state characterized the law as a
17 response to the "deeply divisive issue of homosexuality" and claimed to need leeway to handle
18 matters calmly over time. (Lin Decl. Ex. J (No. 94-1039, Brief for Petitioners at 47 (April 21,
19 1995)).) The Court disagreed, finding no rational basis for the law. *Romer*, 517 U.S. at 635-36.
20 Even if a wait-for-a-basis-to-develop approach were rational, marriages of same-sex
21 couples were "untested" when DOMA was enacted only because states historically discriminated
22 against gay people by refusing to recognize their unions. (Dkt. 150 at 24.) That discrimination
23 no longer prevails in a growing number of jurisdictions, and in any event, historic discrimination
24 is a basis for striking down DOMA, not enshrining prejudice in federal law. (*See* Dkt. 133 at 23.)
25 Regardless, there is nothing "cautious" about DOMA's radical departure from the federal
26 government's longstanding deference to state marriage law. BLAG attempts to downplay this
27 long-established deference by arguing that "up until the eve of DOMA, there was general
28 uniformity in those states' laws." (Dkt. 174 at 21.) That assertion ignores the undisputed history

of marriage law. As explained in the unrebutted testimony of Plaintiff's expert Professor Nancy Cott, state marriage laws have undergone radical shifts in highly divisive contexts. For decades, interracial marriage was an issue that "bitterly divided" the states, with some recognizing those marriages and others not. (Cott Decl., Dkt. 135 ¶ 57.) Similarly, in the 1960s, states began for the first time to permit no-fault divorce, a previously unprecedented approach in this country and the subject of great social debate. (*Id.* ¶¶ 58-63.) The federal government continued to defer to states during these unprecedented, hotly contested shifts in state marriage law, and has continued to do so in every respect—*except* when it comes to the sex of the spouses. (*Id.* ¶¶ 37-38, 40-41, 43-44.) *See Gill*, 699 F. Supp. 2d at 392.

BLAG's assertion that the federal government has involved itself in marriage law in three isolated instances only serves to reinforce this point.[12] (Dkt. 174 at 21-22.) As Professor Cott has explained, the federal government addressed marriage in those three situations only because *no state* was regulating marriage. First, BLAG cites the Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862), in which Congress banned polygamy in the Utah Territory. Congress, however, deliberately enacted this statute *before* Utah became a State, recognizing that it "would have no power to define or regulate marriage in Utah once it obtained statehood." (Cott Decl., Dkt. 135 ¶¶ 78-79.) Second, BLAG references Civil War era actions by Union military and reconstruction authorities to promote marriages of former slaves. In that instance, when "Confederate states crumbled," Union authorities took steps in the "occupied South (where state legislatures had not yet been reconstituted)" to permit ex-slaves to marry, a right they had been denied. (*Id.* ¶¶ 75-76.) Then, "[o]nce state governments were reconstituted, the [Union] gave up its unusual authority, and Southern states resumed their jurisdiction over marriage law, subject however to the authority of the Fourteenth Amendment." (*Id.* ¶ 77.) Third, BLAG points to

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[12] BLAG also references an argument in its motion to dismiss reply brief that some federal statutes require more than just a valid state-law marriage to obtain benefits. (Dkt. 150 at 28.) For example, some couples must be married for at least one year to obtain certain Social Security benefits. *See* 42 U.S.C. § 416. Immigration law discounts marriages entered solely to obtain immigration status. 8 U.S.C. § 1186a(b)(1). Those statutes do not purport to create a federal definition of marriage. Rather, they impose requirements *in addition to marriage* to further particular legislative goals.

unidentified actions of the Bureau of Indian Affairs in connection with certain tribes, which are subject to special sovereignty rules and are not governed by the states. *See, e.g.*, Bureau of Indian Affairs, FAQ, http://www.bia.gov/FAQs/index.htm (describing the federal government's unique relationship with Indian tribes). BLAG's examples only highlight DOMA's extraordinary nature.

BLAG also insists that DOMA merely "preserves" Congress's intent to limit marriage to heterosexual couples in all federal statutes. BLAG, however, still cannot cite any legislative history indicating that Congress intended the word "spouse" in the Federal Employee Health Benefits Act ("FEHBA"), the statute at issue here, to be so limited. To the contrary, FEHBA's legislative history indicates a desire that benefits *evolve* with state law. (*See* Dkt. 133 at 22 n.19.) BLAG continues to offer no response to this point.

The undisputed evidence is that DOMA broke new ground by, for the first time, overriding state marriage determinations. Though BLAG protests that this "argument confuses novelty and irrationality" (Dkt. 174 at 21), it is *BLAG* that has attempted to justify DOMA as a purported act of "caution." "Caution" is hardly a rational basis for a wholly unprecedented law.

C. The Denial of Equal Spousal Health Coverage Cannot Be Justified as an Attempt to "Promote Responsible Procreation."

1. The Undisputed Evidence Shows that There Is No Basis to Conclude that Different-Sex Parents Are Superior to Same-Sex Parents.

Plaintiff's expert Professor Michael Lamb has testified that it is "beyond scientific dispute" that same-sex married couples are nothing less than equally capable parents. (Lamb Decl., Dkt. 136 ¶ 14.) The author of the principal article on which BLAG relies concedes that Professor Lamb is an "expert" and an "authority" in the field. (Lin Decl. Ex. B, Marks Dep. at 69:7-16.) Professor Lamb cites over 50 peer-reviewed empirical studies regarding same-sex parenting undertaken over the past 30 years, all of which have unanimously concluded that there is no basis to find same-sex parents to be inferior. (*Id.* ¶¶ 29-32.) BLAG offers no expert testimony to the contrary or a *single* empirical study reaching a different conclusion.

Instead, BLAG points to three snippets of articles shown to Professor Lamb during his deposition. (Dkt. 174 at 23.) As Professor Lamb explained at deposition, however, none of those creates a material dispute of fact. The first excerpt stated that there have been fewer studies on

1 gay male parents than lesbian parents, but as Professor Lamb explained, the studies of gay male
2 parents had the "same" results as the lesbian family research: that "child outcomes did not vary
3 depending on the parents' sexual orientation." (Further Lamb Decl. ¶ 7; *see also* Lin Decl. Ex. K,
4 Lamb Dep. at 76:6-17, June 24, 2011.) The second excerpt noted that there are fewer studies on
5 adolescents than younger children, but it is undisputed that "there are several . . . studies that have
6 looked at adolescent offspring living with same-sex parents" and those studies have "uniformly
7 reported positive outcomes." (Further Lamb Decl. ¶¶ 9-10; *see also* Lin Decl. Ex. K, Lamb Dep.
8 at 82:15-83:21.) The third excerpt does not discuss gay parenting at all, and therefore ignores the
9 existence of studies regarding gay parenting with representative sample sizes. (Further Lamb
10 Decl. ¶¶ 11-12, 16; *see also* Lin Decl. Ex. K, Lamb Dep. at 85:10-86:7.)

11 BLAG then cites three sources, none of which involve any empirical study showing same-
12 sex parents to be inferior. One is a three-page Slate.com piece by Ann Hulbert, who has no
13 professional expertise in child development. (Further Lamb Decl. ¶ 15.) Another is an article by
14 Norval Glenn about the size of the samples used in these studies. As Professor Lamb explains,
15 such sampling is routinely used in psychological research, and in any event, a number of the
16 studies on which Professor Lamb relied *have* used representative samples. (*Id.* ¶ 16.) The last is
17 an unpublished piece posted online by Professor Loren Marks. That document criticizes a 2005
18 brief issued by the American Psychological Association concluding that social science research
19 indicates that gay parents provide a home environment equally likely to support children's
20 psychosocial growth. (*Id.* ¶ 20.) The Marks piece deliberately ignores the many studies
21 published after 2005 (in addition to many published before 2005) supporting the conclusion that
22 parents' sexual orientation is unrelated to their children's adjustment. (*Id.* ¶¶ 21-27.) Professor
23 Marks does not purport to offer any opinion on the current state of research on this topic.

24 BLAG also cites an Eleventh Circuit opinion in *Lofton v. Sec'y of the Dep't of Children &*
25 *Family Servs.*, 358 F.3d 804, 824 (11th Cir. 2004). That case, however, involved no expert
26 testimony on this topic. *See Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383 (S.D. Fla. 2001)
27 (noting that plaintiffs did not submit evidence and "did not object to nor disagree with
28 Defendants' statements that married heterosexual families provide children with a more stable

home environment"). Without such record evidence, the Eleventh Circuit was left to rely on a booklet from an advocacy organization opposing marriage of same-sex couples, a 1995 review article calling for the types of studies that have since been published, and another review article that in fact concluded "there is no evidentiary basis for considering parental sexual orientation in decisions about children's best interest." (Further Lamb Decl. ¶¶ 17-19.) *Cf. Witt*, 527 F.3d at 818 n.6 (criticizing *Lofton* for "fail[ing] to appreciate" key aspects of *Lawrence*).

As Professor Lamb explains, it remains "beyond scientific dispute" that same-sex parents are as fit as different-sex parents. (Further Lamb Decl. ¶ 28.) "None of the sources cited by BLAG identifies a single reliable scientific study to the contrary, and none identifies any basis to ignore the conclusive empirical evidence that is well-accepted in the scientific community." (*Id.*)

2. There Is No Rational Basis to Believe that DOMA Will Cause Heterosexuals to Procreate More "Responsibly."

In any event, regardless of the relative merits of same-sex and different-sex parents, there is no rational basis to believe DOMA or its denial of equal health coverage to same-sex spouses will cause more heterosexuals to marry or to have children. *See Gill*, 699 F. Supp. 2d at 389 ("[D]enying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.").

BLAG's principal response is to insist that DOMA will "foster the link between marriage and childrearing." (Dkt. 174 at 25.) That makes no sense. Same-sex married couples often rear children, as Plaintiff and her spouse are doing.[13] Refusing federal recognition to the marriages in which those children are raised only *increases* the number of children being raised outside federally recognized wedlock, further decoupling marriage from childrearing.[14]

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[13] *See* Adam P. Romero, The Williams Institute, *Census Snapshot*, at 1, 2 (December 2007) (census data "show that 20% of same-sex couples in the U.S. are raising children" and as of 2005 an estimated 270,313 of the country's children were living in households headed by same-sex couples), *available at* http://www.policyarchive.org/handle/10207/bitstreams/18082.pdf

[14] BLAG cross-references its motion to dismiss reply brief, which speculates that there "may be" a connection between declining birth rates and the recognition of marriages between same-sex spouses in Scandinavia and the Netherlands. (Dkt. 150 at 26-27 n.18.) That connection has been conclusively disproven. *See* M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, Sexuality Research and Social Policy Journal, at 8 (Sept. 2004) (finding that "no evidence" supports that connection; birth rates have

(Footnote continues on next page.)

Moreover, if Congress's intent was truly to send a message that marriage is intertwined with childrearing, the denial of rights to same-sex spouses is an irrational way to accomplish that goal. Congress could easily have provided such rights only to married persons with children instead. Although BLAG is correct that rational basis review does not require legislative classifications to be narrowly tailored, the Supreme Court has expressly refused to credit a legislature's choice of an attenuated path toward a supposed goal when a far more direct path is readily available. *Cleburne*, for example, invalidated under rational basis review a zoning ordinance barring a home for the mentally disabled. The Court held that, if the city's interest was truly to prevent overcrowding, it could have easily passed a zoning regulation limiting the number of occupants. 473 U.S. at 449-50. The same skepticism should apply here. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (citations omitted); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (finding that law failed rational basis review where "purported justifications . . . made no sense in light of how the [government] treated other groups similarly situated"); *Williams v. Vermont*, 472 U.S. 14, 23-24 (1985) (holding that distinction in tax obligation between similarly situated groups bore no relation to statutory purpose and thus failed rational basis review).

CONCLUSION

For the forgoing reasons, plaintiff's motion for summary judgment should be granted.

Dated: November 1, 2011

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(Footnote continued from previous page.)

changed across Scandinavia, Europe, and the United States "regardless of whether or not they adopted same-sex partnership laws"; and this trend was "underway well before the passage of laws that gave same-sex couples rights" in Scandinavia); *see also* William Eskridge & Darren Spedale, *Gay Marriage, For Better or For Worse?* (2006) (concluding that the Scandinavian evidence shows that marriages between same-sex couples *strengthen* the institution).