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KAREN GOLINSKI

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| KAREN GOLINSKI,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, and JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,<br><br>Defendants. | Case No. 3:10-cv-0257-JSW<br><br>**SECOND AMENDED COMPLAINT** |

## INTRODUCTION

1. In this action, plaintiff Karen Golinski challenges federal discrimination against her as a lesbian married to someone of the same sex, and the harm that such discrimination has caused her and her family.

2. Plaintiff is a citizen of the State of California and of the United States of America. She is legally married to a person of the same sex in accordance with California law.

3. The federal government does not license marriages, but many of its programs take marital status into account to determine eligibility for federal benefits, protections and responsibilities. Statutes, precedent, and principles of federalism establish that state law is the touchstone for determining a couple's marital status when establishing eligibility for federal programs.

4. Plaintiff is an employee of the federal judiciary. She receives health insurance through her employer and has elected a family health insurance plan to provide coverage to herself and to her son. She requested that her employer enroll her spouse, Amy Cunninghis, in her family plan, a benefit available to married employees of the federal judiciary. Defendants, on behalf of the federal government, however, refused and blocked the enrollment, based on plaintiff's sexual orientation, and based on her sex in relation to the sex of her spouse.

5. As the basis for their denial of the benefits and protections of federal law, defendants invoked Section 3 of the so-called "Defense of Marriage Act," P.L. 104-199, codified in part as 1 U.S.C. § 7 ("DOMA"), and stated that the federal government will only recognize marriages between a man and a woman.

6. Defendants' application of DOMA has barred plaintiff and her spouse from receiving benefits that are routinely granted to other similarly situated married couples, based on plaintiff's sexual orientation and her sex in relation to the sex of her spouse.

7. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and for review of agency action pursuant to 5 U.S.C. §§ 701-706. It seeks a determination that DOMA, 1 U.S.C. § 7, as applied to plaintiff, violates the United States Constitution by refusing to recognize lawful marriages for purposes of the laws

governing benefits for federal employees. The result of these violations of the Constitution is that plaintiff has been denied, and will continue to be denied, legal protections and benefits under federal law that would be available to her if she were a heterosexual with a different-sex spouse.

## PARTIES

8. Plaintiff Karen Golinski is a California citizen residing in San Francisco, California.

9. Defendant United States Office of Personnel Management is an independent establishment in the executive branch of the United States government. 5 U.S.C. § 1101.

10. Defendant John Berry is the Director of the United States Office of Personnel Management.

## JURISDICTION, VENUE, AND SOVEREIGN IMMUNITY

11. This action arises under the Constitution of the United States and the laws of the United States. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 8912; 28 U.S.C. § 1331; and 28 U.S.C. § 1346(a)(2).

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

13. The United States has waived sovereign immunity under 5 U.S.C. § 702.

14. Defendant John Berry's actions in this matter were beyond the scope of his statutory and his constitutional authority. Accordingly, sovereign immunity does not apply to this action.

## FACTS

15. Karen Golinski and Amy Cunninghis have been partners for 21 years. They met in the fall of 1989 and have been in a committed relationship ever since. They became registered domestic partners with the City and County of San Francisco in 1995 and with the State of California in 2003. They have an eight-year-old son whom they have raised from birth together.

16. On May 15, 2008, the California Supreme Court ruled that the State's laws that limited the institution of marriage to different-sex couples, while prohibiting same-sex couples from marrying, violated the California Constitution. *In re Marriage Cases*, 43 Cal. 4th 757, 855-56 (2008). On or about June 17, 2008, San Francisco and other California counties began to issue

marriage licenses to same-sex couples. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

17. Ms. Golinski married Amy Cunninghis on August 21, 2008, at San Francisco City Hall, pursuant to a duly issued California marriage license. Ms. Golinski and Ms. Cunninghis remain lawfully married under the laws of the State of California.

The Federal Employees Health Benefits Program

18. Ms. Golinski has been employed by the United States Court of Appeals for the Ninth Circuit, now located at 95 Seventh Street in San Francisco, California 94103, for approximately 19 years. She is currently employed in the Motions Unit of the Office of Staff Attorneys. The United States Court of Appeals for the Ninth Circuit prohibits employment discrimination based on, among other things, sex or sexual orientation.

19. As an employee of the federal judiciary, Ms. Golinski obtains health insurance under the Federal Employees Health Benefits Program ("FEHB"). *See generally* 5 U.S.C. § 8901 et seq. Because she and her spouse have an eight-year-old son, Ms. Golinski has, since his birth, paid for "self and family" health insurance coverage under the Blue Cross and Blue Shield Service Benefit Plan ("Blue Cross/Blue Shield").

20. The FEHB Handbook described Family Members Eligibility for Coverage as follows:

> Employing Office Responsibilities
>
> Your employing office is responsible for making decisions about whether a family member is eligible for coverage.
>
> * * *
>
> General Eligibility for Coverage
>
> Family members eligible for coverage under your Self and Family enrollment are your spouse (including a valid common law marriage) and children under age 22, including legally adopted children and recognized natural (born out of wedlock) children who meet certain dependency requirements.
>
> * * *

> Eligible Family Members Automatically Covered
>
> When you enroll for Self and Family, you automatically include all eligible members of your family. If you don't list an eligible family member on your Health Benefits Election Form (SF 2809) or other enrollment request, that person is still entitled to coverage. If you list a person who is not an eligible family member, your employing office will explain why the person is not eligible for coverage and will remove the name from the list. The listing of an ineligible person on the SF 2809 doesn't entitle him/her to benefits.

FEHB Handbook (Oct. 28, 2008).

21. According to 5 U.S.C. § 8901(5), "member of family" is defined, in relevant part, to "mean[] the spouse of an employee or annuitant [and] an unmarried dependent child under 22 years of age."

22. On September 2, 2008, Ms. Golinski sought to enroll her spouse in the family health plan for which she was paying by submitting the appropriate forms to her employer's human resources department. The human resources department forwarded the request to the Administrative Office of the United States Courts ("AO").

23. On September 11, 2008, the AO advised the Ninth Circuit's human resources department that Ms. Cunninghis was ineligible for coverage because Ms. Golinski and her spouse are both women.

24. On October 21, 2008, the AO once again advised the Ninth Circuit's human resources department that Ms. Golinski's election form would not be processed, and that Ms. Cunninghis was ineligible for coverage, for the same reason. On both occasions, the AO indicated that it based its actions on the "Defense of Marriage Act."

25. If Ms. Golinski were a man, or conversely if Ms. Cunninghis were a man, Ms. Golinski would be able to add her spouse to her existing family plan at no additional cost to her. Similarly situated heterosexual employees in Ms. Golinski's position routinely receive this significant benefit as a matter of course. For example, one employee who had recently joined the Motions Unit under the same title and who, like Ms. Golinski, has a spouse and a young child, attested that,

> as soon as I began to work for the United States Court of Appeals for the Ninth Circuit, I applied to have both my spouse and my

> daughter covered under a family coverage health plan obtained through my employer. I completed the "Health Benefits Election Form," which stated that I wanted my wife and daughter to be covered under the plan . . . . Both my wife and daughter received coverage shortly thereafter.

Ms. Golinski performs work equal to that of her co-workers, and in fact has more experience in the position than most, yet she does not receive the benefits that her married heterosexual co-workers receive for their respective spouses.

26. The government's refusal to provide Ms. Golinski with benefits that similarly situated different-sex married couples receive burdens and stigmatizes her relationship.

27. Ms. Golinski has been forced to obtain separate, individual health insurance — that is, coverage outside of a group health plan — for her spouse that is inferior to the coverage she would receive under her plan. In addition to payment of monthly premiums, Ms. Cunninghis must also pay higher out-of-pocket costs for her health insurance than she would have to pay if she were covered under plaintiff's employee group plan. Ms. Cunninghis also receives less comprehensive coverage with her individual plan. Ms. Cunninghis has been unable to obtain individual coverage of similar quality to that offered through Ms. Golinski's employee health plan because no equivalent individual coverage is available for purchase on the market. As a result, Ms. Golinski and her spouse have suffered, and continue to suffer, financial hardship and severe anxiety about the possibility that Ms. Cunninghis will be unable to obtain the care necessary to address serious health issues should they develop.

The "Defense of Marriage Act"

28. Congress enacted the so-called "Defense of Marriage Act," P.L. 104-199, in 1996, and it was approved on September 21, 1996.

29. Section 3 of DOMA, 1 U.S.C. § 7, provides, in part, as follows:

> Sec. 3 DEFINITION OF MARRIAGE.
>
> (a) IN GENERAL – Chapter 1 of title 1, United States Code is amended by adding at the end the following:
>
> §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."

30. This law responded to "a very particular development in the State of Hawaii." H.R. Rep. No. 104-664, *reprinted in* 1996 U.S.C.C.A.N. 2905, at 2906. As the controlling House Judiciary Committee Report explained, "the state courts in Hawaii appear on the verge of requiring that State to issue marriage licenses to same-sex couples," and that development "threatens to have very real consequences . . . on federal law . . . ." *Id*. More specifically,

> [I]f Hawaii does ultimately permit homosexuals to 'marry,' that development could have profound practical implications for federal law. For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits.

*Id*. at 2914.

31. In passing Section 3 of DOMA, Congress took the unprecedented step of preemptively nullifying a class of marriages that it expected states would begin to license at some point in the future, that is, marriages of same-sex couples. It withdrew from these marriages, but not from others, all federal responsibilities, protections, and benefits, financial and otherwise.

32. With regard to a lesbian or gay individual married to someone of the same sex, Section 3 of DOMA has overridden the long-standing deference of federal law to state law in determining the marital status of an individual seeking the benefits or responsibilities of any federal law triggered by a person's marital status, and it categorically denies both rights and responsibilities.

33. If not for the application of DOMA, Ms. Golinski, as a person legally married under California law, would receive the same benefits, responsibilities, and protections under federal law as other married persons. Yet DOMA operates to single out one class of marriages legally recognized by the State of California, those of same-sex couples, and to deny their existence for all ends and purposes under federal law.

34. In a 1997 Report, the General Accounting Office ("GAO")[1] estimated that at least 1,049 federal laws were affected by DOMA, because those laws depended on or in some way related to marital status. U.S. Gov. Accountability Office, GAO/OGC-97-16 Defense of Marriage Act (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf. A follow-up study in 2004 found that 1,138 federal laws tied benefits, protections, or responsibilities to marital status. U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

35. Ms. Golinski has been denied legal benefits and protections typically available to spouses under federal law. Despite the willingness of Ms. Golinski and her spouse to assume the legally imposed responsibilities of marriage at the federal level, they are prevented from doing so by DOMA.

36. DOMA grants preferred legal status and unique privileges to individuals married to someone of a different sex.

37. The official House Report on DOMA, H.R. Rep. No. 104-664, advanced four rationales for why the federal government drew a line between its treatment of individuals married to a same-sex spouse and individuals married to a different-sex spouse:

> (1) H.R. 3396 [the bill number] ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING AND NURTURING THE INSTITUTION OF TRADITIONAL HETEROSEXUAL MARRIAGE.
>
> (2) H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING TRADITIONAL NOTIONS OF MORALITY.
>
> (3) H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PROTECTING STATE SOVEREIGNTY AND DEMOCRATIC SELF GOVERNANCE.
>
> (4) H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PRESERVING SCARCE GOVERNMENT RESOURCES.

[1] The General Accounting Office changed its name to the Government Accountability Office in 2004. (*See* http://www.gao.gov/about/namechange.html.)

38. None of these interests is adequate to justify discrimination against married persons in same-sex relationships, and no other federal interest justifies such discrimination.

39. The first claimed federal "interest" in "defending" "traditional heterosexual marriage" simply restates the government's intent to discriminate against same-sex couples and provides no independent justification for the government's discriminatory action. The federal government has long accepted state determinations of marital status, even in the face of changes in marriage licensing by the states. The only state-licensed marriages it categorically refuses to honor are those of same-sex couples. The federal government's refusal to recognize plaintiff's marriage does not nurture, improve, stabilize, or enhance the marriages of other married couples. Nor would the federal government's recognition of plaintiff's marriage degrade, destabilize, or have any other deleterious effect on the marriages of other married couples.

40. The second claimed federal interest in "morality" is another reframing of Congress's disapproval of lesbians and gay men. Lesbians and gay men have suffered a long history of public and private discrimination. Discrimination for its own sake is not a legitimate purpose upon which disadvantageous classifications may be imposed. Moreover, sexual orientation bears no relation whatsoever to an individual's ability to participate in or contribute to society.

41. The third claimed interest in "protecting state sovereignty" is actually subverted by DOMA, not advanced by it. In enacting DOMA, Congress violated inherent constitutional principles of federalism and failed to honor our nation's system of dual sovereignty, because it is the states, and not the federal government, that regulate marriage and determine family status. Congress did not "protect" state sovereignty in enacting DOMA, since it dishonored the sovereignty of the states that license or recognize marriages of same-sex couples.

42. As to the fourth claimed interest in preserving government resources, the available data from the Congressional Budget Office establishes that recognizing the marriages of individuals married to a person of the same sex would result in an annual net increase in federal revenue. Congressional Budget Office, U.S. Congress, The Potential Budgetary Impact of Recognizing Same-Sex Marriages, June 21, 2004. Furthermore, family health coverage for same-

sex couples would provide countervailing advantages and cost savings for the government by reducing strain on social services and by strengthening the competitiveness of public employers. There was and is no basis for the claim that DOMA "preserv[es] scarce government resources."

43. While the public fisc is always a matter of concern, the government cannot achieve this interest by singling out a similarly situated vulnerable minority group, such as lesbians and gay men, for discrimination based on their sexual orientation and sex in relation to the sex of their spouse. There was and is no valid justification to deny lesbian and gay individuals who have met their obligations as taxpaying citizens and who are married to someone of the same sex the protections available to persons who are married to someone of a different sex.

44. DOMA does not maintain the status quo or promote consistency. It substantially altered the status quo with respect to the federal government's treatment of marriage and provision of marriage-related benefits and created new inconsistencies in these arenas.

45. Defendants' categorical denial of equal compensation to plaintiff based on her sexual orientation and sex in relation to the sex of her spouse subjects defendants' conduct to strict or at least heightened scrutiny. Defendants' conduct cannot withstand such scrutiny because defendants' conduct does not serve any legitimate governmental interests, let alone any important or compelling governmental interests, nor does it serve any such interests in an adequately tailored manner.

46. At root, DOMA is motivated by disapproval of lesbians and gay men and their relationships, which is an illegitimate federal interest.

Ninth Circuit EDR Review

47. In December 1997, the United States Court of Appeals for the Ninth Circuit adopted an Employment Dispute Resolution Plan ("EDR Plan"). The EDR Plan was adopted at the direction, and with the approval, of the Judicial Conference of the United States. The AO is subject to the "supervision and direction of the Judicial Conference of the United States." 28 U.S.C. § 604. As revised through December 2000, that EDR Plan prohibits employment discrimination based on, among other things, sex or sexual orientation.

48. Because the AO had informed Ms. Golinski that it would not enroll her spouse in her family plan, on October 2, 2008, Ms. Golinski timely and properly filed a complaint under the EDR Plan seeking redress of the discrimination she was suffering in the terms of her employment. She alleged that: (1) the denial of coverage violates the anti-discrimination provisions of the Ninth Circuit's EDR Plan; (2) the FEHB and DOMA do not compel such discriminatory treatment, and under those statutes, she is entitled to coverage for her spouse; and (3) such treatment violates her rights under the Fifth Amendment of the United States Constitution.

49. As required by the EDR Plan, Ms. Golinski's complaint was heard by the Chief Judge of the Ninth Circuit. Following a hearing in November 2008, the Chief Judge issued a series of orders dated November 24, 2008, January 13, 2009, November 19, 2009, December 22, 2009, and March 5, 2010. The Chief Judge's orders are attached hereto as Exhibits A-E, respectively, and are incorporated herein by reference.

50. By his orders dated November 24, 2008, and January 13, 2009, the Chief Judge ordered the Director of the AO to process Ms. Golinski's health benefit election forms without regard to Ms. Golinski's sexual orientation or the sex of her spouse. The January 13 order explained that the AO had incorrectly concluded that DOMA prohibited the extension of family health insurance coverage to a same-sex spouse of a judicial employee. (Exhibit B [January 13, 2009 Order] at 2-7.)

51. The AO complied with the Chief Judge's orders of November 24, 2008, and January 13, 2009, and submitted the appropriate enrollment papers to Ms. Golinski's insurance carrier, Blue Cross/Blue Shield, to effectuate enrollment.

Defendants' Unlawful Interference with the Provision of Benefits

52. Notwithstanding the final decision of Ms. Golinski's employing office and agency that, under the pertinent federal laws, Ms. Golinski is entitled to enroll her spouse in her family plan, OPM intervened to prevent such enrollment. On February 20, 2009, OPM sent a letter to AO stating, in part:

> As you are aware, Title 5, chapter 89 of the United States Code governs the Federal Employees Health Benefits (FEHB) Program. It provides for coverage of the employee and members of the employee's family. Members of the family are defined in the law, and include only certain unmarried dependent children and the spouse of the eligible employee or annuitant. P.L. 104-199, the Defense of Marriage Act (DOMA) requires an agency when interpreting an Act of Congress, to define the word "spouse" as a person of the opposite sex who is a husband or a wife. OPM issued guidance to agencies regarding the definitions of "marriage" and "spouse" in Benefits Administration Letter 96-111, dated November 15, 1996. This Letter is available on the OPM web site at http://www.opm.gov/retire/pubs/bals and remains in effect. Officials of agencies participating in the Federal benefits programs administered by OPM must follow the guidance provided in the Letters.

(Exhibit C [November 19, 2009 Order], at Ex. A thereto.)

53. OPM's February 20 letter further stated,

> We have advised Kaiser Foundation Health and the Blue Cross and Blue Shield Service Benefit Plans that they may not accept the enrollment forms submitted by your agency to provide coverage that is not allowed under Federal law.

(*Id*.)

54. As a result of OPM's interference, the Chief Judge issued a further order on November 19, 2009, "to protect Ms. Golinski and the integrity of the Judiciary's EDR plans." (Exhibit C at 3.) The Chief Judge explained that, as to judicial employees, the separation of powers doctrine requires that an EDR tribunal's reasonable interpretations of the law take precedence over that of any office or agency of the executive. (Exhibit C at 11-12.) The Chief Judge expressly ordered OPM to remedy its prior, erroneous guidance to Blue Cross/Blue Shield blocking Ms. Cunninghis's enrollment and to cease all prospective interference. (Exhibit C at 15-16.) The Chief Judge ordered the Clerk of the Court to serve the order on OPM (which it did), and he invited OPM to appeal. (*Id*. at 16.)

55. In that November 19, 2009 order, the Chief Judge also awarded Ms. Golinski ongoing back pay to reimburse her for the cost of purchasing separate individual insurance to cover Ms. Cunninghis. As the Chief Judge found in that order, and in the subsequent March 5, 2010 order calculating the precise amount of the back pay award, the back pay received by Ms. Golinski is inadequate to remedy the discrimination that she suffers. Because comparable

coverage is not available for purchase by individuals on the private market, Ms. Cunninghis's coverage remains inferior, in terms of both the scope of its coverage and its higher out-of-pocket costs. Moreover, as the Chief Judge observed, the award of back pay does nothing to alter Ms. Golinski's consignment to a "de facto separate, and therefore inherently unequal, benefits system based on her sex and sexual orientation."

56. OPM did not appeal the Chief Judge's November 19, 2009 order, and it did not comply with the order. Instead, it issued a press release stating, in part:

> Karen Golinski, an employee of the Federal Courts, filed a grievance against her employer claiming that the denial of enrollment of her same-sex spouse in the Federal Employees Health Benefits Plan (FEHBP) violated the Ninth Circuit's Equal Employment Opportunity policy. Ninth Circuit Chief Judge Alex Kozinski, sitting in his administrative capacity, and not as a federal judge in a court case, said that employees of the court were entitled to FEHBP health benefits for their same-sex spouses. OPM must administer the FEHBP in a lawful manner, and the Department of Justice (DOJ) has advised OPM that providing those benefits would violate the so-called "Defense of Marriage Act."
>
> * * *
>
> In other words, the current federal law means that same-sex spouses are ineligible to be enrolled in federal benefit programs that define eligibility based on their status as spouses. As the President has explained, the Administration believes that this law is discriminatory and needs to be repealed by Congress — that is why President Obama has stated that he opposes DOMA and supports its legislative repeal.
>
> * * *
>
> The decision in this matter was not reached lightly — after we learned of this development, we examined our options and consulted with the DOJ. DOJ advised us that the order issued by Judge Kozinski does not supersede our obligation to comply with existing law because it is not binding on OPM, as it was issued in his administrative capacity, and not as a judge in a court case.

(Statement from Elaine Kaplan, OPM General Counsel, *available at* http://www.washingtonpost.com/wp-srv/nation/documents/statement_from_elaine_kaplan_opm.pdf, attached hereto as Exhibit F, and incorporated herein by reference.)

57. On December 22, 2009, the Chief Judge issued a final order holding that the time to appeal the prior orders had expired, finding that those prior orders are "therefore final and

preclusive on all issues decided therein as to others who could have, but did not appeal, such as the [OPM]," and authorizing Ms. Golinski to take further action to enforce the prior orders. (Exhibit D [December 22, 2009 Order] at 1.)

58. Defendants continue to block the provision of the spousal health insurance coverage to which Ms. Golinski is entitled.

Procedural History

59. On January 20, 2010, Ms. Golinski filed the instant lawsuit, and she filed a First Amended Complaint ("FAC") on March 8, 2010. Therein she sought a writ of mandamus to direct OPM to comply with Chief Judge Kozinski's orders and injunctive relief to compel OPM to rescind its prior guidance blocking Ms. Cunninghis's enrollment, and to cease further interference.

60. On February 23, 2011, the Attorney General of the United States announced in a letter to Congress that because Section 3 of DOMA is unconstitutional, and because classifications based on sexual orientation warrant heightened scrutiny, the Department of Justice will forego defense of the statute. The Attorney General indicated, however, that "Section 3 will continue to be enforced by the Executive Branch."[2]

61. On March 16, 2011, the Court dismissed the FAC without prejudice, stating that "[t]he Court would, if it could, address the constitutionality" of "the legislative decision to enact Section 3 of DOMA to unfairly restrict benefits and privileges to state-sanctioned same-sex marriages . . . . However, the Court is not able to reach these constitutional issues due to the unique procedural posture of this matter." (Dkt. No. 98 at 11.) The Court granted Ms. Golinski leave to amend.

62. Ms. Golinski files this Second Amended Complaint to challenge defendants' unlawful and unconstitutional action blocking coverage of her spouse on terms equal to those of employees with different-sex spouses.

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[2] Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

## FIRST CLAIM FOR RELIEF
## (Unlawful Agency Action and Withholding of Benefits)

63. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 62 of this Complaint as if set forth fully herein.

64. The FEHB program is a creature of federal statute, Chapter 89 of Title 5 of the United States Code. *See* 5 U.S.C. § 8901 *et seq*.

65. Pursuant to Congressional authority OPM prescribes regulations to carry out the FEHB program and administers the program. *See* 5 U.S.C. § 8913. The pertinent regulations promulgated by OPM are contained in Part 890 of Title 5 of the Code of Federal Regulations.

66. The FEHB program extends to employees of the federal judiciary. *See generally* 5 U.S.C. §§ 2105(a)(2), 8901(1)(A).

67. Under existing FEHB statutory and regulatory provisions, the spouse of a covered employee who has elected "Self and Family" coverage is entitled to enroll, and is automatically enrolled, in the employee's health insurance plan under the FEHB program.

68. FEHB provides that "[a] contract may not be made or a plan approved which excludes an individual because of race, sex, health status, or, at the time of the first opportunity to enroll, because of age." 5 U.S.C. § 8902(f).

69. Under existing FEHB statutory and regulatory provisions, Ms. Cunninghis would be enrolled in Ms. Golinski's "Self and Family" plan but for defendants' application of DOMA, 1 U.S.C. § 7, which defendants maintain prevents provision of health insurance coverage to the spouse of an employee of the federal judiciary if that spouse is of the same sex as the employee.

70. Defendants' interference with the enrollment of plaintiff's spouse and the resulting withholding of benefits, based on plaintiff's sexual orientation and her sex in relation to the sex of her spouse, exceeds the authority delegated to defendants by Congress, contravenes the applicable laws governing FEHB, and violates plaintiff's rights under the laws of the United States and the Constitution of the United States, including her rights to equal protection and due process secured by the Fifth Amendment.

71. The disparity of treatment with regard to federal employment-related benefits available to Ms. Golinski and other similarly situated individuals is not mandated by DOMA, 1 U.S.C. § 7, but rather reflects an improper and overly narrow construction of the permissible bounds of the federal government's authority to extend coverage to family members. Federal statutory provisions as to employment-related benefits that turn on "member of family," "family," or "family members," including but not limited to 5 U.S.C. § 8901, set general guidelines and minimum requirements of coverage availability but do not establish absolute ceilings or outer boundaries of coverage.

72. To the extent that the disparity of treatment with regard to federal employment-related benefits available to Ms. Golinski is, in fact, mandated by DOMA, 1 U.S.C. § 7, that disparity of treatment creates a classification that treats similarly situated individuals differently without adequate justification and improperly burdens and penalizes her relationship, based on her sexual orientation and her sex in relation to the sex of her spouse, in violation of the rights of equal protection and due process secured by the Fifth Amendment of the Constitution of the United States.

73. An actual controversy exists between and among the parties, and plaintiff has no other adequate remedy.

**SECOND CLAIM FOR RELIEF**
**(Declaratory and Injunctive Relief, 28 U.S.C. §§ 2201-2202)**

74. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 73 of this Complaint as if set forth fully herein.

75. This case presents an actual case or controversy because there is an existing, ongoing, real, and substantial controversy between plaintiff and defendants, who have adverse interests. This controversy is sufficiently immediate, substantial, and real to warrant the issuance of a declaratory judgment because plaintiff has been denied and will continue to be denied family coverage by defendants' unlawful actions and enforcement of the unconstitutional law.

76. This case is ripe for consideration because it presents issues suitable for an immediate and definitive determination of the legal rights of the parties in this adversarial

proceeding, and plaintiff has been and will continue to be subjected to irreparable injury and significant hardship by defendants' interference with the provision of family coverage for plaintiff's spouse.

77. Plaintiff's claims are not speculative or hypothetical, but rather involve the validity of a statute that is being implemented and enforced by defendants against plaintiff and all other lesbian and gay federal employees who are legally married to persons of the same sex. Defendants' continued enforcement of the unconstitutional law will deprive plaintiff of family health coverage for her spouse, and will deprive plaintiff of the constitutional rights pleaded herein.

78. The injury plaintiff has suffered and will continue to suffer if her rights are not adjudicated herein is real, immediate, actual, concrete, and particularized and is not just threatened but certain and ongoing. No further events need take place to determine that defendants' enforcement of Section 3 of DOMA has caused and will proximately cause plaintiff irreparable injuries.

79. Plaintiff seeks injunctive relief to protect her constitutional rights and to eliminate the resultant financial and emotional harms described above. A decision enjoining defendants would redress and prevent further irreparable injuries from occurring to plaintiff.

80. The irreparable injuries plaintiff has suffered and will suffer absent injunctive relief have no adequate remedy at law or in equity. An injunction is the only way of adequately protecting plaintiff from the harms of the deprivation of her constitutional rights, the absence of family coverage to address her spouse's ongoing health needs, and the financial burden of obtaining separate health coverage for her spouse. No legal or equitable remedy short of an injunction can alleviate the stigma of the government's failure to recognize plaintiff's marital status with respect to family health insurance coverage.

81. The burden on defendants of maintaining family coverage for plaintiff will be minor or non-existent. Under its current contract with the insurer, the federal government would incur no additional cost by enrolling Ms. Cunninghis because it pays no additional money when an employee adds additional family members to a family health plan. Further, there are only a

small number of lesbian and gay federal employees who are legally married and who have sought to obtain family coverage for a spouse. In contrast, the hardship to plaintiff of being deprived of insurance coverage for her spouse is significant, immediate, and ongoing. The balance of hardships thus tips strongly in favor of plaintiff.

**PRAYER**

WHEREFORE, plaintiff Karen Golinski prays for relief as follows:

a. A declaration that Section 3 of DOMA, 1 U.S.C. § 7, is unconstitutional as applied to plaintiff to prevent provision of health insurance coverage to her spouse;

b. A declaration that Ms. Golinski and her spouse are entitled to such coverage under the FEHB program;

c. A permanent injunction enjoining defendants, and those acting at their direction or on their behalf, from interfering with the enrollment of Ms. Golinski's spouse in her family health insurance plan;

d. Costs incurred in maintaining this suit, including attorneys' fees and costs, pursuant to 5 U.S.C. § 504 and 28 U.S.C. § 2412; and

e. Such other and further relief as the Court may deem just and proper.

Dated: April 14, 2011

MORRISON & FOERSTER LLP

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: /s/ James R. McGuire
JAMES R. McGUIRE

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