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Attorneys for Plaintiff
KAREN GOLINSKI

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,

Defendant.

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

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDMGENT; MEMORANDUM OF POINTS AND AUTHORITIES

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

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, at 9:00 a.m. on September 16, 2011, or as soon thereafter as may be heard, in the courtroom of the Honorable Jeffrey S. White, located at 450 Golden Gate Avenue, San Francisco, CA 94102, plaintiff Karen Golinski, by and through her counsel, will and hereby does move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 56-1.

This motion is brought on the grounds that there is no genuine question as to any material fact and judgment should be entered in Ms. Golinski's favor as a matter of law because Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to her, and because defendants' interference with the enrollment of her spouse in her employee health insurance plan violates the prohibition on exclusion from coverage based on sex under the Federal Employee Health Benefits Act, 5 U.S.C. § 8902(f). Ms. Golinski's motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the declaration of Karen Golinski (filed herewith), the declaration of Rita F. Lin (filed herewith), the declarations of Gary Segura, Michael Lamb, Nancy Cott, Letitia Anne Peplau, and George Chauncey filed on June 24, 2011 (Dkt. 134-38), the pleadings and papers on file herein, and such other written and oral argument as may be presented to the Court.

Dated: July 1, 2011

MORRISON & FOERSTER LLP

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: /s/ Rita F. Lin
RITA F. LIN

Attorneys for Plaintiff
KAREN GOLINSKI

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SUMMARY OF ARGUMENT

The essential facts of this case are not in dispute. Relying on Section 3 of the Defense of Marriage Act ("DOMA"), defendants have blocked Karen Golinski, a federal court employee, from enrolling her spouse in her employer's family health plan. As such, Ms. Golinski is being compensated less than her similarly situated colleagues because of her sex and sexual orientation. This discrimination violates core principles of equal protection and due process.

DOMA bears the classic hallmarks of a law subject to heightened scrutiny. As confirmed by case law and expert testimony, lesbians and gay men have faced a history of discrimination and remain politically vulnerable, sexual orientation is unrelated to the ability to contribute to society, and sexual orientation is a trait fundamental to one's identity. As a matter of law, DOMA is also subject to heightened scrutiny because it discriminates based on sex and burdens the fundamental liberty interest in family relationships.

DOMA, however, cannot survive even rational basis review, let alone heightened scrutiny. Far from maintaining the "historical" status quo, DOMA radically *departs* from the federal government's longstanding adherence to state definitions of marriage. Nothing justifies singling out marriages of same-sex couples for such disapprobation. The overwhelming scientific consensus is that same-sex parents are equally likely to raise well-adjusted children as different-sex parents. And, in any event, DOMA has no effect on who can become a parent under any law. Nor does DOMA do anything to encourage heterosexuals to procreate within marriage.

Moreover, even if DOMA could withstand constitutional scrutiny, the Federal Employee Health Benefits Act ("FEHBA") bars excluding persons from coverage based on sex.

Ms. Golinski anticipates that BLAG will contend that the motion is premature. A party cannot, however, oppose a summary judgment motion based on the need for discovery that the party refuses to pursue. Before its response to this motion will be due, BLAG will already have deposed in other DOMA litigation all of Ms. Golinski's experts, whose reports in those actions are materially identical to those submitted here. Ms. Golinski has offered to stipulate to the admission of those depositions here, or in the alternative, has invited BLAG to propose a schedule for discovery and to extend BLAG's opposition deadline as needed. BLAG has refused.

STATEMENT OF ISSUES

Whether DOMA is unconstitutional as applied here.

Whether the denial of spousal health coverage violates the prohibition on exclusion from coverage based on sex under 5 U.S.C. § 8902(f).

STATEMENT OF UNDISPUTED FACTS

A. The Passage of DOMA in 1996

DOMA, hastily enacted in 1996 in anticipation of potential marriage rights for same-sex couples in Hawaii, sweepingly excludes same-sex couples from the definition of marriage for all federal purposes:

> 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.

1 U.S.C. § 7.

As explained in Ms. Golinski's opposition to BLAG's motion to dismiss,[1] DOMA's passage marked an unabashed expression of congressional animus towards homosexuality and same-sex relationships. Congress acknowledged that the Act marked a dramatic departure from the federal government's longstanding deference to state law marriage determinations. (*See* Dkt. 133 at 2.) Nonetheless, despite the Act's blunderbuss impact on hundreds of federal rights dependent on marital status, Congress conducted virtually no fact-finding, but instead set out to demonstrate its "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664 at 16 (1996) (footnote omitted), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920. (*See* Dkt. 133 at 2-3.) Rep. Henry Hyde, then-Chairman of the House Judiciary Committee, stated: "Most people do not approve of homosexual conduct . . . and they express their disapprobation through the law. . . . It

[1] To avoid repeating arguments in this brief, Ms. Golinski incorporates by reference her opposition to defendants' and BLAG's motions to dismiss. (Dkt. 133.)

is . . . the only way possible to express this disapprobation." 142 CONG. REC. H7480, 7501 (daily ed. July 12, 1996). In the floor debate, legislators referred to homosexuality as "immoral," "depraved," "unnatural," "based on perversion" and "an attack upon God's principles," and asserted that marriage by lesbians and gay men would "demean" and "trivialize" marriage for heterosexuals. (*See* Dkt. 133 at 3 (citing statements by legislators).)

B. Ms. Golinski's Attempt to Enroll Her Spouse in Her Health Plan.

Karen Golinski is a Staff Attorney in the Motions Unit of the Ninth Circuit, where she has been employed for 19 years. (Declaration of Karen Golinski in Support of Motion for Summary Judgment ("Golinski Decl.") ¶ 2.) Ms. Golinski met Amy Cunninghis in 1989 and has been in a committed relationship with her ever since. (*Id.* ¶ 3.) They registered as domestic partners with the City and County of San Francisco in 1995 and with the State of California in 2003. (*Id.*) They were legally married under the laws of the State of California on August 21, 2008 and remain lawfully married. (*Id.*) They have an eight-year-old son. (*Id.*)

On September 2, 2008, shortly after the couple's marriage, Ms. Golinski attempted to add Ms. Cunninghis to her existing Blue Cross/Blue Shield family coverage health insurance plan, which at the time covered Ms. Golinski and their son. (Golinski Decl. ¶¶ 4, 7.) Her request was refused because Ms. Cunninghis is of the same sex as Ms. Golinski. (*Id.* ¶¶ 8-9, Exs. C and D.) Thus, although Ms. Golinski pays the full rate for self and family coverage from Blue Cross/Blue Shield, she receives coverage only for herself and her son, not for her entire family. (*Id* ¶ 4.)

As a result of the denial, Ms. Golinski is receiving significantly less compensation, in terms of her employment benefits, than her similarly situated colleagues who have different-sex spouses. If Ms. Golinski were a man, she would have been able to add Ms. Cunninghis to her existing family health plan at no additional cost to herself or her employer. (*Id.* ¶ 10, Ex. E.) For example, Ms. Golinski's coworker Kenneth Sogabe had the same job title as Ms. Golinski and had only worked for the Ninth Circuit for one year, but received spousal health insurance for his wife as a matter of course. (Declaration of Rita F. Lin in Support of Motion for Summary Judgment ("Lin Decl."), Ex. A.)

Because Ms. Golinski has been denied health insurance for her spouse, her family has had

to purchase separate individual insurance for Ms. Cunninghis, who receives no medical coverage through her work as a contract employee at a nonprofit organization. (Golinski Decl. ¶ 5.) That separate health plan provides coverage that is significantly inferior to Ms. Golinski's plan. (*Id.* ¶ 6, Exs. A-B.) For example, in addition to imposing higher co-pays and a $1,700 deductible, Ms. Cunninghis's plan saddles Ms. Golinski's family with 30% of treatment costs for most care for Ms. Cunninghis, whereas Ms. Golinski's employer-sponsored plan would cover 100% of those costs after applicable co-pays. (*Id.* ¶¶ 6, 14, Exs. A and B.) In addition, Ms. Cunninghis's individual plan places an annual cap of $2,500 on brand name prescription medications, whereas Ms. Golinski's plan has no such cap. (*Id.*)

Ms. Cunninghis's underinsured status causes significant anxiety for Ms. Golinski and her family. If Ms. Cunninghis were to suffer any major illness or accident requiring significant ongoing medical care and brand-name prescription medication, the costs for Ms. Golinski's family could run into the tens or even hundreds of thousands of dollars, posing a significant financial hardship. (*Id.* ¶ 15.) In addition, Ms. Cunninghis continues to forgo important preventive care due to its cost. (*Id.* ¶ 14) This preventive care would be fully covered, without additional charge, under Ms. Golinski's plan. (*Id.*) Ms. Golinski and Ms. Cunninghis have studied twenty-six individual coverage options for a woman of Ms. Cunninghis's age and geographic location, including a plan with a monthly premium of $1,152. (*Id.* ¶ 13, Ex. G.) None of these plans provides coverage comparable to Ms. Golinski's. (*Id.*)

The discriminatory denial of equal spousal health coverage is painful and degrading for Ms. Golinski. (Golinski Decl. ¶ 16.) She is proud of her nearly two decades of public service with the Ninth Circuit Court of Appeals. (*Id.*) Yet, her spouse's underinsured status is a daily reminder that the government she serves regards her as unequal to her heterosexual co-workers. (*Id.*)

Ms. Golinski filed a complaint under the Ninth Circuit's Employment Dispute Resolution ("EDR") Plan on October 2, 2008, challenging the denial of coverage. (Lin Decl. Ex. B (January 13, 2009 EDR Order).) By Orders dated November 24, 2008, and January 13, 2009, Chief Judge Kozinski found that Ms. Golinski had indeed suffered unlawful discrimination and

therefore ordered the Administrative Office of the United States Courts (the "AO") to forward Ms. Golinski's enrollment forms to her insurer. (*Id.*) Although the AO complied, OPM moved to block the provision of coverage, directing the AO and Blue Cross/Blue Shield not to process Ms. Golinski's forms. (*Id.* (November 19, 2009 Order).) Chief Judge Kozinski ordered OPM to cease and desist its interference. (*Id.*) After OPM refused, Ms. Golinski filed this suit.

LEGAL STANDARD

A court must grant summary judgment when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The responding party must then present specific facts by affidavit or other admissible evidence showing that contradiction is possible. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir. 1978). Rather than a mere "scintilla" of support, the responding party bears the burden of showing that the trier of fact could reasonably find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

ARGUMENT

I. DOMA CANNOT PASS CONSTITUTIONAL SCRUTINY.

A. Undisputed Facts Demonstrate That DOMA is Subject to Heightened Scrutiny.

1. The Courts Should Carefully Scrutinize Discrimination Based on Sexual Orientation Classifications.

As detailed in Ms. Golinski's opposition to BLAG's motion to dismiss (Dkt. 133 at 5-10), the appropriate level of scrutiny for sexual orientation classifications remains unsettled under Ninth Circuit and Supreme Court jurisprudence. This Court instead should be guided by the traditional considerations determining whether heightened scrutiny is warranted, which call for elevated scrutiny here. *See id.* at 8-15 (analyzing in greater detail why sexual orientation classifications require heightened scrutiny); *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), (appeal pending); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 43 Cal. 4th 757, 841-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*,

957 A.2d 407, 432-61 (Conn. 2008). While no single factor for determining elevated scrutiny is dispositive, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976), the presence of any of the following factors is a sign that the particular classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), and hence demands heightened scrutiny.

a. Settled Law and Undisputed Evidence Demonstrate a History of Discrimination Against Lesbians and Gay Men.

The Ninth Circuit has recognized for at least two decades that "homosexuals have suffered a history of discrimination." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants 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*"); *Watkins*, 875 F.2d at 724 (Norris, J., concurring); *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J., dissenting from denial of certiorari); *Perry*, 704 F. Supp. 2d at 981; Report from Attorney General to Speaker of House of Representatives, February 23, 2011 ("Attorney General Report") at 2, *available at* www.justice.gov/opa/pr/2011/February/11-ag-223.html. This long and painful history of discrimination, which remains ongoing, also has been extensively documented by Ms. Golinski's expert witnesses. (*See* Chauncey Decl., Dkt. 134 ¶¶ 6-103.) Defendants signal no dispute here, and no court to consider the question has found otherwise.

b. Sexual Orientation Is Unrelated to the Ability to Contribute to Society.

Rather than resting on "meaningful considerations," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), laws that discriminate based on sexual orientation, like laws that discriminate based on race, national origin or sex, target a characteristic that "bears no relation to ability to perform or contribute to society." *Id.* at 440-41 (citation omitted). BLAG has not suggested that a person's sexual orientation bears in any way upon an individual's ability to contribute to society, nor could BLAG dispute this fact given the overwhelming evidence to the

contrary.[2] As courts have recognized, "by every available metric . . . as partners, parents and citizens, opposite-sex couples and same-sex couples are equal." *Perry*, 704 F. Supp. 2d at 1002. *See also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987) (quoting the American Psychological Association for the proposition that homosexuality "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities"), *rev'd in part on other grounds*, 895 F.2d 563 (9th Cir. 1990); *Watkins*, 875 F.2d at 725 (Norris, J., concurring).

c. Sexual Orientation Is a Defining and Immutable Characteristic.

Nor can BLAG argue there is a triable issue of fact regarding the immutable nature of sexual orientation, given Ninth Circuit authority already addressing this point. As a threshold matter, federal equal protection doctrine does not treat immutability as a prerequisite for determining whether a classification warrants strict scrutiny. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 375-76 (1971) (classifications based on alienage subject to strict scrutiny). But, in any event, the Ninth Circuit already has recognized that sexual orientation is "immutable" and "so fundamental to one's identity that a person should not be required to abandon [it]." *See, e.g., Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds, Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). This understanding conforms with the settled consensus of the major professional psychological and mental health organizations. (*See* Peplau Decl., Dkt. 137 ¶ 21; Attorney General Report at 3.)[3] Courts have considered a trait "immutable" when altering it would "involve great difficulty, such as requiring a major physical

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[2] *See* Peplau Decl., Dkt. 137 ¶ 11 ("homosexuality is a normal expression of human sexuality"); ¶ 31 ("[l]esbians and gay men are as able to form loving, committed relationships" as heterosexuals; and, an "extensive body of research that examines the quality and functioning of same-sex relationships demonstrates that same-sex couples are not inherently different from heterosexual couples" and "closely resemble" heterosexuals); *and generally* ¶¶ 29-33. *See also* Section II.B.2 (describing overwhelming consensus that same-sex parents raise children equally likely to be well-adjusted as different-sex parents).

[3] *See also* Peplau Decl., Dkt. 137 ¶ 10 ("Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective."); *see generally* ¶¶ 19-28; American Psychological Association, *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel* at 5 (2008) (the notion that sexual orientation can be changed "has been rejected by all the major health and mental health professions"), *available at* www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

change or a traumatic change of identity," or when the trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." *Watkins*, 875 F.2d at 726 (Norris, J., concurring); *Perry*, 704 F. Supp. 2d at 964 ("No credible evidence supports a finding that an individual may . . . change his or her sexual orientation").

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

As the Attorney General, as well as Plaintiff's expert, confirm, lesbians and gay men "have limited political power and 'ability to attract the [favorable] attention of the lawmakers.'" (Attorney General Report at 3 (citing *Cleburne*, 473 U.S. at 445); Segura Decl., Dkt. 138 ¶¶ 9-85 (detailing ongoing political powerlessness of lesbians and gay men).) This factor examines relative political powerlessness: whether the "discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440. In its motion to dismiss, BLAG incorrectly approached the inquiry — as did the majority opinion in *High Tech Gays* — as one of absolute, rather than relative, political powerlessness, fatally "skew[ing] equal protection analysis as ordained by the Supreme Court." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 909 F.2d 375 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc).

Under BLAG's approach, neither race- nor sex-based classifications would have warranted more than rational basis review. When *Korematsu v. United States*, 323 U.S. 214 (1944), was decided, race discrimination was prohibited by three federal constitutional amendments and federal civil rights enactments dating back to 1866. *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting from denial of rehearing en banc); *see also* Segura Decl., Dkt. 138 ¶¶ 84-85. When the Supreme Court applied heightened review to sex-based discrimination in *Frontiero v. Richardson*, 411 U.S. 677 (1973), Congress had "manifested an increasing sensitivity to sex-based classifications" by enacting protections under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and by approving the federal Equal Rights Amendment for ratification by the states. *Id.* at 685, 686 n.17, 687; *see also* Segura Decl., Dkt. 138 ¶¶ 82-83.

As was true for women at the time of *Frontiero*, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17

(noting that there never had been a female President, U.S. Supreme Court Justice or U.S. Senator; only 14 women held seats in the U.S. House of Representatives; and underrepresentation was present throughout all levels of state and federal government). Congress has only four openly gay members. (Segura Decl., Dkt. 138 ¶ 46.) No openly gay person has ever served as President, on the U.S. Supreme Court, in the U.S. Senate or as a Cabinet level appointee. (*Id.*) Several systemic barriers contribute to this marked disparity, including gay peoples' invisibility (*id.* ¶¶ 56-65), their targeting for hostility (*id.* ¶¶ 66-74), powerful and well-funded opposition (*id.* ¶¶ 79-80), and relatively small minority numbers (*id.* ¶ 49.)

Moreover, rather than affording lesbians and gay men effective means to protect themselves from discrimination, the legislative process has frequently disadvantaged them. (*See, e.g.*, Segura Decl., Dkt. 138 ¶ 43 ("The initiative process has now been used specifically against gay men and lesbians more than against any other social group.").) Ballot initiatives in no fewer than three-fifths of the states have sought to eliminate their right to marry, and eleven additional states expressly deny that right through statute. (*Id.* ¶ 34.)[4] To this day, lesbians and gay men remain unprotected in a majority of states against discrimination in the most basic transactions of ordinary life. (*Id.* ¶¶ 29, 33.) "[M]ore searching judicial inquiry" is warranted exactly where, as here, majoritarian bias "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). BLAG's observations in its motion to dismiss about the enactment of the Matthew Sheppard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 and the Don't Ask Don't Tell ("DADT") Repeal Act of 2010[5] do not controvert the clear and indisputable evidence that lesbians and gay men remain a politically vulnerable minority. (*See* Segura Decl., Dkt. 138 ¶¶ 25, 52-55; *see also* Attorney General Report at 3 (while "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.'").)

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[4] *See also* Segura Decl., Dkt. 138 ¶¶ 35-39 (describing initiatives stripping gay people of right to be free of discrimination, marry and adopt); Chauncey Decl., Dkt. 134 ¶¶ 97-102.

[5] *See* Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 and Pub. L. No. 111-321, §§ 1-2, 124 Stat. 3515, 1-2, respectively.

DOMA's sexual orientation-based classification entirely excluding all married same-sex couples from federal marital protections thus satisfies the standards for heightened scrutiny.

2. DOMA's Discrimination Based on Ms. Golinski's Sex Requires Heightened Scrutiny.

DOMA is subject to heightened scrutiny not only because it discriminates based on sexual orientation, but also because it discriminates based on sex. *See United States v. Virginia*, 518 U.S. 515, 524-25 (1996). The undisputed facts show that Ms. Golinski has been denied spousal coverage based on her sex in relation to the sex of her spouse. (Golinski Decl. ¶ 10, Ex. E.) As Judge Reinhardt reasoned in *Levenson*, if Ms. Golinski were a man, she could secure health coverage for her spouse, but she is denied them simply because she is a woman. *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. EDR 2009). (*See also* Golinski Decl. ¶ 10, Ex. E (email admitting that if Ms. Golinski's spouse were a man, she would be eligible for spousal coverage).) Courts have recognized that discrimination against lesbians and gay men because they form a life partnership with a same-sex rather than a different-sex partner is sex discrimination. (*See* Dkt. 133 at 14-15 (citing cases).) As described further in Ms. Golinski's opposition to BLAG's motion to dismiss (*Id.* at 15-16), DOMA's sex-based distinction is no less invidious because it equally denies men and women eligibility for a same-sex spouse's insurance coverage. *Cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967).

3. DOMA Impermissibly Burdens Ms. Golinski's Fundamental Liberty to Sustain an Intimate Family Relationship, Triggering Heightened Scrutiny on that Basis as Well.

DOMA deprives Ms. Golinski of substantive due process by burdening her constitutional liberty to build a family life with her same-sex partner and by unconstitutionally conditioning equal treatment on the exercise of that liberty interest in a government-favored heterosexual manner. The undisputed evidence demonstrates that DOMA's preclusion of health insurance to Ms. Golinski's spouse subjects the couple to the risk that Ms. Cunninghis may suffer serious untreated illness, potentially ruinous financial consequences, and significant anxiety about this ongoing vulnerability. (Golinski Decl. ¶ 15.) No adequate government interest can sustain this impermissible burden on Ms. Golinski's family relationship. As further described in

Ms. Golinski's opposition to BLAG's motion to dismiss (Dkt. 133 at 16-18), family relationships enjoy constitutional protection as a fundamental aspect of personal liberty, and laws cannot withstand constitutional scrutiny when they penalize or otherwise place a government-imposed stamp of stigma on such private relationships. Yet, that is precisely what DOMA does.

Moreover, the Supreme Court repeatedly has held that government benefits may not be conditioned on requiring people to consent to an infringement on their constitutionally protected interests. By restricting federal recognition to those who exercise their liberty in a private family relationship only in a government-sanctioned heterosexual manner, DOMA imposes precisely this type of unconstitutional condition. (*See* Dkt. 133 at 16-18 (describing case law).)

Because DOMA cannot survive even rational basis review, as described below, DOMA fails heightened scrutiny as well under any of the theories discussed above.

B. DOMA Cannot Survive Even Rational Basis Scrutiny, Let Alone the Heightened Scrutiny Required Under DOMA.

Even if rational basis review applied here, DOMA would warrant the particularly careful and searching rational basis review applied to laws targeting a politically unpopular group and inhibiting important personal relationships. (*See* Dkt. 133 at 18-19.) DOMA, however, cannot survive even the most deferential form of rational basis review, let alone the searching review required here.

1. As a Matter of Law, DOMA Cannot Be Justified Based on an Interest in Preserving "Traditional" Heterosexual Marriage.

The denial of health coverage to Ms. Golinski's spouse bears no conceivable relationship to the likelihood that Ms. Golinski, or anyone else, will enter or remain in a "heterosexual marriage." (*See* Dkt. 133 at 20-21.) The notion that the denial of spousal health coverage would somehow encourage gay people to enter into heterosexual marriages has no basis in law or fact. (*Id.*; *see also* Part I.A.1.c, *supra* (summarizing Ninth Circuit case law and undisputed evidence treating sexual orientation as immutable).) Nor is there any evidence that providing equal health coverage will somehow destabilize existing heterosexual marriages. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (granting summary judgment because "denying

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 suggests that DOMA can be defended as maintaining the "historical" status quo. As explained in Ms. Golinski's opposition to BLAG's motion to dismiss, however, DOMA radically *departs* from the federal government's longstanding adherence to state definitions of marriage in every respect. (*See* Dkt. 133 at 22-23.) The federal government has no valid interest in advancing its own definition of marriage separate from state law, which the Supreme Court has consistently held remains sovereign over the subject of domestic relations. (*Id.* at 21-22.) Marriage eligibility requirements have long varied over time and across state lines concerning common law marriage, age requirements, inter-racial marriage, first-cousin marriage and divorce law. (Cott Decl., Dkt. 135 ¶¶ 24-64.) Nonetheless, until DOMA, the federal government had never found such inconsistencies to be a problem, and it continues to tolerate inconsistencies in every respect but this one.

Moreover, adhering to a "historic" definition of marriage is not a legitimate government end in itself, but instead a mere tautology. At best, it merely describes what the law does, not a reason for doing it. The Supreme Court has not hesitated to strike down "historic" laws targeting gay people, recognizing that the ancient lineage of discrimination does not make it rational. (Dkt. 133 at 23-24.) The same reasoning should apply here.

2. DOMA Does Not Promote "Responsible Procreation."

In granting summary judgment for the plaintiffs, *Gill* "readily dispos[ed]" of the claim that DOMA was intended to "encourag[e] responsible procreation and child-bearing." 699 F. Supp. 2d at 378, 388. That conclusion applies with equal force here. It is "beyond scientific dispute" that same-sex married couples are anything less than equally capable parents. (Lamb Decl., Dkt. 136, ¶ 14.) "Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill*, 699 F. Supp. 2d at 388; *see also* Dkt. 133 at 24-26 (collecting cases). The leading authorities on pediatrics, psychology and child welfare have issued numerous policy statements

and publications confirming this conclusion. (*See* Dkt. 133 at 24 n.21 (collecting authorities); *see also* Lamb Decl. ¶ 32, Ex. B.) Thirty years of scholarship, including more than 50 peer-reviewed empirical reports, overwhelmingly demonstrate that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by different-sex parents. (Lamb Decl. ¶¶ 29-32.)

BLAG nonetheless insists that "[l]ogically," children raised by a same-sex married couple may have a different experience because the "two sexes are not fungible." (Dkt. 119-1 at 26-27.) No empirical evidence supports that view. "There is . . . no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well-being." (Lamb Decl. ¶ 14.) Though mothers and fathers often interact with children differently, many parents do not conform to traditional sex-typed parenting styles, without ill effect. (*Id.* ¶¶ 26-27.) And "[s]ociety is replete with role models from whom children can learn about socially prescribed male and female roles." (*Id.* ¶ 28.) The publications relied upon by BLAG do not cite any evidence to the contrary, and instead base their conclusions on studies regarding absent fathers or one-parent families.[6] One-parent family situations, however, are not comparable to families headed by two married same-sex parents. The "primary causes of increased risk of maladjustment among children or adolescents in one-parent families are the reduced resources available when there is one parent, and the disruptive effects of and conflict associated with parental separation," not the parents' sex or sexual orientation. (*Id.* ¶¶ 22-23, 37-38.)

BLAG's motion to dismiss makes much of the notion that the government does not bear the initial burden to put forth empirical evidence of a rational relationship. (Dkt. 119-1 at 23.) That, however, does not mean that the rationality of the government's view is beyond evidentiary

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[6] *See* David Popenoe, *Life Without Father* (1996) (discussing the effect of "absent fathers" in one-parent households); George William Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, at *595 (1999) (discussing studies regarding "[t]he father's absence from the home" in one-parent households); Maggie Gallagher, *What is Marriage For?*, 62 La. L. Rev. 773 (2002) (same); Maggie Gallagher, *The Case for Marriage* (2000) (same); Lynn D. Wardle, *Multiply and Replenish*, 24 Harv. J.L. & Pub. Pol'y 771, at *790-91 (2001) (discussing studies about "children born out of wedlock" in "one parent, never married families").

attack. "The Supreme Court has cautioned that 'even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation.' . . . Consistent with this admonition, our circuit has allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 590-591 (9th Cir. 2008) (citation omitted). Accordingly, where evidence is proffered by a party challenging a statutory classification, and a summary judgment motion is brought, courts have routinely carried out their traditional role under Rule 56 of assessing whether there is a triable issue of material fact as to the rationality of the classification.[7]

Furthermore, DOMA is not rationally related to encouraging heterosexual parenting. DOMA has no effect on who can or should become a parent under any law. (*See* Dkt. 133 at 26-27.) Nor does DOMA, or indeed any state law (present or past), require the ability to procreate as a precondition to marriage. (*Id.* at 26.) DOMA's non-recognition of marriages between same-sex couples does not in any conceivable way encourage *heterosexuals* to raise children within married relationships. (*Id.* at 26-27 (collecting cases).) Though the fit between a classification and a stated government interest need not be perfect under rational basis review, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446; *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22 (1985). (*See also* cases cited at Dkt. 133 at 27.) As a matter of undisputed evidence, there is no such relationship here.

[7] *See, e.g.*, *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (in equal protection challenge to city's moratorium on new water hookups, which city claimed were needed due to water shortage, analyzing whether there was factual dispute under Rule 56 about whether water shortage existed); *Parks v. Watson*, 716 F.2d 646, 654-55 & n. 4 (9th Cir. 1983) (when developer brought an equal protection claim against city for requiring developer to relinquish a well before it could build, analyzing whether there was factual dispute under Rule 56 about whether developer had failed to submit drawings and whether public access was rational concern in light of easement to which developer had agreed).

3. Any Attempt to Justify DOMA Based on "Traditional Notions of Morality" or "Preservation of Scarce Resources" Fails as a Matter of Law Under Controlling Supreme Court Precedent.

In enacting DOMA Congress asserted an interest in defending "traditional notions of morality" and in "preserv[ation] [of] scarce . . . resources," H.R. Rep. No. 104-664, at 12-18, which likewise fail rational basis review.

BLAG itself has retreated from the "morality" justification, making no attempt to defend that asserted interest as satisfying even the most deferential form of rational basis review. "Traditional" views of morality are insufficient justification for discrimination. "[T]he fact that the 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." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citation omitted); *see also In re Levenson*, 587 F.3d 925, 931-32 (9th Cir. 2009).

Preservation of scarce resources is equally flawed as a justification for blocking equal health coverage. *Any* denial of benefits to a particular group might be deemed to conserve resources, but the question, at the very least, is whether Congress selected a valid and rational line for deciding on whom to impose the burdens of cost-cutting. *See Plyler*, 457 U.S. at 227 (the government "must do more than justify its classification with a concise expression of an intent to discriminate"); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[a state] must do more than show that denying welfare benefits to new residents saves money"), *overruled in part on other grounds by Edelmann v. Jordan*, 415 U.S. 651 (1974); *In re Levenson*, 587 F.3d at 932-33. None has been identified here. *See Gill*, 699 F. Supp. 2d at 390 ("This court can discern no principled reason to cut government expenditures at the particular expense of plaintiffs . . . ."); *Dragovich v. United States Dep't of the Treasury*, No. 10-01564, 2011 U.S. Dist. LEXIS 4859, at *33 (N.D. Cal. Jan. 18, 2011) ("preservation of resources does not justify barring some arbitrarily chosen group of individuals from a government program").

II. THE REFUSAL TO PROVIDE EQUAL SPOUSAL HEALTH COVERAGE ALSO VIOLATES THE FEDERAL EMPLOYEE HEALTH BENEFITS ACT.

Furthermore, even if DOMA could withstand constitutional scrutiny, nothing in DOMA or the Federal Employee Health Benefits Act ("FEHBA") bars spousal health coverage here. To

the contrary, as explained in Ms. Golinski's opposition to defendants' motion to dismiss, FEHBA *prohibits* the exclusion of Ms. Golinski from spousal health coverage based on her sex. (*See* Dkt. 133 at 28-30.)

III. THE UNDISPUTED EVIDENCE SHOWS THAT MS. GOLINSKI SATISFIES THE REQUIREMENTS FOR INJUNCTIVE AND DECLARATORY RELIEF.

The undisputed evidence establishes that Ms. Golinski satisfies the requirements for declaratory relief. "In a case of actual controversy within its jurisdiction," this Court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The Court has jurisdiction over this action, and defendants' ongoing discriminatory treatment of Ms. Golinski plainly poses a justiciable controversy. Ms. Golinski also satisfies the criteria for permanent injunctive relief. Such relief is appropriate when a party shows "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (citation omitted).

Ms. Golinski not only has suffered, but continues to suffer on a daily basis, substantial irreparable injury. Defendants blocked the provision of important employment benefits to her more than two and one-half years ago, and as a result of their discriminatory conduct, Ms. Golinski still lacks access to the spousal health benefits the government routinely provides to similarly situated employees. (*See* Statement of Undisputed Facts, *supra*.) Ms. Golinski and her spouse suffer not only the stigma of official governmental discrimination and second-class treatment but also severe anxiety concerning the health risks to Ms. Cunninghis as a result of her underinsured status. (*See id.*) Monetary damages provided after the fact cannot compensate Ms. Golinski for this harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (where a plaintiff showed (1) loss of a contract, and (2) unconstitutional discrimination, explaining that "[w]hile money damages might remedy the first harm, it is not apparent to us how they would remedy the second," and "an alleged constitutional infringement will often alone

constitute irreparable harm."); *Angotti v. Rexam, Inc.*, No. C 05-5264, 2006 U.S. Dist. LEXIS 42104, at *51 (N.D. Cal. June 14, 2006) (in case involving access to Medicare benefits, finding "irreparable harm of anxiety, even for those . . . who ultimately may not take advantage of . . . benefits during the course of this litigation"); *In re Golinski*, 587 F.3d 956, 960 (9th Cir. EDR 2009) (Kozinski, C.J.) ("[T]here is an inherent inequality in allowing some employees to participate fully in the FEHBP, while giving others a wad of cash to go elsewhere. Even if the destination is the same, it's still the back of the bus.").

The balance of equities tips sharply in Ms. Golinski's favor as well. Defendants' unlawful conduct substantially harms her, while the government in fact stands to benefit by ceasing its discriminatory treatment.[8] Moreover, adding Ms. Golinski's spouse to her health plan will cost the government nothing under its current contractual arrangement with the insurer. (Golinski Decl. ¶ 10, Ex. E.) It costs the taxpayer *more* to provide Ms. Golinski the back pay she currently receives to compensate her for purchasing separate, inferior insurance. (Lin Decl. ¶ 3, Ex. B (March 5, 2010 EDR Order).) Ms. Golinski requests that the Court enjoin defendants from interfering with the enrollment of her spouse in her family health plan.

IV. BLAG'S ANTICIPATED ATTACK ON THIS MOTION AS PREMATURE IS UNWARRANTED, PARTICULARLY GIVEN BLAG'S REFUSAL TO MEET AND CONFER REGARDING A SCHEDULE PERMITTING DISCOVERY.

Ms. Golinski anticipates that BLAG will reiterate its claim that her motion for summary judgment is "premature." (*See* Dkt. 127 at 4.) Rule 56 expressly authorizes a summary judgment motion at any time prior to the close of discovery. Fed. R. Civ. P. 56(b). Though a party may oppose summary judgment as premature, a party opposing summary judgment on that basis bears the burden to demonstrate, via declaration, the *specific* facts on which discovery is necessary in

[8] As defendant John Berry explained when testifying before Congress on behalf of OPM in support of the Domestic Partnership Benefits and Obligations Act, the denial of equal benefits to life partners of gay and lesbian employees is not only "unjust" but "directly undermines the Federal Government's ability to recruit and retain the nation's best workers." Statement of John Berry, Director, U.S. Office of Personnel Management, July 8, 2009, *available at* http://www.opm.gov/News_Events/congress/testimony/111thCongress/07_08_2009.asp; *see also* H.R. Rep. 86-957 at 1-2 (a principal legislative purpose of FEHBA was to "close the gap" with private sector and improve "competitive position of the government with respect to private enterprise in the recruitment and retention of competent civilian personnel").

order to oppose summary judgment and the *specific* reason why such facts are unavailable to that party. *See* Fed. R. Civ. P. 56(d) (requiring declaration that "for specified reasons" the nonmovant "cannot present facts *essential* to justify its opposition") (emphasis added); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) ("A party requesting a continuance pursuant to Rule 56(f) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment."); *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001) (similar).[9] Therefore, if it seeks delay, BLAG "must show: (1) it has set forth in affidavit form the *specific* facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are *essential* to resist the summary judgment motion." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (emphasis added).

Here, many of the essential facts about Ms. Golinski's situation — that she was denied spousal health coverage that would have been routinely available to her if her spouse had been a man — are not in dispute. The only conceivable potential area for factual development is the expert testimony regarding Ms. Golinski's constitutional claims.

Ms. Golinski has repeatedly attempted to provide BLAG every opportunity to develop any facts that it believes necessary to refute the expert testimony that she has submitted, but BLAG has declined to do so. The expert declarations submitted in support of this motion provide all the information required of an expert report under Rule 26. Each of those experts provided materially identical declarations to BLAG in *Windsor v. United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y.), on May 16 and 20, 2011. (Lin Decl. ¶ 4, Ex. C.) The same experts also provided the materially identical declarations to BLAG in another DOMA challenge, *Pedersen v. OPM*, No. 10-CV-1750 (VLB) (D. Conn.). (*Id.* ¶ 6, Ex. E.) In *Windsor*, BLAG has already deposed two of those experts and is scheduled to complete depositions of the remaining three prior to its deadline to oppose this motion. (*Id.* ¶ 4.) On June 7, 2011, well in advance of those

[9] Until amendment to the Rules in 2010, what is now Rule 56(d) was set forth in Rule 56(f). *See* Fed. R. Civ. P. 56, *Notes of Advisory Committee on 2010 amendments* ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).").

depositions, Ms. Golinski offered to stipulate to the admissibility of the expert depositions from *Windsor* in this matter, so long as BLAG and defendants agreed not to re-depose the experts here (*id.* ¶¶ 7-8, 10, Exs. F and H), an arrangement BLAG already has entered into in *Pedersen*. (*Id.* ¶ 6, Ex. E.) Despite several attempts by Ms. Golinski to resolve the issue in a manner that will simplify the discovery process and conserve all parties' time and resources, BLAG has refused to respond. (*Id.* ¶¶ 7-8, 10-12, Exs. F, H, I.)

Unable to obtain an answer from BLAG, Ms. Golinski also repeatedly invited BLAG to discuss an expert discovery schedule, including whether BLAG intended to designate any experts of its own. (Lin Decl. ¶¶ 7-8, 10-12, Exs. F, H, I.)[10] Plaintiff specifically asked what else, if anything, BLAG anticipated needing in terms of discovery, and offered to respond to written discovery on a shortened time frame if necessary. (*Id.* Ex. H.) Plaintiff also offered to extend BLAG's time to oppose summary judgment in order to provide sufficient time for any necessary discovery. (*Id.*) BLAG again refused to respond. (*Id.* ¶ 12.)

Discovery has been open in this case since the parties' Rule 26(f) conference on May 24, 2010. (Dkt. 50 at 1.) Though BLAG has been free to conduct discovery and to confer about a schedule to permit discovery in advance of its opposition deadline, it has refused to do so. BLAG has no basis to demand a Rule 56(d) stay to conduct discovery while at the same time refusing to move forward with such discovery. *See, e.g.*, *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006) (explaining that a party seeking a Rule 56(d) delay must have "diligently pursued previous discovery opportunities") (citation omitted); *Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002) (no continuance because party seeking delay "had ample opportunity to conduct discovery").

Moreover, BLAG's assertion that it does not want to incur the cost of discovery prior to resolution of its motion to dismiss rings hollow. BLAG is already incurring the cost of pursuing discovery in order to oppose summary judgment motions by plaintiffs in other similar DOMA

[10] BLAG has not designated any experts of its own in preparing to oppose the plaintiffs' summary judgment motions in *Windsor* or *Pedersen*. (Lin Decl. ¶ 6.)

cases, in which all fact and expert discovery is scheduled to close before BLAG's opposition to this motion is even due in this action. (Lin Decl. Exs. D-E (*Windsor* and *Pedersen* scheduling orders).) Ms. Golinski has offered to limit BLAG's costs by permitting it to rely on that same expert discovery from other matters. Yet, BLAG has declined to even discuss that offer. BLAG's desire to delay this case for its own strategic reasons is not a basis for prolonging resolution of a case that is ripe for summary judgment.

CONCLUSION

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

Dated: July 1, 2011

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