

**American Bankruptcy Institute**

Case 2:11-bk-17831-NB Doc 29 Filed 04/15/11 Entered 04/15/11 15:25:10 Desc  
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**ADDITIONAL SERVICE INFORMATION**

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August 2010

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12  
13 **UNITED STATES BANKRUPTCY COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **LOS ANGELES DIVISION**

16 In re:  
17 Gene Douglas Balas and Carlos A. Morales,  
18  
19 Debtors.

Case No.: 2:11-bk-17831-AA

Chapter 13

**DEBTORS' OPPOSITION TO THE  
U.S. TRUSTEE'S MOTION TO  
DISMISS AND RESPONSE TO THE  
U.S. TRUSTEE'S CONFIRMATION  
OBJECTION; MEMORANDUM OF  
POINTS AND AUTHORITIES;  
DECLARATION OF GENE  
DOUGLAS BALAS; DECLARATION  
OF CARLOS A. MORALES**

Date: May 11, 2011  
Time: 1:30 p.m.  
Place: Courtroom 1345  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, California 90012

26  
27  
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1 **STATUTES**

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1 TO THE HONORABLE THOMAS B. DONOVAN,<sup>1</sup> UNITED STATES  
2 BANKRUPTCY JUDGE; PETER C. ANDERSON, UNITED STATES TRUSTEE;  
3 HATTY K. YIP, TRIAL ATTORNEY; KATHY A. DOCKERY, CHAPTER 13  
4 TRUSTEE; AND ALL CREDITORS AND PARTIES IN INTEREST:

5 Gene Douglas Balas and Carlos A. Morales, the debtors (together, the “Debtors”) in  
6 the above-captioned chapter 13 bankruptcy case (the “Bankruptcy Case”), hereby (i) oppose  
7 the *United States Trustee’s Motion to Dismiss Pursuant to 11 U.S.C. § 1307(c), or For*  
8 *Related Relief* [Docket No. 28], filed April 15, 2011 (the “Motion to Dismiss”), and  
9 (ii) respond to the *United States Trustee’s Objection to Confirmation of Plan; and*  
10 *Declaration of Hatty Yip in Support Thereof* [Docket No. 26], filed April 15, 2011 (the  
11 “Confirmation Objection” and the “Yip Declaration”).

12 By the Motion to Dismiss and Confirmation Objection, the U.S. Trustee seeks  
13 dismissal of the Bankruptcy Case and denial of confirmation solely on the ground that the  
14 Debtors’ joint bankruptcy filing is prohibited by the federal Defense of Marriage Act, Pub.  
15 L. No. 104-199, 110 Stat. 2419 (Sep. 21, 1996), *codified in pertinent part at* 1 U.S.C. § 7  
16 (“DOMA”), notwithstanding the undisputed fact that the Debtors “were legally married in  
17 the state of California on August 30, 2008, and were still married as of the date of filing the  
18 petition,” Motion at 3:17-18. The U.S. Trustee offers no basis for dismissal of the  
19 Bankruptcy Case or denial of confirmation other than the observation that “Debtors appear to  
20 be two males,” Yip Decl. ¶ 2, and thus concedes that – but for the application of DOMA –  
21 the Debtors are entitled to avail themselves of the benefit of “filing . . . a single petition,” 11  
22 U.S.C. § 302(a), and the incidents thereof, *see, e.g.*, LBR 1015-1(a).

23 The Debtors respectfully submit that the Motion to Dismiss should be denied and the  
24 Confirmation Objection should be overruled. As set out in the annexed Memorandum of  
25 Points and Authorities, and as further elucidated in the annexed Declaration of Gene Douglas

26  
27 <sup>1</sup> By Public Notice 11-008 (issued April 14, 2011), the Clerk of the Court has advised that this  
28 case is among those that will be automatically reassigned from the Honorable Alan M. Ahart to  
the Honorable Thomas B. Donovan on May 2, 2011, which is after the date of this filing but  
prior to the date of the hearing to which it relates.

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1 Balas (the “Balas Declaration”) and Declaration of Carlos A. Morales (the “Morales  
2 Declaration”), section 3 of DOMA cannot constitutionally be applied to the Debtors, who are  
3 legally married under state law – a conclusion already reached by the President of the United  
4 States and the Attorney General of the United States. *See* Letter from Hon. Eric H. Holder,  
5 Jr. to Hon. John A. Boehner, dated Feb. 23, 2011, *available at* 2011 WL 641582 (the  
6 “Holder Letter”) (appended hereto as **Tab A**).<sup>2</sup> The same conclusion has been reached by  
7 every court to have squarely considered the question. *See In re Levenson*, 560 F.3d 1145  
8 (9th Cir. Jud. Council 2009) (“*Levenson I*”) (appended hereto as **Tab B**); *In re Levenson*, 587  
9 F.3d 925 (9th Cir. Jud. Council 2009) (“*Levenson II*”) (appended hereto as **Tab C**);  
10 *Dragovich v. U.S. Dep’t of the Treasury*, No. 10-01564-CW, 2011 WL 175502, 2011 U.S.  
11 Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011) (the slip opinion of which is appended hereto as  
12 **Tab D**); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (appended  
13 hereto as **Tab E**). This Court should reach the same conclusion as the President and the  
14 Attorney General (in the Holder Letter), Judge Reinhardt (in *Levenson I* and *Levenson II*),<sup>3</sup>  
15 Judge Wilken (in *Dragovich*), and Judge Tauro (in *Gill*). No court has squarely concluded  
16 otherwise,<sup>4</sup> and the Debtors respectfully submit that this Court should not be the first.

17 \_\_\_\_\_  
18 <sup>2</sup> A duly authenticated copy of the Holder Letter was Exhibit B to the previously filed *Declaration*  
19 *of Robert J. Pfister* (“Pfister Declaration”) in support of *Debtors’ Application to Employ Klee,*  
20 *Tuchin, Bogdanoff & Stern LLP as Special Counsel on a Pro Bono Basis in Connection with*  
21 *Certain Specified Matters* [Docket No. 21], filed April 1, 2011 (the “Employment Application”).  
22 The Debtors join the *Request for Judicial Notice in Support of United States Trustee’s Notice of*  
23 *Motion and Motion to Dismiss Pursuant to 11 U.S.C. § 1307(c) or For Related Relief* [Docket  
24 No. 29] and the *Request for Judicial Notice in Support of United States Trustee’s Notice of*  
25 *Objection and Objection to Confirmation of Plan* [Docket No. 27], both filed April 15, 2011,  
26 which ask the Court to take judicial notice of, among other things, the Employment Application  
27 and all exhibits attached thereto.

28 <sup>3</sup> *Levenson I* and *Levenson II* are decisions issued by Judge Reinhardt in his administrative  
capacity as a member of the Ninth Circuit Judicial Council, just as *In re Golinski*, 587 F.3d 901  
(9th Cir. Jud. Council 2009) (“*Golinski I*”) and *In re Golinski*, 587 F.3d 956 (9th Cir. Jud.  
Council) (“*Golinski II*”) are decisions issued by Chief Judge Kozinski in the same capacity. *See*  
*generally Golinski v. Office of Pers. Mgmt.*, 2011 WL 1044643, at \*7, 2011 U.S. Dist. LEXIS  
34969, at \*18 (N.D. Cal. Mar. 16, 2011).

<sup>4</sup> *In re Kandau*, 315 B.R. 123 (Bankr. W.D. Wash. 2004), is the only decision arguably to the  
contrary. That case, however, concerned a Washington couple whose Canadian marriage was  
not recognized in their home state. *Id.* at 130; *see also id.* at 133 (“Washington State has adopted  
its own definition of marriage identical to DOMA . . .”).

Southwest Bankruptcy Conference

1 Pursuant to LBR 9013-1(f)(1), the Debtors hereby “advise the adverse party that any  
2 reply to [this] opposition must be filed with the court and served on [the Debtors] not later  
3 than 7 days prior to the hearing on the motion,” as set out in LBR 9013-1(g), and further  
4 advise that any evidentiary objection to the declarations and other evidence submitted  
5 herewith “may be deemed waived unless it (A) is set forth in a separate document; (B) cites  
6 the specific Federal Rule of Evidence upon which the objection is based; and (C) is filed  
7 with the . . . reply papers,” as set out in LBR 9013-1(i)(2).

8 WHEREFORE, the Debtors respectfully request that the Court deny the Motion to  
9 Dismiss, overrule the Confirmation Objection, and grant such other and further relief as may  
10 be warranted.

11 Dated: April 27, 2011

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

Like millions of Americans affected by the financial crisis of late, the Debtors have been driven by extended unemployment and unreimbursed medical expenses to seek the protection and fresh start afforded by the Bankruptcy Code. And like countless Americans, the Debtors have committed to sharing with each other their lives (and their livelihoods) in lawful matrimony – for better, for worse; for richer, for poorer; in sickness and in health. The Debtors also happen to be two men. It is solely on account of this latter circumstance that the Court is asked to dismiss this case and deny the Debtors a right that is automatically and unquestioningly afforded to every legally married heterosexual couple.

Nothing in the Bankruptcy Code restricts joint bankruptcy filings on the basis of gender or sexual orientation. To the contrary, section 302 of the Bankruptcy Code specifically authorizes joint filings by any “individual . . . and such individual’s spouse.” 11 U.S.C. § 302(a). Nor is there any warrant in the Bankruptcy Code for this Court to look behind the Debtors’ perfectly valid California marriage certificate to ascertain whether the legal union it memorializes is between persons of the same or the opposite gender. Instead, the proffered legal impediment to the Debtors’ joint petition is DOMA, a 1996 non-bankruptcy law purporting to impose gender restrictions on every use of the term “spouse” in “any Act of Congress [and] any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States . . . .” 1 U.S.C. § 7. DOMA effectively re-writes the first sentence of section 302 of the Bankruptcy Code to read:

A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and ~~such individual’s spouse~~ a person of the opposite sex who is a husband or a wife.

11 U.S.C. § 302(a), modified to replace “such individual’s spouse” (the language enacted by Congress in 1978) with the gender-restrictive definition provided in DOMA (under which “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”).

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1 DOMA cannot constitutionally be applied here. Dismissing the Bankruptcy Case on  
2 the ground that one of the Debtors is not “a person of the opposite sex,” 1 U.S.C. § 7, is  
3 nothing more and nothing less than unconstitutional gender discrimination. A line of  
4 Supreme Court cases stretching back four decades to the unanimous decision in *Reed v.*  
5 *Reed*, 404 U.S. 71 (1971), holds that the government may not arbitrarily treat people  
6 differently on account of their gender. Here, there is no question that the Debtors are  
7 lawfully married “spouses” as required by the plain text of section 302 of the Bankruptcy  
8 Code. Whether they are also “of the opposite sex,” 1 U.S.C. § 7, has no conceivable  
9 connection to their fitness to be joint debtors – and certainly not the “exceedingly persuasive  
10 justification” required under settled Supreme Court precedent “to defend gender-based  
11 government action,” *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“*VMP*”).

12 Treating the Debtors’ marriage as unworthy of federal recognition also constitutes  
13 unlawful discrimination on the basis of sexual orientation. This Court should reach the same  
14 conclusion the Executive Branch reached in the Holder Letter, which is what every court to  
15 have squarely addressed the issue has also held: DOMA’s attempt to disfavor certain valid  
16 marriages unlawfully deprives the parties to those unions of the equal protection of the law.  
17 See Holder Letter [Tab A] at 1 (“[T]he President of the United States has made the  
18 determination that Section 3 of [DOMA], as applied to same-sex couples who are legally  
19 married under state law, violates the equal protection component of the Fifth Amendment.”);  
20 accord *Levenson I*, 560 F.3d at 1151; *Levenson II*, 587 F.3d at 931; *Dragovich*, slip op. [Tab  
21 D] at 25; *Gill*, 699 F. Supp. 2d at 397. Notably, this straightforward conclusion does not  
22 require the Court to weigh in on the constitutionality *vel non* of restricting marriage to  
23 opposite-gender couples, which was the question presented in *Perry v. Schwarzenegger*, 704  
24 F. Supp. 2d 921 (N.D. Cal. 2010) (“*Perry*”) (striking down Proposition 8). Rather, the only  
25 issue in this Bankruptcy Case is whether some legally married couples are entitled to fewer  
26 rights than other legally married couples, based solely on a factor (the gender and/or sexual  
27 orientation of the parties to the union) that finds no support in the Bankruptcy Code or Rules  
28 and should be a constitutional irrelevancy.

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1 The equal protection component of the Fifth Amendment “keeps governmental  
2 decisionmakers from treating differently persons who are in all relevant respects alike.”  
3 *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Commonwealth*  
4 *of Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly circumstanced shall be treated  
5 alike”)). As a lawfully wedded couple, the Debtors are constitutionally indistinguishable  
6 from opposite-gender married couples who enjoy the rights and responsibilities attendant to  
7 joint bankruptcy petitions. DOMA’s irrational insistence to the contrary “is not within our  
8 constitutional tradition,” as it violates “the principle that government and each of its parts  
9 remain open on impartial terms to all who seek its assistance.” *Romer v. Evans*, 517 U.S.  
10 620, 633 (1996). DOMA, as the U.S. Trustee seeks to apply it in this Bankruptcy Case, is  
11 inconsistent with the Constitution’s guarantee of equal treatment. The Motion to Dismiss  
12 should be denied and the Confirmation Objection should be overruled.

## 13 II.

### 14 FACTUAL BACKGROUND

15 The Debtors are indisputably a lawfully married California couple. *See* Pfister Decl.  
16 Ex. A (Debtors’ License and Certificate of Marriage); Balas Decl. ¶ 2 (“[We] were married  
17 in California on August 30, 2008, and we remain married to this day. We publicly hold  
18 ourselves out as a married couple, and our family, friends and business associates recognize  
19 us as such.”); Morales Decl. ¶ 2 (same); Motion to Dismiss at 3:17-18 (conceding that  
20 Debtors “were legally married in the state of California on August 30, 2008, and were still  
21 married as of the date of filing the petition”); *see also Strauss v. Horton*, 207 P.3d 48, 119-22  
22 (Cal. 2009) (clarifying that the approximately 18,000 same-gender couples who legally wed  
23 in California prior to the November 2008 passage of Proposition 8 remain validly married for  
24 all purposes under California law).

25 The annexed declarations set out in moving detail how the Debtors met, fell in love,  
26 married, and built a life together, overcoming along the way challenges of discrimination and  
27 illness. This evidence also shows that the Debtors experience their sexual orientation as an  
28 innate aspect of their personhood – fixed, unchanging, and wholly unrelated to their fitness

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1 for jointly seeking bankruptcy protection under section 302 of the Bankruptcy Code. In  
2 addition, even though no heterosexual married couple seeking bankruptcy protection is  
3 obliged to prove why their marriage is worthy of recognition and respect, the Debtors’  
4 declarations put the lie to the ugly premise of DOMA – that same-gender marriages do not  
5 “count,” and that parties to these unions should be treated as strangers (or perhaps  
6 roommates) instead of lawfully wedded spouses. Cf. Motion to Dismiss at 4:11-16 (relying  
7 on cases such as *In re Jephunneh Lawrence & Associates Chartered*, 63 B.R. 318 (Bankr.  
8 D.D.C. 1986), where the court dismissed a petition jointly filed by a corporation and its sole  
9 shareholder). The Debtors are not strangers, mere roommates, or related corporate entities;  
10 they are lawfully wedded spouses who have undertaken a lifelong commitment to each other.  
11 They ought to be treated as such.<sup>5</sup>

12 Following an extended period of unemployment occasioned by a 1,000-person layoff,  
13 the Debtors come to this Court to restructure and repay their debts (many of which are the  
14 direct consequence of unreimbursed medical expenses) pursuant to a plan of reorganization.  
15 The Debtors seek relief under chapter 13 of the Bankruptcy Code, which “facilitate[s] the  
16 adjustments of all types of debts . . . through extension and composition plans funded out of  
17 future income, under the protection of the court.” 8 COLLIER ON BANKRUPTCY ¶ 1300.02  
18 (16th ed., rev. 2010). See also *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966)  
19 (describing the predecessor of chapter 13: “[T]he wage-earner extension-of-time [chapter of  
20 the Bankruptcy Act] was intended to give to the wage earner a reasonable opportunity to  
21 arrange installment payments to be made out of his future earnings. Congress clearly  
22 intended to encourage wage earners to pay their debts in full, rather than to go into straight  
23 bankruptcy . . .”). The Debtors seek no free ride. Rather, they ask only for the opportunity  
24 to “reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life

25 \_\_\_\_\_  
26 <sup>5</sup> The Supreme Court’s description of the marital relation in *Griswold v. Connecticut*, 381 U.S.  
27 479, 486 (1965), is far more applicable than anything cited in the Motion to Dismiss: “Marriage  
28 is a coming together for better or for worse, hopefully enduring, and intimate to the degree of  
being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not  
political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for  
as noble a purpose as any involved in our prior decisions.”

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1 with a clear field for future effort, unhampered by the pressure and discouragement of  
2 preexisting debt.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v.*  
3 *Hunt*, 292 U.S. 234, 244 (1934)). They seek, in other words, the “fresh start” that the  
4 Bankruptcy Code offers the “honest but unfortunate debtor.” *Id.* at 286-87. There is no  
5 dispute that the Debtors qualify for such relief.

6 The Debtors filed jointly pursuant to section 302 of the Bankruptcy Code because,  
7 like many families, they pool all of their income and expenses. *See* Balas Decl. ¶ 3 (“We  
8 view everything as belonging to (or owed by) us as a couple. There is no ‘his’ and ‘mine’;  
9 everything is ‘ours.’”); Morales Decl. ¶ 3 (same). Indeed, the Debtors are fully subject to  
10 California’s community property system, which vests in each spouse a “present, existing,  
11 and equal” interest in all property acquired during marriage, CAL. FAM. CODE §§ 751 & 760,  
12 and generally renders the marital community “liable for a debt incurred by either spouse  
13 before or during marriage, regardless of which spouse has the management and control of the  
14 property and regardless of whether one or both spouses are parties to the debt or to a  
15 judgment for the debt,” CAL. FAM. CODE § 910(a). *See* Balas Decl. ¶ 3 (“All the property  
16 that either of us owns is community property, and all of our debts are community debts. We  
17 have no prenuptial agreement, postnuptial agreement or transmutation agreement.”); Morales  
18 Decl. ¶ 3 (same).

19 A joint filing recognizes the reality of the Debtors’ intertwined financial lives by  
20 allowing for automatic and presumptive substantive consolidation of estates. *See* LBR 1015-  
21 1(a) (“A joint case commenced for spouses by the filing of a single petition under 11 U.S.C.  
22 § 302(a) will be deemed substantively consolidated unless the court orders otherwise.”). It  
23 also saves the expense of multiple filing fees and the motion practice that would otherwise  
24 be required to achieve a comparable result. 2 COLLIER ON BANKRUPTCY ¶ 302.02[1][a]  
25 (16th ed., rev. 2010); 28 U.S.C. § 1930. No purpose would be served by forcing the Debtors  
26 to pretend as though their financial lives are not inextricably intertwined. Nor is it sufficient  
27 to assert that the Debtors may be able to work around DOMA’s irrational prohibition by  
28 filing two separate cases and moving to substantively consolidate them. As Chief Judge

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1 Kozinski explained when rejecting an analogous proposed remedy for a gay federal  
2 employee who was improperly denied the same family insurance coverage available to  
3 heterosexual federal employees on account of DOMA: “[T]here is an inherent inequality in  
4 allowing some employees to participate fully in the [Federal Employees Health Benefits  
5 Program], while giving others a wad of cash to go elsewhere. Even if the destination is the  
6 same, it’s still the back of the bus.” *Golinski II*, 587 F.3d at 960. Here, too, the Debtors are  
7 entitled to the same rights as every other validly married couple in this District.

8 **III.**

9 **JURISDICTION AND VENUE**

10 This Court has jurisdiction over the Bankruptcy Case pursuant to 28 U.S.C. §§ 157  
11 and 1334, and venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Motion to  
12 Dismiss and Confirmation Objection are core matters under 28 U.S.C. §§ 157(b)(2)(A) & (L)  
13 that this Court may hear and determine pursuant to 28 U.S.C. § 157(b)(1).

14 **IV.**

15 **DISMISSING THE BANKRUPTCY CASE ON THE GROUND THAT**  
16 **ONE OF THE DEBTORS IS NOT A “PERSON OF THE OPPOSITE SEX”**  
17 **IS UNCONSTITUTIONAL GENDER DISCRIMINATION**

18 Distilled to its essence, the U.S. Trustee’s motion asks the Court to dismiss this case  
19 because the “Debtors appear to be two males.” Yip Decl. ¶ 2. If Gene Balas were “Gina  
20 Balas,” or if Carlos Morales were “Carla Morales,” there would be no question about the  
21 propriety of a joint bankruptcy filing. Absent DOMA’s explicit gender-based limitation, *see*  
22 1 U.S.C. § 7 (mandating that “the word ‘spouse’ refers only to a person of the opposite sex  
23 who is a husband or a wife”), nothing in the Bankruptcy Code would preclude the Debtors  
24 from filing jointly under section 302, which contains no gender-based distinctions: “A joint  
25 case under a chapter of this title is commenced by the filing with the bankruptcy court of a  
26 single petition under such chapter by an individual that may be a debtor under such chapter  
27 and such individual’s spouse.” 11 U.S.C. § 302(a).  
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1 Although discrimination on the basis of sexual orientation is not invariably “a subset  
2 of, or subsumed within, discrimination on the basis of sex,” *In re Marriage Cases*, 183 P.3d  
3 384, 439 (Cal. 2008), it is nonetheless true that “[s]exual orientation discrimination can take  
4 the form of sex discrimination.” *Perry*, 704 F. Supp. 2d at 996; *accord Levenson I*, 560 F.3d  
5 at 1147 (“Levenson was unable to make his spouse a beneficiary of his federal benefits due  
6 solely to his spouse’s sex. If Sears were female, or if Levenson himself were female,  
7 Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue  
8 here was sex-based and can be understood as a violation of the [Judiciary’s] prohibition of  
9 sex discrimination.”); *see also Golinski II*, 587 F.3d at 957 (“Karen Golinski has been denied  
10 a benefit of employment because she married a woman rather than a man. I previously  
11 determined that violates this court’s guarantee of equal employment opportunity.”) (citing  
12 *Golinski I*, 587 F.3d at 902 (characterizing claim as “denial of [a] benefit on account of sex  
13 and sexual orientation”)). As applied in this particular case, where the sole factor allegedly  
14 disqualifying the Debtors from a joint bankruptcy filing is the fact that one of them is not “a  
15 person of the opposite sex,” 1 U.S.C. § 7, DOMA is classic gender discrimination.

16 Barring a person from exercising a right solely on the ground that he or she is the  
17 “wrong” gender has been recognized as unconstitutional since the Supreme Court’s  
18 unanimous decision in *Reed v. Reed*, 404 U.S. 71 (1971). In that case, estranged spouses  
19 Sally Reed and Cecil Reed each sought to be appointed administrator of the estate of their  
20 deceased child. *Id.* at 71-72. Although both parents were equally qualified to serve, the  
21 Idaho probate court appointed Cecil Reed on the sole basis that, under Idaho probate law,  
22 ““of several persons claiming and equally entitled to administer, males must be preferred to  
23 females.”” *Id.* at 73 (quoting the Idaho statute). The Supreme Court unanimously struck  
24 down this law as a violation of the equal protection clause: “[T]he arbitrary preference  
25 established in favor of males by . . . the Idaho Code cannot stand in the face of the  
26 Fourteenth Amendment’s command that no State deny the equal protection of the laws to  
27 any person within its jurisdiction.” *Id.* at 74.

28

1           *Reed* is the first in what by now is a long line of Supreme Court cases striking down  
2 state and federal statutes that discriminate on the basis of gender.<sup>6</sup> Two subsequent cases  
3 applying *Reed* are particularly important here. In *Orr v. Orr*, 440 U.S. 268 (1979), the  
4 Supreme Court applied *Reed* to invalidate an Alabama law that disadvantaged men (by  
5 providing that husbands, but not wives, may be required to pay alimony upon divorce) rather  
6 than women (as the Idaho law in *Reed* preferred male candidates for probate administrators).  
7 *See id.* at 278-79 (“In authorizing the imposition of alimony obligations on husbands, but not  
8 on wives, the Alabama statutory scheme provides that different treatment be accorded on the  
9 basis of sex; it thus establishes a classification subject to scrutiny under the Equal Protection  
10 Clause. The fact that the classification expressly discriminates against men, rather than  
11 women, does not protect it from scrutiny.”). Under *Orr*, the fact that DOMA discriminates  
12 against Gene Balas for not being “Gina” (rather than vice versa) or against Carlos Morales  
13 for not being “Carla” (rather than vice versa) does not immunize it from scrutiny for  
14 unconstitutional gender bias.

15           The Supreme Court’s decision in *Califano v. Westcott*, 443 U.S. 76 (1979), is also  
16 relevant here. *Westcott* concerned a federal program that provided benefits to “families  
17 whose dependent children have been deprived of parental support because of the

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19 <sup>6</sup> *E.g.*, *VMI*, 518 U.S. 515 (invalidating men-only admission policy of state-supported  
20 university); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating  
21 women-only admission policy of state-supported university); *Kirchberg v. Feenstra*, 450  
22 U.S. 455 (1981) (invalidating Louisiana law that made husbands “head and master” of  
23 property jointly owned with their wives); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142  
24 (1980) (invalidating Missouri law that denied widowers, but not widows, benefits absent  
25 mental or physical incapacity or dependency); *Caban v. Mohammed*, 441 U.S. 380 (1979)  
26 (invalidating New York statute that permitted an unwed mother, but not an unwed father, to  
27 withhold consent to an adoption); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating  
28 federal law under which survivors benefits were payable to widows regardless of  
dependency, but were paid to widowers only on a showing of dependency); *Craig v. Boren*,  
429 U.S. 190 (1976) (invalidating Oklahoma statute that prohibited the sale of certain  
alcoholic beverages to men under age 21 and women under age 18); *Stanton v. Stanton*, 421  
U.S. 7 (1975) (invalidating Utah statute under which girls attained majority at 18 but boys  
did not attain majority until age 21); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)  
(invalidating federal statute under which survivor’s benefits differed based on whether the  
worker was male or female); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating state  
law automatically exempting women from jury service); *Frontiero v. Richardson*, 411 U.S.  
677 (1973) (plurality) (invalidating federal statute under which spouses of male members of  
the uniformed services were deemed dependents but spouses of female members had to  
prove actual dependency).

1 unemployment of the father, but [not] when the mother becomes unemployed.” *Id.* at 78.  
2 The government defended the law on the basis that its application to families (rather than  
3 individuals) necessarily meant that it did not amount to gender discrimination:

4 The Secretary readily concedes that [the statute] entails a gender distinction.  
5 He submits, however, that the Act does not award AFDC benefits to a father  
6 where it denies them to a mother. ***Rather, the grant or denial of aid based on***  
7 ***the father’s unemployment necessarily affects, to an equal degree, one man,***  
8 ***one woman, and one or more children.*** As the Secretary puts it, even if the  
9 statute is “gender-based,” it is not “gender-biased.”

10 *Id.* at 83-84 (emphasis added). A similar assertion here might be that applying DOMA to  
11 dismiss the Debtors’ Bankruptcy Case is not gender discrimination because the statute is  
12 directed at non-recognition of the Debtors as a married couple, and not specifically at one of  
13 the spouses. The Supreme Court rejected that rationalization in *Westcott*:

14 We are not persuaded by this analysis. For mothers who are the primary  
15 providers for their families, and who are unemployed, [the law] is obviously  
16 gender biased, for it deprives them and their families of benefits solely on the  
17 basis of their sex. The Secretary’s argument, at bottom, turns on the fact that  
18 the impact of the gender qualification is felt by family units rather than  
19 individuals. But this Court has not hesitated to strike down gender  
20 classifications that result in benefits being granted or denied to family units on  
21 the basis of the sex of the qualifying parent. [Citations.] Here, as in those  
22 cases, the statute discriminates against one particular category of family – that  
23 in which the female spouse is a wage earner.

24 *Id.* at 84 (internal quotation marks omitted). Here, too, the fact that DOMA’s gender  
25 qualification is felt by the Debtors as a family unit (that is, as two married men) does not  
26 make DOMA any less subject to equal protection scrutiny. Like the statute in *Westcott*,  
27 DOMA “discriminates against one particular category of family” (same-gender couples), and  
28 as applied to either Debtor, the law “is obviously gender-biased [because] it deprives [that  
particular Debtor] of benefits solely on the basis of [his] sex.” *Id.*

Inasmuch as DOMA unquestionably draws distinctions on the basis of gender, the  
statute is constitutionally infirm absent affirmative proof by the U.S. Trustee of an  
“exceedingly persuasive justification” for DOMA’s gender-based distinctions. *VMI*, 518  
U.S. at 531 (“Parties who seek to defend gender-based government action must demonstrate

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1 an ‘exceedingly persuasive justification’ for that action.”). Critically, “[t]he justification  
2 must be genuine, not hypothesized or invented *post hoc* in response to litigation,” *id.* at 533,  
3 which means – as the Holder Letter recognizes – that “the United States can defend [DOMA]  
4 only by invoking Congress’ actual justifications for the law.” Holder Letter [Tab A] at 4.  
5 Because those actual justifications do not even touch on the invidious gender discrimination  
6 effected by DOMA, this law is unlike any of the (rare) enactments upheld by the Supreme  
7 Court as permissible gender discrimination.<sup>7</sup> Rather, like the law at issue in *Romer* (which  
8 was subject only to rational basis scrutiny), DOMA’s gender discriminatory effect “fails,  
9 indeed defies, . . . conventional inquiry,” 517 U.S. at 632. Nothing about the Debtors’  
10 gender has even the slightest connection to their fitness to file a joint bankruptcy petition.  
11 Indeed, nowhere on the official bankruptcy forms are debtors required or even requested to  
12 indicate their gender. *Cf.* Yip Decl. ¶ 2 (stating for the apparent purpose of establishing an  
13 otherwise absent record that “Debtors appear to be two males”). In short, there is no  
14 question that DOMA’s effect here is “sex-based,” *Levenson I*, 560 F.3d at 1147, and there is  
15 no legally defensible justification for such effect. Thus, the statute is both “gender-based”  
16 and “gender-biased,” *Westcott*, 443 U.S. at 83-84, and it cannot constitutionally be applied to  
17 require the dismissal of the Debtors’ joint Bankruptcy Case.

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<sup>7</sup> In *Nguyen v. INS*, 533 U.S. 53 (2001), for example, the Supreme Court rejected a constitutional  
23 challenge to an immigration statute that imposes more stringent proof requirements when a child  
24 claims citizenship through a father instead of a mother. The Court reasoned that “[f]athers and  
25 mothers are not similarly situated with regard to the proof of biological parenthood.” *Id.* at 63.  
26 “In the case of the mother, the relation is verifiable from the birth itself. The mother’s status is  
27 documented in most instances by the birth certificate or hospital records and the witnesses who  
28 attest to her having given birth. In the case of the father, the uncontested fact is that he need  
not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible  
proof of fatherhood.” *Id.* at 62. The distinction drawn in *Nguyen*, therefore, was rooted in a  
concrete biological difference between men and women that the Supreme Court viewed as  
substantially related to an important governmental interest.

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V.

**TREATING THE DEBTORS’ MARRIAGE AS UNWORTHY OF  
FEDERAL RECOGNITION ALSO CONSTITUTES UNLAWFUL  
DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION**

As the President, the Attorney General, and every court that has squarely addressed the issue has recognized, DOMA’s attempt to disfavor certain valid marriages unlawfully deprives the parties to those unions of the equal protection of the law. Holder Letter [Tab A] at 1; *Levenson I*, 560 F.3d at 1151; *Levenson II*, 587 F.3d at 931; *Dragovich*, slip op. [Tab D] at 25; *Gill*, 699 F. Supp. 2d at 397. Reaching that conclusion does *not* require deciding whether gays and lesbians have a constitutional right to marry. *Cf. Perry*, 704 F. Supp. 2d 921. Instead, the issue is whether under the constitution legally married couples who are heterosexual may be granted more rights than legally married couples who are gay. They may not. Under the constitution, the Debtors are in precisely the same position as any of the countless heterosexual married couples who file joint bankruptcy petitions each day in courts around the country. Being “similarly circumstanced,” they are entitled to “be treated alike.” *F.S. Royster*, 253 U.S. at 415; *accord Nordlinger*, 505 U.S. at 10.<sup>8</sup>

The unconstitutionality of section 3 of DOMA is not a close question. If DOMA purported to deny federal recognition of any otherwise valid marriage on the ground that the union was solemnized on a particular day of the week (say, Tuesday), or because the

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<sup>8</sup> Because DOMA is a federal law, the Debtors’ constitutional challenge arises under the due process clause of the Fifth Amendment (which binds the national government) rather than any portion of the Fourteenth Amendment (which applies by its terms only to the states). *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Nevertheless, the Fifth Amendment’s due process clause includes an equal protection component that mirrors the protections of the Fourteenth Amendment. *Id.*; *Davis v. Passman*, 442 U.S. 228, 234 (1979). It should also be noted that the absence of a “constitutional right to obtain a discharge of one’s debts in bankruptcy,” *United States v. Kras*, 409 U.S. 434, 446 (1973), is no barrier to the Debtors’ challenge to DOMA because the “opportunity [to seek bankruptcy relief], where the [government] has undertaken to provide it, . . . must be made available to all on equal terms.” *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *cf. Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (although “a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all,” “that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty”).

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1 celebrants had a particular physical attribute (perhaps red hair), there would be no doubt that  
2 the law is arbitrary, irrational and unconstitutional. *E.g., Village of Willowbrook v. Olech*,  
3 528 U.S. 562, 564-65 (2000) (equal protection clause is violated where government acts in  
4 an “irrational and wholly arbitrary” manner, even if the actions impact only a “class of one”  
5 rather than a traditionally protected group); *Colgate v. Harvey*, 296 U.S. 404, 425-26 (1935)  
6 (hypothesizing the absurdity – and hence the unconstitutionality – of a statute that levied “a  
7 tax upon all income from loans except those made on Mondays”), *overruled on other*  
8 *grounds by Madden v. Kentucky*, 309 U.S. 83 (1940); *Barsky v. Board of Regents*, 347 U.S.  
9 442, 470 (1954) (Frankfurter, J., dissenting) (governmental authority may never be premised  
10 “on arbitrary, whimsical or irrational considerations”; “A license cannot be revoked because  
11 a man is redheaded or because he was divorced, except for a calling, if such there be, for  
12 which redheadedness or an unbroken marriage may have some rational bearing.”).

13 It is just as arbitrary and irrational to deny recognition of a valid marriage on the  
14 ground that the parties to the union are gay as it would be to deny recognition because the  
15 marriage was solemnized on a Tuesday. Governmental actions that “treat individuals  
16 differently on the basis of their sexual orientation violate the constitutional guarantee of  
17 equal protection.” *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1137 (9th Cir.  
18 2003). The fact that the Debtors are gay is, as Justice Jackson said of indigence, “a neutral  
19 fact – constitutionally an irrelevance, like race, creed, or color” that “cannot be used . . . to  
20 test, qualify, or limit [their] rights as [citizens] of the United States.” *Edwards v. California*,  
21 314 U.S. 160, 184-85 (1941) (concurring opinion). The Supreme Court’s recent decision in  
22 *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), rejects the tired canard that  
23 discriminating against gay and lesbian individuals is merely discrimination on the basis of  
24 “conduct”: “Our decisions have declined to distinguish between status and conduct in this  
25 context.” *Id.* at 2990 (citing, *inter alia*, *Lawrence v. Texas*, 539 U.S. 558, 583 (2003)  
26 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to  
27 conduct, the conduct targeted by this law is conduct that is closely correlated with being  
28 homosexual. Under such circumstances, the law is targeted at more than conduct. It is

1 instead directed toward gay persons as a class.”); *Bray v. Alexandria Women’s Health Clinic*,  
2 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”)).

3 **A. Classifications Based On Sexual Orientation Warrant Heightened**  
4 **Scrutiny**

5 The first question presented when addressing an equal protection challenge is the  
6 level of constitutional scrutiny applicable. Although there is only a single equal protection  
7 clause, the Supreme Court has developed a tiered system of review under which some  
8 classifications (such as those based on race or gender) are automatically deemed suspect and  
9 are subject to particularly searching examination. *See generally United States v. Carolene*  
10 *Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Gerald Gunther, *In Search Of Evolving Doctrine*  
11 *On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).  
12 As the Holder Letter cogently demonstrates, “classifications based on sexual orientation  
13 warrant heightened scrutiny,” Holder Letter [Tab A] at 2, which is necessarily fatal to  
14 DOMA because “the legislative record underlying [the statute’s] passage” in 1996  
15 indefensibly reflects “precisely the kind of stereotype-based thinking and animus the Equal  
16 Protection Clause is designed to guard against,” *id.* at 4-5 (collecting examples). *See also*  
17 *Witt v. Dep’t of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to a  
18 claim of sexual orientation discrimination advanced under the due process clause).<sup>9</sup>

19 Neither the Supreme Court nor the Ninth Circuit has settled the appropriate level of  
20 scrutiny for sexual orientation classifications. The Supreme Court reviewed a sexual

21 <sup>9</sup> As noted above, *see supra* note 8, the Debtors’ challenge to DOMA’s application in this case is  
22 based on the due process clause of the Fifth Amendment, which has been held to contain an  
23 equal protection component. The Debtors claim the benefit of the entirety of the clause,  
24 however, and do not limit their argument to a strict equal protection analysis. *See generally*  
25 *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3090-93, 3101 (2010) (Stevens, J., dissenting)  
26 (describing the office of the due process clause in safeguarding fundamental rights, and noting  
27 that “[g]overnment action that . . . pointlessly infringes settled expectations, trespasses into  
28 sensitive private realms or life choices without adequate justification, perpetrates gross injustice,  
or simply lacks a rational basis will always be vulnerable to judicial invalidation” under the due  
process clause); *see also Dragovich*, slip op. [Tab D] at 28 (where plaintiffs “sufficiently stated a  
claim that [section 3 of DOMA] do[es] not bear a rational relationship to a legitimate  
governmental interest,” plaintiffs thereby also “stated a cognizable claim for violation of their  
rights to substantive due process”).

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1 orientation classification in *Romer*, but it declined to decide whether the classification  
2 requires heightened scrutiny because, it found, the challenged law “fail[ed], indeed defie[d],  
3 even” rational basis review. 517 U.S. at 632. The Ninth Circuit once applied heightened  
4 scrutiny to classifications based on sexual orientation, *see Hatheway v. Sec’y of the Army*,  
5 641 F.2d 1376, 1382 (9th Cir. 1981); *see also Beller v. Middendorf*, 632 F.2d 788, 809-10  
6 (9th Cir. 1980) (Kennedy, J.), but reversed course and applied rational basis review in *High*  
7 *Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir.  
8 1990), primarily on the authority of *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers*, of  
9 course, has been repudiated by the Supreme Court. *See Lawrence*, 539 U.S. at 578 (“*Bowers*  
10 was not correct when it was decided, and it is not correct today. It ought not to remain  
11 binding precedent. *Bowers v. Hardwick* should be and now is overruled.”); *see also id.* at  
12 575 (holding that *Bowers*’ “continuance as precedent demeans the lives of homosexual  
13 persons”).

14 It is therefore an open question in the Ninth Circuit what level of scrutiny applies to  
15 classifications based on sexual orientation. *Witt*, 527 F.3d at 824 (Canby, J., concurring in  
16 part and dissenting in part) (“[T]he overruling of *Bowers* by *Lawrence* has undermined *High*  
17 *Tech Gays*. We accordingly are free to revisit the question whether the adverse classification  
18 of homosexuals is ‘suspect’ under equal protection analysis.”). *See also Levenson I*, 560  
19 F.3d at 1149 (observing that it is “likely that some form of heightened constitutional scrutiny  
20 applies to Levenson’s claims,” but declining to resolve the issue definitively because “the  
21 denial of benefits here cannot survive even rational basis review, the least searching form of  
22 constitutional scrutiny”); *Golinski I*, 587 F.3d at 904 (noting the Ninth Circuit’s application  
23 of heightened scrutiny in *Witt*); *Dragovich*, slip op. [Tab D] at 21 (declining to decide  
24 “whether Plaintiffs are members of a protected class,” inasmuch as DOMA fails even  
25 rational basis review).

26 This Court should apply heightened scrutiny to DOMA. As the Executive Branch  
27 now recognizes (and as the Ninth Circuit once recognized in *Hatheway* and *Beller*, prior to  
28 the now-repudiated decision in *Bowers*), each of the factors traditionally examined by courts

1 when deciding whether to apply heightened scrutiny are present with respect to gays and  
2 lesbians. The Holder Letter persuasively outlines the Executive Branch’s rationale. *See*  
3 Holder Letter [Tab A] at 2-4. Four factors are important:

- 4 • “[W]hether the group in question has suffered a history of discrimination”;
- 5 • “[W]hether individuals exhibit obvious, immutable, or distinguishing  
6 characteristics that define them as a discrete group”;
- 7 • “[W]hether the group is a minority or is politically powerless”; and
- 8 • “[W]hether the characteristics distinguishing the group have little relation to  
9 legitimate policy objectives or to an individual’s ability to perform or  
10 contribute to society.”

11 *Id.* at 2 (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne*  
12 *Living Ctr.*, 473 U.S. 432, 441-42 (1985)) (internal quotation marks omitted). “Each of these  
13 factors counsels in favor of being suspicious of classifications based on sexual orientation.”  
14 *Id.*; *accord Perry*, 704 F. Supp. 2d at 997 (concluding, after trial, that “gays and lesbians are  
15 the type of minority strict scrutiny was designed to protect”; “All classifications based on  
16 sexual orientation appear suspect, as the evidence shows that California would rarely, if ever,  
17 have a reason to categorize individuals based on their sexual orientation.”).

18 1. Lesbians and Gay Men Have Experienced a History of Discrimination

19 “[T]here is, regrettably, a significant history of purposeful discrimination against gay  
20 and lesbian people, by governmental as well as private entities, based on prejudice and  
21 stereotypes that continue to have ramifications today.” Holder Letter [Tab A] at 2. *See, e.g.,*  
22 *Perry*, 704 F. Supp. 2d at 981-82 (collecting evidence of hundreds of hate crimes each year  
23 in California alone motivated by sexual orientation bias). It is beyond reasonable dispute  
24 that “for centuries there have been powerful voices to condemn homosexual conduct as  
25 immoral,” and that “state-sponsored condemnation” of homosexuality has led to  
26 “discrimination both in the public and in the private spheres.” *Lawrence*, 539 U.S. at 571,  
27 575-76; *accord Witt*, 527 F.3d at 824-25 (Canby, J., concurring in part and dissenting in part)  
28 (“[H]omosexuals have experienced a history of purposeful unequal treatment and been

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1 subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative  
2 of their abilities.”) (internal quotation marks omitted). The Ninth Circuit stated more than  
3 twenty years ago that “homosexuals have suffered a history of discrimination,” *High Tech*  
4 *Gays*, 895 F.2d at 573, and the Circuit reiterated that observation in *Perry v. Proposition 8*  
5 *Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009). This history alone suggests that  
6 legal classifications based on sexual orientation are especially likely to reflect bias and are  
7 unlikely to be based on the pursuit of legitimate objectives. See *Plyler v. Doe*, 457 U.S. 202,  
8 217-18 n.14 (1982).

9 2. Sexual Orientation Is a Defining and Immutable Characteristic

10 “[W]hile sexual orientation carries no visible badge, a growing scientific consensus  
11 accepts that sexual orientation is a characteristic that is immutable; it is undoubtedly unfair to  
12 require sexual orientation to be hidden from view to avoid discrimination.” Holder Letter  
13 [Tab A] at 3 (citations omitted). The Executive Branch’s conclusion in this regard accords  
14 with well-settled Ninth Circuit precedent:

15 Sexual orientation and sexual identity are immutable; they are so fundamental  
16 to one’s identity that a person should not be required to abandon them. Many  
17 social and behavioral scientists generally believe that sexual orientation is set  
18 in place at an early age. The American Psychological Association has  
19 condemned as unethical the attempted “conversion” of gays and lesbians.  
20 Further, the American Psychiatric Association and the American Psychological  
21 Association have removed “homosexuality” from their lists of mental  
22 disorders.

21 *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (citations omitted),  
22 *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).  
23 *See also Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005). Judge Walker likewise  
24 concluded after trial in *Perry* that “[n]o credible evidence supports a finding that an  
25 individual may, through conscious decision, therapeutic intervention or any other method,  
26 change his or her sexual orientation.” 704 F. Supp. 2d at 964. This case law accords with  
27 the Debtors’ own personal experience. Balas Decl. ¶ 5 (“It is an innate part of me – just as I  
28

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1 am right handed – and it is something that cannot be changed, nor was it a ‘choice.’”);  
2 Morales Decl. ¶¶ 5-7.

3 3. Lesbians and Gay Men Face Significant Political Obstacles

4 “[T]he adoption of laws like those at issue in [*Romer*] and *Lawrence*, the longstanding  
5 ban on gays and lesbians in the military, and the absence of federal protection for  
6 employment discrimination on the basis of sexual orientation show [that gays and lesbians as  
7 a group] have limited political power and ability to attract the favorable attention of the  
8 lawmakers.” Holder Letter [Tab A] at 3 (internal quotation marks omitted). Voters (through  
9 ballot measures) as well as lawmakers repeatedly have passed measures denying lesbians and  
10 gay men protections against discrimination. *See, e.g., Strauss*, 207 P.3d 48 (upholding  
11 Proposition 8 against state constitutional challenge); *Lofton v. Sec’y of Dep’t of Children &*  
12 *Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida statute that bars lesbian and  
13 gay couples from adopting); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir.  
14 2006) (upholding Nebraska ballot measure that strips same-sex couples of all legal  
15 protections akin to marriage, civil union, or domestic partnership).

16 The fact that lesbians and gay men may have achieved sporadic successes in  
17 combating discrimination does not obviate the significant, ongoing obstacles they confront.  
18 Negative stereotypes, for example, “inhibit political compromise with other groups: ‘It’s  
19 very difficult to engage in the give-and-take of the legislative process when I think you are  
20 an inherently bad person. That’s just not the basis for compromise and negotiation in the  
21 political process.’” *Perry*, 704 F. Supp. 2d at 937 (quoting political scientist Gary Segura,  
22 whose expert testimony at trial was credited by the court). In other words, the question is not  
23 whether a group has achieved *any* successes, but rather its relative political power and  
24 whether substantial obstacles persist to the group’s ability to achieve redress through  
25 democratic means. Classifications based on gender, for example, warrant heightened  
26 scrutiny despite the fact that “the position of women in America has improved markedly in  
27 recent decades”; key protective legislation had been enacted; and “women do not constitute a  
28 small and powerless minority.” *Frontiero*, 411 U.S. at 685-86 & n.17. Similarly,

1 discrimination based on race is subject to strict scrutiny notwithstanding undeniable progress  
2 in race relations – including the election of the nation’s first black President. *See, e.g.,*  
3 *Perry*, 704 F. Supp. 2d at 943 (crediting expert testimony that “gays and lesbians possess less  
4 power than groups [traditionally] granted judicial protection”).

5 4. Sexual Orientation Is Unrelated to the Ability to Contribute to Society

6 “Finally, there is a growing acknowledgment that sexual orientation “bears no relation  
7 to ability to perform or contribute to society.”” Holder Letter [Tab A] at 3 (quoting  
8 *Frontiero*, 411 U.S. at 686). Rather than resting on “meaningful considerations,” *Cleburne*,  
9 473 U.S. at 441, laws that discriminate based on sexual orientation, like laws that  
10 discriminate based on race, national origin or sex, target a characteristic that “bears no  
11 relation to ability to perform or contribute to society.” *Id.* “[B]y every available metric . . .  
12 as partners, parents and citizens, opposite-sex couples and same-sex couples are equal.”  
13 *Perry*, 704 F. Supp. 2d at 1002. *See also* *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir.  
14 1989) (*en banc*) (Norris, J., concurring in the judgment) (“Sexual orientation plainly has no  
15 relevance to a person’s ability to perform or contribute to society.”) (internal quotation marks  
16 omitted).

17 \* \* \*

18 The Holder Letter persuasively demonstrates that legal classifications based on sexual  
19 orientation should be viewed with particular skepticism, given the four factors the Supreme  
20 Court has identified as relevant to the application of heightened scrutiny. In addition, the  
21 Ninth Circuit ruled in *Witt* that “when the government attempts to intrude upon the personal  
22 and private lives of homosexuals, in a manner that implicates the rights identified in  
23 *Lawrence*,” the law is subject to heightened scrutiny. 527 F.3d at 819. DOMA’s preclusion  
24 of equal treatment, in both purpose and effect, seeks to demean the Debtors’ marriage, and as  
25 such, impinges on the “liberty protected by the Constitution” identified in *Lawrence*, which  
26 held that “adults may choose to enter upon [same-gender relationships] and still retain their  
27 dignity as free persons.” 539 U.S. at 567. DOMA’s purpose and effect is to erase lawful  
28 marriages between persons of the same gender from federal recognition for all purposes,

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1 thereby implicating approximately 1,138 federal laws that tie benefits, protections, rights, or  
2 responsibilities to married status. *See Gill*, 699 F. Supp. 2d at 379. DOMA is inconsistent  
3 with the protections for individual dignity and respect for private lives that *Lawrence*  
4 guarantees to lesbians and gay men, as to others. *Lawrence*, 539 U.S. at 567-68. *Witt*  
5 provides still another reason for subjecting DOMA to heightened scrutiny.

6 **B. DOMA Cannot Withstand Heightened Scrutiny**

7 As the Holder Letter properly concludes, heightened scrutiny is fatal to DOMA.  
8 Holder Letter [Tab A] at 5. “Under heightened scrutiny, ‘a tenable justification must  
9 describe actual state purposes, not rationalizations for actions in fact differently grounded.’”  
10 *Id.* at 4 (quoting *VMI*, 518 U.S. at 535-36). “In other words, under heightened scrutiny, the  
11 United States cannot defend [DOMA] by advancing hypothetical rationales, independent of  
12 the legislative record”; rather, the government is limited to “invoking Congress’ actual  
13 justifications for the law.” *Id.* The Holder Letter forthrightly acknowledges that those actual  
14 justifications are indefensible. *Id.* at 4-5 & n.7 (demonstrating that the legislative record  
15 underlying DOMA is filled with “precisely the kind of stereotype-based thinking and animus  
16 the Equal Protection Clause is designed to guard against”) (citing *Cleburne*, 473 U.S. at 448  
17 (“mere negative attitudes, or fear” are not permissible bases for discriminatory treatment);  
18 *Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by “the liberties of  
19 landlords or employers who have personal or religious objections to homosexuality”);  
20 *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the  
21 law, but the law cannot, directly or indirectly, give them effect.”)); *accord Dragovich*, slip  
22 op. [Tab D] at 25 (“The animus toward, and moral rejection of, homosexuality and same-sex  
23 relationships are apparent in the Congressional Record.”).<sup>10</sup>

24  
25  
26 <sup>10</sup> The asserted justifications underlying DOMA are addressed in detail below. As every court to  
27 have squarely confronted the issue has ruled, the supposed governmental interests offered for  
28 DOMA fail even the lowest level of constitutional scrutiny (rational basis), and thus necessarily  
cannot meet a heightened standard. *Levenson I*, 560 F.3d at 1149-51; *Levenson II*, 587 F.3d at  
931-33; *Dragovich*, slip op. [Tab D] at 25; *Gill*, 699 F. Supp. 2d at 397.

1 In addition to a close examination of the actual motivations and justifications for  
2 DOMA (rather than merely imagining hypothetical rationales), heightened scrutiny is  
3 distinct from rational basis review insofar as the “analysis is as-applied rather than facial.”  
4 *Witt*, 527 F.3d at 819. Thus, when the Ninth Circuit in *Witt* applied heightened scrutiny to  
5 the “Don’t Ask, Don’t Tell” law that discriminated against gay and lesbian members of the  
6 armed services, the court refused the government’s invitation to limit its inquiry to whether  
7 the military’s policy “has some hypothetical, post-hoc rationalization in general,” such as  
8 “unit cohesion” or “troop morale.” *Id.* Instead, the Ninth Circuit’s heightened scrutiny  
9 review required the government to demonstrate that “a justification exists for the application  
10 of the policy *as applied to Major Witt.*” *Id.* (emphasis added). See *Golinski I*, 587 F.3d at  
11 904 (describing the holding in *Witt* as requiring the military’s policy “to survive heightened  
12 scrutiny as applied to each service member discharged”). The case was remanded to the  
13 district court for a trial on whether application of Don’t Ask, Don’t Tell “specifically to  
14 Major Witt significantly furthers the government’s interest and whether less intrusive means  
15 would achieve substantially the government’s interest.” *Witt*, 527 F.3d at 821.<sup>11</sup>

16 As in *Witt*, applying heightened scrutiny in this case means that the requisite “analysis  
17 is as-applied rather than facial.” *Id.* at 819. The question is not whether “there is any  
18 reasonably conceivable state of facts that could provide a rational basis” for DOMA, *FCC v.*  
19 *Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993), or whether “the legislative facts on which  
20 the classification is apparently based could . . . reasonably be conceived to be true by the  
21 governmental decisionmaker,” *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Rather, the Court  
22 must determine whether dismissing the Debtors’ particular Bankruptcy Case pursuant to  
23 DOMA “advances an important governmental interest.” *Witt*, 527 F.3d at 821. It does not.

24  
25 <sup>11</sup> After a full trial on the merits, the district court held that “the suspension and discharge of  
26 Margaret Witt did not significantly further the important government interest in advancing unit  
27 morale and cohesion,” and ordered Major Witt reinstated. *Witt v. Dep’t of Air Force*, 739 F.  
28 Supp. 2d 1308, 1315-17 (W.D. Wash. 2010) (“The evidence before the Court is that Major  
Margaret Witt was an exemplary officer. She was an effective leader, a caring mentor, a skilled  
clinician, and an integral member of an effective team. Her loss within the squadron resulted in  
a diminution of the unit’s ability to carry out its mission. Good flight nurses are hard to find.”).

1 There is no possible governmental interest to be advanced by dismissing this Bankruptcy  
2 Case. No creditor has objected. The Debtors are lawfully married and otherwise (but for  
3 DOMA) fully qualified to be joint debtors pursuant to section 302 of the Bankruptcy Code.  
4 Dismissal of the Bankruptcy Case will not:

- 5 • “[E]ncourage[e] responsible procreation and child-bearing” (the Debtors have  
6 no children, and even if they did, a joint bankruptcy filing would not hurt  
7 them);
- 8 • “[D]efend[] [or] nurture[e] the institution of traditional heterosexual marriage”  
9 (the Debtors are already married to each other, and allowing them to proceed  
10 jointly in this Bankruptcy Case will not have the slightest effect on anyone  
11 else’s marriage);
- 12 • “[D]efend[] traditional notions of morality” (the Debtors’ joint bankruptcy  
13 filing is in no sense an affront to morality, traditional or otherwise); or
- 14 • “[P]reserve[e] scarce resources” (no governmental resources are implicated by  
15 the Debtors’ Bankruptcy Case, other than perhaps the resources brought to bear  
16 in seeking dismissal of the case).

17 *Gill*, 699 F. Supp. 2d at 388 (setting out the reasons Congress offered for passing DOMA).

18 **C. DOMA Lacks Even A Rational Basis**

19 Even if the Court were to apply rational basis review rather than heightened scrutiny,  
20 DOMA must still be found unconstitutional – as every court to have squarely considered the  
21 issue has held. *Levenson I*, 560 F.3d at 1151; *Levenson II*, 587 F.3d at 931; *Dragovich*, slip  
22 op. [Tab D] at 25; *Gill*, 699 F. Supp. 2d at 397. “If the constitutional conception of equal  
23 protection of the laws means anything, it must at the very least mean that a bare desire to  
24 harm a politically unpopular group cannot constitute a legitimate governmental interest.”  
25 *Romer*, 517 U.S. at 634-35 (internal quotation marks omitted) (striking down under rational  
26 basis review a law that, like DOMA does here, singled out gays and lesbians “for disfavored  
27 legal status or general hardships”); *accord Lawrence*, 539 U.S. at 583 (O’Connor, J.,  
28 concurring in the judgment) (“Moral disapproval of a group cannot be a legitimate

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1 governmental interest under the Equal Protection Clause because legal classifications must  
2 not be drawn for the purpose of disadvantaging the group burdened by the law.”); *Golinski I*,  
3 587 F.3d at 903 (“[D]isapproval of homosexuality itself isn’t a proper legislative end.”).

4 Rational basis scrutiny requires that classifications be “rationally related to a  
5 legitimate government purpose.” *Cleburne*, 473 U.S. at 446; *United States Dep’t of Agric. v.*  
6 *Moreno*, 413 U.S. 528, 533 (1973). Under rational basis review, courts must examine  
7 whether disadvantages are imposed arbitrarily or for improper reasons. *Romer*, 517 U.S. at  
8 634-35 (striking down measure based on “bare desire to harm” lesbian and gay persons).  
9 This is precisely what DOMA does. In *Gill*, Judge Tauro found DOMA unconstitutional  
10 because, after examining the interests advanced by the government and the evidence  
11 submitted by both sides, he was “convinced that ‘there exists no fairly conceivable set of  
12 facts that could ground a rational relationship’ between DOMA and a legitimate government  
13 objective.” 699 F. Supp. 2d at 387. Judge Wilken similarly concluded that “neither [the  
14 government’s] current justification, nor the actual contemporaneous reasons, for the  
15 exclusion of same-sex couples for the federal definition of marriage can be found as a matter  
16 of law to be rationally based on a legitimate governmental interest.” *Dragovich*, slip op.  
17 [Tab D] at 25. This Court should reach the same conclusion.

#### 18 1. Rational Basis Review Is Not Toothless

19 Although rational basis review “is not a license for courts to judge the wisdom,  
20 fairness, or logic of legislative choices,” *Beach Commc’ns*, 508 U.S. at 313, the standard of  
21 review “is not a toothless one,” *Matthews v. De Castro*, 429 U.S. 181, 185 (1976). The  
22 government interest claimed to be furthered by discriminating against a particular group  
23 must still be “legitimate,” meaning not only that it must be a proper basis for government  
24 action, but also that it must be “properly cognizable” by the governmental body at issue,  
25 *Cleburne*, 473 U.S. at 448, and “relevant to interests” the classifying body “has the authority  
26 to implement,” *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001). This  
27 ensures that the interest supposedly advanced is within the purview of those making the  
28 classification. *See, e.g., Plyler*, 457 U.S. at 225 (overturning state law discriminating against

1 immigrants and noting that although it is a “routine and normally legitimate part of the  
2 business of the Federal Government to classify on the basis of alien status . . . only rarely are  
3 such matters relevant to legislation by a State”) (internal citation omitted); *see also Hampton*  
4 *v. Mow Sun Wong*, 426 U.S. 88, 114-15 (1976) (Civil Service Commission could not justify  
5 rule barring employment of aliens because asserted interests in encouraging nationalization  
6 were “not matters which are properly the business of the Commission”). This concern is  
7 particularly acute here, where the federal government has legislated in an area traditionally a  
8 matter of state concern.<sup>12</sup>

9 In addition, the classification must be “narrow enough in scope and grounded in  
10 sufficient factual context . . . to ascertain some relation between the classification and the  
11 purpose it serve[s].” *Romer*, 517 U.S. at 632-33. The classification drawn “must find some  
12 footing in the realities of the subject addressed by the legislation,” *Heller v. Doe*, 509 U.S.  
13 312, 321 (1993), and the government “may not rely on a classification whose relationship to  
14 an asserted goal is so attenuated as to render the distinction arbitrary or irrational,” *Cleburne*,  
15 473 U.S. at 446; *Garrett*, 531 U.S. at 366 n.4 (no rational basis where the “purported  
16 justifications . . . ma[k]e no sense in light of how the [government] treated other groups  
17 similarly situated in relevant respects”). As the Supreme Court made clear in *Romer*,  
18 rational basis review invalidates a measure whose “sheer breadth” is “discontinuous with the  
19 reasons offered for it . . . .” 517 U.S. at 632.

20 Moreover, the requirement of a reasonably conceivable state of facts, *Vance*, 440 U.S.  
21 at 111, demands that any claimed factual basis for a categorization be plausible. *Romer*, 517

22  
23 <sup>12</sup> “[T]he Constitution delegated no authority to the Government of the United States on the subject  
24 of marriage and divorce.” *Haddock v. Haddock*, 201 U.S. 562, 575 (1906). Given the centuries-  
25 long American tradition of federal deference to state regulation of marital relations, DOMA’s  
26 spiteful prohibition on recognizing the Debtors’ lawful marriage is inconsistent with “the  
27 division of authority between federal and state governments,” *Massachusetts v. Dep’t of Health*  
28 *& Human Servs.*, 698 F. Supp. 2d 234, 246 (D. Mass. 2010) (quoting *New York v. United States*,  
505 U.S. 144, 156 (1992)) – especially where, as here, the federal government has zero stake in  
the outcome of this case. *See also Levenson I*, 560 F.3d at 1149 n.4 (“I should note that marriage  
is a status traditionally established and regulated by state law.”); *Dragovich*, slip op. [Tab D] at  
22 (characterizing DOMA’s effect as “robbing states of the power to allow same-sex civil  
marriages that will be recognized under federal law”).

1 U.S at 635 (rejecting justifications where “[t]he breadth of the [measure] is so far removed  
2 from these particular justifications that we find it impossible to credit them”); *Eisenstadt v.*  
3 *Baird*, 405 U.S. 438, 449 (1972) (law discriminating between married and unmarried persons  
4 in access to contraceptives “so riddled with exceptions” that the interest claimed by the  
5 government “cannot reasonably be regarded as its aim”). Courts take a particularly careful  
6 approach to rational basis review where, as here, laws single out and selectively burden  
7 disfavored groups, or when important rights are at stake. *See Romer*, 517 U.S. at 633 (“By  
8 requiring that the classification bear a rational relationship to an independent and legitimate  
9 legislative end, we ensure that classifications are not drawn for the purpose of  
10 disadvantaging the group burdened by the law.”); *Lawrence*, 539 U.S. at 580 (O’Connor, J.,  
11 concurring in the judgment) (“When a law exhibits such a desire to harm a politically  
12 unpopular group, we have applied a more searching form of rational basis review to strike  
13 down such laws under the Equal Protection Clause.”); *id.* (“We have been most likely to  
14 apply rational basis review to hold a law unconstitutional . . . where . . . the challenged  
15 legislation inhibits personal relationships” or reflects a “desire to harm a politically  
16 unpopular group.”) (collecting cases); *Kelo v. City of New London*, 545 U.S. 469, 490-91  
17 (2005) (Kennedy, J., concurring) (distinguishing between the analysis applied to “economic  
18 regulation” and that applied to classifications intended to injure a particular group).

19 2. The Interests Asserted by Congress Cannot Support DOMA

20 Congress claimed to advance four interests when it enacted DOMA: “(1) encouraging  
21 responsible procreation and child-bearing, (2) defending and nurturing the institution of  
22 traditional heterosexual marriage, (3) defending traditional notions of morality, and (4)  
23 preserving scarce resources.” *Gill*, 699 F. Supp. 2d at 388 (citing H.R. Rep. No. 104-664, at  
24 12-18 (1996)). As Judges Reinhardt, Wilken and Tauro all recently ruled, these justifications  
25 each either constitute an illegitimate interest or bear no rational relationship to DOMA, or  
26 both.

1 a. *“Encouraging Responsible Procreation and Child-Bearing”*

2 In *Gill* case, Judge Tauro had no trouble “readily dispos[ing]” of the notion that  
3 DOMA was intended to “encourag[e] responsible procreation and child-bearing.” *Gill*, 699  
4 F. Supp. 2d at 378, 388. He was correct to do so. As Judge Tauro explained, “[s]ince the  
5 enactment of DOMA, a consensus has developed among the medical, psychological, and  
6 social welfare communities that children raised by gay and lesbian parents are just as likely  
7 to be well-adjusted as those raised by heterosexual parents.” *Id.* at 388 (collecting  
8 authorities); *accord* Holder Letter [Tab A] 3-4 n.6 (“As the Department [of Justice] has  
9 explained in numerous filings, . . . many leading medical, psychological, and social welfare  
10 organizations have concluded, based on numerous studies, that children raised by gay and  
11 lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.”).  
12 And in any event, “the ability to procreate is not now, nor has it ever been, a precondition to  
13 marriage in any state in the country,” *Gill*, 699 F. Supp. 2d at 389, and indeed “the sterile  
14 and the elderly are allowed to marry,” *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

15 Moreover, the vast majority of the laws DOMA affects have little if anything to do  
16 with parenting or children generally. This case, for example, has absolutely nothing to do  
17 with procreation or child-bearing. The Debtors have no children; they merely want to file a  
18 joint bankruptcy petition. Stripping them and other validly married couples like them of that  
19 right helps no one. *Cf. Moreno*, 413 U.S. at 536-38 (statutory provision designed to “prevent  
20 so-called ‘hippies’ and ‘hippy communes’ from participating in the food stamp program”  
21 failed rational basis scrutiny where its sweeping means were disproportionate to its  
22 purportedly narrow ends). And if the Debtors did have children, the wholesale denial of  
23 federal rights to the Debtors’ family would certainly not benefit those children. *See*  
24 *Levenson II*, 587 F.3d at 934 (“[DOMA] does not serve any governmental interest in  
25 promoting a child-rearing environment, because the children of same-sex couples are eligible  
26 for federal benefits and the denial of benefits to same-sex spouses will not affect the  
27 decisions made by same-sex couples regarding marriage or parenting.”).

28

b. *“Defending and Nurturing Traditional Heterosexual Marriage”*

Similarly, Congress’ stated interest in defending or promoting the institution of “traditional heterosexual marriage” cannot support DOMA. Denying validly married gay and lesbian couples federal rights accorded to heterosexual couples bears no conceivable relationship to the likelihood that they, or anyone else, will enter or remain in a “heterosexual marriage.” Indeed, as Judge Reinhardt noted, this justification makes little sense insofar as the couples whose rights are denied by DOMA are already married: “Where, as here, the couple involved is already married, those decisions [about whether and whom to marry] have already been made.” *Levenson II*, 587 F.3d at 932. *See also Gill*, 699 F. Supp. 2d at 389 (“[T]his court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.”); *Dragovich*, slip op. [Tab D] at 24 (“The exclusion of same-sex couples from the federal definition of marriage does not encourage heterosexual marriage.”). Furthermore, “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.” *Gill*, 699 F. Supp. 2d at 389; *see also Levenson II*, 587 F.3d at 934 (“Excluding from health care coverage spouses of employees who have entered into legally binding relationships does not serve the government’s interest in promoting long-term relationships.”).

“What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it ‘only by punishing same-sex couples who exercise their rights under state law.’ And this the Constitution does not permit.” *Id.*; *see also Levenson II*, 587 F.3d at 932 (“denying married same-sex spouses health coverage is far too attenuated a means” of achieving this objective); *Moreno*, 413 U.S. at 534. This putative “interest” provides no rational justification for DOMA.

1 c. *“Defending Traditional Notions of Morality”*

2 Congress also attempted to justify DOMA by asserting an interest in defending  
3 “traditional notions of morality.” As the Supreme Court has repeatedly explained, however,  
4 “the fact that the governing majority in a State has traditionally viewed a particular practice  
5 as immoral is not a sufficient reason for upholding a law prohibiting the practice.”  
6 *Lawrence*, 539 U.S. at 577 (citation omitted). *See also Romer*, 517 U.S. at 634-35 (“If the  
7 constitutional conception of ‘equal protection of the laws’ means anything, it must at the  
8 very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute  
9 a legitimate governmental interest.”) (quoting *Moreno*, 413 U.S. at 534); *Cleburne*, 473 U.S.  
10 at 448. The Constitution does not permit the federal government to advance its “traditional”  
11 notion of morality by imposing unique burdens on same-sex married couples. *See, e.g.*,  
12 *Levenson II*, 587 F.3d at 932 (“*Romer* makes clear that a simple desire to treat gays and  
13 lesbians differently is not, in and of itself, a proper justification for government actions.  
14 Discrimination against gays and lesbians, or same-sex couples, must, at the very least, serve  
15 some more substantial and lawful function.”).

16 d. *“Preserving Scarce Resources”*

17 Finally, Congress sought to justify DOMA by asserting an interest in preserving  
18 scarce resources. The history of DOMA, however, indicates that Congress made no effort to  
19 tailor its legislation to this particular goal: “though Congress paid lip service to the  
20 preservation of resources as a rationale for DOMA, such financial considerations did not  
21 actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that  
22 would have required a budgetary analysis of DOMA’s impact prior to passage.” *Gill*, 699 F.  
23 Supp. 2d at 390 n.116 (citations omitted). Furthermore, although DOMA drastically  
24 amended the eligibility criteria for a vast number of different federal benefits, rights, and  
25 privileges that depend upon marital status, the relevant committees did not engage in a  
26 meaningful examination of the scope or effect of the law. For example, Congress did not  
27 hear testimony from agency heads regarding how DOMA would affect federal programs.  
28 Nor was there testimony from historians, economists, or specialists in family or child

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1 welfare. Instead, the House Report simply observed that the terms “marriage” and “spouse”  
2 appeared hundreds of times in various federal laws and regulations, and that those terms  
3 were defined, prior to DOMA, only by reference to each state’s marital status  
4 determinations. *Id.* at 379.

5 This Bankruptcy Case is a prime example of how DOMA’s denial of rights to validly  
6 married same-gender couples will often have no connection to the preservation of federal  
7 resources. The U.S. Trustee has no pecuniary interest in this case, and has surely expended  
8 more resources in ascertaining that the “Debtors appear to be two males,” Yip Decl. ¶ 2, and  
9 in prosecuting the Motion to Dismiss and the Confirmation Objection than could possibly be  
10 “earned” through payment of an additional chapter 13 filing fee.<sup>13</sup> In short, forbidding the  
11 Debtors from filing a joint bankruptcy petition will not save the federal government any  
12 money. Similarly, in *Golinski II*, Chief Judge Kozinski noted that the employee in question  
13 “is already signed up for a family [health insurance] plan to cover the child of the marriage,”  
14 and “[a]dding her wife’s name to the plan would cost the government nothing.” 587 F.3d at  
15 960. *Accord Levenson II*, 587 F.3d at 933 (“Further, the application of DOMA in this  
16 context [health insurance] frequently saves the government no money at all.”).

17 In all respects, even if Congress could rationally have believed that DOMA would  
18 conserve scarce resources, this putative interest does not justify DOMA: “a concern for the  
19 preservation of resources standing alone can hardly justify the classification used in  
20 allocating those resources.” *Plyler*, 457 U.S. at 227. Any denial of benefits to a particular  
21 group might be deemed to conserve resources, but the question, at the very least, is whether  
22 Congress selected a valid and rational line by which to impose the burdens of cost-cutting.  
23 *See id.* (the government “must do more than justify its classification with a concise  
24 expression of an intent to discriminate”); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)  
25 (“[a state] must do more than show that denying welfare benefits to new residents saves

26  
27 <sup>13</sup> That is, to the extent it could be argued that the extra filing fee Debtors would have to pay to file  
28 two petitions would be “revenue,” the additional administrative burdens of having two cases (not  
to mention the judicial resources consumed by resolving the inevitable motion to substantively  
consolidate the two cases) surely outweighs any marginal net filing-fee gain to the government.

1 money”), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).  
 2 As Judge Tauro reasoned, “[t]his court can discern no principled reason to cut government  
 3 expenditures at the particular expense of plaintiffs, apart from Congress’ desire to express its  
 4 disapprobation of same-sex marriage. And ‘mere negative attitudes, or fear, unsubstantiated  
 5 by factors which are properly cognizable [by the government]’ are decidedly impermissible  
 6 bases upon which to ground a legislative classification.” *Gill*, 699 F. Supp. 2d at 390; *see*  
 7 *also Levenson II*, 587 F.3d at 933 (“There is no rational relationship between the sex of an  
 8 employee’s spouse and the government’s desire to limit its employee health insurance  
 9 outlays; the government could save far more money using other measures, such as by  
 10 eliminating coverage for all spouses, or even every fifth or tenth spouse.”).

### 11 3. DOMA Advances No Other Valid Governmental Interests

12 The “interests” Congress actually identified to justify DOMA are so indefensible or  
 13 irrational that, in the recent challenges to the statute in the Northern District of California and  
 14 the District of Massachusetts, the government “disavowed Congress’s stated justifications  
 15 for the statute,” *Gill*, 699 F. Supp. 2d at 388, and instead “assert[ed] a post-hoc argument”  
 16 that was never a stated basis on which the law was passed, *Dragovich*, slip op. [Tab D] at 22.  
 17 Specifically, the government argued that DOMA is justified by its desire to “preserve the  
 18 ‘status quo’” or to “proceed incrementally” as the contentious debate regarding same-sex  
 19 marriage plays out in the states, to eliminate “state-to-state inconsistencies in the distribution  
 20 of federal marriage-based benefits,” and to ease the administrative burden presented by “a  
 21 changing patchwork of state approaches to same-sex marriage.” *Gill*, 699 F. Supp. 2d at  
 22 390-95; *accord Dragovich*, slip op. [Tab D] at 22-23. Both Judge Wilkin and Judge Tauro  
 23 determined that these new justifications fared no better than the law’s original justifications.

#### 24 a. *“Preserving the Status Quo”*

25 The federal government’s desire to “preserve the status quo” or to “proceed  
 26 incrementally” pending resolution of a socially contentious debate in the states regarding  
 27 allowing same-sex couples to marry provide no support for DOMA. As a threshold matter,  
 28 this rationale “relies on a conspicuous misconception of what the status quo was at the

1 federal level in 1996.” *Id.* at 393. DOMA did not maintain the status quo but rather  
2 drastically altered the status quo. At the time Congress enacted DOMA, “the status quo at  
3 the federal level was to recognize, for federal purposes, any marriage declared valid  
4 according to state law. Thus, Congress’ enactment of a provision denying federal  
5 recognition to a particular category of valid state-sanctioned marriages was, in fact, a  
6 significant departure from the status quo at the federal level.” *Id.*; see also *Levenson II*, 587  
7 F.3d at 933-34.

8 Moreover, “preserving the status quo” and “proceeding incrementally” are not  
9 government interests in and of themselves. At best, they are merely descriptions of what a  
10 law does; they are not reasons for doing it: “[s]taying the course is not an end in and of itself,  
11 but rather a means to an end.” *Gill*, 699 F. Supp. 2d at 390-94. These rationales also fail  
12 insofar as they imply that the federal government has a valid role to play in shaping this  
13 socially contentious debate. As set out in more detail below, the federal government has no  
14 such interest because the field of domestic relations, including marriage, is reserved for the  
15 States. *See id.* at 390-95.

16 b. “Eliminating Inconsistencies and Easing Administrative Burden”

17 Judge Tauro also correctly found that the putative interest in eliminating “state-to-  
18 state inconsistencies in the distribution of federal marriage-based benefits,” or in easing the  
19 administrative burden presented by “a changing patchwork of state approaches to same-sex  
20 marriage,” likewise must fail. “Decidedly, DOMA does not provide for nationwide  
21 consistency in the distribution of federal benefits among married couples. Rather it denies to  
22 same-sex married couples the federal marriage-based benefits that similarly situated  
23 heterosexual couples enjoy.” *Id.* at 394. Furthermore, eligibility requirements for marriage  
24 have varied widely over time and across states, and they continue to vary from state to state,  
25 for example, with respect to age requirements. *Id.* at 390-95. Nevertheless, the federal  
26 government has never before found such inconsistencies to be a problem, and it continues to  
27 tolerate inconsistency in every respect other than sexual orientation. A claimed interest in  
28

1 “consistency” cannot support a law that treats similarly situated individuals differently. *See*  
2 *id.* at 394-95.

3 Similarly, differing state laws with respect to the ability of same-sex couples to marry  
4 create no administrative burden for the federal government, because the federal government  
5 is not burdened with the task of implementing these changing laws. Rather, the federal  
6 government simply takes those couples that have obtained state-sanctioned marriage licenses  
7 as it finds them. This task is not made administratively more difficult simply because some  
8 of those couples are of the same gender, or because some of those couples previously did not  
9 qualify for marriage. *Id.* at 395. To the contrary, attempting to pick out those validly  
10 married couples who are same-gender would appear to be more administratively difficult.  
11 Tax and bankruptcy forms do not generally require specification of gender or sexual  
12 orientation, and the U.S. Trustee’s office in this case felt compelled to submit a sworn  
13 declaration to the effect that “Debtors appear to be two males.” Yip Decl. ¶ 2. The costs of  
14 gender policing are likely to far outweigh any alleged administrative convenience in denying  
15 rights to same-gender couples.

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VI.

CONCLUSION

For all the reasons set out above, the Debtors respectfully request that the Court deny the Motion to Dismiss, overrule the Confirmation Objection, and grant such other and further relief as may be warranted.

Dated: April 27, 2011 KLEE, TUCHIN, BOGDANOFF & STERN LLP

/s/ Robert J. Pfister

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**DECLARATION OF GENE DOUGLAS BALAS**

I, Gene Douglas Balas, hereby declare under penalty of perjury that:

1. Together with Carlos A. Morales, I am one of the debtors in this chapter 13 bankruptcy case. I respectfully submit this declaration in opposition to the U.S. Trustee’s Motion to Dismiss and in response to the U.S. Trustee’s Confirmation Objection. I am over eighteen years of age and have personal knowledge of the facts set forth herein; if called as a witness, I could and would testify competently with respect thereto from my own personal knowledge.

2. Carlos and I were married in California on August 30, 2008, and we remain married to this day. We publicly hold ourselves out as a married couple, and our family, friends and business associates recognize us as such.

3. All the property that either of us owns is community property, and all of our debts are community debts. We have no prenuptial agreement, postnuptial agreement or transmutation agreement. We view everything as belonging to (or owed by) us as a couple. There is no “his” and “mine”; everything is “ours.”

4. I understand that the U.S. Trustee is asking the Court to dismiss our bankruptcy case because our marriage does not “count” under federal law. According to DOMA, Carlos and I are no more than strangers (or possibly roommates). It is hurtful to hear my own government say that my marriage is not valid for purposes of federal law. To show why this makes no sense, I would like to share the story of how we met, fell in love, married, and built a life together.

5. Since childhood, I’ve known that I was “different.” It wasn’t until I reached puberty that I realized that that “difference” is being gay. It isn’t just a sexual attraction to other men; rather, it is also a spiritual and emotional bond I also seek with another man. It is an innate part of me – just as I am right handed – and it is something that cannot be changed, nor was it a “choice.” It would seem equally unnatural for me to try to love a person of the opposite sex as it would be for me to write with my left hand. My orientation to seek to bond with a person of the same gender is fundamental to who I am, how I approach the

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1 world, and whom I love. And “love” is the operative word: it transcends the mere sexual and  
2 physical to encompass the entirety of the person with whom I wish to commit my life. It is  
3 impossible to strip gender out of one’s soul, heart and mind; I am a man in every sense of the  
4 word, and the person I love can only be the same.

5 6. I’ve had crushes on other men since I was in high school, and it was very  
6 lonely for me not to have a partner, or even a date, until after I left Youngstown, Ohio, to  
7 move to Houston to attend school when I was 17. I immediately went on a quest to find a  
8 soul mate. In that regard, I eventually became successful after a long period of isolation and  
9 depression that being gay in a straight world can bring, and I met my first partner, George, in  
10 December 1987 at the age of 19 when I was a student at the University of Houston. He was  
11 21 at the time. He was diabetic and, unbeknownst to me, he was also HIV positive. Six  
12 months into our relationship, in May 1988, I became infected with HIV from George and we  
13 decided to make a life change. We had already exchanged rings and demonstrated our  
14 commitment to each other; now, we wanted to commit to trying new life experiences, as we  
15 did not know how long we had to live.

16 7. In January of 1989, we packed our meager belongings and moved sight unseen  
17 from Houston to Los Angeles, and given my partial education in finance and solid work  
18 history (while attending the University of Houston on a full National Merit scholarship, I  
19 worked full time and went to school full time), I soon landed a job at an investment bank, at  
20 the age of 20 as a research assistant. My career on Wall Street was then launched, but  
21 George’s was coming to a close: he was losing his eyesight and his kidneys were failing due  
22 to diabetes, and he went on disability. Given his illness, our relationship was no longer  
23 physical, but one based on love, caring, and emotional and spiritual intimacy and mutual  
24 support for each other.

25 8. My goal was to take care of George so that he could live the short remainder of  
26 his life without concern for money or living expenses. I worked 80 hours a week at two jobs  
27 to support the two of us, and to this day I regret not spending more time with George while  
28 he stayed at home, isolated, while I worked to support our household and his medical bills.

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1 It was an unfortunate necessity that life brought, and one which haunts me to this day of how  
2 lonely George was at home while I left for work at 4:45 a.m. to arrive for work at 6:00 a.m.  
3 and leaving work at my second job at 10:00 p.m. and not arriving home until 11:30 p.m. The  
4 bills, including his medical expenses, needed to be paid, however.

5 9. George wanted to return to Houston to die near his family. My employer,  
6 which treated us as a couple, transferred me to Houston for the purpose of bringing George  
7 back to his family for the remainder of his life, and so that I could finish school at the  
8 University of Houston. We packed our U-Haul and moved back to Houston in January of  
9 1991. On September 14, 1991, at the age of 25, George died of AIDS and diabetes, only a  
10 few days after I turned 23. We had been together almost four years.

11 10. I paid for the funeral myself; his family gave me a check for half the cost at the  
12 funeral home but then stopped payment on the check. George's death devastated me, and I  
13 turned my focus to work. I worked every single day, including weekends and holidays, from  
14 September 1991 to May 1992, all while attending school full time. I had nobody to turn to,  
15 and nobody to talk to. I was horribly lonely, miserable and overwhelmed with grief. I  
16 couldn't bear to be home alone in the eerily empty house. I didn't know what else to do  
17 other than work. That behavior pattern would eventually become my downfall.

18 11. When my firm transferred me to New York in March of 1993, I welcomed the  
19 distraction, and for many years after moving to New York had a singular focus on my career,  
20 getting my Chartered Financial Analyst designation in 2000 (a process that took three years),  
21 followed by getting my MBA from Columbia Business School in 2003 in a full time  
22 program while working full time. After that point, I was getting older, and getting lonely. I  
23 wanted a partner once again.

24 12. Since religion had always been important to me, and I was a member of an  
25 Episcopal church in New York for a number of years, on the evening of September 2, 2005  
26 during the Labor Day weekend, I prayed intently with a friend from my church for me to find  
27 a partner. After my friend was tired, I left her apartment and went to Oscar Wilde, a bar on  
28 New York's Upper East Side. I saw Carlos, and was instantly attracted. I went over,

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1 introduced myself, and that sparked a whole chain of events that would soon follow. It  
2 turned out my prayers earlier that evening had been answered.

3 13. The next day, Carlos came over to my apartment in Jersey City to enjoy the  
4 rooftop pool. From then on, we were inseparable, and as events transpired, our relationship  
5 together helped us both endure a number of tribulations that afflicted each of us. To begin,  
6 my work hours became increasingly challenging even as my relationship with Carlos was  
7 building. Carlos would leave his evening job as a graphic design specialist at a management  
8 consulting firm in midtown Manhattan, where he worked from 2:30 p.m. to 10:30 p.m., and  
9 arrive at my Jersey City apartment around 11:00 p.m., only to find me often still at the office,  
10 where I had started my workday before 9:00 a.m. Carlos' visits were the delight of my day,  
11 to come home from work to find Carlos waiting for me. I was thrilled to have someone in  
12 my life, especially someone who would be patient with me and my schedule.

13 14. One night, he surprised me with a gift that I had found so thoughtful: a butter  
14 dish, beautifully gift-wrapped. While seemingly such a small item, it was the thought behind  
15 it that was so touching: the thoughtful observation that I needed a simple butter dish since I  
16 kept sticks of butter lying in my kitchen cupboards in their wax paper wrappers. It was the  
17 nicest thing anyone had ever done for me in the 14 years since George died.

18 15. In January of 2006, we moved in together to a new apartment in the same  
19 building in which I was living, with both our names on the lease. It was our first joint  
20 commitment. Carlos brought me such joy – finally – in a life that had been isolated, lonely  
21 and devoid of love and happiness for 14 years, and I was elated to have found him and to  
22 begin our life together.

23 16. By the time Carlos and I moved in together, I was working 90 or more hours a  
24 week. Long hours are part and parcel of working on Wall Street, but are usually reserved for  
25 younger, more junior associates and not for someone older and more advanced in their  
26 career, such as myself. In my twenties, working so many hours was not problematic. In my  
27 late thirties, I no longer had that stamina. As my workweek lengthened and weekends  
28 evaporated, I became increasingly stressed. My work patterns that I embraced to cope with

1 George's death were no longer working for me, but against me. I remembered the lonely  
2 hours George spent while I was at work, and I vowed to never let work come between Carlos  
3 and me. I wanted to spend more time with Carlos; I needed to find another job. Carlos also  
4 wanted to return to Los Angeles to be close to his mother, who was aging.

5 17. I began interviewing with a new firm in Los Angeles in April of 2006. Carlos  
6 and I then decided that we were going to commit to each other, and that we were going to  
7 live our lives as a couple. We entered a New Jersey domestic partnership in May of 2006,  
8 and celebrated our union with lunch at a restaurant near city hall, as my work schedule did  
9 not permit anything more. I returned to the office, and a coworker remarked, "You look  
10 happy. Why?" I excitedly exclaimed, "I just got married!" and proudly pointed to the ring  
11 newly planted on my finger. For my coworkers who probably had never seen me do  
12 anything but work and who might have thought I had no social life whatsoever, this must  
13 have come as a complete shock.

14 18. After that, in mid-May, I returned to the firm I was interviewing at in Los  
15 Angeles for another set of interviews. During some spare time, Carlos, who stayed home in  
16 Jersey City, gave me directions from Google Maps while I drove around the neighborhood in  
17 East Los Angeles where he grew up. His virtual visit of Los Angeles with my descriptions  
18 of his old haunts over my cell phone brought back nostalgic memories for him and he did  
19 want to be close to his aging mother.

20 19. My interview with the president of the firm I was considering took a very  
21 unpleasant turn when he told me that he preferred to hire a different candidate because the  
22 other person competing for the job was a "married man with a wife," and therefore  
23 presumably had a more legitimate reason to be relocated to Los Angeles. I felt hurt that my  
24 relationship with Carlos was somehow diminished because I was a "partnered" instead of  
25 married.

26 20. I did ultimately get a job offer. But back in New York on Memorial Day  
27 weekend of 2006, my lack of sleep from my work hours and continued stress took its toll. I  
28 had what I thought was a stroke, in which I experienced paralysis and was unable to move.

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1 Carlos called 911 to take me to the emergency room. I was diagnosed with acute stress, and  
2 Carlos was by my side the whole time in the hospital. I don't know how I would have  
3 managed without his support.

4 21. I got out of the hospital after a few days, and although I was still reluctant, I  
5 accepted the job offer in Los Angeles. There was to be, however, no letup from the stress for  
6 either of us. I had another hospitalization for acute stress in June, this time for a week, while  
7 Carlos was also experiencing significant stress of his own. Then, as we were packing our  
8 things to move to Los Angeles in mid-July 2006, Carlos experienced what seemed like a  
9 heart attack at the time, and he was hospitalized himself for several days with acute stress  
10 and conversion disorder. The day after he was released from the hospital, we boarded a  
11 plane to move to Los Angeles to continue our lives together.

12 22. We obtained our California domestic partnership status, as it was important to  
13 establish our relationship as a committed couple in California. Our hospital stays reminded  
14 us just how important it would be for one of us to be able to visit the other in the hospital or  
15 make medical decisions for each other. By this time, all of our finances were joint: we had a  
16 joint bank account, a joint brokerage account, and Carlos was beneficiary of my life  
17 insurance and vice versa. We paid all our bills from our joint account, shopped for groceries  
18 together, made major decisions jointly and spent most of our free time together. We even  
19 picked out a church together, since religion is important to me and we wanted to find a  
20 church home where we both could be happy. We joined a Unitarian Universalist church in  
21 Santa Monica.

22 23. The next few years were stressful as well. It took time for Carlos to find a job.  
23 Carlos did start working again, only to need to leave that job in a few months to be by his  
24 mother's side, as she had fallen ill and was hospitalized for over four months before passing  
25 away. I was with Carlos during this very difficult time, and luckily my income had helped  
26 support us both for the ten months that he wasn't working. During this period when Carlos  
27 wasn't working, following our move to Los Angeles and during Carlos' mother's  
28

1 hospitalization, we jointly incurred debts to cover our living expenses, with me taking on  
2 debt to help make up the difference for Carlos’ lost income, and Carlos doing the same.

3 24. Even though my salary supported both of us while Carlos wasn’t working, it  
4 wasn’t entirely sufficient and we both took on debts to provide for our joint living expenses.  
5 We never saw it as “my” income and “his” income or Gene’s debts or Carlos’ debts. It was  
6 “our” income and debt. Carlos was covered under my employer’s health insurance plan,  
7 which was vital since we never could afford a private health insurance plan for Carlos with  
8 our budgets tight with just my income to support the two of us.

9 25. For a while, we did enjoy some calm. Our happiest day together, our wedding,  
10 came on Labor Day weekend in 2008, the same holiday weekend during which we had met  
11 in 2005, so we could make Labor Day weekend the “right” anniversary. We held our  
12 ceremony in the church where we had become very involved: I was the Treasurer, on the  
13 Board of Directors and on the executive committee of the church. It was the perfect  
14 opportunity for us to celebrate – finally – becoming lawfully wedded spouses in a  
15 community that saw us as nothing other than a married couple.

16 26. We went to company picnics and holiday office parties together. I went to his  
17 company functions as his spouse, and his coworkers treated us as such. My family views us  
18 as a unit, and so does his family. Our neighbors do, too, and even the clerks at Walgreen’s  
19 pharmacy or the woman at the dry cleaners who always knows that I am picking up Carlos’  
20 dry cleaning or vice versa. Having this oasis of family stability in our household has helped  
21 us deal with all of the stress from the outside world to that point, but more was yet to come.

22 27. In March of 2009, at the height of the financial crisis, when the stock market  
23 fell to a twelve year low, I lost my job when my company laid off 1,000 people. While it is  
24 always unpleasant being laid off, I needed the time off: I had been working continuously –  
25 and, for the most part, excessively – since 1984, and I needed a long rest. However, my  
26 income had gone from \$200,000 a year to just \$475 a week on unemployment, and Carlos’  
27 income was nowhere near sufficient to pay our bills, which we paid out of our pooled funds.

28

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1 Luckily, given my medical conditions, I am covered under Carlos' employer's medical plan,  
2 and it is a vital lifeline to us for his employer to treat us as a married couple.

3 28. Otherwise, I don't know what I'd do without being covered by Carlos'  
4 insurance, as it would be impossible to obtain a health care plan on my own and I wouldn't  
5 have been able to afford COBRA coverage without Carlos' income to support me. Carlos  
6 was extremely supportive emotionally as well as financially, and I put him through  
7 tremendous stress as I interviewed for jobs in cities all across the country, many of which  
8 were places neither of us desired to live. We would, however, consider as a couple any job  
9 opportunities I might have; I would never consider taking a job without Carlos' buy-in,  
10 especially as we would likely have to relocate. Many of the jobs I had considered were in  
11 states that did not recognize our relationship, and we were extremely reluctant to consider  
12 them, given how the legal recognition of our relationship has been vital to both our finances  
13 and our medical issues over our years together.


14 29. Carlos' stress from my unemployment and long job search and the uncertainty  
15 it entailed did take a toll on him, and while I was unemployed, he went out on disability.  
16 Our finances took a huge hit, and we depleted our savings. We withdrew funds from our  
17 retirement accounts to fund our joint living expenses. After a year, I began working again as  
18 a free-lance writer for a financial website, but make 80% less than what I did before. Having  
19 exhausted our savings, bankruptcy became the only option.

20 30. Now, we need to adjust to life with a lot less money, and Carlos is now the  
21 primary breadwinner of the family. The reversal of fortunes has been difficult for both of us,  
22 but as Carlos told me, "I didn't marry you for your money." We now must adjust to a very  
23 different lifestyle than we had before, but we always are thankful we have each other. We  
24 are in this together, and we remind ourselves each day of the stresses we've been through  
25 together and how those events have made our relationship stronger and more resilient. We  
26 talk about growing old together and what we might be like when we are in 70's and think of  
27 where we might want to retire.  
28

1           31. The health of our relationship is demonstrated in everyday rituals. We go  
2 grocery shopping together, but I know he likes Fuji apples and hates carrots, and he knows  
3 that I like Red Delicious apples and hate celery. I do all of the cooking; he does all of the  
4 cleaning. I write out the checks but he does all of the filing. We eat dinner together at home  
5 every night, and we pray together every day before we eat. We now go to a different church  
6 than we did before, but it is one that we picked out together, and it is one that we both like.  
7 We depend on each other for emotional support as we continue to go through uncertainty, as  
8 I still need to find another job with more income, and the uncertainty of where we might be  
9 living continues to be a major stressor. Additionally, it is hurtful to have our own  
10 government argue that we are not legally married for purpose of federal law.

11           32. However, we never let the stress come between us. We never “fight” in the  
12 angry sense of the word. We have disagreements, and we may become upset with each  
13 other, but it never lasts for long and we have never even raised our voices to each other.  
14 Instead, we talk about the issues we face and discuss our feelings to each other rationally and  
15 calmly. We listen to what each other is saying – and feeling – and never yell or scream at  
16 each other. In this respect, our relationship is ideal: a tranquil, stable bond that unites the  
17 two of us in the midst of the turmoil of the outside world. It is this bond that keeps us sane  
18 and centered. Without it, I do not know what I might have done on my own in the face of a  
19 very challenging five and a half years. God has indeed answered the prayers I made that  
20 evening just hours before I met Carlos, the love of my life.

21  
22 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
23 knowledge and belief. Executed on April 27, 2011 at Los Angeles, California.

24  
25  
26   
27 \_\_\_\_\_  
28 GENE DOUGLAS BALAS

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**DECLARATION OF CARLOS A. MORALES**

I, Carlos A. Morales, hereby declare under penalty of perjury that:

1. Together with Gene Douglas Balas, I am one of the debtors in this chapter 13 bankruptcy case. I respectfully submit this declaration in opposition to the U.S. Trustee’s Motion to Dismiss and in response to the U.S. Trustee’s Confirmation Objection. I am over eighteen years of age and have personal knowledge of the facts set forth herein; if called as a witness, I could and would testify competently with respect thereto from my own personal knowledge.

2. Gene and I were married in California on August 30, 2008, and we remain married to this day. We publicly hold ourselves out as a married couple, and our family, friends and business associates recognize us as such.

3. All the property that either of us owns is community property, and all of our debts are community debts. We have no prenuptial agreement, postnuptial agreement or transmutation agreement. We view everything as belonging to (or owed by) us as a couple. There is no “his” and “mine”; everything is “ours.”

4. I understand that the U.S. Trustee is asking the Court to dismiss our bankruptcy case because our marriage does not “count” under federal law. According to DOMA, Gene and I are no more than strangers (or possibly roommates). It is hurtful to hear my own government say that my marriage is not valid for purposes of federal law. To show why this makes no sense, I would like to share the story of how we met, fell in love, married, and built a life together.

5. Since I was five, I knew I had an attraction towards members of my own gender. Not fully understanding the meaning of sexual orientation, I knew this attraction made me different from the other boys I knew at the time. I had even developed schoolboy crushes on other boys in my class; however, I kept those to myself because even at this young age, I knew that somehow, this disclosure would have met with disapproval among my peers and family.

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1           6. I was born and raised in East Los Angeles, a place rooted in deep traditional  
2 Latino and Catholic traditions. Homosexuality was considered taboo. It wasn't until my  
3 college years at U.C. Santa Barbara that I started to acknowledge that perhaps I was not  
4 meant to follow a traditional path of a relationship with a woman. However, I did not pursue  
5 any relationships with men because I was not yet willing to fully accept that my sexual  
6 orientation was different, as it went against everything I had been raised to believe.

7           7. In 1990, I fully acknowledged and accepted the fact that I am gay. However,  
8 after coming out to myself and to friends, I was still not comfortable coming out to the rest  
9 of my family. I knew that in order to develop as a fully independent young gay man, I had to  
10 break with some of the family ties and move on my own. Shortly after coming out to my  
11 mother, I decided to move to New York to pursue career and life opportunities, and in  
12 October 1993, I sold most of my belongings and moved to New York to start a new life.

13           8. While in New York, I had a couple of short-term relationships but it wasn't  
14 until Labor Day weekend of 2005 that I had met someone who would have a major impact  
15 on my life. I first met Gene after spending a quiet Friday evening with some friends, who  
16 are both men in a stable, committed and loving relationship with one another. As the  
17 evening was winding down, I decided to stop at a neighborhood bar before heading home.  
18 That is where I met Gene. After our introductions, his firm handshake sealed the deal. I felt  
19 that I had met someone with whom I could see myself spending the rest of my life.

20           9. I had an instant attraction to Gene that went beyond the physical. I felt an  
21 instant bond and connection with him. I had found a soul mate. We dated for a few months  
22 before he asked me to move in with him. At first I was reluctant, given that I had been living  
23 on my own for several years and was no longer accustomed to sharing a living space – let  
24 alone my life – with anyone. But, with Gene I felt that this could have the potential for a  
25 long-term, steady and stable relationship that I did not have with anyone else. A few months  
26 after meeting Gene, we moved in to a new apartment in Jersey City. I broke my lease of my  
27 Manhattan apartment and took all of my belongings with me, including two cats.

28

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1           10. Shortly after moving in with Gene, his work load and hours increased. I saw  
2 him briefly early in the morning and late in the evening before and after work, often arriving  
3 home from work after midnight. I began to notice the toll the work load had taken on him  
4 and it was beginning to affect me as well. He was constantly fatigued and I began to worry  
5 about his health. At one point he came down with pneumonia but only missed a day of work  
6 (and still worked from home that day). The stress of deadlines and his workload gave me  
7 cause for concern. I was worried that this would have a negative impact on his overall  
8 health.

9           11. One Saturday morning, he yelled out my name. I noticed the panicked look on  
10 his face and knew something was seriously wrong. He complained of numbness and lack of  
11 mobility in his arms and legs. I immediately called 911 and they arrived and took him to the  
12 hospital. I rode along with him in the ambulance to a nearby hospital where I sat with him in  
13 the emergency room while the doctors treated him and tried to diagnose him. He was later  
14 admitted and I spent the entire Memorial Day weekend by his side comforting him in any  
15 way I could. The doctors would later diagnose his condition as stress-related. I was relieved  
16 that it had not been a stroke. I spoke with the doctors and gave them what little medical  
17 history I knew at the time since we had only been living together for a short period of time.

18           12. During Gene's hospitalization, I called his relatives who were nearby and  
19 updated them on Gene's condition. They saw me as his partner and caretaker, and not once  
20 objected to me being by his side. After his discharge from the hospital, Gene and I realized  
21 that in order to make this relationship stronger, we had to learn more about each other's  
22 medical histories to better handle such situations should they arise again. Gene's workload  
23 did not get better; it actually worsened as his hospitalization set him back.

24           13. Prior to his hospitalization, Gene had begun to look for work elsewhere,  
25 including outside of New York. I knew his job search had the potential to take him out of  
26 the area, and I had to make a decision to commit to this relationship or move on. Without  
27 hesitation, I agreed to follow him to wherever this new job would take him. After his first  
28 hospitalization, I was even more committed to Gene as my lifelong partner. He began the

1 interview process with a financial firm in Los Angeles. I had spent a good 20 years away  
2 from L.A. and was ready to move back to be close to family. I was no longer the naïve and  
3 worried young man afraid of how my family might react to me being gay. This time, I was  
4 in a committed relationship about which I felt strongly and had the confidence in myself and  
5 in my partner to be able to face any situation.

6 14. If any proof was needed of our level of commitment, it came when we went to  
7 city hall on a morning in early May 2006 to be registered as New Jersey domestic partners.  
8 We knew we had to take the next step in our relationship to make it solid, especially since  
9 we were planning to move across the country. And, as another test to our commitment, Gene  
10 underwent a second hospitalization one month after the last, also due to stress-related illness.  
11 The move, combined with the two hospitalizations, began to affect me as well. I had  
12 undergone a tremendous amount of stress being a caretaker and planning a move across the  
13 country. I underwent a hospitalization of my own on my birthday, two days before we had  
14 to catch a flight to Los Angeles. Upon arriving in the emergency room, I was treated for a  
15 possible heart attack but the tests were negative for any heart problems and the doctors said it  
16 was a stress-related illness. Nevertheless, I boarded a plane less than 48 hours after leaving  
17 the hospital to be with Gene out in Los Angeles and began a new life, hopefully free from all  
18 the troubles we had while living in Jersey City with Gene working those long hours.

19 15. In Los Angeles, we lived off Gene's income for a few months. Fortunately,  
20 Gene's employer provided domestic partner benefits as COBRA premiums from my former  
21 job would have drained our savings. I also took this time to reconnect with my mother who  
22 was living in Los Angeles. She still had issues with my being gay – and especially with me  
23 being in a relationship with another man. However, as I spent more time with her, she began  
24 to warm up to the idea of my relationship and my level of commitment.

25 16. Unfortunately, shortly after my arrival to Los Angeles, my mother had an  
26 accident at her home and had to be hospitalized. I had just started working and now had to  
27 balance being a caretaker and working full time, which was not easy. My mother spent four  
28 months in the hospital and nursing home before she passed away. During the time my

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1 mother was ill, Gene met several of my family members and friends of my mother. My  
2 family turned out to be quite open-minded about my relationship with Gene. They saw us as  
3 a committed couple, especially after witnessing for themselves the level of commitment  
4 Gene and I displayed towards one another. Gene was by my side supporting emotionally as  
5 well as financially, since I had to leave my job to take care of my mother while she was ill.

6 17. On the day my mother passed away, my family and her friends gathered in the  
7 hospital room to say goodbye. Gene left work early to meet me there and was by my side.  
8 My mother quietly passed away later in the night. The following day, Gene took the day off  
9 from work to be with me and help me go through the business of handling the details of her  
10 passing. He, along with a friend of my mother's, joined me at the funeral home to make the  
11 arrangements, as he had been through the ordeal of planning a loved one's funeral with the  
12 death of his partner many years before, and that of his father more recently. Gene provided  
13 the comfort and support I need to get through this difficult time; all the while, my family and  
14 friends acknowledged him as an important part of my life.

15 18. I soon began working full time again as a presentation specialist, a role which I  
16 had done at my previous employer in New York. From the beginning, my employer offered  
17 domestic partner benefits, which covered Gene, who was also the main beneficiary of my life  
18 insurance. Even though we already were registered as domestic partners in New Jersey,  
19 Gene and I decided to register as domestic partners in California. We wanted to be certain  
20 that our relationship would be recognized by our new home state.

21 19. By this point our lives had become fully integrated. We had long since opened  
22 a joint checking account, named each other as beneficiaries in our life insurance and  
23 employee health insurance. We were living as a single, joint unit instead of two separate  
24 individuals. We would cook for each other, share household responsibilities, care for our  
25 cats, and even pick a church to attend and then become members.

26 20. There was no doubt in our minds as to what to do next, once the California  
27 Supreme Court ruled in favor of same-sex marriage. On August 30, 2008, we were legally  
28 married. We held our ceremony at our church, the Unitarian Universalist Community

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1 Church of Santa Monica. In front of friends and family, we exchanged our vows and made it  
2 official. It was one of the happiest days of my life. After all we had been through to this  
3 point, it only made sense to sanctify our commitment to one another for the world to see.

4 21. We plan for old age and retirement together; there is no doubt that we are  
5 committed to each other for life. We are a single unit. We live our lives together, and our  
6 finances are joint. Everything we own is each other's.

7 22. However, our finances were nothing to celebrate. During most of my mother's  
8 illness, I had been unemployed. We had only Gene's income to support us, and that was not  
9 always enough to get us through. We found ourselves putting basic necessities such as food  
10 and clothing on our credit cards. Once I began working, we were able to make payments and  
11 relied less on our credit cards. We took measures to reduce our expenses such as moving to  
12 a less expensive unit in our complex. We were managing well, but then in March 2009,  
13 Gene lost his job when his company laid off nearly a fifth of its workforce. Our total income  
14 was dramatically reduced and even with a less expensive apartment, it was going to be a  
15 difficult challenge to meet our expenses.

16 23. We tried all that we could to make ends meet. We cut back on expenses where  
17 we could. We had only one car instead of two. I began taking public transportation to work.  
18 We withdrew funds from our retirement savings and borrowed against our 401(k) to meet  
19 expenses. Still that wasn't enough. Our credit card payments had increased, as well as the  
20 interest rates. Many of our credit card companies were charging interest rates over 30%,  
21 which made paying down the balances next to impossible.

22 24. After a year of Gene's unemployment, we began to consider bankruptcy as an  
23 option. I had been resistant to the idea, hoping our financial difficulties would only be  
24 temporary. However, after a lengthy period of unemployment and cutting back expenses, I  
25 knew that even if our situation were to change for the better, we had incurred such a large  
26 amount of debt that it would be difficult to overcome the challenge of paying it down,  
27 especially given the exorbitantly high interest rates the credit card companies had been  
28 charging.

1           25. Filing bankruptcy would bring a different set of challenges in itself. We knew  
2 that because of DOMA, the federal government would not recognize our relationship as  
3 legal, even though we are legally married in the State of California. We also knew that filing  
4 individually made no sense to us either, because our lives and finances have become so  
5 intertwined. It would seem like an impossible task to separate our finances – something akin  
6 to a divorce – in order to file individually. The stress of our financial condition and the  
7 uncertainty of how we would find relief under the Bankruptcy Code impacted my health and  
8 I went out on disability for nearly five months between June 2010 and November 2010.

9           26. Filing jointly is the only option we have. Our lives – including our finances –  
10 have become inseparable. My income is the main supporter for the both of us. Gene is  
11 covered under my employer's health plan, without which his medical expenses would pose a  
12 difficult financial challenge. My family, my colleagues at work and our friends fully  
13 acknowledge Gene as my spouse. It is imperative that we file jointly as we are married to  
14 each other in every sense of the word.

15  
16 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
17 knowledge and belief. Executed on April 27, 2011 at Los Angeles, California.

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21 CARLOS A. MORALES  
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American Bankruptcy Institute

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Table with 2 columns: Debtor(s) and Case Number. Debtor(s): Gene Douglas Balas and Carlos A. Morales. Case Number: 2:11-bk-17831-AA. Also includes CHAPTER 13.

NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

KLEE, TUCHIN, BOGDANOFF & STERN LLP
1999 Avenue of the Stars, 39th Floor
Los Angeles, CA 90067

A true and correct copy of the foregoing document described as DEBTORS' OPPOSITION TO THE U.S. TRUSTEE'S MOTION TO DISMISS AND RESPONSE TO THE U.S. TRUSTEE'S CONFIRMATION OBJECTION; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF GENE DOUGLAS BALAS; DECLARATION OF CARLOS A. MORALES will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d), and (b) in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On April 28, 2011 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the e-mail address indicated below:

SEE ATTACHED SERVICE LIST

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II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served): On April 28, 2011 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

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III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P.5 and/or controlling LBR, on April 28, 2011 I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method ) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Via Personal Delivery
The Honorable Alan M. Ahart
U.S. Bankruptcy Court
Roybal Federal Building
255 E. Temple Street, Suite 1382
Los Angeles, CA 90012-3332

Via Personal Delivery
The Honorable Thomas B. Donovan
U.S. Bankruptcy Court
Roybal Federal Building
255 E. Temple Street, Suite 1352
Los Angeles, CA 90012-3332

Via Personal Delivery
Office of the United States Trustee
Attn: Peter C. Anderson
725 S. Figueroa Street, Suite 2600
Los Angeles, CA 90017

Service Information continued on attached page.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

April 28, 2011
Date

Rosalind Williams
Type Name

Handwritten signature of Rosalind Williams
Signature

130489.1 This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

# Southwest Bankruptcy Conference

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In re: Gene Douglas Balas and Carlos A. Morales Debtor(s).	CHAPTER 13 CASE NUMBER 2:11-bk-17831-AA
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## ADDITIONAL SERVICE INFORMATION (if needed):

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August 2010

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# American Bankruptcy Institute

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Southwest Bankruptcy Conference



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

February 23, 2011

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

Re: Defense of Marriage Act

Dear Mr. Speaker:

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

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

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

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

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

### Standard of Review

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

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

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

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

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

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

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

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

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

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

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

### Application to Section 3 of DOMA

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

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

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

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

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

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

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

#### **Application to Second Circuit Cases**

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

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

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

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

American Bankruptcy Institute

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Tab A - Holder Letter Page 6 of 6

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

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

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

Sincerely yours,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", with a stylized flourish at the end.

Eric H. Holder, Jr.  
Attorney General

IN RE LEVENSON

Cite as 560 F.3d 1145 (9th Cir. 2009)

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In The Matter of Brad LEVENSON.

Judicial Council of the Ninth Circuit.

Feb. 2, 2009.

**Background:** Deputy federal public defender (FPD) challenged Central District of California FPD’s denial, pursuant to Defense of Marriage Act (DOMA), of his request that his same-sex spouse be made family-member beneficiary of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA).

**Holdings:** The Judicial Council, Reinhardt, Circuit Judge, held that:

- (1) denial of deputy FPD’s request violated Ninth Circuit’s Employment Dispute Resolution (EDR) Plan, and
- (2) DOMA, as applied to preclude deputy FPD’s request, violated Due Process Clause.

Ordered accordingly.

1. Civil Rights ⇌1193

Defense of Marriage Act (DOMA)-based denial of deputy federal public defender’s request that his same-sex spouse be made family-member beneficiary of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA) constituted violation of Ninth Circuit’s Employment Dispute Resolution (EDR) Plan, which prohibited discrimination based on sex or sexual orientation. 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901 et seq.

2. Constitutional Law ⇌4170

Marriage ⇌54(2)

United States ⇌39(2)

Defense of Marriage Act (DOMA), as applied to preclude deputy federal public defender’s request that his same-sex spouse be made family-member beneficiary of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA), violated Due Process Clause; no rational basis existed for differ-

ential treatment of opposite-sex vs. same-sex spouses, since it would not encourage gay people to enter into heterosexual marriages or discourage same-sex marriages, was too attenuated a means of achieving DOMA’s purpose to defend traditional notions of morality, and was drastically underinclusive as cost-saving measure. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901 et seq.

West Codenotes

Limited on Constitutional Grounds

1 U.S.C.A. § 7

Before: STEPHEN REINHARDT, Circuit Judge.

ORDER

REINHARDT, Circuit Judge:

Overview

Brad Levenson, a deputy federal public defender in the Office of the Federal Public Defender for the Central District of California (“FPD”), married Tony Sears on July 12, 2008, in accordance with California law. Three days later, Levenson requested that Sears be made a family member beneficiary of his federal health, dental, and vision benefits (hereinafter “federal benefits”). Levenson’s request was denied on the ground that his spouse is male and the federal Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, prohibits the provision of federal benefits to same-sex spouses. Levenson filed a complaint with the FPD, alleging that the denial of benefits violates the Ninth Circuit’s Employment Dispute Resolution Plan for Federal Public Defenders and Staff (“EDR Plan”), which expressly prohibits discrimination on the basis of sex and sexual orientation, as well as the Unit-

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ed States Constitution. For the reasons explained below, I agree, and direct the Director of the Administrative Office of the United States Courts to submit Levenson's Health Benefits Election form 2809 to the appropriate health insurance carrier, and to process his request for FEDVIP coverage.

#### Facts

Brad Levenson has been a deputy federal public defender in the FPD since July 11, 2005. He and Tony Sears have been partners for 15 years. They registered their domestic partnership on March 16, 2000, and were married in California on July 12, 2008. On July 15, 2008, Levenson requested that his husband be added as a family member beneficiary of his federal benefits. That request was denied on the basis of a memorandum prepared by the Office of the Circuit Executive stating that the provision of benefits to same-sex spouses is prohibited by DOMA. According to the memorandum:

[T]he federal government does not recognize a same-sex union as marriage for any purpose, even if the state law recognizes such unions as marriages.

Judicial Branch employees work for the federal government. The federal law defines a federal employee's rights to health benefits, and those benefits are

delivered through the Federal Employee Health Benefits (FEHB) program. For this reason, we can not [sic] extend any health benefits beyond those prescribed by federal law.

Levenson alleges that this denial violates the EDR Plan, as well as the Constitution.

The EDR Plan was adopted by the Ninth Circuit Judicial Council "to provide rights and protections to employees of the Federal Public Defender Offices . . . which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995."<sup>1</sup> EDR Plan at A-1. The Plan prohibits discrimination on numerous grounds, including both sex and sexual orientation. *Id.* at A-2. The availability of health, dental, and vision insurance for oneself and one's family is a valuable benefit of employment,<sup>2</sup> and denial of such a benefit on account of sex or sexual orientation would violate the terms of the EDR plan.

As required by the EDR Plan, *see id.* at A-6-A-9, Levenson requested counseling, which failed, and mediation, which also failed. He then filed the pending complaint. *Id.* at A-10. In my role as Chair of the Ninth Circuit's Standing Committee on Federal Public Defenders at the time of the complaint's filing, and presently as designee of the current Chair of the Stand-

1. The Congressional Accountability Act of 1995 "extended to [Congress's] employees the protections of eleven labor laws generally applicable to other public and private employees, including the protections against discrimination provided in Title VII. . . ." *Dotson v. Griesa*, 398 F.3d 156, 173 (2d Cir.2005). "In enacting the CAA, Congress initially considered extending the statute's coverage to employees of the judicial branch but, mindful of the importance of judicial autonomy, ultimately decided against such action." *Id.* Thus, the EDR Plan, rather than Title VII or any other federal labor law, provides Levenson's exclusive remedy for his claim of employment discrimination.
2. FPD employees and their family members have the right to these benefits pursuant to the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901-8914 ("FEHBA"), and FEDVIP, the federal employee dental and vision insurance program, *see* 5 U.S.C. §§ 8951-62, 8981-92; 5 C.F.R. §§ 894.101 *et seq.* Before Levenson joined the FPD, he was employed in the California Attorney General's Office, which provided Sears with full medical, dental, and vision benefits. Since Levenson joined the FPD, he and Sears have paid \$277 per month to provide Sears with health insurance, and have also paid the full cost of Sears's dental and vision care.

## IN RE LEVENSON

Cite as 560 F.3d 1145 (9th Cir. 2009)

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ing Committee, I am charged with hearing and ruling upon Levenson's complaint. *Id.*

## Analysis

## I. Levenson's Rights under the EDR Plan Were Violated

[1] There is no doubt that the denial of Levenson's request that Sears be made a beneficiary of his federal benefits violated the EDR Plan's prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the EDR Plan's prohibition of sex discrimination. Alternatively, the denial of benefits can be understood as discrimination on the basis of sexual orientation. As the California Supreme Court recently explained, the differential treatment of opposite-sex and same-sex couples

cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting [benefits] to opposite-sex couples, the [ ] statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender. A statute that limits [benefits] to a union of persons of opposite sexes, thereby placing [those benefits] outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis

of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.

*In re Marriage Cases*, 43 Cal.4th 757, 839–40, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).

Because the EDR Plan prohibits discrimination based on both sex and sexual orientation, it is not necessary to determine which form of discrimination is at issue in the present proceeding in order to find a violation of the EDR Plan. Regardless of whether Levenson experienced discrimination due to his sex or due to his sexual orientation, the denial of benefits violated the EDR Plan.

## II. What Is the Remedy, if Any?

Levenson's rights under the EDR Plan were violated. It is therefore necessary to determine the appropriate remedy, if any. Before doing so, however, I must consider the effect of DOMA, which, as applied to the FEHBA and FEDVIP, precludes an award of federal benefits to Levenson's spouse. Ultimately, I conclude that, to provide for the equal treatment of all judicial branch employees within the Ninth Circuit, and because any other directive would be unconstitutional, the appropriate remedy in this case is an order requiring the provision of FEHBA and FEDVIP benefits to Levenson's spouse.

Federal employees, including employees of the FPD, receive health benefits pursuant to the FEHBA. The FEHBA permits federal employees to elect coverage "either as an individual or for self and family," 5 U.S.C. § 8905(a), and defines "member of family" as "the spouse of an employee or annuitant" or "an unmarried dependent child under 22 years of age . . ." 5 U.S.C.

§ 8901(5). FEDVIP likewise defines “family member” as “a spouse . . . and/or unmarried dependent child(ren).” 5 C.F.R. § 894.101. These definitions of family member are limited, however, by DOMA, which provides that, “[i]n 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. Accordingly, the FEHBA and FEDVIP provisions defining family members to include spouses must be interpreted, pursuant to DOMA, to include only *opposite-sex* spouses.

DOMA on its face “does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition [of marriage],” *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006). DOMA simply limits the definition of “spouse” under federal law. It is the FEHBA, when read in light of the subsequently enacted DOMA, which appears to have that effect.<sup>3</sup> For two reasons, however, I conclude that, DOMA and the FEHBA notwithstanding, it is both necessary and appropriate to direct that Levenson’s husband receive the federal benefits requested by Levenson.

First, in a recent decision resolving an identical complaint by a member of the central staff of the Ninth Circuit Court of Appeals, Chief Judge Kozinski, as hearing officer under the EDR Plan for Ninth Circuit employees, ordered the provision of FEHBA benefits to her same-sex

spouse. According to that decision, the legal significance of the definition of “member of family” at 5 U.S.C. § 8901(5) is ambiguous, because the FEHBA does not expressly state whether FEHBA coverage can be afforded *only* to those family members falling within the definition provided by § 8901(5), or whether benefits may be provided to others as well. According to the ruling in that proceeding, under the doctrine of constitutional avoidance, *see I.N.S. v. St. Cyr*, 533 U.S. 289, 300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), this ambiguity must be resolved in favor of providing the coverage to same-sex spouses even though they do not fall within the statutory definition of “member of family,” because a contrary construction of the FEHBA as limited by DOMA would raise significant constitutional questions.

Although Chief Judge Kozinski’s order was issued under the EDR Plan applicable to Ninth Circuit employees, rather than the EDR plan applicable to FPD employees, both plans were prepared and approved by the Judicial Council of the Ninth Circuit, and their anti-discrimination provisions are identical. The plans thus reflect the Judicial Council’s intent to treat FPD employees and other judicial branch employees equally in matters pertaining to their right to be protected from workplace discrimination. Although I am not bound by Chief Judge Kozinski’s decision, in order to ensure that the rights of FPD employees under the FPD EDR Plan are the same as those of other judicial branch employees in the Ninth Circuit, the remedy chosen by the Chief Judge should be adopted here unless I conclude that I am compelled to disagree with his choice of remedy as a matter of law. Because I do

3. The statutes that establish FEDVIP incorporate the definition of family member in the FEHBA, 5 U.S.C. §§ 8951, 8981, and have the same structure as the FEHBA. For the sake

of simplicity, I will conduct the subsequent discussion solely in terms of the FEHBA. However, the arguments apply in full to both the FEHBA and FEDVIP.

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not disagree with the Chief Judge's ultimate holding, I direct that the same-sex spouses of FPD employees be granted the same benefits as same-sex spouses of other judicial branch employees, specifically, that in this case, Levenson's spouse be provided with FEHBA and FEDVIP benefits.

[2] Although I adopt the same remedy as the Chief Judge, I reach that conclusion in a somewhat different manner. I must reluctantly disagree with the view that the FEHBA is ambiguous. I believe instead that the only reasonable reading of that statute is that it does not permit coverage of persons falling outside its definition of family member. Accordingly, I believe that I am compelled to reach the constitutional issue. Doing so, I conclude that the application of DOMA to FEHBA so as to deny Levenson's request that his same-sex spouse receive federal benefits violates the Due Process Clause of the Fifth Amendment.

In reaching that conclusion, I believe it likely that some form of heightened constitutional scrutiny applies to Levenson's claims. See, e.g., *Witt v. Dep't of Air Force*, 527 F.3d 806, 818–21 (9th Cir.2008) (applying heightened scrutiny on an “as applied” basis to a discharged service member's challenge to the military's “Don't Ask, Don't Tell” policy); *id.* at 823–26 (Canby, J., concurring in part and dissenting in part) arguing that discrimination based on sexual orientation is subject to strict scrutiny; see also *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 67, 68 (1993) (finding distinction between opposite-sex couples and same-sex couples to be a sex-based classification subject to heightened

scrutiny). However, the denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny. Accordingly, it is not necessary to determine whether heightened scrutiny is applicable to this claim. Because there is no rational basis for denying benefits to the same-sex spouses of FPD employees while granting them to the opposite-sex spouses of FPD employees, I conclude that the application of DOMA to the FEHBA so as to reach that result is unconstitutional.

Any government action resting on a distinction between discrete classes “must be rationally related to a legitimate governmental purpose.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Under this standard, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests.” *Id.* at 446–47, 105 S.Ct. 3249 (citations omitted). Applying this standard to the present case, the challenged denial of benefits is constitutional only if there is a rational basis for the government to provide FEHBA and FEDVIP coverage to the opposite-sex spouses of FPD employees while denying those benefits to the same-sex spouses of FPD employees. No such basis exists.<sup>4</sup>

The denial of federal benefits to same-sex spouses cannot be justified simply by a distaste for or disapproval of same-sex marriage or a desire to deprive same-sex

4. I should note that marriage is a status traditionally established and regulated by state law. It is also a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Whether a state may deny such status to same-sex couples is beyond the scope of this decision. Here, I need

determine only whether same-sex couples who have been legally married under the laws of the relevant state may, because of the sex or sexual orientation of the couple, be denied federal benefits that are afforded to other couples legally married under such laws.

spouses of benefits available to other spouses in order to discourage them from exercising a legal right afforded them by a state. As *City of Cleburne* made clear, “a bare desire to harm a politically unpopular group” cannot provide a rational basis for governmental discrimination. *Id.* at 447, 105 S.Ct. 3249. In *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Supreme Court applied that rule in the specific context of a law that discriminated against gay people and held that the state constitutional amendment at issue, which raised “the inevitable inference that the disadvantage imposed [was] born of animosity” toward gay people as a class, was unconstitutional. *Id.* at 634–36, 116 S.Ct. 1620. Thus, the denial of federal benefits to same-sex spouses cannot be justified as an expression of the government’s disapproval of homosexuality, preference for heterosexuality, or desire to discourage gay marriage. *Romer* makes clear that the differential treatment of gay people is not, in and of itself, a proper justification for government actions. Discrimination against gay people, or same-sex couples, must, at the very least, serve some more substantive and lawful function.

The House report on DOMA identified three interests advanced by the statute: “the government’s interest in defending and nurturing the institution of traditional, heterosexual marriage;” “the government’s interest in defending traditional notions of morality;” and “the government’s interest in preserving scarce government resources.” H.R.Rep. No. 104–664, at \*12–\*18. The first interest is largely irrelevant to the rational basis analysis here because the same-sex couple here is already married. Gay people will not be encouraged to enter into marriages with members of the opposite sex by the government’s denial of benefits to same-sex spouses, and the denial will not discourage same-sex couples from entering into same-sex marriages; so, the denial cannot be

said to “nurture” or “defend” the institution of heterosexual marriage. As to the second “interest,” if the denial is designed to “defend” traditional notions of morality by discouraging same-sex marriage, it does so *only* by punishing same-sex couples who exercise their rights under state law, and thus exhibits the “bare desire to harm” same-sex couples that is prohibited under *City of Cleburne* and *Romer*. In addition, denying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of “defending traditional notions of morality,” as it also is with respect to achieving the objective of “defending and nurturing the institution of traditional, heterosexual marriage.” More important, *Romer* and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), strongly suggest that the government cannot justify discrimination against gay people or same-sex couples based on “traditional notions of morality” alone. *See Lawrence*, 539 U.S. at 571, 578, 123 S.Ct. 2472 (finding criminal law barring homosexual sodomy constitutionally invalid despite “powerful voices” that “for centuries” have “condemn[ed] homosexual conduct as immoral”); *Romer*, 517 U.S. at 644, 116 S.Ct. 1620 (Scalia, J., dissenting) (noting that the Colorado constitutional amendment held unconstitutional by the majority expressed the “moral disapproval of homosexual conduct” of Colorado’s citizens). For these reasons, neither of the first two interests identified by Congress can provide a rational basis for the denial of benefits at issue here.

The third interest can be disposed of quickly. The denial of health insurance to same-sex spouses may in a comparatively few cases relieve the government of paying its portion of a family coverage premium. However, that a government policy incidentally saves the government an insignificant amount of money does not provide a rational basis for that policy if the policy is, as a cost-saving measure, drastically

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underinclusive, let alone founded upon a prohibited or arbitrary ground. See *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir.2008). That rule applies here: There is no rational relationship between the sex of an employee’s spouse and the government’s desire to limit its employee health insurance outlays; the government could save far more money using other measures, such as by eliminating coverage for all spouses; and the application of DOMA in this context sometimes saves the government no money at all.<sup>5</sup>

I can identify no other government interests that might be served by denying Levenson’s request that Sears receive the same federal benefits available to other spouses of FPD employees. Excluding from health care coverage spouses of employees who have entered into legally binding relationships does not serve the government’s interest in promoting long-term relationships. Likewise, it does not serve any governmental interest in promoting a child-rearing environment, because the children of same-sex couples are eligible for federal benefits and the denial of benefits to same-sex spouses will not affect the decisions made by same-sex couples regarding marriage or parenting. Aside from all else, the relationship of the denial of benefits to such potential objectives is “so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249. Accordingly, a decision denying Levenson’s request that federal benefits be extended to his same-sex spouse would have no rational basis. In sum, to the extent that the application of DOMA serves to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employ-

5. The denial of coverage to same-sex spouses of FPD employees does not save the government any money if an FPD employee already has family coverage for a dependent, such as

ee’s and his or her spouse’s sex or sexual orientation, DOMA as applied contravenes the Fifth Amendment to the Constitution and is therefore unconstitutional.

To ensure the equal treatment of judicial branch employees in the Ninth Circuit and to preclude the unconstitutional denial of benefits to Levenson’s spouse, the Director of the Administrative Office of the United States Courts is ordered to submit Levenson’s Health Benefits Election form 2809, which he signed and submitted on July 15, 2008, to the appropriate health insurance carrier, and to process Levenson’s request that Sears be added as a beneficiary of his FEDVIP benefits. Any future beneficiary addition requests are also to be processed without regard to the sex of a listed spouse.

I retain jurisdiction over this matter so that I may issue any further order that may be necessary to ensure that Levenson’s spouse receives the benefits to which he is entitled.



UNITED STATES of America,  
 Plaintiff–Appellant,

v.

Kerry Dean BENALLY, Defendant–  
 Appellee.

No. 08–4009.

United States Court of Appeals,  
 Tenth Circuit.

March 23, 2009.

Diana Hagen, Trina A. Higgins, Office of  
 the United States Attorney, Salt Lake  
 City, UT, for Plaintiff–Appellant.

a child, because there is no cost to the employee or to the government of adding an additional family member to an existing family policy.

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The stipulation says only that the “lower court may invest the interpleaded funds during the pendency of the instant appeals.” We thus apply the “usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–63, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (citing eight cases). On remand, the district court shall order all interest accrued on the interpleaded funds returned to Merrill Lynch.

3. Two Supreme Court Justices remarked on the desirability of transferring this case to a different district judge. *Pimentel*, 128 S.Ct. at 2196 (Stevens, J., concurring in part and dissenting in part) (explaining “that the District Judge would likely have substantial difficulty in putting out of his or her mind previously-expressed views” (internal quotation marks omitted)); *id.* at 2198 (Souter, J., concurring in part and dissenting in part) (“For reasons given by Justice Stevens, I would order that any further proceedings in the District Court be held before a judge fresh to the case.”). The district judge’s handling of the case on remand confirms the prescience of these views. We therefore remand this case to the Chief Judge of the District of Hawaii for reassignment to a different district judge, *see United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir.1986) (per curiam), and expedited proceedings in conformity with our order.

**REMANDED.**

The mandate shall issue forthwith. *See* Fed. R.App. P. 2; 41(b).

**In the Matter of Brad LEVENSON.****No. 09–80172.**

United States Court of Appeals,  
Ninth Circuit.

Nov. 18, 2009.

**Background:** Deputy federal public defender (FPD) challenged Central District of California FPD’s denial, pursuant to Defense of Marriage Act (DOMA), of his request that his same-sex spouse be made family-member beneficiary of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA). Following determination by the Judicial Council, Reinhardt, Circuit Judge, 560 F.3d 1145, that denial of benefits violated Ninth Circuit’s Employment Dispute Resolution Plan for Federal Public Defenders and Staff (EDR Plan) and the United States Constitution, deputy federal public defender requested order directing Office of FPD to enter into separate contracts with private insurers in order to provide him with benefits comparable to those provided in existing federal plans, or alternatively, monetary award pursuant to Back Pay Act.

**Holdings:** The Court of Appeals, Stephen Reinhardt, Circuit Judge, held that:

- (1) DOMA, as applied to preclude deputy federal public defender’s request, violated Due Process Clause, and
- (2) denial of benefits warranted award under Back Pay Act.

Ordered accordingly.

**1. Civil Rights ⇐1193**

Defense of Marriage Act (DOMA)-based denial of deputy federal public defender’s request that same-sex spouse be made beneficiary of his federal benefits

under Federal Employee Health Benefits Act (FEHBA) violated prohibition on discrimination based on sex or sexual orientation in Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff (EDR Plan); deputy federal public defender was unable to make his spouse a beneficiary of his federal benefits due to his spouse's sex and sexual orientation. 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901 et seq.

## 2. Constitutional Law ⇌4170

### United States ⇌39(2)

Defense of Marriage Act (DOMA), as applied to preclude deputy federal public defender's request that his same-sex spouse be made family-member beneficiary of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA), violated Due Process Clause; no rational basis existed for different treatment of opposite-sex vs. same-sex spouses, since it would not encourage homosexual people to enter into heterosexual marriages or discourage same-sex marriages, was too attenuated a means of achieving DOMA's purpose to defend traditional notions of morality, was drastically underinclusive as cost-saving measure, and did not maintain consistent definition of marriage at federal level for purposes of distributing federal benefits while individual states considered how to resolve issue of marriage equality for same-sex couples. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901 et seq.

## 3. Constitutional Law ⇌2970

Any government action resting on a distinction between discrete classes must be rationally related to a legitimate governmental purpose.

## 4. Constitutional Law ⇌3900

Under the rational basis standard, for due process purposes, the State may not rely on a classification whose relationship

to an asserted goal is so attenuated as to render the distinction arbitrary or irrational; furthermore, some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests. U.S.C.A. Const.Amend. 5.

## 5. Civil Rights ⇌1448

Office of Federal Public Defender (FPD) did not have authority to enter into health insurance contracts for its employees or to bind the United States to any such contract, and thus order directing FPD to negotiate with private insurers to obtain benefits for deputy federal public defender's same-sex spouse comparable to those he would receive if he were permitted to enroll in federal benefits plans as spouse was not appropriate remedy for denial of benefits in violation of due process and Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff (EDR Plan). U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7; 5 U.S.C.A. § 8903.

## 6. United States ⇌60(1)

Under federal law, a purported agreement with the United States is not binding unless the other party can show that the official with whom the agreement was made had authority to bind the United States.

## 7. Alternative Dispute Resolution ⇌152

Circuit judge, as hearing officer assigned pursuant to Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff (EDR Plan), was appropriate authority to determine whether deputy federal public defender's rights under Due Process Clause and EDR Plan were violated by denial of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA) to same-sex spouse; Deputy federal public defender had no remedies

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under the Civil Service Reform Act, was not covered by Title VII of the Civil Rights Act, and could not bring *Bivens* action to challenge unconstitutional discrimination in workplace, deputy federal public defender was required to resolve employment discrimination claim through procedures set forth in EDR Plan, which was intended to be exclusive remedy of employee relating to rights enumerated under EDR Plan, and deputy federal public defender took appropriate steps to challenge denial of spousal benefits under EDR Plan. U.S.C.A. Const.Amend. 5; Civil Service Reform Act of 1978, 5 U.S.C.A. § 1101 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 5 U.S.C.A. § 5596(b)(1).

**8. Civil Rights ⇔1193, 1471**

Denial of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA) to same-sex spouse, which resulted in violation of deputy federal public defender's rights under Due Process Clause and Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff (EDR Plan), warranted monetary award under Back Pay Act; failure to enroll spouse in his federal benefits plans resulted in withdrawal or reduction of all or part of pay, allowances, or differentials, failure to provide deputy federal public defender with spousal health insurance coverage, which was valuable employment benefit, was personnel action, and denial of benefits constituted discrimination on basis of sex or sexual orientation. U.S.C.A. Const. Amend. 5; 5 U.S.C.A. § 5596(b)(1).

**9. Civil Rights ⇔1473**

Based on determination by hearing officer that denial of health insurance and other benefits under Federal Employee Health Benefits Act (FEHBA) for same-sex spouse violated Due Process Clause and Ninth Circuit's Employment Dispute

Resolution Plan for Federal Public Defenders and Staff (EDR Plan), deputy federal public defender was entitled to award of back pay for period since he first attempted to enroll his spouse in his federal benefits plans. U.S.C.A. Const.Amend. 5; 5 U.S.C.A. §§ 5596, 8903.

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**Limited on Constitutional Grounds**

1 U.S.C.A. § 7

Brad Douglas Levenson, Los Angeles, CA, pro se.

**ORDER**

STEPHEN REINHARDT, Circuit Judge.

**Overview**

Brad Levenson, a deputy federal public defender in the Office of the Federal Public Defender for the Central District of California ("FPD"), is legally married, under California law, to Tony Sears. Nevertheless, Levenson has not been permitted to enroll Sears as a family member beneficiary of his federal health, dental, and vision benefits (hereinafter "federal benefits") because both spouses are of the same sex. In a previous order, I determined that the denial of benefits on this ground violates the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff ("EDR Plan"), which expressly prohibits discrimination on the basis of sex and sexual orientation. I also determined for similar reasons that the denial of benefits violates the United States Constitution. As a further remedy for those violations, Levenson now requests an order directing the FPD to en-

ter into separate contracts with private insurers in order to provide Sears with benefits comparable to those provided in the existing federal plans, or alternatively, a monetary award pursuant to the Back Pay Act. For the reasons set forth below, I have determined that an order directing the FPD to enter into separate health insurance contracts would not be a “necessary and appropriate” remedy within the scope of the EDR Plan. A back pay award, however, would be appropriate under the circumstances. Accordingly, I grant Levenson’s alternative request for a monetary award, and remand the matter to the FPD to determine the actual amount to be awarded.

#### Facts

Brad Levenson has been a deputy federal public defender in the FPD since July 11, 2005. He and Tony Sears have been partners for 15 years. They registered their domestic partnership on March 16, 2000, and were married in California on July 12, 2008, at a time when under the law in that state persons could marry individuals of the same sex. On July 15, 2008, Levenson requested that his husband be added as a family member beneficiary of his federal benefits.<sup>1</sup> That request was denied on the basis that the provision of benefits to same-sex spouses is prohibited

by the federal Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7. Levenson challenged that denial as a violation of his rights under the EDR Plan and the Constitution.

The EDR Plan provides for the only forum in which Levenson can bring a claim of employment discrimination. The Plan was adopted by the Ninth Circuit Judicial Council “to provide rights and protections to employees of the Federal Public Defender Offices . . . which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.”<sup>2</sup> EDR Plan at A-1. The Plan prohibits discrimination on numerous grounds, including both sex and sexual orientation, *id.* at A-2, and establishes a grievance procedure for presenting claims of discrimination, *id.* at A-4-A-14.

As required by the EDR Plan, *see id.* at A-6-A-9, Levenson requested counseling, which failed, and mediation, which also failed. He then filed the pending complaint. *Id.* at A-10. In my role as Chair of the Ninth Circuit’s Standing Committee on Federal Public Defenders at the time of the complaint’s filing, and presently as designee of the current Chair of the Standing Committee, I am charged with hearing and ruling upon Levenson’s complaint and

1. FPD employees and their family members have the right to these benefits pursuant to the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901–8914 (“FEHBA”), and FED-VIP, the federal employee dental and vision insurance program, *see* 5 U.S.C. §§ 8951–62, 8981–92; 5 C.F.R. §§ 894.101 *et seq.* Before Levenson joined the FPD, he was employed in the California Attorney General’s Office, which provided Sears with full medical, dental, and vision benefits. Since Levenson joined the FPD, he and Sears have paid the full cost of Sears’s health insurance premiums and his dental and vision care.

2. The Congressional Accountability Act of 1995 “extended to [Congress’s] employees the

protections of eleven labor laws generally applicable to other public and private employees, including the protections against discrimination provided in Title VII. . . .” *Dotson v. Griesa*, 398 F.3d 156, 173 (2d Cir.2005). “In enacting the CAA, Congress initially considered extending the statute’s coverage to employees of the judicial branch but, mindful of the importance of judicial autonomy, ultimately decided against such action.” *Id.* Thus, the EDR Plan, rather than Title VII or any other federal labor law, provides Levenson’s exclusive remedy for his claim of employment discrimination.

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fashioning a “necessary and appropriate” remedy. *Id.* at A–10, A–13.

In my previous order, I ruled that the denial of benefits to Levenson’s spouse violated the anti-discrimination provisions of the EDR Plan as well as the Due Process Clause of the Fifth Amendment. I directed the Director of the Administrative Office of the United States Courts (“AO”) to submit Levenson’s Health Benefits Election form 2809 to the appropriate health insurance carrier, and to process his request for FEDVIP coverage. I retained jurisdiction over this matter in order to ensure that Levenson’s spouse receives the benefits to which he is entitled.

Although the AO complied with my previous order, Levenson’s spouse has not yet received coverage under the federal benefits plans because the Office of Personnel Management (“OPM”) intervened to prevent his enrollment. Levenson does not request that I take any action against OPM for its role in the ongoing unconstitutional denial of federal benefits for his spouse. Rather, he requests that I enter an order directing the FPD to contract with private insurance companies to obtain separate coverage for his spouse, or alternatively, that I issue a monetary award pursuant to the Back Pay Act.

#### Analysis

Under the EDR Plan, I have the authority to order a “necessary and appropriate remedy” for the violation of a substantive right protected by the Plan. EDR Plan at A–13. The remedy may be retrospective, prospective, or both, and must be “tailored as closely as possible to the specific violation involved.” *Id.* It would be consistent with this grant of equitable authority to consider Levenson’s views as to how best to make him whole, and if possible, to award one of the remedies he has requested. Whether either of the two proposed

alternatives is both appropriate and closely tailored depends, in turn, on the specific nature of the violation. Accordingly, I begin by examining the nature of the discrimination Levenson has experienced and the statutory framework within which that violation has occurred.

#### I. Substantive rights violated by the denial of spousal benefits

[1] As I stated in my previous order, the denial of Levenson’s request that Sears be made a beneficiary of his federal benefits violated the EDR Plan’s prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse’s sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and constitutes a violation of the EDR Plan’s prohibition of sex discrimination. Alternatively, the denial of benefits constitutes discrimination on the basis of sexual orientation. As the California Supreme Court recently explained, the differential treatment of opposite-sex and same-sex couples

cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting [benefits] to opposite-sex couples, the [ ] statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender. A stat-

ute that limits [benefits] to a union of persons of opposite sexes, thereby placing [those benefits] outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation. In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation.

*In re Marriage Cases*, 43 Cal.4th 757, 839–40, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).<sup>3</sup>

Because the EDR Plan prohibits discrimination based on both sex and sexual orientation, it is not necessary to determine which form of discrimination is at issue in the present proceeding in order to find a violation of the EDR Plan. Regardless of whether Levenson experienced discrimination due to his sex or due to his sexual orientation, the denial of benefits violated the EDR Plan.

The denial of federal benefits originally occurred because the Office of the Circuit Executive concluded that DOMA, as ap-

3. Following issuance of the decision in *In re Marriage Cases*, the voters of California adopted by a narrow margin an initiative measure adding to the California Constitution a provision prohibiting same-sex marriage. See *Strauss v. Horton*, 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 59 (2009). The California Supreme Court upheld the enactment of that change by a simple majority of those voting on the statewide initiative, notwithstanding the claim that such a change constituted a revision of the California Constitution, which under California law required the use of a different electoral process. *Id.* at 60, 63–64. The plaintiffs in that proceeding did not raise the question whether the ban on same-sex marriage violated the Federal Constitution.

Although the California Supreme Court held that allowing the initiative to have pro-

plied to the statutes governing health benefits for federal employees, precluded an award of federal benefits to Levenson's spouse. Federal employees, including employees of the FPD, receive health benefits pursuant to the FEHBA. The FEHBA permits federal employees to elect coverage "either as an individual or for self and family," 5 U.S.C. § 8905(a), and defines "member of family" as "the spouse of an employee or annuitant" or "an unmarried dependent child under 22 years of age..." 5 U.S.C. § 8901(5). FEDVIP likewise defines "family member" as "a spouse ... and/or unmarried dependent child(ren)." 5 C.F.R. § 894.101. DOMA operates as a limitation on these definitions by providing that, "[i]n 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. Accordingly, when the FEHBA and FED-VIP provisions defining family members are read in light of the limitation imposed by

spective effect was consistent with the state Constitution, the court also concluded that "the marriages of same-sex couples performed prior to the effective date of [the ballot measure] remain valid and must continue to be recognized in this state." *Id.* at 64. Because Levenson and Sears were married before the measure was adopted, their marriage remains valid under California law.

4. The statutes that establish FEDVIP incorporate the definition of family member in the FEHBA, 5 U.S.C. §§ 8951, 8981, and have the same structure as the FEHBA. For the sake of simplicity, I will conduct the subsequent discussion solely in terms of the FEHBA. However, the arguments apply in full to both the FEHBA and FEDVIP.

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DOMA, those provisions include only *opposite-sex* spouses.

[2] As I concluded in my previous order, the application of DOMA to FEHBA so as to deny Levenson's request that his same-sex spouse receive federal benefits violates the Due Process Clause of the Fifth Amendment. In reaching that conclusion, I believe it likely that some form of heightened constitutional scrutiny applies to Levenson's claims. *See, e.g., Witt v. Dep't of Air Force*, 527 F.3d 806, 818–21 (9th Cir.2008) (applying heightened scrutiny on an “as applied” basis to a discharged service member's challenge to the military's “Don't Ask, Don't Tell” policy); *id.* at 823–26 (Canby, J., concurring in part and dissenting in part) (arguing that discrimination based on sexual orientation is subject to strict scrutiny); *see also Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 67, 68 (1993) (finding distinction between opposite-sex couples and same-sex couples to be a sex-based classification subject to heightened scrutiny). However, the denial of benefits here cannot survive even rational basis review, the least searching form of constitutional scrutiny. Accordingly, it is not necessary to determine whether or which form of heightened scrutiny is applicable to this claim. Because there is no rational basis for denying benefits to the same-sex spouses of FPD employees while granting them to the opposite-sex spouses of FPD employees, I conclude that the application of DOMA to the FEHBA so as to reach that result is unconstitutional.

5. I should note that marriage is a status traditionally established and regulated by state law. It is also a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Whether a state may deny such status to same-sex couples is beyond the scope of this decision. Here, I need

[3, 4] Any government action resting on a distinction between discrete classes “must be rationally related to a legitimate governmental purpose.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Under this standard, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests.” *Id.* at 446–47, 105 S.Ct. 3249 (citations omitted). Applying this standard to the present case, the challenged denial of benefits is constitutional only if there is a rational basis for the government to provide FEHBA and FEDVIP coverage to the opposite-sex spouses of FPD employees while denying those benefits to the same-sex spouses of FPD employees. No such basis exists.<sup>5</sup>

The denial of federal benefits to same-sex spouses cannot be justified simply by a distaste for or disapproval of same-sex marriage or a desire to deprive same-sex spouses of benefits available to other spouses in order to discourage them from exercising a legal right afforded them by a state. As *City of Cleburne* made clear, “a bare desire to harm a politically unpopular group” cannot provide a rational basis for governmental discrimination. *Id.* at 447., 105 S.Ct. 3249 In *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Supreme Court applied that rule in the specific context of a law that discriminated against gays and lesbians and held that the state constitutional

determine only whether same-sex spouses who have been legally married under the laws of the relevant state may, because of the sex or sexual orientation of the couple, be denied federal benefits that are afforded to other spouses legally married under such laws.

amendment at issue, which raised “the inevitable inference that the disadvantage imposed [was] born of animosity” toward gays and lesbians as a class, was unconstitutional. *Id.* at 634–36, 116 S.Ct. 1620. Thus, the denial of federal benefits to same-sex spouses cannot be justified as an expression of the government’s disapproval of homosexuality, preference for heterosexuality, or desire to discourage gay marriage. *Romer* makes clear that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions. Discrimination against gays and lesbians, or same-sex couples, must, at the very least, serve some more substantive and lawful function.

The House report on DOMA identified three interests advanced by the statute: “the government’s interest in defending and nurturing the institution of traditional, heterosexual marriage;” “the government’s interest in defending traditional notions of morality;” and “the government’s interest in preserving scarce government resources.” H.R.Rep. No. 104–664, at \*12–\*18. The first interest is largely irrelevant to the rational basis analysis here because the same-sex couple who seek the benefits are already married. Also, gays and lesbians will not be encouraged to enter into marriages with members of the opposite sex by the government’s denial of benefits to same-sex spouses, and the denial will not discourage same-sex couples from entering into same-sex marriages; so, the denial cannot be said to “nurture” or “defend” the institution of heterosexual marriage. As to the second “interest,” if the denial is designed to “defend” traditional notions of morality by discouraging same-sex marriage, it does so *only* by punishing same-sex couples who exercise their rights under state law, and thus exhibits the “bare desire to harm” same-sex couples that is prohibited under *City of Cleburne* and *Romer*. Moreover, discour-

aging gay marriage serves only to force gay couples to live in a “state of sin” rather than in a lawfully-recognized “state of connubial bliss” that encourages a long-enduring permanent relationship that, in turn, serves as the basis of a state-recognized family. Thus, rather than encouraging morality, the denial of fair and equal treatment to gay and lesbian couples encourages immorality, at least to the extent that it can be said to have any effect at all on decisions about whether and whom to marry. Where, as here, the couple involved is already married, those decisions have already been made, and there can be no such effect. In addition, denying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of “defending traditional notions of morality,” as it also is with respect to achieving the objective of “defending and nurturing the institution of traditional, heterosexual marriage.” More important, *Romer* and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), strongly suggest that the government cannot justify discrimination against gays and lesbians or same-sex couples based on “traditional notions of morality” alone. *See Lawrence*, 539 U.S. at 571, 578, 123 S.Ct. 2472 (finding criminal law barring homosexual sodomy constitutionally invalid despite “powerful voices” that “for centuries” have “condemn[ed] homosexual conduct as immoral”); *Romer*, 517 U.S. at 644, 116 S.Ct. 1620 (Scalia, J., dissenting) (noting that the Colorado constitutional amendment held unconstitutional by the majority expressed the “moral disapproval of homosexual conduct” of Colorado’s citizens). For these reasons, neither of the first two interests identified by Congress can provide a rational basis for the denial of benefits at issue here.

The third interest can be disposed of quickly. The denial of health insurance to

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same-sex spouses may in a comparatively few cases relieve the government of paying its portion of a family coverage premium. However, that a government policy incidentally saves the government an insignificant amount of money does not provide a rational basis for that policy if the policy is, as a cost-saving measure, drastically underinclusive, let alone founded upon a prohibited or arbitrary ground. See *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir.2008). That rule applies here: There is no rational relationship between the sex of an employee's spouse and the government's desire to limit its employee health insurance outlays; the government could save far more money using other measures, such as by eliminating coverage for all spouses, or even every fifth or tenth spouse. Further, the application of DOMA in this context frequently saves the government no money at all.<sup>6</sup>

Recently, the government has advanced an additional argument in defense of DOMA: that the statute serves a legitimate governmental interest in maintaining a consistent definition of marriage at the federal level for purposes of distributing federal benefits while individual states consider how to resolve the issue of marriage equality for same-sex couples. Because this was not among the actual purposes Congress had for adopting DOMA, this post hoc justification would not survive the heightened scrutiny that, as I have stated, likely applies to Levenson's claim. See *supra* page 931 (citing *Witt v. Dep't of Air Force*, 527 F.3d 806, 818–21 (9th Cir.2008); *id.* at 823–26 (Canby, J., concurring in part and dissenting in part); *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 67, 68 (1993)). Even under the more deferential rational basis review, however,

this argument fails. DOMA did not preserve the status quo vis-à-vis the relationship between federal and state definitions of marriage; to the contrary, it disrupted the long-standing practice of the federal government deferring to each state's decisions as to the requirements for a valid marriage. Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593–94, 10 S.Ct. 850, 34 L.Ed. 500 (1890))); *De Sylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 100 L.Ed. 1415 (1956) (“[T]here is no federal law of domestic relations, which is primarily a matter of state concern.”). Because state law governs marriage recognition, the only consistent definition that could be employed at the federal level is the one that was in effect prior to DOMA. At that point, a marriage recognized as valid by the couple's state of domicile was also recognized as valid by the federal government. DOMA replaced that consistency with a marked *in* consistency: under DOMA, a couple can be legally married in their state of domicile but not “married” for purposes of receiving federal benefits.

Moreover, even if Congress could be said to have an independent interest in remaining neutral with regard to a contentious social issue, that is not what Congress did here. By enacting DOMA, Congress affirmatively stepped into the fray, and took the position that same-sex partners should not have access to federal benefits no matter what legal status a state decides to accord their relationship.

6. The denial of coverage to same-sex spouses of FPD employees does not save the government any money if an FPD employee already has family coverage for a dependent, such as

a child, because there is no cost to the employee or to the government of adding an additional family member to an existing family policy.

Congress thus sided with those states that would limit marriage to opposite-sex couples, and against those states that would recognize the marriages of same-sex couples. Taking that position did not further any governmental interest in neutrality, if indeed such an interest exists.

I can identify no other governmental interests that might be served by denying Levenson's request that his spouse, Sears, receive the same federal benefits as other spouses of FPD employees. Excluding from health care coverage spouses of employees who have entered into legally binding relationships does not serve the government's interest in promoting long-term relationships. Likewise, it does not serve any governmental interest in promoting a child-rearing environment, because the children of same-sex couples are eligible for federal benefits and the denial of benefits to same-sex spouses will not affect the decisions made by same-sex couples regarding marriage or parenting. Aside from all else, the relationship of the denial of benefits to such potential objectives is "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249. Accordingly, a decision denying Levenson's request that federal benefits be extended to his same-sex spouse would have no rational basis. In sum, to the extent that the application of DOMA serves to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employee's and his or her spouse's sex or sexual orientation, DOMA, as applied, contravenes the Fifth Amendment to the United States Constitution and is therefore unconstitutional.

## II. Proposed remedies

Bearing in mind the specific nature of the violation that has occurred, I now turn to the question whether either of Leven-

son's proposed remedies would be "necessary and appropriate," as well as "tailored as closely as possible" to the violation, so as to be a proper exercise of my remedial authority under the EDR Plan. EDR Plan at A-13.

### A. An order directing the FPD to enter into separate contracts would not be appropriate

[5] Levenson's first request is for an order directing the FPD to negotiate with private insurers to obtain benefits for Sears comparable to those he would receive if he were permitted to enroll in the federal benefits plans as Levenson's spouse. Although I give significant weight to Levenson's remedial preferences, I conclude that this particular remedy would not be appropriate under the current circumstances.

[6] "Under federal law, a purported agreement with the United States is not binding unless the other party can show that the official with whom the agreement was made had authority to bind the United States." *Grosinsky v. United States*, 947 F.2d 417, 419 (9th Cir.1991) (per curiam). Although the FEHBA creates authority to enter into health insurance contracts for federal employees, it vests that authority in a single executive agency, OPM. 5 U.S.C. § 8903. No statute or regulation authorizes the FPD to enter into health insurance contracts for its employees or to bind the United States to any such contract. Because the FPD does not have federal contracting authority, I conclude that an order directing it to enter into separate contracts with private insurers would not be appropriate.

### B. A monetary award pursuant to the Back Pay Act would be appropriate

Levenson also requests, in the alternative, an award of back pay for the period

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since he first attempted to enroll his spouse in his federal benefits plans. Under the EDR Plan, “back pay and associated benefits” may be awarded to a successful complainant if “the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied.” EDR Plan at A-13. The Back Pay Act provides that an employee

who, on the basis of . . . an administrative determination . . . is found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee . . . is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred. . . .

5 U.S.C. § 5596(b)(1). The statute authorizes OPM to prescribe implementing regulations, but makes those regulations inapplicable to the judiciary. *Id.* § 5596(c). Accordingly, in analyzing whether “the statutory criteria . . . are satisfied,” EDR Plan at A-13, I will look to the OPM regulations only as a guide.

**1. Appropriate authority**

[7] I begin by examining whether I am the “appropriate authority” to determine that a violation of Levenson’s rights has occurred. *See* 5 U.S.C. § 5596(b)(1). Levenson, like most other employees of the federal judiciary,<sup>7</sup> has no remedies under the Civil Service Reform Act, is not cov-

7. Federal Public Defender Organizations are established pursuant to 18 U.S.C. § 3006A(g)(2), which grants each United States Court of Appeals the authority to appoint and remove Federal Public Defenders.

ered by Title VII of the Civil Rights Act, and cannot bring a *Bivens* action to challenge unconstitutional discrimination in the workplace. *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir.1999); *see also Dotsen v. Griesa*, 398 F.3d 156, 173 (2d Cir.2005). Instead, Levenson must resolve any employment discrimination claim through the procedures set forth in the EDR Plan, which “is intended to be the exclusive remedy of the employee . . . relating to rights enumerated under the Plan.” EDR Plan at A-1.

Levenson took the appropriate steps to challenge the denial of spousal benefits under the EDR Plan, filing the current complaint only after counseling and mediation had failed. As the EDR hearing officer assigned to this matter, I have the responsibility for reviewing his complaint, holding any necessary hearings, and determining whether his rights under the EDR Plan have been violated. EDR Plan at A-10. Because the EDR process is the appropriate forum for Levenson’s claim, and because I have been delegated the authority to rule on his claim pursuant to the procedures set forth in the EDR Plan, I conclude that I am the “appropriate authority” to make the determination as to whether Levenson’s rights have been violated.

**2. Eligibility for monetary relief**

[8] Under the Back Pay Act, the violation of an employee’s rights creates entitlement to a monetary award only if it has caused “the withdrawal or reduction of all or part of [his] pay, allowances, or differentials” through a “personnel action” that

Attorneys employed by Federal Public Defender Organizations are employees of the judicial branch. *See Sullivan v. United States*, 21 F.3d 198, 202 (7th Cir.1994).

was “unjustified or unwarranted.” 5 U.S.C. § 5596(b)(1). Preliminarily, I might note that, in my view, the phrase “withdrawal or reduction” includes the term “withholding.”

**a. Pay, allowances, and differentials**

OPM’s regulations define “pay, allowances, and differentials” to include “pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment.” 5 C.F.R. § 550.803. The commentary accompanying the regulations explains that “benefits received under the Federal employee health benefits . . . programs prior to retirement are employment benefits” falling within the scope of this definition. Rules and Regulations, Office of Personnel Management, 5 C.F.R. pt. 550, 46 Fed.Reg. 58,271, 58,272 (Dec. 1, 1981).

The ability to obtain health, dental, and vision care for one’s family is a valuable benefit of employment; indeed, when employers and employees consider questions about appropriate compensation, health care is often a weightier issue than base rate of pay. Accordingly, I adopt OPM’s interpretation that health benefits must be considered “pay, allowances, or differentials” as those terms are used in the Back Pay Act. I therefore conclude that the failure to enroll Levenson’s spouse in his federal benefits plans has resulted in “the withdrawal or reduction of all or part of [his] pay, allowances, or differentials.”

**b. Personnel action**

To satisfy the statutory criteria of the Back Pay Act, the withdrawal or reduction of pay, allowances, or differentials must have occurred as the result of a “personnel action.” 5 U.S.C. § 5596(b)(1). The defi-

nition of “personnel action” includes “the omission or failure to take an action or confer a benefit.” *Id.* § 5596(b)(5). The failure to provide Levenson with spousal health insurance coverage, which is a valuable employment benefit, satisfies this definition.

**c. Unjustified or unwarranted**

The Back Pay Act provides for relief if the personnel action that caused the withdrawal or reduction of pay, allowances or differentials was “unjustified or unwarranted.” 5 U.S.C. § 5596(b)(1). Under OPM’s regulations, an “unjustified or unwarranted” personnel action includes

an act of omission (i.e., failure to . . . confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law . . . or mandatory personnel policy established by an agency or through a collective bargaining agreement.

5 C.F.R. § 550.803. Here, Levenson challenged the “failure to . . . confer” federal benefits to his spouse. Through the EDR process, I have found that the challenged personnel action constitutes discrimination on the basis of sex or sexual orientation. I reached that conclusion on the basis of both a “mandatory personnel policy” (the EDR Plan) and “applicable law” (the Constitution). Accordingly, I conclude that the denial of federal benefits to Levenson’s spouse constitutes an “unjustified or unwarranted personnel action” under the Back Pay Act.

**3. Timing and extent of monetary relief**

**a. Correction of the personnel action**

[9] The Back Pay Act states that an employee who suffers the withdrawal or

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reduction of pay, allowances, or differentials as the result of an unjustified or unwarranted personnel action becomes eligible for a monetary award “on correction of the personnel action.” 5 U.S.C. § 5596(b)(1). This criterion is satisfied upon the determination by an appropriate authority that the personnel action has violated the employee’s rights and the issuance of an appropriate order to correct that action. Because I made such a determination and issued such an order on February 2, 2009, I conclude that Levenson is currently eligible for a back pay award.

**b. Period for which the personnel action is in effect**

A back pay award may cover only the “period for which the personnel action was in effect,” 5 U.S.C. § 5596(b)(1)(A), and “in no case may pay, allowances, or differentials be granted . . . for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.” *Id.* § 5596(b)(4).

The relevant period, for purposes of computing a back pay award, began on July 15, 2008, when Levenson first attempted to enroll his spouse in his federal benefits plans. That start date falls within the six-year statutory time limit, whether measured from the date of this order or my previous order. Although my previous order directed the correction of the wrongful denial of federal benefits to Levenson’s spouse, that order has not yet been implemented; thus, it has not resulted in Levenson actually receiving the benefits to which

he is entitled. Until Levenson begins to receive FEHBA and FEDVIP coverage for his spouse, as opposed to back pay, the unwarranted or unjustified personnel action remains in effect and he will be entitled to accrue back pay.

**c. Amount equal to the wrongfully denied benefits**

Because Levenson has been found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the reduction of his employment benefits, he is now entitled to receive “an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred.” 5 U.S.C. § 5596(b)(1).

Had Levenson been permitted to enroll his spouse in the federal benefits plans, Levenson would have received health, dental, and vision insurance covering him. While there is no obvious way to determine “an amount equal to” that coverage, I believe that the amount that it would have cost to obtain comparable coverage is likely to be the closest possible approximation.<sup>8</sup> On remand, the FPD in consultation with Levenson shall resolve that question and compute the amount due to date, as well as determine whether amounts that may accrue following the period covered by such payment shall be paid on a monthly, quarterly, or other basis.

**4. Conclusion**

I continue to retain jurisdiction over this matter so that I may resolve any disputes

8. This amount is not necessarily equivalent to the expenses that Levenson actually incurred for his spouse’s health care during the relevant period; in fact, the EDR Plan expressly precludes an award of compensatory damages. EDR Plan at A-13. I recognize, in addition, that the insurance Levenson and Sears bought did not provide coverage as full

as that provided through the FEHBA plan, and that it did not cover Sears’s dental or vision care, for which the couple has been paying on an out-of-pocket basis. Finally, I recognize that it may not be possible to obtain precisely the same coverage in an individual policy that spouses are provided under the government’s group policy.

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that may arise on remand and so that I may issue any further order that may be necessary.



Lester FLEMING, Plaintiff–Appellant,

v.

YUMA REGIONAL MEDICAL CENTER; Yuma Anesthesia Medical Services, Defendants–Appellees.

No. 07–16427.

United States Court of Appeals,  
 Ninth Circuit.

Argued and Submitted Feb. 12, 2009.

Filed Nov. 19, 2009.

**Background:** Anesthesiologist, as independent contractor, sued medical center for breach of employment contract and disability discrimination, in violation of Rehabilitation Act, arising from medical center’s refusal to accommodate anesthesiologist’s operating room and call schedules due to his sickle cell anemia. The United States District Court for the District of Arizona, Roslyn O. Silver, J., granted medical center summary judgment. Anesthesiologist appealed.

**Holding:** The Court of Appeals, Bybee, Circuit Judge, held that in matter of first impression, Rehabilitation Act applied to independent contractor.

Reversed.

**1. Federal Courts** ⇨776

Court of Appeals reviews a district court’s grant of summary judgment de novo.

**2. Action** ⇨3

**Civil Rights** ⇨1330(1), 1511

Rehabilitation Act creates a private right of action for individuals subjected to disability discrimination by any program or activity receiving federal financial assistance, including employment discrimination in such programs. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

**3. Civil Rights** ⇨1041, 1110

Although anesthesiologist was independent contractor, rather than employee of medical center, he was not foreclosed from asserting disability discrimination claim, under Rehabilitation Act, against medical center for refusing to accommodate anesthesiologist’s operating room and call schedules due to his sickle cell anemia, since Act’s protection was not limited to employers and employees as defined by ADA, but rather, also applied to independent contractors and entities that hired them, as Rehabilitation Act selectively incorporated ADA’s substantive standards for determining what conduct violated Rehabilitation Act but not definition of who was covered under Act. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 102, 42 U.S.C.A. § 12112.

**4. Civil Rights** ⇨1005

**United States** ⇨82(2)

Rehabilitation Act, at least insofar as the Act applies to private entities, draws on Congress’s conditional spending power. U.S.C.A. Const. Art. 1, § 8, cl. 1; Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

**5. Civil Rights** ⇨1005

**Commerce** ⇨74.50

The ADA derives from Congress’s power under the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ameri-

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DRAGOVICH; MICHAEL GAITLEY;  
ELIZABETH LITTERAL; PATRICIA  
FITZSIMMONS; CAROLYN LIGHT; and  
CHERYL LIGHT; on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE  
TREASURY; TIMOTHY GEITHNER, in his  
official capacity as Secretary of the  
Treasury, United States Department of  
the Treasury; INTERNAL REVENUE  
SERVICE; DOUGLAS SHULMAN, in his  
official capacity as Commissioner of  
the Internal Revenue Service; BOARD  
OF ADMINISTRATION OF CALIFORNIA  
PUBLIC EMPLOYEES' RETIREMENT SYSTEM;  
and ANNE STAUSBOLL, in her official  
capacity as Chief Executive Officer,  
CalPERS,

Defendants.

No. 10-01564 CW  
  
ORDER DENYING  
FEDERAL  
DEFENDANTS'  
MOTION TO DISMISS  
(Docket No. 25)

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

Southwest Bankruptcy Conference

United States District Court  
For the Northern District of California

1 section 7702B(f) provides favorable federal tax treatment to  
2 qualified state-maintained long-term care insurance plans for state  
3 employees. 26 U.S.C. § 7702B(f). Section 7702B(f) disqualifies a  
4 state-maintained plan from this favorable tax treatment if it  
5 provides coverage to individuals other than certain specified  
6 relatives of state employees and former employees. § 7702B(f)(2).  
7 The provision's list of eligible relatives does not include  
8 registered domestic partners, but does include spouses. 26 U.S.C.  
9 § 7702B(f)(2)(C); 26 U.S.C. § 152(d)(2)(A)-(G). One month later,  
10 section three of the DOMA amended the United States Code to define,  
11 for federal law purposes, the term "spouse" to mean solely "a  
12 person of the opposite sex who is a husband or wife," and  
13 "marriage" to mean only "a legal union between one man and one  
14 woman as husband and wife." 1 U.S.C § 7.

15 Plaintiffs are three California public employees and their  
16 same-sex spouses, who are in long-term committed relationships  
17 legally recognized in California as both marriages and registered  
18 domestic partnerships. California Public Employees' Retirement  
19 System (CalPERS) provides retirement and health benefits, including  
20 long-term care insurance, to many of the state's public employees,  
21 retirees, and their families. CalPERS has refused to make  
22 available its Long-Term Care (LTC) Program to the same-sex spouses  
23 of the public employee Plaintiffs.

24 Plaintiffs contend that section three of the DOMA and  
25 I.R.C. § 7702B(f) violate the Fifth and Fourteenth Amendment  
26  
27  
28

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1 guarantees of equal protection and substantive due process.<sup>1</sup>  
2 Plaintiffs have named both Federal and State Defendants. Federal  
3 Defendants move to dismiss under Federal Rule of Civil Procedure  
4 12(b)(1), on grounds that this Court lacks subject matter  
5 jurisdiction because Plaintiffs do not have standing. In addition,  
6 Federal Defendants move to dismiss Plaintiffs' action under Federal  
7 Rule of Civil Procedure 12(b)(6) for failure to state claims for  
8 violations of equal protection and substantive due process. State  
9 Defendants have answered the complaint and do not join the motion  
10 to dismiss.

11 BACKGROUND

12 I. Facts Alleged in the Complaint

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

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

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

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

24  
25 <sup>1</sup> While the Fourteenth Amendment equal protection guarantee  
26 does not directly apply to the United States, courts have  
27 interpreted the Fifth Amendment's Due Process Clause as imposing on  
28 the United States the same principles of equal protection  
established in the Fourteenth Amendment. Adarand Constructors,  
Inc. v. Pena, 515 U.S. 200, 213-18 (1995).

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

17 B. I.R.C. § 7702B

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

26 Congress enacted these provisions because of the critical role  
27 of long term care insurance in protecting families. "The  
28

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

12 A state-maintained long-term care insurance program provides  
13 its beneficiaries the same favorable federal tax treatment if the  
14 program meets the requirements of I.R.C. § 7702B(b) and is offered  
15 only to the state's current and former employees, their spouses,  
16 and certain relatives. Id. § 7702B(f). Eligible relatives include  
17 children, grandchildren, brothers, sisters, stepbrothers,  
18 stepsisters, fathers, mothers, stepfathers, stepmothers,  
19 grandparents, nephews, nieces, aunts, uncles, sons-in-law,  
20 daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law,  
21 and sisters-in-law. See I.R.C. §§ 7702B(f) (2) (C) (iii);  
22 152(d) (2) (A) - (G).

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

28

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

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

9 C. Plaintiff Couples and their California Status

10 As noted earlier, Plaintiffs are current California public  
11 employees--Michael Dragovich, Elizabeth Litteral, and Carolyn  
12 Light--and their same-sex spouses. Plaintiffs legally married  
13 during the window of time that California allowed civil marriage  
14 for same-sex couples, following the state supreme court's decision  
15 in In re Marriage Cases, 43 Cal. 4th 757 (2008) (holding that the  
16 denial of the right to marry to same-sex couples violated the state  
17 constitution, and that strict scrutiny review applies to laws  
18 burdening persons based on sexual orientation). Although  
19 Proposition 8 subsequently amended the California Constitution to  
20 prohibit civil marriage for same-sex couples, Plaintiffs' marriages  
21 remain valid under California law. Strauss v. Horton, 46 Cal. 4th  
22 364, 474 (2009) ("[W]e conclude that Proposition 8 cannot be  
23 interpreted to apply retroactively so as to invalidate the  
24 marriages of same-sex couples that occurred prior to the adoption  
25 of Proposition 8. Those marriages remain valid in all respects.").

26 In addition to being legally married, Plaintiff couples are  
27 registered domestic partners, pursuant to California Family Code  
28

1 § 297. Since January 1, 2005, California law has provided,  
2 Registered domestic partners shall have the same rights,  
3 protections, and benefits, and shall be subject to the  
4 same responsibilities, obligations, and duties under  
5 law, whether they derive from statutes, administrative  
6 regulations, court rules, government policies, common  
7 law, or any other provisions or sources of law, as are  
8 granted to and imposed upon spouses.

9 Cal. Fam. Code § 297.5(a). However, section (g) of the same  
10 statute specifically exempts CalPERS' federally qualified LTC  
11 Program from the general requirement that public agencies treat  
12 registered domestic partners as spouses. Cal. Fam. Code  
13 § 297.5(g).

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

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

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

3 At the time the lawsuit was filed, Plaintiffs Elizabeth  
4 Litteral and Patricia Fitzsimmons had been in a committed  
5 relationship for over seventeen years, and were raising a fourteen  
6 year old daughter. They registered as domestic partners in 2006,  
7 and married legally in 2008. Litteral has been employed with the  
8 University of California San Francisco Medical Center since 1995.  
9 Plaintiff Litteral has not purchased long-term care coverage  
10 through CalPERS, nor has either of them purchased coverage through  
11 a private insurer. They seek to join the CalPERS Program, because  
12 the premiums are lower than those charged by private carriers of  
13 individual policies.

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

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

27  
28

## 1 II. Facts Submitted by Declaration

2 In addition to the facts plead in the complaint, Plaintiffs  
3 have submitted declarations providing details about the CalPERS LTC  
4 Program, and their intent and efforts to participate in it.  
5 Plaintiffs may furnish affidavits or other evidence necessary to  
6 satisfy their burden of establishing subject matter jurisdiction.  
7 Colwell v. Department of Health and Human Services, 558 F.3d 1112,  
8 1121 (9th Cir. 2009). Thus, in considering Federal Defendants'  
9 motion to dismiss under Rule 12(b)(1), the Court takes account of  
10 these additional facts.

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

20 Plaintiffs affirmed their intent and financial ability to  
21 participate in the CalPERS LTC Program as soon as they are  
22 permitted. Michael Dragovich Dec. ¶¶ 27-28; Carolyn Light Dec.  
23 ¶¶ 13-14; Patricia Fitzsimmons Dec. ¶¶ 13-14. Dragovich attested  
24 that enrolling his spouse, Gaitley, in a long-term care policy is a  
25 necessary step in their financial planning. Dragovich Dec. at ¶ 7.  
26 He tried to enroll Gaitley in the CalPERS LTC Program in 2007,  
27 prior to their marriage, when he and Gaitley were solely recognized

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1 as registered domestic partners. Dragovich Dec. at ¶ 9. A CalPERS  
2 representative informed him then that domestic partners were not  
3 eligible for enrollment in the plan. Id. at ¶ 10. As noted above,  
4 in 2008, after marrying Gaitley, Dragovich again contacted CalPERS  
5 to request an application for the LTC Program. Id. at ¶ 11. After  
6 a CalPERS representative informed Dragovich that same-sex spouses  
7 were also ineligible due to federal law, he asked the  
8 representative to provide him with an application anyway. Id. at  
9 ¶ 12-14. Dragovich was told, however, that CalPERS would not  
10 furnish a program application for a same-sex spouse. Id. at ¶ 15.  
11 On March 14, 2009, Dragovich made an additional attempt to secure  
12 an application for the LTC Program online through the CalPERS  
13 website. Id. at Ex. A. CalPERS responded that applications were  
14 not available, but his name would be added to a mailing list for  
15 such materials. Though there was no open enrollment period for the  
16 LTC Program in 2009, during that year CalPERS made available a  
17 special, alternate application process for enrollment. Center  
18 Dec., Ex. E. Nonetheless, Dragovich never received an application  
19 to enroll his spouse. Dragovich Dec. ¶ 18.

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

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

28

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

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

19 LEGAL STANDARD

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

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

3 A Rule 12(b)(1) motion may either attack the sufficiency of  
4 the pleadings to establish federal jurisdiction, or allege an  
5 actual lack of jurisdiction which exists despite the formal  
6 sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. &  
7 Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.  
8 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "In support of a  
9 motion to dismiss under Rule 12(b)(1), the moving party may submit  
10 affidavits or any other evidence properly before the court . . . It  
11 then becomes necessary for the party opposing the motion to present  
12 affidavits or any other evidence necessary to satisfy its burden of  
13 establishing that the court, in fact, possesses subject matter  
14 jurisdiction." Colwell, 558 F.3d at 1121 (internal citations  
15 omitted); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039  
16 n.2 (9th Cir. 2003). The court enjoys broad authority to order  
17 discovery, consider extrinsic evidence, and hold evidentiary  
18 hearings in order to determine its own jurisdiction. Rosales v.  
19 United States, 824 F.2d 799, 803 (9th Cir. 1987).

20 Dismissal under Rule 12(b)(6) for failure to state a claim is  
21 appropriate only when the complaint does not give the defendant  
22 fair notice of a legally cognizable claim and the grounds on which  
23 it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A  
24 complaint must contain a "short and plain statement of the claim  
25 showing that the pleader is entitled to relief." Fed. R. Civ. P.  
26 8(a). In considering whether the complaint is sufficient to  
27 state a claim, the court will take all material allegations as true

28

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

8 I. Subject Matter Jurisdiction--Standing

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

12 In Lujan v. Defenders of Wildlife, the Supreme Court explained  
13 the irreducible constitutional minimum of standing  
14 contains three elements. First, the plaintiff must  
15 have suffered an injury in fact--an invasion of a  
16 legally protected interest which is (a) concrete and  
17 particularized, and (b) actual or imminent, not  
18 conjectural or hypothetical. Second, there must be a  
19 causal connection between the injury and the conduct  
20 complained of--the injury has to be fairly traceable  
21 to the challenged action of the defendant, and not the  
22 result of the independent action of some third party  
23 not before the court. Third, it must be likely, as  
24 opposed to merely speculative, that the injury will be  
25 redressed by a favorable decision.

26 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks  
27 omitted).

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

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1           A. Injury in Fact

2           Federal Defendants assert that Plaintiffs have not adequately  
3 demonstrated injury in fact, because they have failed to apply for  
4 the LTC Program. "Plaintiffs must demonstrate 'a personal stake in  
5 the outcome' in order to 'assure that concrete adverseness which  
6 sharpens the presentation of issues' necessary for the proper  
7 resolution of constitutional questions." City of Los Angeles v.  
8 Lyons, 461 U.S. 95, 101-02 (1983) (quoting Baker v. Carr, 369 U.S.  
9 186, 204 (1962)).

10           CalPERS refused to furnish an application to Dragovich for  
11 Gaitley. Carolyn Light learned about the exclusion of same-sex  
12 couples through Dragovich. Fitzsimmons also stated that she and  
13 her spouse were aware of the policy prohibiting same-sex spouses  
14 from enrollment in the LTC Program. CalPERS made the exclusion  
15 abundantly clear in its written and oral communications. Moreover,  
16 the DOMA and the I.R.C. plainly result in the exclusion of same-sex  
17 spouses and registered domestic partners. The Ninth Circuit has  
18 consistently held that standing does not require exercises in  
19 futility. See, e.g., Aleknagik Natives Ltd. v. Andrus, 648 F.2d  
20 496, 499 (9th Cir. 1981); Taniguchi v. Ashcroft, 303 F.3d 950, 957  
21 (9th Cir. 2002); see also Black Faculty Ass'n of Mesa College v.  
22 San Diego Community College Dist., 664 F.2d 1153, 1156 (9th Cir.  
23 1981) ("We recognize that an individual need not always file and  
24 perfect an application for a position to have standing . . .")  
25 (internal citation omitted).

26           In a number of cases, courts have found the plaintiffs to have  
27 standing in spite of the absence of any formal application under a  
28

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

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

23 The Ninth Circuit has denied standing where the absence of an  
24 application rendered the policy and the legal dispute ambiguous.  
25 In Madden v. Boise State University, 976 F.2d 1219 (9th Cir.  
26 1992), the plaintiff brought a disability discrimination suit based  
27 on a dispute with the University over the availability of free

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1 disabled parking. After the University told him that no free  
2 permits for disabled parking were available, the plaintiff filed a  
3 complaint with the U.S. Department of Education, Office of Civil  
4 Rights. In response to the OCR investigation finding the  
5 University's parking policy out of compliance with federal law, the  
6 University voluntarily took remedial measures, installing nine  
7 additional disabled parking spaces, three of which were designated  
8 free of charge to disabled persons who did not wish to pay the fee  
9 for a general disabled parking permit. The plaintiff,  
10 nevertheless, sued the University without submitting a formal  
11 application for a parking permit or otherwise requesting relief  
12 from the parking permit fee. As a result, the court was "left  
13 somewhat at sea" about the nature of the "real dispute." *Id.* at  
14 1221. There is no such ambiguity here.

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

28

1 Assoc'd Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666  
2 (1993); see also Gratz v. Bollinger, 539 U.S. 244, 261-62 (2003).

3 In an equal protection challenge to a purportedly  
4 discriminatory program, the Ninth Circuit has applied an "able and  
5 ready" standard to determine whether a plaintiff is in a position  
6 to compete on an equal basis for a program benefit. Carroll v.  
7 Nicotiana, 342 F.3d 934, 941-42 (9th Cir. 2003) (citing Bras v.  
8 California Pub. Util. Comm'n., 59 F.3d 869, 873 (9th Cir. 1995)).  
9 A plaintiff sufficiently alleges injury when a discriminatory  
10 policy has interfered with the plaintiff's otherwise equal ability  
11 to compete for the program benefit. In Carroll, a case upon which  
12 Federal Defendants rely, the court found that the plaintiff, who  
13 alleged discrimination in a state-run business loan program, had  
14 done "essentially nothing to demonstrate that he is in a position  
15 to compete equally" with other loan applicants. Id. at 942. The  
16 plaintiff presented no work history or experience in  
17 entrepreneurial endeavors to bolster the bona fides of his business  
18 loan application, and failed to respond to the defendant's request  
19 for more information to complete his application. Id. at 942-43.<sup>2</sup>

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

23  
24 <sup>2</sup> Carroll also considered an equal protection challenge to a  
25 second program, which leased homesteads. Id. at 943. However,  
26 contrary to Federal Defendants' suggestion, the court did not hold  
27 that the plaintiff was injured only because he had properly  
28 submitted an application. No party disputed the existence of an  
injury with respect to the homestead program, and the court simply  
reiterated the district court's finding.

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1 Light and Fitzsimmons are current public employees. Plaintiffs  
2 have attested to their willingness and financial ability to pay the  
3 premiums associated with coverage through the CalPERS Program. Id.  
4 at 942 (“[T]he intent of the applicant may be relevant to standing  
5 in an equal protection challenge.”) (citing Gratz, 539 U.S. at  
6 261).

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

14 B. Causation

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

## 1 C. Redressability

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

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

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

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

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

13 II. Failure to State a Claim

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

18 A. Equal Protection

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

26 Yet courts must balance this mandate with the "practical  
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1 necessity that most legislation classifies for one purpose or  
2 another, with resulting disadvantage to various groups or persons.”  
3 Romer, 517 U.S. at 631. The equal protection guarantee preserves a  
4 measure of power for states and the federal government to create  
5 laws that classify certain groups. Personnel Administrator of  
6 Mass. v. Feeney, 442 U.S. 256, 271-72 (1979). Certain  
7 classifications, such as those based on race, are presumptively  
8 invalid. Id. at 272. Courts apply heightened scrutiny to laws  
9 burdening protected classes, while laws that do not burden a  
10 protected class are subject to rational basis review. Romer, 517  
11 U.S. at 631; Massachusetts Bd. Of Retirement v. Murgia, 427 U.S.  
12 307, 312-314 (1976). Under the rational basis test, a law must be  
13 rationally related to the furtherance of a legitimate state  
14 interest. Romer, 517 U.S. at 631.

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

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

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

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

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

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

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

25 The DOMA's definition of marriage does not bear a relationship  
26 to encouraging procreation, because marriage has never been  
27 contingent on having children. See Lawrence, 539 U.S. at 605

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1 (Scalia, J., dissenting) (observing, "what justification could  
2 there possibly be for denying the benefits of marriage to  
3 homosexual couples . . . [s]urely not the encouragement of  
4 procreation, since the sterile and the elderly are allowed to  
5 marry."); Goodridge v. Dept. of Public Health, 440 Mass. 309, 332  
6 (2003) ("While it is certainly true that many, perhaps most,  
7 married couples have children together (assisted or unassisted), it  
8 is the exclusive and permanent commitment of the marriage partners  
9 to one another, not the begetting of children, that is the sine qua  
10 non of civil marriage."). The exclusion of same-sex couples from  
11 the federal definition of marriage does not encourage heterosexual  
12 marriages. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D.  
13 Cal. 2010) ("Permitting same-sex couples to marry will not affect  
14 the number of opposite-sex couples who marry, divorce, cohabit,  
15 have children outside of marriage or otherwise affect the stability  
16 of opposite-sex marriages."). Furthermore, the preservation of  
17 resources does not justify barring some arbitrarily chosen group of  
18 individuals from a government program. Plyler v. Doe, 457 U.S.  
19 202, 229 (1982).

20 Nor does moral condemnation of homosexuality provide the  
21 requisite justification for the DOMA's section three. The "bare  
22 desire to harm a politically unpopular group" is not a legitimate  
23 state interest. Romer, 517 U.S. at 634-35; City of Cleburne, 473  
24 U.S. at 446-47; Dept. of Agriculture v. Moreno, 413 U.S. 528, 534  
25 (1973). In Romer the Supreme Court struck down a Colorado law,  
26 which it found "made a general announcement that gays and lesbians  
27 shall not have any particular protections from the law." The Court  
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1 reasoned that the law "impos[ed] a broad and undifferentiated  
2 disability on a single named group," 517 U.S. at 632, yet was  
3 "inexplicable by anything but animus[.]" Id. at 635.

4       The animus toward, and moral rejection of, homosexuality and  
5 same-sex relationships are apparent in the Congressional record.  
6 The House Report on the pending DOMA bill stated, "Civil laws that  
7 permit only heterosexual marriage reflect and honor a collective  
8 moral judgment about human sexuality. This judgment entails [a]  
9 moral disapproval of homosexuality . . ." H.R. Rep. 104-664, at  
10 15-16. The report further adopted the view that "'[S]ame-sex  
11 marriage, if sanctified by the law, if approved by the law,  
12 legitimates a public union, a legal status that most people . . .  
13 feel ought to be illegitimate.'" Id. at 16 (alteration and  
14 omission in original).

15       In sum, Plaintiffs have sufficiently stated a claim that  
16 section three of the DOMA bears no rational relationship to a  
17 legitimate governmental interest. The section does not preserve  
18 the status quo of the states' authority to define marriage because  
19 it instead impairs their customary and historic authority in the  
20 realm of domestic relations. The Act's contemporaneous  
21 justifications have been found not to constitute legitimate  
22 government interests. Because neither Federal Defendants' current  
23 justification, nor the actual contemporaneous reasons, for the  
24 exclusion of same-sex couples from the federal definition of  
25 marriage can be found as a matter of law to be rationally based on  
26 a legitimate government interest, Plaintiffs have asserted a  
27 cognizable claim for an equal protection violation.

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1 B. Substantive Due Process

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

7 The substantive due process right "provides heightened  
8 protection against interference with certain fundamental rights and  
9 liberty interests . . ." William v. Glucksberg, 521 U.S. 702, 720  
10 (1997) (recognizing "a long line of cases" holding that the Bill of  
11 Rights protects "the rights to marry, to have children, to direct  
12 the education and upbringing of one's children, to marital privacy,  
13 to use contraception, to bodily integrity, and to abortion.")  
14 (internal citations omitted).

15 When the government infringes a "fundamental liberty  
16 interest," the strict scrutiny test applies, and the law will not  
17 survive constitutional muster "unless the infringement is narrowly  
18 tailored to serve a compelling state interest." Id. at 721. Where  
19 no fundamental right is burdened by a challenged law, the law is  
20 scrutinized under the rational basis standard; it must be  
21 rationally related to a legitimate government interest. Id. at  
22 728; Heller v. Doe, 509 U.S. 312, 319-320 (1993).

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

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1 Court and the Ninth Circuit have made clear that government  
2 intrusion into a same-sex relationship may violate substantive due  
3 process rights, though the precise nature of the liberty interest  
4 has not been decided. See Lawrence, 539 U.S. at 578 (holding that  
5 same-sex couples have the constitutional right to engage in  
6 intimate relationships “without the intervention of the  
7 government”); Witt, 527 F.3d at 812 (“We cannot reconcile what the  
8 Supreme Court did in Lawrence with the minimal protections afforded  
9 by traditional rational basis review.”). Lawrence invalidated laws  
10 criminalizing same-sex intimacy, which amounted to a substantial  
11 government intrusion into same-sex relationships through the threat  
12 of criminal prosecution and related stigma. In Witt, the Ninth  
13 vacated the district court’s dismissal of the plaintiff’s  
14 substantive due process challenge of her discharge under the  
15 military’s “Don’t Ask Don’t Tell” policy. The court held that  
16 “[w]hen the government attempts to intrude upon the personal and  
17 private lives of homosexuals, in a manner that implicates the  
18 rights identified in Lawrence,” the law is reviewed with heightened  
19 scrutiny. 527 F.3d at 819 (citing Sell v. United States, 539 U.S.  
20 166 (2003)). The court remanded the case to the district court for  
21 further development of the factual record and application of the  
22 heightened scrutiny test it articulated in its decision.

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

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

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

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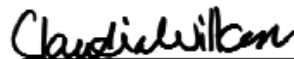
CONCLUSION

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

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

IT IS SO ORDERED.

Dated: 1/18/2011



CLAUDIA WILKEN  
United States District Judge

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nation. This court, therefore, must conclude that no reasonable fact finder could render a verdict in Wilson’s favor.

For the foregoing reasons, the Defendant’s *Motion for Summary Judgment* [# 17] is ALLOWED.

AN ORDER HAS ISSUED.

ORDER

For the reasons set forth in the accompanying memorandum, the Defendant’s *Motion for Summary Judgment* [# 17] is ALLOWED.

IT IS SO ORDERED.



Nancy GILL & Marcelle Letourneau, et al., Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT, et al., Defendants.

Civil Action No. 09-10309-JLT.

United States District Court, D. Massachusetts.

July 8, 2010.

**Background:** Same-sex couples married in Massachusetts and three survivors of same-sex spouses, also married in Massachusetts, brought action alleging that, due to operation of Defense of Marriage Act (DOMA), they were denied certain federal marriage-based benefits that were available to similarly-situated heterosexual couples, in violation of equal protection principles embodied in Fifth Amendment’s Due Process Clause. Federal officials moved to dismiss, and plaintiffs moved for summary judgment.

**Holdings:** The District Court, Tauro, J., held that:

- (1) court could not redress inability of surviving same-sex spouse of deceased federal employee to enroll in Federal Employees Health Benefits (FEHB) program;
- (2) DOMA violated core constitutional principles of equal protection;
- (3) there was no rational relationship between DOMA and Congress’s goal of preserving status quo; and
- (4) purported administrative burden presented by changing patchwork of state approaches to same-sex marriage in distributing federal marriage-based benefits did not provide rational basis for DOMA.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⇔103.2, 103.3

Irreducible constitutional minimum of standing contains three requirements: (1) there must be alleged and ultimately proven injury in fact; (2) there must be fairly traceable connection between plaintiff’s injury and complained-of conduct of defendant; and (3) there must be likelihood that requested relief will redress alleged injury. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2. Federal Civil Procedure ⇔103.2

Where plaintiff lacks standing to pursue his claim, court, in turn, lacks subject matter jurisdiction over dispute. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3. Constitutional Law ⇔704

Federal district court could not redress inability of surviving same-sex spouse of deceased federal employee to enroll as annuitant in Federal Employees Health Benefits (FEHB) program, and thus spouse lacked standing to challenge constitutionality of Defense of Marriage Act’s (DOMA) exclusion of same-sex spouses from definition of “spouse” under

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federal law, where Office of Personnel Management (OPM) found spouse ineligible for survivor annuity, Merit Systems Review Board affirmed OPM's denial, and spouse's appeal of Board's decision was pending before Federal Circuit. 1 U.S.C.A. § 7.

**4. United States** ⇨39(2)

Statute establishing Federal Employees Health Benefits (FEHB) program did not confer upon Office of Personnel Management (OPM) discretion to provide health benefits to same-sex couples, notwithstanding Defense of Marriage Act (DOMA). 1 U.S.C.A. § 7; 5 U.S.C.A. § 8901(5).

**5. Constitutional Law** ⇨3051

In examining equal protection claims, courts apply strict scrutiny only to those laws that burden fundamental right or target suspect class, and law that does neither will be upheld if it bears rational relationship to legitimate government interest. U.S.C.A. Const.Amends. 5, 14.

**6. Constitutional Law** ⇨3438**Marriage** ⇨17.5(1)

There existed no fairly conceivable set of facts that could ground rational relationship between Defense of Marriage Act (DOMA) and legitimate government objective, and thus DOMA violated core constitutional principles of equal protection; consensus among medical, psychological, and social welfare communities was that children raised by gay and lesbian parents were as likely to be well-adjusted as those raised by heterosexual parents, denial of same-sex marriage did nothing to promote stability in heterosexual parenting, ability to procreate was never precondition to marriage, and federal government's denial of benefits to same-sex spouses could not encourage homosexual people to marry members of opposite sex. U.S.C.A. Const. Amend. 5; 1 U.S.C.A. § 7.

**7. Constitutional Law** ⇨1020, 1055

Classification neither involving fundamental rights nor proceeding along suspect lines is accorded strong presumption of validity, and courts are compelled under rational-basis review to accept legislature's generalizations even when there is imperfect fit between means and ends. U.S.C.A. Const.Amends. 5, 14.

**8. Constitutional Law** ⇨3057

Law challenged on equal protection principles can only survive rational basis inquiry if it is narrow enough in scope and grounded in sufficient factual context for court to ascertain some relation between classification and purpose it serves. U.S.C.A. Const.Amends. 5, 14.

**9. Constitutional Law** ⇨3053, 3054

Constitutional equal protection principles will not tolerate government reliance on classification whose relationship to asserted goal is so attenuated as to render distinction arbitrary or irrational. U.S.C.A. Const.Amends. 5, 14.

**10. Constitutional Law** ⇨3057

Law must fail rational basis review under constitutional equal protection principles where purported justifications make no sense in light of how government treated other groups similarly situated in relevant respects. U.S.C.A. Const.Amends. 5, 14.

**11. States** ⇨18.13

Fact that governing majority in State has traditionally viewed particular practice as immoral is not sufficient reason for upholding law.

**12. Constitutional Law** ⇨2970

Concern for preservation of resources standing alone cannot justify classification used in allocating those resources.

**13. Constitutional Law** ⇨2970

Mere negative attitudes, or fear, unsubstantiated by factors that are properly cognizable by government, are impermissi-

ble bases upon which to ground legislative classification.

14. Constitutional Law ¶3438

Marriage ¶17.5(1)

There was no rational relationship, for equal protection purposes, between Defense of Marriage Act (DOMA) and Congress's goal of preserving status quo pending resolution of socially contentious debate taking place in states over whether to sanction same-sex marriage; Congress had no interest in uniform definition of marriage for purposes of determining federal rights, benefits, and privileges, federal government had historically deferred to state marital status determinations, DOMA did not provide for nationwide consistency in distribution of federal benefits among married couples, and federal government recognized heterosexual marriages that would not be sanctioned in other states. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7.

15. Marriage ¶25(3)

Congress does not have authority to place restrictions on states' power to issue marriage licenses.

16. Constitutional Law ¶3438

Marriage ¶17.5(1)

Purported administrative burden presented by changing patchwork of state approaches to same-sex marriage in distributing federal marriage-based benefits did not provide rational basis for Defense of Marriage Act's (DOMA) exclusion of same-sex marriages from definition of "marriage" under federal law, for purpose of determining whether DOMA violated equal protection principles; federal agencies merely distributed federal marriage-based benefits to couples that had already ob-

1. 1 U.S.C. § 7.
2. Defendants in this action are the Office of Personnel Management; the United States Postal Service; John E. Potter, in his official

tained state-sanctioned marriage licenses, DOMA injected complexity into an otherwise straightforward administrative task by sundering class of state-sanctioned marriages into two, and DOMA's scope reached far beyond realm of pecuniary benefits. U.S.C.A. Const.Amend. 5; 1 U.S.C.A. § 7.

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Held Unconstitutional

1 U.S.C.A. § 7

Gary D. Buseck, Mary L. Bonauto, Jan-son Wu, Gay & Lesbian Advocates and Defenders, Amy Senier, Catherine C. De-neke, Claire Laporte, Matthew E. Miller, Vickie L. Henry, Foley Hoag LLP, Richard L. Jones, William E. Halmkin, David J. Nagle, Sullivan & Worcester LLP, Bos-ton, MA, Paul M. Smith, Jenner & Block, LLP, Washington, DC, for Plaintiffs.

W. Scott Simpson, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM

TAURO, District Judge.

I. Introduction

This action presents a challenge to the constitutionality of Section 3 of the De-fense of Marriage Act<sup>1</sup> as applied to Plain-tiffs, who are seven same-sex couples mar-ried in Massachusetts and three survivors of same-sex spouses, also married in Mas-sachusetts.<sup>2</sup> Specifically, Plaintiffs con-tend that, due to the operation of Section 3 of the Defense of Marriage Act, they have been denied certain federal marriage-

capacity as the Postmaster General of the United States of America; Michael J. Astrue, in his official capacity as the Commissioner of the Social Security Administration; Eric H. Holder, Jr., in his individual capacity as the

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based benefits that are available to similarly-situated heterosexual couples, in violation of the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.<sup>3</sup> Because this court agrees, *Defendants' Motion to Dismiss* [# 20] is DENIED and *Plaintiffs' Motion for Summary Judgment* [# 25] is ALLOWED, except with regard to Plaintiff Dean Hara's claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.

II. *Background*<sup>4</sup>A. *The Defense of Marriage Act*

In 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act ("DOMA").<sup>5</sup> At issue in this case is Section 3 of DOMA, which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman. In particular, it provides that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various adminis-

United States Attorney General; and the United States of America. Hereinafter, this court collectively refers to the Defendants as "the government."

3. Though the Fifth Amendment to the United States Constitution does not contain an Equal Protection Clause, as the Fourteenth Amendment does, the Fifth Amendment's Due Process Clause includes an Equal Protection component. See *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).
4. In the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.) this court holds that the Defense of Marriage Act is additionally rendered unconstitutional by operation of the Tenth Amendment and the Spending Clause.
5. Pub.L. No. 104-199, 110 Stat. 2419 (1996)

trative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.<sup>6</sup>

In large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin*,<sup>7</sup> a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples might be entitled to marry under the state's constitution.<sup>8</sup> That decision raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses.<sup>9</sup>

The House Judiciary Committee's Report on DOMA (the "House Report") referenced the *Baehr* decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and expressed concern that this development "threaten[ed] to have very real consequences . . . on federal law."<sup>10</sup> Specifically, the Report warned that "a redefinition of marriage in Hawaii to include homosexual couples

6. 1 U.S.C. § 7.

7. 74 Haw. 530, 852 P.2d 44 (1993).

8. See *id.* at 59-67.

9. Notably, the *Baehr* decision did not carry the day in Hawaii. Rather, Hawaii ultimately amended its constitution to allow the state legislature to limit marriage to opposite-sex couples. See HAW. CONST. art. I, § 23. However, five other states and the District of Columbia now extend full marriage rights to same-sex couples. These five states are Iowa, New Hampshire, Connecticut, Vermont, and Massachusetts, where Plaintiffs reside.

10. Aff. of Gary D. Buseck, Ex. D, H.R.Rep. No. 104-664 at 2-3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07 ("H. Rep.") [hereinafter "House Report"].

could make such couples eligible for a whole range of federal rights and benefits.”<sup>11</sup>

And so, in response to the Hawaii Supreme Court’s decision, Congress sought a means to both “preserve[ ] each State’s ability to decide” what should constitute a marriage under its own laws and to “lay[ ] down clear rules” regarding what constitutes a marriage for purposes of federal law.<sup>12</sup>

In enacting Section 2 of DOMA,<sup>13</sup> Congress permitted the states to decline to give effect to the laws of other states respecting same-sex marriage. In so doing, Congress relied on its “express grant of authority,” under the second sentence of the Constitution’s Full Faith and Credit Clause, “to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States.”<sup>14</sup> With regard to Section 3 of DOMA, the House Report explained that the statute codifies the definition of marriage set forth in “the standard law dictionary,” for purposes of federal law.<sup>15</sup>

The House Report acknowledged that federalism constrained Congress’ power, and that “[t]he determination of who may marry in the United States is uniquely a

function of state law.”<sup>16</sup> Nonetheless, it asserted that Congress was not “supportive of (or even indifferent to) the notion of same-sex ‘marriage,’”<sup>17</sup> and, therefore, embraced DOMA as a step toward furthering Congress’s interests in “defend[ing] the institution of traditional heterosexual marriage.”<sup>18</sup>

The House Report further justified the enactment of DOMA as a means to “encourag[e] responsible procreation and child-rearing,” conserve scarce resources,<sup>19</sup> and reflect Congress’ “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>20</sup> In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that “[m]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law.”<sup>21</sup>

In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it “immoral,” “depraved,” “unnatural,” “based on perversion” and “an attack upon God’s principles.”<sup>22</sup> They argued that marriage by gays and lesbians would “demean” and “trivialize” heterosexual marriage<sup>23</sup> and

11. *Id.* at 10.

12. *Id.* at 2.

13. Section 2 of DOMA provides that “[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”

14. *Id.* at 25.

15. *Id.* at 29. (citing BLACK’S LAW DICTIONARY 972 (6th ed.1990)).

16. *Id.* at 3.

17. *Id.* at 12.

18. *Id.*

19. *Id.* at 13, 18.

20. *Id.* at 16 (footnote omitted).

21. 142 CONG. REC. H7480 (daily ed. July 12, 1996).

22. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *Id.* at H7494 (statement of Rep. Smith).

23. *Id.* at H7494 (statement of Rep. Smith); see also 142 CONG. REC. S10, 110 (daily ed. Sept. 10, 1996) (statement of Sen. Helms) (“[Those opposed to DOMA] are demanding

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might indeed be “the final blow to the American family.”<sup>24</sup>

Although DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status, the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare. Instead, the House Report simply observed that the terms “marriage” and “spouse” appeared hundreds of times in various federal laws and regulations, and that those terms were defined, prior to DOMA, only by reference to each state’s marital status determinations.<sup>25</sup>

In January 1997, the General Accounting Office issued a report clarifying the scope of DOMA’s effect. It concluded that DOMA implicated at least 1,049 federal laws, including those related to entitlement programs, such as Social Security, health benefits and taxation, which are at issue in this action.<sup>26</sup> A follow-up study conducted in 2004 found that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status.<sup>27</sup>

that homosexuality be considered as just another lifestyle—these are the people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle . . . . Homosexuals and lesbians boast that they are close to realizing their goal—legitimizing their behavior. . . . At the heart of this debate is the moral and spiritual survival of this Nation.”); 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is “under direct assault by the homosexual extremists all across this country”).

24. *Id.* at H7276 (statement of Rep. Largent); see also 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) (“Al-

B. *The Federal Programs Implicated in This Action*

Prior to filing this action, each Plaintiff, or his or her spouse, made at least one request to the appropriate federal agency or authority for treatment as a married couple, spouse, or widower with respect to particular federal benefits available to married individuals. But each request was denied. In denying Plaintiffs access to these benefits, the government agencies responsible for administering the relevant programs all invoked DOMA’s mandate that the federal government recognize only those marriages between one man and one woman.

1. *Health Benefits Based on Federal Employment*

Plaintiffs’ allegations in this case encompass three federal health benefits programs: the Federal Employees Health Benefits Program (the “FEHB”), the Federal Employees Dental and Vision Insurance Program (the “FEDVIP”), and the federal Flexible Spending Arrangement program.

Plaintiff Nancy Gill, an employee of the United States Postal Service, seeks to add her spouse, Marcelle Letourneau, as a beneficiary under Ms. Gill’s existing self and family enrollment in the FEHB, to add

lowing for gay marriages would be the final straw, it would devalue the love between a man and a woman and weaken us as a Nation.”).

25. House Report at 10–11.

26. Aff. of Gary D. Buseck, Ex. A, Report of the U.S. General Accounting Office, Office of General Counsel, January 31, 1997 (GAO/OGC–97–16).

27. U.S. Gov. Accountability Office, GAO–04–353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

Ms. Letourneau to FEDVIP, and to use her flexible spending account for Ms. Letourneau's medical expenses.

Plaintiff Martin Koski, a former employee of the Social Security Administration, seeks to change his "self only" enrollment in the FEHB to "self and family" enrollment in order to provide coverage for his spouse, James Fitzgerald. And Plaintiff Dean Hara seeks enrollment in the FEHB as the survivor of his spouse, former Representative Gerry Studds.

A. *Federal Employees Health Benefits Program*

The FEHB is a comprehensive program of health insurance for federal civilian employees,<sup>28</sup> annuitants, former spouses of employees and annuitants, and their family members.<sup>29</sup> The program was created by the Federal Employees Health Benefits Act, which established (1) the eligibility requirements for enrollment, (2) the types of plans and benefits to be provided, and (3) the qualifications that private insurance carriers must meet in order to offer coverage under the program.<sup>30</sup>

The Office of Personnel Management ("OPM") administers the FEHB and is empowered to negotiate contracts with potential carriers, as well as to set the premiums for each plan.<sup>31</sup> OPM also prescribes regulations necessary to carry out the program, including those setting forth "the time at which and the manner and conditions under which an employee is eligible to enroll,"<sup>32</sup> as well as "the beginning and

ending dates of coverage of employees, annuitants, members of their families, and former spouses."<sup>33</sup> Both the government and the enrollees contribute to the payment of insurance premiums associated with FEHB coverage.<sup>34</sup>

An enrollee in the FEHB chooses the carrier and plan in which to enroll, and decides whether to enroll for individual, i.e. "self only," coverage or for "self and family" coverage.<sup>35</sup> Under OPM's regulations, "[a]n enrollment for self and family includes all family members who are eligible to be covered by the enrollment."<sup>36</sup> For the purposes of the FEHB statute, a "member of family" is defined as either "the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age..."<sup>37</sup> An employee enrolled in the FEHB for "self only" coverage may change to "self and family" coverage by submitting documentation to the employing office during an annual "open season," or within sixty days after a change in family status, "including a change in marital status."<sup>38</sup>

An "annuitant" eligible for coverage under the FEHB is, generally speaking, either an employee who retires on a federal annuity, or "a member of a family who receives an immediate annuity as the survivor of an employee . . . or of a retired employee. . . ." <sup>39</sup> To be covered under the FEHB, anyone who is not a current federal employee, or the family member of a current employee, must be eligible for a

28. "Employee" is defined as including a Member of Congress. 5 U.S.C. § 8901(1)(B).

29. 5 U.S.C. § 8905.

30. *Id.* §§ 8901–8914.

31. *Id.* §§ 8902, 8903, 8906.

32. *Id.* § 8913.

33. *Id.*

34. *Id.* § 8906.

35. *Id.* §§ 8905, 8906.

36. 5 C.F.R. § 890.302(a)(1).

37. *Id.* § 8901(5).

38. *See* 5 U.S.C. § 8905(f); 5 C.F.R. § 890.301(f), (g).

39. *See* 5 U.S.C. § 8901(3)(B).

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federal annuity, either as a former employee or as the survivor of an employee or former employee. When a federal employee or annuitant dies under “self and family” enrollment in FEHB, the enrollment is “transferred automatically to his or her eligible survivor annuitants.”<sup>40</sup>

B. *Federal Employees Dental and Vision Insurance Program (“FEDVIP”)*

The Federal Employees Dental and Vision Insurance Program provides enhanced dental and vision coverage to federal civilian employees, annuitants, and their family members, in order to supplement health insurance coverage provided by the FEHB.<sup>41</sup> The program was created by the Federal Employee Dental and Vision Benefits Enhancement Act of 2004,<sup>42</sup> and, as with the FEHB generally, FEDVIP is administered by OPM, which contracts with qualified companies and sets the premiums associated with coverage.<sup>43</sup> OPM is also authorized to “prescribe regulations to carry out” this program.<sup>44</sup>

Persons enrolled in FEDVIP pay the full amount of the premiums,<sup>45</sup> choose the plan in which to enroll, and decide whether to enroll for “self only,” “self plus one,” or “self and family” coverage.<sup>46</sup> Under the

associated regulations, an enrollment for “self and family” “covers the enrolled employee or annuitant and all eligible family members.”<sup>47</sup> An employee enrolled in FEDVIP for “self only” coverage may change to “self and family” coverage during an annual “open season” or within 60 days after a “qualifying life event,” including marriage or “acquiring an eligible child.”<sup>48</sup> The terms “annuitant” and “member of family” are defined in the same manner for the purposes of the FEDVIP as they are for the FEHB more generally.<sup>49</sup>

C. *Flexible Spending Arrangement Program*<sup>50</sup>

A Flexible Spending Arrangement (“FSA”) allows federal employees to set aside a portion of their earnings for certain types of out-of-pocket health care expenses. The money withheld in an FSA is not subject to income taxes.<sup>51</sup> OPM established the federal Flexible Spending Arrangement program in 2003.<sup>52</sup> This program does not apply, however, to “[c]ertain executive branch agencies with independent compensation authority,” such as the United States Postal Service, which established its own flexible benefits plan prior to the creation of the FSA.<sup>53</sup>

40. 5 C.F.R. § 890.303(c).

41. 5 U.S.C. §§ 8951, 8952, 8981, 8982.

42. *Id.* §§ 8951, 8954, 8981, 8984.

43. *Id.* §§ 8952(a), 8953, 8982(a), 8983.

44. *Id.* §§ 8962(a), 8992(a).

45. *Id.* §§ 8958(a), 8988(a).

46. *Id.* §§ 8956(a), 8986(a); *see* 5 C.F.R. § 894.201(b).

47. *Id.* § 894.201(c).

48. *Id.* 894.509(a), (b).

49. *See* 5 U.S.C. §§ 8951(2), 8991(2).

50. Plaintiffs’ *First Amended and Supplemental Complaint* refers to the “Federal Flexible Spending Account Program”. Compl. ¶ 401. Although OPM and the Internal Revenue Service have occasionally used that term, the term now used by both agencies is “Flexible Spending Arrangement.” The term “HCFSA” used by the plaintiffs means “health care flexible spending arrangement.” *Id.* ¶¶ 401, 410–12.

51. 26 U.S.C. § 125.

52. *See* 71 Fed.Reg. 66,827 (Nov. 17, 2006).

53. *Id.*; *see* 68 Fed.Reg. 56,525 (Oct. 1, 2003). Because Plaintiff Gill works for the United State Postal Service, her claim with regard to her FSA is asserted only against the Postal Service and not against OPM.

2. *Social Security Benefits*

The Social Security Act (“Act”) provides, among other things, Retirement and Survivors’ Benefits to eligible persons. The Act is administered by the Social Security Administration, which is headed by the Commissioner of Social Security.<sup>54</sup> The Commissioner has the authority to “make rules and regulations and to establish procedures, not inconsistent with the [pertinent] provisions of [the Social Security Act], which are necessary or appropriate to carry out such provisions.”<sup>55</sup>

A number of the plaintiffs in this action seek certain Social Security Benefits under the Act, based on marriage to a same-sex spouse. Specifically, Jo Ann Whitehead seeks Retirement Insurance Benefits based on the earnings record of her spouse, Bette Jo Green. Three of the Plaintiffs, Dean Hara, Randell Lewis-Kendell, and Herbert Burtis, seek Lump-Sum Death Benefits based on their marriages to same-sex spouses who are now deceased. And Plaintiff Herbert Burtis seeks Widower’s Insurance Benefits.

A. *Retirement Benefits*

The amount of Social Security Retirement Benefits to which a person is entitled depends on an individual’s lifetime earnings in employment or self-employment.<sup>56</sup> In addition to seeking Social Security Retirement Benefits based on one’s own earnings, an individual may claim benefits based on the earnings of a spouse, if the claimant “is not entitled to old-age . . . insurance benefits [on his or her own ac-

count], or is entitled to old-age . . . insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of [his or her spouse].”<sup>57</sup>

B. *Social Security Survivor Benefits*

The Act also provides certain benefits to the surviving spouse of a deceased wage earner. This action implicates two such types of Survivor Benefits, the Lump-Sum Death Benefit and the Widower’s Insurance Benefit.<sup>58</sup>

i. *Lump-Sum Death Benefit*

The Lump-Sum Death Benefit is available to the surviving widow or widower of an individual who had adequate lifetime earnings from employment or self-employment.<sup>59</sup> The amount of the benefit is the lesser of \$255 or an amount determined based on a formula involving the individual’s lifetime earnings.<sup>60</sup>

ii. *Widower’s Insurance Benefit*

The Widower’s Insurance Benefit is available to the surviving husband of an individual who had adequate lifetime earnings from employment or self-employment.<sup>61</sup> The claimant, with a few limited exceptions, must not have “married” since the death of the individual, must have attained the age set forth in the statute, and must be either (1) ineligible for old-age insurance benefits on his own account or (2) entitled to old-age insurance benefits “each of which is less than the primary insurance amount” of his deceased spouse.<sup>62</sup>

Benefit is implicated here because the only plaintiff who seeks such benefits herein is Herbert Burtis, a male.

54. 42 U.S.C. §§ 901, 902.

55. *Id.* § 405(a); *see id.* § 902(a)(5).

56. *Id.* §§ 402, 413(a), 414, 415.

57. *Id.* § 402(b), (c).

58. The Social Security Act also provides for a Widow’s Insurance Benefit, *see* 42 U.S.C. § 402(e), but only the Widower’s Insurance

59. *Id.* §§ 402(I), 413(a), 414(a), (b).

60. *Id.* §§ 402(I), 415(a).

61. *Id.* §§ 402(f), 413(a), 414(a), (b).

62. *Id.* § 402(f)(1); *see id.* § 402(f)(3).

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3. *Filing Status Under the Internal Revenue Code*

Lastly, a number of Plaintiffs in this case seek the ability to file federal income taxes jointly with their spouses. The amount of income tax imposed on an individual under the Internal Revenue Code depends in part on the taxpayer's "filing status." In accordance with the income tax scheme utilized by the federal government, a "married individual . . . who makes a single [tax] return jointly with his spouse" is generally subject to a lower tax than an "unmarried individual" or a "head of household."<sup>63</sup> "[I]f an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse," the couple may file a joint return within three years after the filing of the original returns.<sup>64</sup> Should the amended return call for a lower tax due than the original return, the taxpayer may also file an administrative request for a refund of the difference.<sup>65</sup>

III. *Discussion*A. *Summary Judgment*

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of

law.<sup>66</sup> In granting a summary judgment motion, the court "must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof."<sup>67</sup> Because the Parties do not dispute the material facts relevant to the questions raised by this action, it is appropriate for this court to dispose of the issues as a matter of law.<sup>68</sup>

B. *Plaintiff Dean Hara's Standing to Pursue his Claim for Health Benefits*

As a preliminary matter, this court addresses the government's assertion that Plaintiff Dean Hara lacks standing to pursue his claim for enrollment in the FEHB, as a survivor annuitant, in this court.

[1,2] "The irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged (and ultimately proven) an injury in fact. . . . Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury."<sup>69</sup> Where the plaintiff lacks standing to pursue his claim, the court, in turn, lacks subject matter

<sup>63</sup>. 26 U.S.C. § 1(a), (b), (c); *see id.* § 6013(a) ("A husband and wife may make a single return jointly of income taxes . . . even though one of the spouses has neither gross income nor deductions [subject to certain exceptions].").

<sup>64</sup>. *Id.* § 6013(b)(1), (2).

<sup>65</sup>. *Id.* § 6511(a); *see* 26 C.F.R. § 301.6402-2(a)(1).

<sup>66</sup>. *Prescott v. Higgins*, 538 F.3d 32, 40 (1st Cir.2008).

<sup>67</sup>. *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 34 (1st Cir.2005).

<sup>68</sup>. This court notes that *Defendants' Motion to Dismiss* [# 20] is also currently pending. Because there are no material facts in dispute and *Defendants' Motion to Dismiss* turns on the same purely legal question as the pending *Motion for Summary Judgment*, this court finds it appropriate, as a matter of judicial economy, to address the two motions simultaneously.

<sup>69</sup>. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations omitted).

jurisdiction over the dispute.<sup>70</sup> At issue here is the question of redressability.

A surviving spouse can enroll in the FEHB program only if he or she is declared eligible to receive a survivor annuity under federal retirement laws.<sup>71</sup> Such eligibility is a matter determined initially by OPM,<sup>72</sup> subject to review by the Merit Systems Review Board, and finally subject to the *exclusive* judicial review of the United States Court of Appeals for the Federal Circuit.<sup>73</sup>

[3] Prior to this action, Mr. Hara sought to enroll in the FEHB as a survivor annuitant based on his deceased spouse's federal employment. OPM found Mr. Hara ineligible for a survivor annuity both on initial review and on reconsideration. Mr. Hara appealed that decision to the Merit Systems Review Board, which affirmed OPM's denial. And currently, Mr. Hara's appeal of the Merit Systems Review Board's decision is pending before the Federal Circuit.<sup>74</sup> Accordingly, the government asserts that a ruling in this court cannot redress Mr. Hara's inability to enroll in the FEHB as an annuitant, because the Federal Circuit has yet to resolve his appeal of the Merit Systems Review Board's decision, which affirmed OPM's finding adverse to Mr. Hara. And so the government maintains that, if Mr. Hara has not been declared eligible for a survivor annuity, he will remain ineligible for FEHB enrollment, regardless of the outcome of this proceeding. This court agrees.

Plaintiffs arguments to the contrary are unavailing. First, Plaintiffs argue that, in basing its decision on reconsideration ex-

plicitly on the finding that Mr. Hara's spouse failed to elect self and family FEHB coverage prior to his death, OPM effectively conceded Mr. Hara's status as an annuitant for purposes of appeal to the Federal Circuit. But, regardless of the grounds upon which OPM rested its decision, the fact remains that Mr. Hara applied for an annuity, and the agency which has authority over such matters denied his claim.

Because the Federal Circuit has not held differently, this court must accept OPM's determination, affirmed by the Merit Systems Review Board, that Mr. Hara is ineligible to receive a survivor annuity pursuant to the FEHB statute. And if he is ineligible to receive a survivor annuity, then he cannot enroll in the FEHB program, notwithstanding this court's finding that Section 3 of DOMA as applied to Plaintiffs violates principles of equal protection.

Second, Plaintiffs argue that, because OPM did not file a cross-appeal to the Federal Circuit, it is estopped from raising the issue of whether Mr. Hara is an "annuitant" on appeal and, therefore, Mr. Hara's eligibility for a survivor annuity turns solely on the constitutionality of DOMA. This argument stems from the fact that, unlike OPM, the Merit Systems Review Board deemed Mr. Hara's spouse to have made the requisite "self and family" benefits election prior to his death, based on un rebutted evidence of his intent.

The Merit Systems Review Board affirmed OPM's decision that Mr. Hara is ineligible for a survivor annuity only be-

70. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).

71. 5 U.S.C. § 8905(b).

72. 5 U.S.C. § 8347(b).

73. See 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); see also *Lindahl v. OPM*, 470 U.S. 768, 775, 791-99, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985).

74. The appeal, however, has been stayed pending the outcome of this action.

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cause DOMA precluded federal recognition of Mr. Hara's same-sex marriage. Plaintiffs therefore contend that, as a matter of judicial economy, it makes sense for this court to render a decision on Mr. Hara's claim, because the pending appeal in the Federal Circuit ultimately turns on the precise legal question at issue here, the constitutionality of DOMA.

Though this court is empathetic to Plaintiffs' argument, identity of issues does not confer standing. The question of standing is one of jurisdiction, not one of efficiency.<sup>75</sup> So if this court cannot redress Mr. Hara's injury, it is without *power* to hear his claim. Based on this court's reading of the Merit Systems Review Board's decision, Plaintiffs are correct that Mr. Hara will be rendered eligible for a survivor annuity if the question of DOMA's constitutionality is resolved in his favor. But that question, as it pertains to Mr. Hara, must be answered by the Federal Circuit. Accordingly, a decision by this court cannot redress Mr. Hara's injury and, therefore, this court is without power to hear his claim.

C. *The FEHB Statute*

In the alternative to the constitutional claims analyzed below, Plaintiffs assert that, notwithstanding DOMA, the FEHB statute confers on OPM the discretion to extend health benefits to same-sex spouses. In support of this argument, Plaintiffs contend that the terms "family members" and "members of family" as used in the FEHB statute set a floor, but not a ceiling, to coverage eligibility. Plaintiffs assert,

therefore, that OPM may, in its discretion, consider same-sex spouses to be eligible "family members" for purposes of distributing health benefits. To arrive at this interpretation of the FEHB statute, Plaintiffs rely on associated regulations which state that an "enrollment for self and family *includes* all family members who are eligible to be covered by the enrollment."<sup>76</sup>

[4] A basic tenet of statutory construction teaches that "where the plain language of a statute is clear, it governs."<sup>77</sup> Under the circumstances presented here, this basic tenet readily resolves the issue of interpretation before this court. The FEHB statute unambiguously proclaims that "'member of family' *means* the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age."<sup>78</sup> And "[w]here, as here, Congress defines what a particular term 'means,' that definition controls to the exclusion of any meaning that is not explicitly stated in the definition."<sup>79</sup>

In other words, through the plain language of the FEHB statute, Congress has clearly limited coverage of family members to spouses and unmarried dependent children under 22 years of age. And DOMA, with similar clarity, defines the word "spouse," for purposes of determining the meaning of *any* Act of Congress, as "a person of the opposite sex who is a husband or wife."<sup>80</sup> In the face of such strikingly unambiguous statutory language to the contrary, this court cannot plausibly interpret the FEHB statute to confer on

75. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations omitted).

76. 5 C.F.R. § 890.302(a)(1) (emphasis added).

77. *One Nat'l Bank v. Antonellis*, 80 F.3d 606, 615 (1st Cir.1996).

78. 5 U.S.C. § 8901(5) (emphasis added).

79. *United States v. Roberson*, 459 F.3d 39, 53 (1st Cir.2006).

80. 1 U.S.C. § 7.

OPM the discretion to provide health benefits to same-sex couples, notwithstanding DOMA.<sup>81</sup>

Having reached this conclusion, the analysis turns to the central question raised by Plaintiffs' Complaint, namely whether Section 3 of DOMA as applied to Plaintiffs<sup>82</sup> violates constitutional principles of equal protection.

#### D. *Equal Protection of the Laws*

"[T]he Constitution 'neither knows nor tolerates classes among citizens.'<sup>83</sup> It is with this fundamental principle in mind that equal protection jurisprudence takes on "governmental classifications that 'affect some groups of citizens differently than others.'<sup>84</sup> And it is because of this "commitment to the law's neutrality where the rights of persons are at stake"<sup>85</sup> that legislative provisions which arbitrarily or irrationally create discrete classes cannot withstand constitutional scrutiny.<sup>86</sup>

**81.** *Accord In re Brad Levenson*, 560 F.3d 1145, 1150 (9th Cir.2009) (Reinhardt, J.); *but see, In re Karen Golinski*, 587 F.3d 956, 963 (9th Cir.2009) (Kozinski, C.J.). This court also takes note of Plaintiffs' argument that the FEHB statute should not be read to exclude same-sex couples as a matter of constitutional avoidance. The doctrine of constitutional avoidance counsels that "between two plausible constructions of a statute, an inquiring court should avoid a constitutionally suspect one in favor of a constitutionally uncontroversial alternative." *United States v. Dwinells*, 508 F.3d 63, 70 (1st Cir.2007). Because this court has concluded that there is but one plausible construction of the FEHB statute, the doctrine of constitutional avoidance has no place in the analysis.

**82.** In the remainder of this Memorandum, this court uses the term "DOMA" as a shorthand for "Section 3 of DOMA as applied to Plaintiffs."

**83.** *Romer v. Evans*, 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J. dissenting)).

[5] To say that all citizens are entitled to equal protection of the laws is "essentially a direction [to the government] that all persons similarly situated should be treated alike."<sup>87</sup> But courts remain cognizant of the fact that "the promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."<sup>88</sup> And so, in an attempt to reconcile the promise of equal protection with the reality of lawmaking, courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class.<sup>89</sup> A law that does neither will be upheld if it merely survives the rational basis inquiry—if it bears a rational relationship to a legitimate government interest.<sup>90</sup>

**84.** *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, —, 128 S.Ct. 2146, 2152, 170 L.Ed.2d 975 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)).

**85.** *Romer*, 517 U.S. at 623, 116 S.Ct. 1620.

**86.** *Id.*

**87.** *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

**88.** *Romer*, 517 U.S. at 631, 116 S.Ct. 1620 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271–72, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).

**89.** *Id.*

**90.** *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 319–320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). This constitutional standard of review is alternately referred to as the rational relationship test or the rational basis inquiry.

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Plaintiffs present three arguments as to why this court should apply strict scrutiny in its review of DOMA, namely that:

- DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations;
- DOMA burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships, and;
- The law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class.

[6] This court need not address these arguments, however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that “there exists no fairly conceivable set of facts that could ground a rational relationship”<sup>91</sup> between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.

#### 1. *The Rational Basis Inquiry*

[7] This analysis must begin with recognition of the fact that rational basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.”<sup>92</sup> A “classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong

presumption of validity . . . [and] courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”<sup>93</sup> Indeed, a court applying rational basis review may go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision.<sup>94</sup>

[8] Nonetheless, “the standard by which legislation such as [DOMA] must be judged is not a toothless one.”<sup>95</sup> “[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained.”<sup>96</sup> In other words, a challenged law can only survive this constitutional inquiry if it is “narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s].”<sup>97</sup> Courts thereby “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>98</sup>

[9,10] Importantly, the objective served by the law must be not only a proper arena for government action, but also properly cognizable by the governmental body responsible for the law in question.<sup>99</sup> And the classification created in furtherance of this objective “must find

91. *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir.2005) (internal citation omitted).

92. *Heller v. Doe*, 509 U.S. 312, 319–20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal citations omitted).

93. *Id.* (internal citations omitted).

94. *Shaw v. Oregon Public Employees’ Retirement Bd.*, 887 F.2d 947, 948–49 (9th Cir.1989) (internal quotation omitted).

95. *Mathews v. de Castro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976) (internal quotation omitted).

96. *Romer*, 517 U.S. at 633, 116 S.Ct. 1620.

97. *Id.*

98. *Id.* (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”)).

99. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (quoting *City of Cleburne*, 473 U.S. at 441, 105 S.Ct. 3249).

some footing in the realities of the subject addressed by the legislation.”<sup>100</sup> That is to say, the constitution will not tolerate government reliance “on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”<sup>101</sup> As such, a law must fail rational basis review where the “purported justifications . . . [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects.”<sup>102</sup>

## 2. Congress’ Asserted Objectives

The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.<sup>103</sup> For purposes of this litigation, the government has disavowed Congress’s stated justifications for the statute and, therefore, they are addressed below only briefly.

But the fact that the government has distanced itself from Congress’ previously

asserted reasons for DOMA does not render them utterly irrelevant to the equal protection analysis. As this court noted above, even in the context of a deferential rational basis inquiry, 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.”<sup>104</sup>

This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA.<sup>105</sup> 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.<sup>106</sup> But even if Congress believed at the time of DOMA’s passage that children had the best chance at success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not

100. *Heller v. Doe*, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

101. *City of Cleburne*, 473 U.S. at 447, 105 S.Ct. 3249.

102. *Garrett*, 531 U.S. at 366 n. 4, 121 S.Ct. 955 (citing *City of Cleburne*, 473 U.S. at 447–450, 105 S.Ct. 3249).

103. House Report at 12–18.

104. *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249.

105. See Def.’s Mem. Supp. Mot. Dismiss, 19 n. 10.

106. Def.’s Mem. Supp. Mot. Dismiss, 19 n. 10 (citing American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and

Family Health, *Coparent or second-parent adoption by same-sex parents*, 109 PEDIATRICS 339 (2002), available at <http://aappolicy.aapublications.org/cgi/content/full/pediatrics>; American Psychological Association, *Policy Statement on Lesbian and Gay Parents*, <http://www.apa.org/about/governance/council/policy/parenting.aspx>; American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* [http://www.aacap.org/cs/root/policy-statements/gay\\_lesbian\\_transgender\\_and\\_bisexual\\_parents\\_policy\\_statement](http://www.aacap.org/cs/root/policy-statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement); American Medical Association, *AMA Policy Regarding Sexual Orientation*, <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbtt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml>; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, <http://www.cwla.org/programs/culture/glbttqposition.htm>).

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provide a rational basis for denying federal recognition to same-sex marriages. Such denial does nothing to promote stability in heterosexual parenting. Rather, it “prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure,”<sup>107</sup> when afforded equal recognition under federal law.

Moreover, an interest in encouraging responsible procreation plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because, as Justice Scalia pointed out in his dissent to *Lawrence v. Texas*, the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country.<sup>108</sup> Indeed, “the sterile and the elderly” have never been denied the right to marry by any of the fifty states.<sup>109</sup> And the federal government has never considered denying recognition to marriage based on an ability or inability to procreate.

Similarly, Congress’ asserted interest in defending and nurturing heterosexual marriage is not “grounded in sufficient factual context [for this court] to ascertain some relation” between it and the classification DOMA effects.<sup>110</sup> To begin with, this court notes that DOMA cannot possibly encourage Plaintiffs to marry members of the opposite sex because Plaintiffs are *already* married to members of the same

sex. But more generally, this court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.<sup>111</sup> And 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.

What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make heterosexual marriage appear more valuable or desirable. But to the extent that this was the goal, Congress has achieved it “*only* by punishing same-sex couples who exercise their rights under state law.”<sup>112</sup> And this the Constitution does not permit. “For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean”<sup>113</sup> that the Constitution will not abide such “a bare congressional desire to harm a politically unpopular group.”<sup>114</sup>

[11] Neither does the Constitution allow Congress to sustain DOMA by reference to the objective of defending traditional notions of morality. As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans*, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a

107. *Goodridge v. Dep’t of Public Health*, 440 Mass. 309, 335, 798 N.E.2d 941 (2003).

108. See *Lawrence v. Texas*, 539 U.S. 558, 605, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Scalia, J., dissenting).

109. *Id.*

110. *Romer*, 517 U.S. at 632–33, 116 S.Ct. 1620.

111. *Accord In re Brad Levenson*, 560 F.3d 1145, 1150 (9th Cir. Jud. Council 2009) (Reinhardt, J.).

112. *Id.*

113. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

114. *Moreno*, 413 U.S. at 534, 93 S.Ct. 2821 (1973); see also, *Lawrence*, 539 U.S. at 571, 578, 123 S.Ct. 2472 (suggesting that the government cannot justify discrimination against same-sex couples based on traditional notions of morality alone).

sufficient reason for upholding a law. . . .”<sup>115</sup>

[12, 13] And finally, Congress attempted to justify DOMA by asserting its interest in the preservation of scarce government resources. While this court recognizes that conserving the public fisc can be a legitimate government interest,<sup>116</sup> “a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.”<sup>117</sup> This court can discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress’ desire to express its disapprobation of same-sex marriage. And “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [by the government]” are decidedly impermissible bases upon which to ground a legislative classification.<sup>118</sup>

### 3. Objectives Now Proffered for Purposes of Litigation

Because the rationales asserted by Congress in support of the enactment of DOMA are either improper or without relation to DOMA’s operation, this court next turns to the potential justifications for DOMA that the government now proffers for the purposes of this litigation.

In essence, the government argues that the Constitution permitted Congress to en-

act DOMA as a means to preserve the “status quo,” pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage. Had Congress not done so, the argument continues, the definitions of “marriage” and “spouse” under federal law would have changed along with each alteration in the status of same-sex marriage in any given state because, prior to DOMA, federal law simply incorporated each state’s marital status determinations. And, therefore, Congress could reasonably have concluded that DOMA was necessary to ensure consistency in the distribution of federal marriage-based benefits.

In addition, the government asserts that DOMA exhibits the type of incremental response to a new social problem which Congress may constitutionally employ in the face of a changing socio-political landscape.

[14] For the reasons set forth below, this court finds that, as with Congress’ prior asserted rationales, the government’s current justifications for DOMA fail to ground a rational relationship between the classification employed and a legitimate governmental objective.

To begin, the government claims that the Constitution permitted Congress to wait for the heated debate over same-sex marriage in the states to come to some

115. *Lawrence*, 539 U.S. at 577, 123 S.Ct. 2472 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (Stevens, J., dissenting)).

116. This court notes that, though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA’s impact prior to passage. See 142 CONG. REC. H7503-05 (daily ed. July 12, 1996). Furthermore, the Congressional Budget Office

concluded in 2004 that federal recognition of same-sex marriages by all fifty states would actually result in a net *increase* in federal revenue. See Buseck Aff., Ex. C at 1, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*.

117. *Plyler v. Doe*, 457 U.S. 202, 227, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (quoting *Graham v. Richardson*, 403 U.S. 365, 374-75, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)).

118. *City of Cleburne*, 473 U.S. at 448, 105 S.Ct. 3249.

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resolution before formulating an enduring policy at the national level. But this assertion merely begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance.

[15] There can be no dispute that the subject of domestic relations is the exclusive province of the states.<sup>119</sup> And the powers to establish eligibility requirements for marriage, as well as to issue determinations of marital status, lie at the very core of such domestic relations law.<sup>120</sup> The government therefore concedes, as it must, that Congress does not have the authority to place restrictions on the states' power to issue marriage licenses. And indeed, as the government aptly points out, DOMA refrains from directly doing so. Nonetheless, the government's argument assumes that Congress has some interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges. There is no such interest.<sup>121</sup> "The scope of a federal right is, of course, a federal question, but that does not mean

that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familiar relationship [because] there is no federal law of domestic relations."<sup>122</sup>

This conclusion is further bolstered by an examination of the federal government's historical treatment of state marital status determinations.<sup>123</sup> Marital eligibility for heterosexual couples has varied from state to state throughout the course of history. Indeed, pursuant to the sovereign power over family law granted to the states by virtue of the federalist system, as well as the states' well-established right to "experiment[ ] and exercis[e] their own judgment in an area to which States lay claim by right of history and expertise,"<sup>124</sup> individual states have changed their marital eligibility requirements in myriad ways over time.<sup>125</sup> And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law.<sup>126</sup>

119. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593, 10 S.Ct. 850, 34 L.Ed. 500 (1890)); *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

120. See *Ankenbrandt v. Richards*, 504 U.S. 689, 716, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (Blackmun, J., concurring).

121. See, generally, *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

122. *De Sylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 100 L.Ed. 1415 (1956) (internal citation omitted).

123. This court addresses the federal government's historical treatment of state marital status determinations at length in the com-

panion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010) (Tauro, J.).

124. *United States v. Lopez*, 514 U.S. 549, 580-83, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring).

125. See, e.g., Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 *Amer. J. of Legal Hist.* 197, 197-200 (1982).

126. See, e.g., *Dunn v. Comm'r of Internal Revenue*, 70 T.C. 361, 366 (1978) ("recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile"); 5 C.F.R. § 843.102 (defining "spouse" for purposes of federal employee benefits by reference to State law); 42 U.S.C. § 416(h)(1)(A)(i) (defining an "applicant" for purposes of Social Security survivor and

By way of one pointed example, so-called miscegenation statutes began to fall, state by state, beginning in 1948. But no fewer than sixteen states maintained such laws as of 1967 when the Supreme Court finally declared that prohibitions on interracial marriage violated the core constitutional guarantees of equal protection and due process.<sup>127</sup> Nevertheless, throughout the evolution of the stateside debate over interracial marriage, the federal government saw fit to rely on state marital status determinations when they were relevant to federal law.

The government suggests that the issue of same-sex marriage is qualitatively different than any historical state-by-state debate as to who should be allowed to marry because, though other such issues have indeed arisen in the past, “none had

become a topic of great debate in numerous states with such fluidity.”<sup>128</sup> This court, however, cannot lend credence to the government’s unsupported assertion in this regard, particularly in light of the lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago.<sup>129</sup>

Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage—or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry.<sup>130</sup>

death benefits as “the wife, husband, widow or widower” of an insured person “if the courts of the State” of the deceased’s domicile “would find such an applicant and such insured individual were validly married”); 20 C.F.R. § 404.345 (Social Security) (“If you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met.”); 38 U.S.C. § 103(c) (Veterans’ benefits); 20 C.F.R. § 10.415 (Workers’ Compensation); 45 C.F.R. § 237.50(b)(3) (Public Assistance); 29 C.F.R. §§ 825.122 and 825.800 (Family Medical Leave Act); 20 C.F.R. §§ 219.30 and 222.11 (Railroad Retirement Board); 38 C.F.R. § 3.1(j) (Veterans’ Pension and Compensation). Indeed, the only federal statute other than DOMA, of which this court is aware, that denies federal recognition to any state-sanctioned marriages is another provision that targets same-sex couples, regarding burial in veterans’ cemeteries, enacted in 1975. See 38 U.S.C. § 101(31).

127. See *Loving v. Virginia*, 388 U.S. 1, 6 n. 5, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

128. Def.’s Reply Mem., 14.

129. See NANCY COTT, PUBLIC VOWS 163 (2000).

130. Congress has contemplated regulating the marital relationship a number of times in the past, but always by way of proposed constitutional amendments, rather than legislation. And none of these proposed constitutional amendments have ever succeeded in garnering enough support to come to a vote in either the House or the Senate. See Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U.L.Q. 611, 614–15 (2004). It is worthy of note that Congress’ resort to constitutional amendment when it has previously considered wading into the area of domestic relations appears to be a tacit acknowledgment that, indeed, regulation of familial relationships lies beyond the bounds of its legislative powers. See *id.* at 620 (internal citations omitted) (“Advocates for nationwide changes to marriage laws typically consider amending the Constitution in part because of the widely-accepted view that, in the United States, for the most part, family law is state law. . . . Although the process of passing a law is much easier than amending the Constitution, a law may still be found unconstitutional. Advocates of federal marriage laws are worried that such laws would be in tension with the thesis that family law is state law and for this reason would be found unconstitutional. Reaching marriage laws by amending the Constitution sidesteps this tension.”).

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Though not dispositive of a statute's constitutionality in and of itself, "a longstanding history of related federal action . . . can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme,' and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests."<sup>131</sup> And the *absence* of precedent for the legislative classification at issue here is equally instructive, for "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [C]onstitution[ ] . . .'"<sup>132</sup>

The government is certainly correct in its assertion that the scope of a federal program is generally determined with reference to federal law. But the historically entrenched practice of incorporating state law determinations of marital status where they are relevant to federal law reflects a long-recognized reality of the federalist system under which this country operates. The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.<sup>133</sup>

Moreover, in order to give any meaning to the government's notion of preserving the status quo, one must first identify, with some precision, the relevant status quo to be preserved. The government has claimed that Congress could have had an interest in adhering to federal policy regarding the recognition of marriages as it existed in 1996. And this may very well

be true. But even assuming that Congress could have had such an interest, the government's assertion that pursuit of this interest provides a justification for DOMA relies on a conspicuous misconception of what the status quo was *at the federal level* in 1996.

The states alone are empowered to determine who is eligible to marry and, as of 1996, no state had extended such eligibility to same-sex couples. In 1996, therefore, it was indeed the status quo *at the state level* to restrict the definition of marriage to the union of one man and one woman. But, the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law. Thus, Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level.

Furthermore, this court seriously questions whether it may even consider preservation of the status quo to be an "interest" independent of some legitimate governmental objective that preservation of the status quo might help to achieve. Staying the course is not an end in and of itself, but rather a means to an end. Even assuming for the sake of argument that DOMA succeeded in preserving the federal status quo, which this court has concluded that it did not, such assumption does nothing more than describe what DOMA does. It does not provide a justification for doing it. This court does not doubt that Congress occasionally encounters social problems best dealt with by preserving the status quo or adjusting national policy

131. *United States v. Comstock*, — U.S. —, —, 130 S.Ct. 1949, 1952, 176 L.Ed.2d 878, 892 (2010) (internal citations omitted).

132. *Romer*, 517 U.S. at 633, 116 S.Ct. 1620 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)).

133. See, generally, *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F.Supp.2d 234 (D.Mass. July 8, 2010).

incrementally.<sup>134</sup> But to assume that such a congressional response is appropriate requires a predicate assumption that there indeed exists a “problem” with which Congress must grapple.<sup>135</sup>

The only “problem” that the government suggests DOMA might address is that of state-to-state inconsistencies in the distribution of federal marriage-based benefits. But the classification that DOMA effects does not bear any rational relationship to this asserted interest in consistency. Decidedly, DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy.

And even within the narrower class of heterosexual married couples, this court cannot apprehend any rational relationship between DOMA and the goal of nationwide

consistency. As noted above, eligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license. For example, a thirteen year-old female and a fourteen year-old male, who have the consent of their parents, can obtain a valid marriage license in the state of New Hampshire.<sup>136</sup> Though this court knows of no other state in the country that would sanction such a marriage, the federal government recognizes it as valid simply because New Hampshire has declared it to be so.

More importantly, however, the pursuit of consistency in the distribution of federal marriage-based benefits can only constitute a legitimate government objective if there exists a relevant characteristic by which to distinguish those who are entitled to receive benefits from those who are not.<sup>137</sup> And, notably, there is a readily

**134.** The government asserts, without explaining, that DOMA exhibits legislative incrementalism. As Plaintiffs aptly point out, it is unclear how this is so. DOMA, by its language, permanently and sweepingly excludes same-sex married couples from recognition for all federal purposes.

**135.** Indeed, the cases cited by the government support this court’s interpretation of the incrementalist approach as a means by which to achieve a legitimate government objective and not an objective in and of itself. See, e.g., *Medeiros v. Vincent*, 431 F.3d 25, 31–32 (1st Cir.2005) (upholding regulation of lobster fishing method, notwithstanding differential treatment of other fishing methods, to ameliorate problem of overfishing); *Butler v. Apfel*, 144 F.3d 622, 625 (9th Cir.1998) (upholding denial of Social Security benefits to incarcerated felons to conserve welfare resources, notwithstanding different treatment of other institutionalized groups because these groups are different in relevant respects); *Massachusetts v. EPA*, 549 U.S. 497, 524, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (noting that a massive problem, such as global change, is not generally resolved at once but rather with

“reform” moving one step at a time, addressing what seems “most acute to the legislative mind”); *SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) (addressing need for regulatory flexibility to address “specialized problems which arise”); *Nat’l Parks Conserv. Ass’n v. Norton*, 324 F.3d 1229, 1245 (11th Cir.2003) (preserving status quo by allowing leaseholders of stilted structures on national park land to continue to live in structures to extend their leases for a limited period of time served legitimate interest in ensuring that structures were maintained pending development of planning process); *Teigen v. Renfrow*, 511 F.3d 1072, 1084–85 (10th Cir.2007) (preserving status quo by not promoting employees involved in active litigation against government employer served government’s legitimate interest in avoiding courses of action that might negatively impact its prospects of success in the litigation).

**136.** RSA 457:4–5.

**137.** *City of Cleburne*, 473 U.S. at 439, 105 S.Ct. 3249 (explaining that equal protection of the laws is “essentially a direction [to the government] that all persons similarly situat-

## GILL v. OFFICE OF PERSONNEL MANAGEMENT

395

Cite as 699 F.Supp.2d 374 (D Mass. 2010)

discernible and eminently relevant characteristic on which to base such a distinction: *marital status*. Congress, by premising eligibility for these benefits on marriage in the first instance, has already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny.<sup>138</sup>

[16] Similarly unavailing is the government's related assertion that "Congress could reasonably have concluded that federal agencies should not have to deal immediately with [the administrative burden presented by] a changing patchwork of state approaches to same-sex marriage"<sup>139</sup> in distributing federal marriage-based benefits. Federal agencies are not burdened with the administrative task of implementing changing state marriage laws—that is a job for the states themselves. Rather, federal agencies merely distribute federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses. That task does not become more administratively complex simply because some of those couples are of the same sex. Nor does it become more complex simply because some of the couples applying for marriage-based benefits were previously ineligible to marry. Every heterosexual couple that obtains a

marriage license was at some point ineligible to marry due to the varied age restrictions placed on marriage by each state. Yet the federal administrative system finds itself adequately equipped to accommodate their changed status.

In fact, as Plaintiffs suggest, DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not. As such, this court finds the suggestion of potential administrative burden in distributing marriage-based benefits to be an utterly unpersuasive excuse for the classification created by DOMA.

Lastly, even if DOMA succeeded in creating consistency in the distribution of federal marriage-based benefits, which this court has concluded that it does not, DOMA's comprehensive sweep across the entire body of federal law is so far removed from that discrete goal that this court finds it impossible to credit the proffered justification of consistency as the motivating force for the statute's enactment.<sup>140</sup>

The federal definitions of "marriage" and "spouse," as set forth by DOMA, are incorporated into at least 1,138 different federal laws, many of which implicate rights and privileges far beyond the realm of pecuniary benefits.<sup>141</sup> For example, persons who are considered married for purposes of federal law enjoy the right to

ed should be treated alike") (internal citation omitted).

138. See *Garrett*, 531 U.S. at 366 n. 4, 121 S.Ct. 955 (finding that a law failed rational basis review where the "purported justifications . . . made no sense in light of how the [government] treated other groups similarly situated").

139. Def.'s Mem. Opp. Summ. Judg., 16.

140. See *Romer*, 517 U.S. at 635, 116 S.Ct. 1620 (rejecting proffered rationale for state constitutional amendment because "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.").

141. See U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

sponsor their non-citizen spouses for naturalization,<sup>142</sup> as well as to obtain conditional permanent residency for those spouses pending naturalization.<sup>143</sup> Similarly, the Family and Medical Leave Act (“FMLA”) entitles federal employees, who are considered married for federal purposes, to twelve weeks of unpaid leave in order to care for a spouse who has a serious health condition or because of any qualifying exigency arising out of the fact that a spouse is on active military duty.<sup>144</sup> But because DOMA dictates that the word “spouse”, as used in the above-referenced immigration and FMLA provisions, refers only to a husband or wife of the opposite sex, these significant non-pecuniary federal rights are denied to same-sex married couples.

It strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of federal marriage-based pecuniary benefits. For though the government is correct that the rational basis inquiry leaves room for a less than perfect fit between the means Congress employs and the ends Congress seeks to achieve,<sup>145</sup> this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves.

In sum, this court is soundly convinced, based on the foregoing analysis, that the government’s proffered rationales, past and current, are without “footing in the realities of the subject addressed by

[DOMA].”<sup>146</sup> And “when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest,”<sup>147</sup> this court finds that DOMA lacks a rational basis to support it.

This court simply “cannot say that [DOMA] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which [this court] could discern a relationship to legitimate [government] interests.”<sup>148</sup> Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where,

142. 8 U.S.C. § 1430.

143. 8 U.S.C. § 1186b(2)(A).

144. *See* 5 U.S.C. § 6382.

145. *See Heller*, 509 U.S. at 319–20, 113 S.Ct. 2637 (internal citations omitted).

146. *Id.* at 321, 113 S.Ct. 2637.

147. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *Romer v. Evans*).

148. *Romer*, 517 U.S. at 635, 116 S.Ct. 1620.

**RODRIGUEZ-RIVAS v. POLICE DEPT. OF PUERTO RICO** 397  
Cite as 699 F.Supp.2d 397 (D.Puerto Rico 2010)

as here, “there is no reason to believe that the disadvantaged class is different, in *relevant* respects” from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification.<sup>149</sup> As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.

IV. *Conclusion*

For the foregoing reasons, *Defendants’ Motion to Dismiss* [# 20] is DENIED and *Plaintiffs’ Motion for Summary Judgment* [# 25] is ALLOWED, except with regard to Plaintiff Dean Hara’s claim for enrollment in the Federal Employees Health Benefits Plan, as he lacks standing to pursue that claim in this court.  
AN ORDER HAS ISSUED.

*ORDER*

For the reasons set forth in the accompanying Memorandum, this court hereby orders that:

1. *Defendants’ Motion to Dismiss* [# 20] is ALLOWED IN PART and DENIED IN PART. Specifically, *Defendant’s Motion to Dismiss* [# 20] is DENIED as to all claims, except Plaintiff Dean Hara’s claim for enrollment in the Federal Employees Health Benefits Plan.
2. *Plaintiffs’ Motion for Summary Judgment* [# 25] is ALLOWED.

IT IS SO ORDERED.



<sup>149</sup>. *Lofton*, 377 F.3d at 1280 (Birch, J., specially concurring in the denial of rehearing en banc) (interpreting the mandate of *City of*

**Marisela RODRIGUEZ-RIVAS,  
et al., Plaintiff(s)**

v.

**POLICE DEPT. OF PUERTO  
RICO, Defendant(s).**

**Civil No. 06-1197 (JAG).**

United States District Court,  
D. Puerto Rico.

March 12, 2010.

**Background:** Female police officer brought action against police department, alleging retaliation and sexual harassment in violation of Title VII. After a jury rendered a verdict for officer, department filed motions for judgment as a matter of law, for new trial and to alter or amend judgment.

**Holdings:** The District Court, Jay A. Garcia-Gregory, J., held that:

- (1) officer took reasonable steps to avoid harm;
- (2) supervisor’s change in demeanor and attitude was not an adverse employment action; and
- (3) new trial was warranted.

Ordered accordingly.

**1. Federal Civil Procedure** ⇨2653, 2655

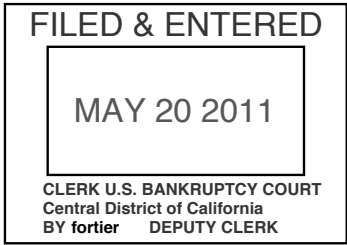
Motions to alter or amend judgment are granted only where a movant shows a manifest error of law or newly discovered evidence. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

**2. Federal Civil Procedure** ⇨928

A motion for reconsideration should be granted if a court has patently misunderstood a party or has made an error not

*Cleburne v. Cleburne Living Center* ) (emphasis added).

Southwest Bankruptcy Conference



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13 CENTRAL DISTRICT OF CALIFORNIA  
14 LOS ANGELES DIVISION

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16 In re:  
17 Gene Douglas Balas and Carlos A. Morales,  
18 Debtors.

Case No.: 2:11-bk-17831-TD

Chapter 13

**ORDER CONTINUING HEARING  
ON THE UNITED STATES  
TRUSTEE'S MOTION TO DISMISS  
AND SETTING DEADLINE FOR  
ANY PLEADINGS OR OTHER  
FILINGS**

Date: May 17, 2011  
Time: 2:00 p.m.  
Place: Courtroom 1345  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, California 90012

1 On May 17, 2011, a hearing was scheduled on the *United States Trustee's Motion to*  
2 *Dismiss Pursuant to 11 U.S.C. § 1307(c), or For Related Relief* [Docket No. 28], filed April  
3 15, 2011, and the *United States Trustee's Objection to Confirmation of Plan; and*  
4 *Declaration of Hatty Yip in Support Thereof* [Docket No. 26], filed April 15, 2011 (together,  
5 the "Motion to Dismiss"), to which the Debtors had timely responded with their *Opposition*  
6 *to the U.S. Trustee's Motion to Dismiss and Response to the U.S. Trustee's Confirmation*  
7 *Objection; Memorandum of Points and Authorities; Declaration of Gene Douglas Balas;*  
8 *Declaration of Carlos A. Morales* [Docket No. 35], filed April 27, 2011 (the "Opposition").  
9 All creditors and parties in interest were notified that the Motion to Dismiss would be heard  
10 on this date. *See Notice to Creditors* [Docket No. 39], dated May 4, 2011 (providing notice  
11 that "the hearing on the U.S. Trustee's motion to dismiss [has] been rescheduled to May 17,  
12 2011 at 2:00 p.m., before the Honorable Thomas B. Donovan, Bankruptcy Judge, Courtroom  
13 1345, Roybal Building, 255 E. Temple Street, Los Angeles, CA 90012.").

14 The following individuals personally appeared at the hearing: Peter C. Anderson,  
15 United States Trustee; Jill M. Sturtevant, Assistant United States Trustee; Kathy A. Dockery,  
16 Chapter 13 Trustee; Angela N. Gill, Staff Attorney at the Office of the Chapter 13 Trustee;  
17 Gene Douglas Balas and Carlos A. Morales, the Debtors; David M. Stern and Robert J.  
18 Pfister, Special Counsel for the Debtors; and Peter M. Lively and Ilya B. Volk, Counsel for  
19 the Debtors. The Court was prepared to hear the Motion to Dismiss and the Opposition, and  
20 the Debtors were ready to proceed. The Court was informed at the outset of the hearing,  
21 however, that the House Bipartisan Legal Advisory Group had asked the United States  
22 Trustee to request a seven (7) day continuance of the hearing. The Debtors consented to a  
23 brief continuance.

24 Upon consideration of the preceding, and based on the reasons and with the  
25 limitations set forth on the record, IT HEREBY IS ORDERED THAT:

26 1. The hearing on the Motion to Dismiss is continued to June 13, 2011, at  
27 2 o'clock p.m.

28 2. Any agency or instrumentality of the United States Government that wishes to

Southwest Bankruptcy Conference

1 be heard on the merits of the Motion to Dismiss or the Opposition must file its merits brief  
2 on or before May 31, 2011. This deadline also applies to any further briefing that the Office  
3 of the United States Trustee wishes to file.

4 3. The Debtors shall have until June 7, 2011 to reply to any such merits brief.

5 4. The Debtors' proposed plan of reorganization may be confirmed on the June  
6 23, 2011, 10 o'clock a.m. consent calendar provided that the Debtors' plan payments are  
7 current and no changed financial circumstance renders the plan infeasible. The confirmation  
8 hearing may be continued further if the Court has not ruled on the Motion to Dismiss.

9

10 **Order Approved as to Form:**

11 By the United States Trustee:

12   /s/ Peter C. Anderson  

13 By the Chapter 13 Trustee:

14   /s/ Kathy A. Dockery  

15 By the Debtors:

16   /s/ Robert J. Pfister  

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23 DATED: May 20, 2011

24   James A. Donovan    
United States Bankruptcy Judge

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KLEE, TUCHIN, BOGDANOFF & STERN LLP  
1999 AVENUE OF THE STARS, 30TH FLOOR  
LOS ANGELES, CALIFORNIA 90067-6049  
(310) 407-4000

American Bankruptcy Institute

Case 2:11-bk-17831-NB Doc 43 Filed 05/20/11 Entered 05/20/11 17:14:08 Desc Main Document Page 4 of 7

Table with 2 columns: In re: Gene Douglas Balas and Carlos A. Morales Debtor(s); CHAPTER 13 CASE NUMBER 2:11-bk-17831-TD

NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

1999 Avenue of the Stars, Thirty-Ninth Floor
Los Angeles, CA 90067

A true and correct copy of the foregoing document described as ORDER CONTINUING HEARING ON THE UNITED STATES TRUSTEE'S MOTION TO DISMISS AND SETTING DEADLINE FOR ANY PLEADINGS OR OTHER FILINGS will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d), and (b) in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On May 20, 2011 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the e-mail address indicated below:

N/A

Service Information continued on attached page.

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served): On May 20, 2011 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

N/A

Service Information continued on attached page.

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P.5 and/or controlling LBR, on May 20, 2011 I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method ) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

The Honorable Thomas B. Donovan
U.S. Bankruptcy Court
Roybal Federal Building
255 E. Temple Street, Suite 1352
Los Angeles, CA 90012-3332

Peter Anderson
United States Trustee (LA)
725 S. Figueroa Street, 26th Floor
Los Angeles, CA 90017-5524

Kathy A. Dockery
700 S. Flower Street, Suite 1950
Los Angeles, CA 90017-4212

Service Information continued on attached page.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

May 20, 2011 Robert J. Pfister /s/ Robert J. Pfister
Date Type Name Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

# Southwest Bankruptcy Conference

Case 2:11-bk-17831-NB Doc 43 Filed 05/20/11 Entered 05/20/11 17:14:08 Desc  
Main Document Page 5 of 7

## **NOTE TO USERS OF THIS FORM:**

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

## **NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled ORDER CONTINUING HEARING ON THE UNITED STATES TRUSTEE'S MOTION TO DISMISS AND SETTING DEADLINE FOR ANY PLEADINGS OR OTHER FILINGS was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of May 18, 2011, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

SEE ATTACHED SERVICE LIST

Service Information continued on attached page.

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

N/A

Service Information continued on attached page.

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

SEE ATTACHED SERVICE LIST

Service Information continued on attached page.

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

**American Bankruptcy Institute**

Case 2:11-bk-17831-NB Doc 43 Filed 05/20/11 Entered 05/20/11 17:14:08 Desc  
Main Document Page 6 of 7

In re: Gene Douglas Balas and Carlos A. Morales	Debtor(s).	CHAPTER 13 CASE NUMBER 2:11-bk-17831-TD
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**SERVICE VIA NOTICE OF ELECTRONIC FILING**

Kathy A. Dockery (TR)	efiling@CH13LA.com
M. Jonathan Hayes	jhayes@polarisnet.net
On behalf of Interested Party Courtesy NEF	
Peter M. Lively	PeterMLively2000@yahoo.com
On behalf of Debtor Gene Balas	
Robert J. Pfister	rpfister@ktbslaw.com
On behalf of Debtor Gene Balas	
United States Trustee (LA)	Ustpreion16.la.ecf@usdoj.gov

**SERVICE BY U.S. MAIL**

Bank of America P.O. Box 15026 Wilmington, DE 19850-5026	Chevron Credit Bank P.O. Box 5010 Concord, CA 94524-0010	Franchise Tax Board Bankruptcy Section MS A340 P.O. Box 2952 Sacramento, CA 95812-2952
Capital One Bank P.O. Box 30285 Salt Lake City, UT 84130-0285	Candica L.L.C. c/o Weinstein and Riley, PS 2001 Western Avenue, Suite 400 Seattle, WA 98121	HSBC Card Services c/o NCO Financial Systems P.O. Box 15372 Wilmington, DE 19850-5372
Internal Revenue Service Centralized Insolvency Operation P.O. Box 7346 Philadelphia, PA 19101-7346	Park La Brea 6200 W. Third Street Los Angeles, CA 90036-3157	Carlos A. Morales 5702 Lindenhurst Avenue Los Angeles, CA 90036-3275
Los Angeles Division 255 E. Temple Street Los Angeles, CA 90012-3332	BMW Financial Services c/o Vital Recovery Services, Inc. P.O. Box 923748 Norcross, GA 30010-3748	Cedars-Sinai P.O. Box 60109 Los Angeles, CA 90060-0109
Citibank P.O. Box 26892 San Francisco, CA 94126-0892	FIA Card Services aka Bank of America c/o Becket and Lee LLP P.O. Box 3001 Malvern, PA 19355-0701	HSBC Bank Nevada, N.A. By PRA Receivables Management, LLC P.O. Box 12907 Norfolk, VA 23541-0907
HSBC Card Services Hunt & Henriques 151 Bernal Road, Suite 8 San Jose, CA 95119-1491	Internal Revenue Service Centralized Insolvency Operations P.O. Box 7346 Philadelphia, PA 19101-7346	Sallie Mae P.O. Box 9533 Wilkes-Barre, PA 18773-9533
Acura Financial Services P.O. Box 600001 City of Industry, CA 91716	BMW Financial Services P.O. Box 3608 Dublin, OH 43016-0306	Chase P.O. Box 15298 Wilmington, DE 19850-5298

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## Southwest Bankruptcy Conference

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Main Document Page 7 of 7

Consultants for Pathology  
4607 Lakeview Canyon Rd., Ste. 598  
Westlake Village, CA 91361-4028

Franchise Tax Board  
Attn: Bankruptcy  
P.O. Box 2952  
Sacramento, CA 95812-2952

HSBC Card Services  
c/o Hunt & Henriques  
151 Bernal Road, Suite 8  
San Jose, CA 95119-1306

HSBC Card Services  
P.O. Box 81622  
Salinas, CA 93912-1622

MD Periodontics  
A. Moshrefi, DDS MS & N.  
Daneshmand  
9735 Wilshire Blvd., Suite 211  
Beverly Hills, CA 90212-2102

Sallie Mae Inc. on behalf of USA Funds  
Attn: Bankruptcy Litigation Unit E3149  
P.O. Box 9430  
Wilkes-Barre, PA 18773-9430

Internal Revenue Service  
P.O. Box 21126  
Philadelphia, PA 19114

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BMW Financial Service  
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Jill M. Sturtevant, Esq.  
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Los Angeles, CA 90017

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

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12  
13 **UNITED STATES BANKRUPTCY COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **LOS ANGELES DIVISION**  
16

17 In re:

18 Gene Douglas Balas and Carlos A. Morales,  
19 Debtors.

Case No.: 2:11-bk-17831-AA

Chapter 13

**DEBTORS' REPLY BRIEF**

Date: June 13, 2011

Time: 2:00 p.m.

Place: Courtroom 1345  
Roybal Federal Building  
255 East Temple Street  
Los Angeles, California 90012

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**REPLY**

There is a doctrine in civil procedure to the effect that a party’s deliberate failure to respond “is equated with an admission that the [non-responding] party has no meritorious claim . . . .” *Karlsson v. Ford Motor Co.*, 45 Cal. Rptr. 3d 265, 278-79 (Cal. App. 2006); *see also Kahn v. Kahn*, 137 Cal. Rptr. 332, 337 (Cal. App. 1977) (“a persistent refusal to comply with an order for the production of evidence is tantamount to an admission that the disobedient party really has no meritorious claim or defense to the action”). While that rule operates in a different context (discovery) in a different judicial forum (the California state court system), the general principle is instructive here, where the House Bipartisan Legal Advisory Group (“BLAG”) has had more than ample opportunity to be heard in this Court on the constitutionality of DOMA,<sup>1</sup> yet has failed to appear and defend this indefensible law:

- On May 17, 2011, at a duly-noticed hearing on a motion filed more than a month before, BLAG asked the United States Trustee via e-mail an hour before the hearing “to come here today to request a brief continuance, so that it can determine whether to intervene in this case, in order [to present] its arguments on the constitutional issues the Debtors have raised.” Transcript [Docket No. 45] (“Tr.”) at 3:17-22.
- As the United States Trustee noted in making this unprecedented entreaty by a non-party, BLAG’s last-minute request to continue did not comply with this Court’s rules, which “call for a written motion to continu[e] filed at least three days before the hearing.” Tr. at 4:3-5; *see* LBR 9013-1(m) (further providing that any motion for a continuance “must set forth in detail the reasons for the continuance . . . and be supported by the declaration of a competent witness attesting to the necessity for the continuance”).
- Moreover, as the Debtors noted at the hearing in response to the Court’s inquiry,

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<sup>1</sup> Capitalized terms not otherwise defined have the meanings ascribed in the Debtors’ Opposition and Response [Docket No. 35], filed April 27, 2011. For ease of reference, the attachments to this Reply (Tab F and Tab G) continue sequentially from the Opposition and Response.

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1 BLAG indisputably knew of the DOMA issue in this Bankruptcy Case since at  
2 least May 4. *See* Tr. 9:5-11 (describing the declaration submitted by the General  
3 Counsel of the House of Representatives in *Golinski*, another DOMA matter,  
4 which identified this Bankruptcy Case by name as one in which “the statute will  
5 be undefended unless the Bipartisan Legal Advisory Group intervenes.”).<sup>2</sup>

- 6 • Notwithstanding the procedural irregularity of BLAG’s request, the Debtors  
7 consented to a brief continuance, and the Court entered its *Order Continuing*  
8 *Hearing on the United States Trustee’s Motion to Dismiss and Setting Deadline*  
9 *for Any Pleadings or Other Filings* [Docket No. 43], which provided: “Any  
10 agency or instrumentality of the United States Government that wishes to be heard  
11 on the merits of the Motion to Dismiss or the Opposition must file its merits brief  
12 on or before May 31, 2011.” Notably, this deadline was *twice as long* as the one-  
13 week continuance BLAG requested. *Cf.* Tr. at 13:10-12 (giving BLAG until May  
14 31 to respond means that “then there can be no excuses” for further delay).
- 15 • On May 31, 2011, BLAG filed nothing: no merits brief, no motion for extension  
16 of time, and not even an explanation for why BLAG inconvenienced the Court, the  
17 parties and a courtroom full of observers<sup>3</sup> with a nearly one-month delay, for no  
18 apparent purpose.

19 Tellingly, BLAG has taken a similar tack in two other pending bankruptcy cases that  
20 implicate DOMA, both of which are chapter 7 proceedings.<sup>4</sup> In both, the courts denied  
21 motions to dismiss the joint petitions pursuant to DOMA, but declined to reach the  
22

23 <sup>2</sup> Specifically, the Debtors were referring to the *Declaration of Kerry W. Kircher in Support of*  
24 *Defendant’s Motion to Enlarge Time to Respond to Plaintiff’s Second Amended Complaint*,  
Docket No. 119 in *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-257 (N.D. Cal., May 4, 2011).

25 <sup>3</sup> As the Court noted on the record, “[t]here are a lot of people in the courtroom.” Tr. at 10:20-21.

26 <sup>4</sup> As set out in the Kircher Declaration, *see supra* note 2, BLAG has identified ten active cases in  
27 which DOMA is at issue: five general civil matters (taxation, government benefits and the like),  
28 two immigration proceedings, and three bankruptcy matters (including this Bankruptcy Case).  
As of the date of this Reply, BLAG has filed motions to intervene in all of the civil and  
immigration cases, but not any of the bankruptcy cases. The Debtors are unaware of any reason  
for BLAG’s failure to engage in the bankruptcy cases.

Southwest Bankruptcy Conference

1 constitutionality of the statute given the lack of briefing by BLAG. See Memorandum  
2 Decision Denying Motion to Dismiss, Docket No. 31 in *In re Somers & Caggiano*, No. 10-  
3 38296 (Bankr. S.D.N.Y., May 4, 2011) (Morris, J.) (attached hereto as **Tab F**) (“The Court  
4 will not conduct its own constitutional analysis of [DOMA] since the issue . . . has not been  
5 briefed by the parties.”); *Civil Minutes*, Docket No. 44 in *In re Ziviello-Howell*, No. 11-  
6 22706 (Bankr. E.D. Cal., May 31, 2011) (McManus, J.) (attached hereto as **Tab G**)  
7 (adopting essentially the same reasoning, “[w]ithout reaching DOMA’s constitutionality”).  
8 Yet notwithstanding the indisputable procedural default by BLAG, the U.S. Trustee filed a  
9 notice of appeal in *Somers & Caggiano*, and apparently will do the same in *Ziviello-Howell*.<sup>5</sup>

10 Whatever the reason for BLAG’s default in *Somers & Caggiano* and *Ziviello-Howell*,  
11 there can be no question that BLAG has had more than ample opportunity to appear and be  
12 heard in this Bankruptcy Case, yet chose (perhaps strategically) to remain silent. Like the  
13 proverbial “dog that didn’t bark,” BLAG’s silence is significant: it betrays the lack of any  
14 compelling argument that DOMA is constitutional.<sup>6</sup> The Debtors respectfully submit that

15 \_\_\_\_\_  
16 <sup>5</sup> The United States Trustee’s *Designation of Record on Appeal* [Docket No. 37 in *Somers &*  
17 *Caggiano*] specifically states that, “at the request of [BLAG], Appellant has included the  
18 constitutionality of [DOMA] and the bankruptcy court’s refusal to dismiss the petition on the  
19 basis of [DOMA] as issues on appeal.”

20 <sup>6</sup> Indeed, last week in *Golinski* (a civil DOMA case before Judge White in San Francisco), BLAG  
21 filed its first merits brief attempting to defend the constitutionality of DOMA since the Attorney  
22 General’s announcement that the United States will no longer defend the law. See *Motion to*  
23 *Dismiss Plaintiff’s Second Amended Complaint*, Docket No. 119 in *Golinski v. U.S. Office of*  
24 *Pers. Mgmt.*, No. 10-257 (N.D. Cal., June 3, 2011).

25 Without endeavoring a point-by-point refutation of a brief filed in another case, suffice it to say  
26 that BLAG’s argument that DOMA is constitutional (that is, the argument BLAG refuses to  
27 bring before this Court) is premised on a *non sequitur*: starting from the proposition that  
28 marriage equality is not a right protected by the federal constitution, BLAG skips to the  
conclusion that the federal government may therefore deny recognition of otherwise valid same-  
sex marriages with impunity. But that conclusion does not follow from its premise. There may  
be, for example, no fundamental federal constitutional right to get married on a Tuesday – but  
that does not mean that the federal government could unjustifiably refuse to recognize any  
otherwise valid marriage on the ground that it was entered into on a particular day of the week.  
One of DOMA’s constitutional infirmities (in addition to many others) is that it treats differently  
couples who are similarly circumstanced in all pertinent respects (those lawfully married under  
state law), with no *constitutionally legitimate* justification for the distinction drawn. And even  
beyond this fundamental flaw, BLAG’s defense of DOMA is rife with other errors, including

(Footnote Continued)

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1 BLAG's deliberate silence should not dissuade this Court from squarely addressing the  
2 constitutional issue that has been fully briefed in this case.

3  
4 Dated: June 7, 2011

KLEE, TUCHIN, BOGDANOFF & STERN LLP

5  
6 /s/ Robert J. Pfister

7 DAVID M. STERN (State Bar No. 67697)  
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23  
24 that it (i) relegates discussion of the plaintiff's sex discrimination claim to a conclusory footnote  
25 that fails to engage the Supreme Court's well-settled gender discrimination case law;  
26 (ii) incorrectly asserts that the proper level of scrutiny for classifications based on sexual  
27 orientation is settled law in the Ninth Circuit; and (iii) dismisses all due process challenges to  
28 DOMA in an inapposite footnote, without addressing contrary controlling decisions of the Ninth  
Circuit.

In short, the attempt by very skilled lawyers (including a former Solicitor General of the United States) to defend DOMA in *Golinski* only confirms that the statute is, indeed, indefensible – as the President and the Attorney General concluded in February.

Southwest Bankruptcy Conference

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In re: Gene Douglas Balas and Carlos A. Morales	Debtor(s).	CHAPTER 13 CASE NUMBER 2:11-bk-17831-AA
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U.S. Bankruptcy Court
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Los Angeles, CA 90012-3332

Via Personal Delivery
Office of the United States Trustee
Attn: Peter C. Anderson
725 S. Figueroa Street, Suite 2600
Los Angeles, CA 90017

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June 7, 2011
Date

Rosalind Williams
Type Name

[Handwritten Signature]
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**American Bankruptcy Institute**

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Main Document Page 7 of 8

In re: Gene Douglas Balas and Carlos A. Morales  Debtor(s).	CHAPTER 13  CASE NUMBER 2:11-bk-17831-AA
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August 2010

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## Southwest Bankruptcy Conference

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**FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In re Theresa L. Somers and Rosemary Caggiano,

Debtors.

Case No. 10-38296  
Chapter 7

-----X

**MEMORANDUM DECISION DENYING MOTION TO DISMISS**

Appearances:

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*Attorney for Debtors*

Lisa M. Penpraze  
Office of United States Trustee  
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*Attorney for the United States Trustee*

This matter came before the Court pursuant to the United States Trustee's motion to dismiss the Debtors' case under section 11 U.S.C. § 707(a), as an "improper joint petition" pursuant to the Defense of Marriage Act. Section 707(a) permits the bankruptcy court to dismiss a chapter 7 bankruptcy case "only for cause." Having considered the pleadings submitted and the record of the Debtors'

## Southwest Bankruptcy Conference

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bankruptcy case and after notice and a hearing held on May 3, 2011, the Court has determined that insufficient cause exists to dismiss the Debtors' case under section 707(a) and the motion is denied. The Court's findings of fact and conclusions of law are as follows:

### **Jurisdiction**

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Standing Order of Reference signed by Acting Chief Judge Robert J. Ward dated July 10, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) because the issue concerns the administration of the Debtors' estate.

### **Background**

The Debtors were married in a civil ceremony on October 9, 2010 in the State of Vermont and received a marriage license. They filed this case jointly as married debtors on October 29, 2010.

According to the petition, the Debtors own their residence as joint property. Schedule B lists as joint property: two cars; two motorcycles; two joint checking accounts; and a joint 401(k). The Debtors' jointly own 200 shares in Termona Pizzeria & Deli, LLC and 200 shares in R&T Woodbourne Realty, LLC and have personally guaranteed and are jointly liable on the business debt. Of the \$259,292.00 secured debt listed on Schedule D, \$248,842.00 is listed as joint debt.

Schedule F lists \$61,928.54 in joint unsecured debt consisting mostly of credit card and miscellaneous business debt.

On January 4, 2011, the Debtors co-signed a reaffirmation agreement with American Suzuki Financial Services. On February 1, 2011, the Debtors co-signed a reaffirmation agreement with Wells Fargo Home Mortgage.

On February 7, 2011, a stipulation was entered extending the time to object to the Debtors' discharge.

On February 11, 2011, the Debtors' electronically filed a motion to sever their joint case.<sup>1</sup> According to that motion, the United States Trustee (the "Trustee") indicated to the Debtors that it would bring an objection or a motion to dismiss this case unless the case was severed. The Debtors requested that the Court waive the second filing fee and stated that the Trustee indicated to the Debtors that it would not object to a request for waiver of the fee.

On February 22, 2011, the Trustee filed a Statement of "no opposition" to the Debtors' motion to sever and to the Debtors' request to waive additional filing fees. There appears to have been an agreement between the Debtors and the Trustee that if the Debtors severed their case, they would not be required to pay a second filing fee.<sup>2</sup>

---

<sup>1</sup> The same motion appears to have been docketed twice on February 11, 2011 and February 14, 2011.

<sup>2</sup> Although Debtors asked that the second filing fee be waived in the Debtors' motion to sever their petition and the Trustee filed a statement of no objection to that request, the Court is not convinced that it has the power to waive a

In a letter dated February 24, 2011, the Debtors withdrew their motion to sever “because President Obama has ordered the Justice Department to stop defending the Defense of Marriage Act.” It was clear to the Court that Debtors’ counsel was referring to the February 23, 2011 letter from the Attorney General, Mr. Eric H. Holder to the Speaker of the House, John A. Boehner.<sup>3</sup>

On March 31, 2011, the Trustee filed this motion to dismiss pursuant to section 707(a), alleging that the Defense of Marriage Act (“DOMA”) required dismissal.

**Dismissal pursuant to section 707(a)**

Section 707(a) states that “[t]he court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

---

filing fee that does not fall under the exceptions listed in Bankruptcy Rule 1006. *See* Fed. R. Bank. P. 1006(a) “Every petition shall be accompanied by a filing fee . . . .”

<sup>3</sup> *See* Letter from Tony West to Judge Barbara S. Jones (Feb. 24, 2011) (Docket No. 10), *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.) (containing as an attachment Letter from Eric H. Holder, Jr. to John A. Boehner (Feb. 23, 2011)). “[C]ourts routinely take judicial notice of documents filed in other courts . . . not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

11 U.S.C. § 707(a) (emphasis added). The three examples of cause provided in the statute are “illustrative, not exhaustive.” *Smith v. Geltzer (In re Smith)*, 507 F.3d 64, 72 (2d Cir. 2007) (defining the standard for a debtor’s voluntary dismissal of a chapter 7 case). In determining whether to dismiss a case under section 707(a), the Court must consider “the interests of both the debtors and creditors” and assess on a case-by-case basis whether there is “cause” sufficient to warrant dismissal. *In re Dinova*, 212 B.R. 437, 441, 442 (B.A.P. 2d Cir. 1997) (citing *In re Schwartz*, 58 B.R. 923 (Bankr. S.D.N.Y. 1986)). Securing a “fresh start,” receiving a discharge, and reducing administrative expenses so that there are resources to work out debts, is usually in the best interest of the debtor. *See In re Schwartz*, 58 B.R. 923, 925 (Bankr. S.D.N.Y. 1986). When dismissal of a case is not voluntary, dismissal is usually not in the best interest of the debtor and the Court should assess whether dismissal is in the best interests of creditors. If the creditors are prejudiced by the continuance of the case, dismissal is appropriate. *See id.* Prejudice may be found where a petition was filed in order to forestall collection by creditors, if a debtor has failed to account honestly for assets, or a case was filed not in good faith. *See In re Dinova*, 212 B.R. 437, 442 (B.A.P. 2d Cir. 1997).

The Trustee’s motion to dismiss is not premised upon the three causes for dismissal listed in section 707(a). Instead, the Trustee argues that filing an “improper joint petition” is cause for dismissal. Section 302(a) of the Bankruptcy

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Code permits “the filing with the bankruptcy court of a single petition . . . by an individual that may be a debtor under such chapter and such individual’s spouse.” The Trustee argues that for purposes of federal law, the term “spouse” is defined by DOMA as “a person of opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

The Trustee cites two cases in support of its motion to dismiss: *In re Jephunneh Lawrence & Associates Chartered*, 63 B.R. 318, 321 (Bankr. D. Colo. 1986) and *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985). Neither of these cases involved the issue currently before the court: whether “cause” exists to dismiss the joint petition of a legally married couple because they are not members of the opposite sex. In *In re Jephunneh Lawrence*, the court dismissed a case where a joint petition was filed by a corporation and its sole shareholder. 63 B.R. at 319. The Code permits only married people to file a joint petition, not a corporation and its shareholder. *Id.*

In *In re Malone*, the chapter 13 trustee used section 302(a) to challenge the filing of a joint petition by a heterosexual couple who had never been legally married. 50 B.R. at 3. The court did not find “cause” to dismiss the case but rather ordered the debtors to amend their joint chapter 13 petition to include only one debtor because they were not legally husband and wife as required under section 302. *Id.* The court stated that if the debtors chose to file a second case, it would “entertain a motion for joint administration of their estates.” *Id.*

In each of the cases cited by the Trustee, the holdings were dependent upon whether or not the parties listed on the petition were legally married. *In re Jephunneh Lawrence* involved a joint petition filed by a corporation and its shareholder. 63 B.R. at 319. *In re Malone* involved a joint petition filed by an unmarried couple. 50 B.R. at 3. The Trustee provides no case law support for its position that “cause” exists for dismissal under section 707(a) where, as here, the Debtors are legally married pursuant to state law. Rather, the Trustee relies on a two-sentence summary of DOMA as cause for dismissal.

It is clear from case law and the plain language of section 302 of the Bankruptcy Code that the Debtors, as a legally married couple, would qualify to file a joint petition if not for the existence of DOMA. In a pre-DOMA case, *In re Favre*, 186 B.R. 769 (Bankr. N.D. Ga. 1995), the issue of whether a same-sex couple, who were not legally married, qualified to file a joint petition came before the court as an objection to the confirmation of their chapter 13 plan. Ultimately, the court held that “in order to qualify to file a joint petition under § 302 . . . , the parties must be legally married.” 186 B.R. at 774. In dicta, the court stated that a legally married same-sex couple recognized by the state “would qualify for relief under section 302.” *Id.* at 773.

In *In re Kandu*, a post-DOMA case and the only bankruptcy case this Court has found interpreting DOMA, the court issued an Order to Show Cause for

Improper Joint Filing under section 302. *In re Kandou*, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004). In response, the debtors challenged the constitutionality of DOMA on several grounds, including equal protection and due process. *Id.* The court conducted a rational basis analysis of that argument, noted that no Ninth Circuit or Supreme Court precedent existed on the issue, and upheld the constitutionality of DOMA.<sup>4</sup> *Id.* at 141. It ordered that the debtors' case be dismissed unless the debtors voluntarily severed their petition. *Id.* at 148. The court performed no analysis of whether "cause" existed to dismiss the debtors' case under section 707(a).

Since the decision in *Kandou*, the constitutionality of DOMA has been questioned by two cases filed in the district courts of this Circuit. *See Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). The Department of Justice also concluded that DOMA would not withstand constitutional analysis under heightened scrutiny. *See Letter from Tony West to Judge Barbara S. Jones* (Feb. 24, 2011) (Docket No. 10), *Windsor v.*

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<sup>4</sup> When a statute's constitutionality is challenged on due process grounds, a court must first make a determination as to whether the law being challenged infringes upon a constitutionally protected fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). If no interest is infringed, the statute will be upheld so long as it is "rationally related to legitimate government interests." *Id.* at 728. If the statute infringes upon a "fundamental liberty interest *at all*" the statute will be found unconstitutional "unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721. This level of analysis is referred to as heightened scrutiny.

Similarly, when a statute's constitutionality is challenged under equal protection, a court must analyze "whether the classifications drawn by [the] statute constitute an arbitrary and invidious discrimination." *Loving v. Virginia*, 388 U.S. 1, 9 (1967). The level of scrutiny applied in analyzing the constitutionality of the statute, whether it is rational basis or a more heightened scrutiny, depends on the classification created by the legislation. *See Id.* at 11. Which level of scrutiny a court uses in determining a statute's constitutionality has a major impact on whether the law is upheld as constitutional.

*United States*, No. 1:10-cv-8435 (S.D.N.Y.) (containing as an attachment Letter from Eric H. Holder, Jr. to John A. Boehner (Feb. 23, 2011)). In *Windsor v. United States*, which is currently pending in the Southern District of New York, the Assistant Attorney General filed a letter stating that “heightened scrutiny is the appropriate standard of review for classifications of sexual orientation” and that “[s]ection 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department will cease its defense of Section 3 in such cases.” See Letter from Tony West to Judge Barbara S. Jones (Feb. 24, 2011) (Docket No. 10), *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.).

The Court will not conduct its own constitutional analysis of the Act since the issue is not before the Court and has not been briefed by the parties. Nevertheless, “[t]he court has substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion **must consider any extenuating circumstances**, as well as the interests of the various parties.” Collier on Bankruptcy P 707.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (emphasis added); see also *In re Atlas Supply Corp.*, 857 F.2d 1061 (5th Cir. 1988) (stating that a court may be guided by equitable principals in determining a motion to dismiss). One extenuating circumstance that the Court finds relevant is that the United States Department of Justice, acting under the instruction of the Attorney

## Southwest Bankruptcy Conference

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General and the President of the United States, argues that “DOMA may not be constitutionally applied to same-sex couples” and has stopped defending the law in cases pending in this Circuit. *See* Letter from Tony West to Judge Barbara S. Jones (Feb. 24, 2011) (Docket No. 10), *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *see also Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). In this case, the United States Trustee, who is appointed by the Attorney General pursuant to 28 U.S.C. § 581, appears to defend the law and yet has offered nothing more than a restatement of the language of DOMA. The mere existence of DOMA is not sufficient to remove the duty imposed on this Court by section 707(a) to find “cause” prior to dismissing the case. *See* 11 U.S.C. § 707(a).

When dismissal of a case is not premised upon one of the enumerated reasons set forth in 707(a), the Second Circuit requires a case-by-case analysis to determine “whether dismissal would be in the best interest of all parties in interest.” *In re Dinova*, 212 B.R. 437, 442 (B.A.P. 2d Cir. 1997) (emphasis added) (quoting *In re Price*, 211 B.R. 170, 172 (Bankr. M.D. Pa. 1997) (“A motion to dismiss is a serious matter affecting the rights of the debtor and all creditors. At a hearing on a motion to dismiss, the court is required to consider the impact the dismissal will have on the various entities and ascertain which direction satisfies the best interest of all parties.”)).

Here, the Trustee has failed to convince the Court that dismissal is in the best interests of all parties. Section 302 is a means of jointly administering the Debtors' estates "to the benefit of both the debtors and their creditors." *In re Malone*, 50 B.R. at 3 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 32 (1978)). Dismissal is not in the best interests of the Debtors, who would lose the benefit of their fresh start and would incur greater administrative costs if they sever their petition and file a second case. The record is absent of allegations of bad faith, hidden assets, or attempts to stall collection by the Debtors, factors normally considered by courts in deciding whether or not to dismiss. *See Dinova*, 212 B.R. at 442. The Debtors' joint case has substantially progressed; they reaffirmed mortgage and vehicle debt and appeared at the meeting of creditors. Dismissing or severing the case at this stage, would duplicate work and costs for the Debtors, the creditors, the Trustee, and the Court.

The chapter 7 trustee's investigation of the Debtors' assets is on-going.<sup>5</sup> He filed a notice of abandonment of the Debtors' real property on February 18, 2011 and the meeting of creditors is scheduled to continue on May 5, 2011. To dismiss the chapter 7 case at this time would prevent the chapter 7 trustee from completing his investigation and would prevent the potential for recovery of assets and for

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<sup>5</sup> A chapter 7 trustee "must 'fully administer' creditors' claims against the bankrupt estate. The trustee controls the assets of the estate, which will be applied to satisfy these claims to the extent assets exist. The remaining property of the debtor which is of no value or is exempt from administration is 'abandoned'." *In re Wade*, 991 F.2d 402, 406 (7th Cir. 1993).

## Southwest Bankruptcy Conference

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distribution of proceeds to creditors. If this case turns out to be an asset case, the creditors will have to file claims in two separate cases for a single debt, increasing their costs. The chapter 7 trustee will have to liquidate a single pool of assets for a single pool of creditors over two cases. This would be cumbersome and lead to increased costs for the chapter 7 trustee and to the creditors.

There has been no demonstration of prejudice to any creditor. No creditor has filed a motion to dismiss the case or except a debt from discharge. In fact, the Debtors have co-signed reaffirmation agreements with American Suzuki Financial Services Company and Wells Fargo Home Mortgage, which demonstrates to the Court the Debtors' willingness to work with their creditors in good faith. Here, the Debtors' debts are by and large joint. They are jointly liable on their mortgage loan, cars loans, motorcycles, and various other credit card and business debt. The Debtors and the creditors alike benefit from the joint administration of this case.

### **Conclusion**

Based on the foregoing reasons, the United States Trustee's scant legal authority and the Court's own analysis that dismissal is not in the best interest of the Debtors or their creditors, the Court finds insufficient cause to dismiss this petition. The Trustee's motion to dismiss is DENIED. The Court shall issue an order consistent with this decision.

**American Bankruptcy Institute**

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Dated: May 4, 2011  
Poughkeepsie, New York

/s/ Cecelia G. Morris  
U.S. Bankruptcy Judge, SDNY

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
CIVIL MINUTES

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**Case Title :** Lynda Rochelle Ziviello-Howell and Brenda Troylene Ziviello-Howell      **Case No :** 11-22706 - A - 7  
**Date :** 5/31/11  
**Time :** 10:00

**Matter :** [9] - Motion/Application to Dismiss Case/Proceeding [UST-1] Filed by Creditor August B. Landis (swas)      **OPPOSED**

**Judge :** Michael S. McManus  
**Courtroom Deputy :** Sarah Head  
**Reporter :** Diamond Reporters  
**Department :** A

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**APPEARANCES for :**

**Movant(s) :** U.S. Trustee's Attorney - Antonia Darling  
**Respondent(s) :** Debtor(s) Attorney - Joseph Feist  
(by phone)

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MOTION was :  
Denied  
See final ruling below.

The court will issue a minute order.

Final Ruling: The motion will be denied and the case will remain pending.

On June 17, 2008, the debtors were issued a valid marriage license by the clerk of Sacramento County and they were married. See Docket #17. On February 2, 2011, the debtors filed a joint chapter 7 petition, pursuant to 11 U.S.C. § 302(a). See Docket #1.

The United States Trustee now moves to dismiss the joint petition pursuant to 11 U.S.C. § 707(a), arguing the debtors' joint petition is improper and unauthorized under 11 U.S.C. § 302 because the term "spouse," as defined in 1 U.S.C. § 7, the Defense of Marriage Act (DOMA), is limited to a person of the opposite sex.

The debtors oppose the motion, contending (1) they qualify under section 302 to file a joint petition; (2) no cause exists to dismiss under section 707(a); and (3) DOMA is unconstitutional.

On April 4, 2011, the debtors filed a motion asking the district court to withdraw the reference in connection with the dismissal motion. See Docket #24. Although the pending withdrawal of the reference motion did not require the U.S. Trustee to stay the prosecution of his motion to dismiss the case, on April 11, 2011 and again, on April 13, 2011, the U.S. Trustee continued the hearing on the dismissal motion. See Docket #24, #26; Fed. R. Bankr. P. 5011(c). The district court denied the debtors' motion on May 31, 2011. See In re Ziviello-Howell, No. CIV 2:11-00916 (E.D. Cal. May 31, 2011), ECF No. 5.

On March 30, 2011, the debtors' meeting of creditors was conducted. See Docket The trustee filed a report of no distribution and the anticipated last day to oppose the debtors' discharge was May 31, 2011. No objections to discharge or complaints seeking to except debts from discharge were filed.

11 U.S.C. § 302 provides that "[a] joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such

chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter."

11 U.S.C. § 707(a) provides that the court may dismiss a case, after notice and hearing, and for cause, which includes (1) unreasonable delay by debtor(s) that is pre-judicial to creditors; (2) nonpayment of required fees and charges; and (3) failure of the debtor to file, within the prescribed amount of time, the information required by section 521(a), but only on a motion by the U.S. Trustee. The grounds that section 707(a) lists as providing "cause" for dismissal are illustrative, not exhaustive, and section 707(a) does not require dismissal of cases. Dismissal is left to the sound discretion of the court. See *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000); *In re Green*, 64 B.R. 530 (B.A.P. 9th Cir. 1986).

Factors influencing a court's decision to dismiss or not to dismiss a case include: 1) whether all of the creditors have consented; 2) whether the debtor is acting in good faith; 3) whether an objection to discharge, an objection to exemptions, or a preference claim is pending. See *In re Turpen*, 244 B.R. 431, 434 (B.A.P. 8th Cir. 2000). "In its simplest terms, the test turns on whether or not the dismissal is in the best interests of the debtor and the creditors of the estate, with particular emphasis on whether the dismissal would be prejudicial to creditors." *In re Aupperle*, 352 B.R. 43, 46 (Bankr. D.N.J. 2005).

The bankruptcy court has subject matter jurisdiction over all cases filed under the Bankruptcy Code, regardless of whether party filing petition is eligible to be bankruptcy debtor. Eligibility for relief under the Bankruptcy Code is not jurisdictional. See 11 U.S.C.A. § 109; *In re Automotive Professionals, Inc.*, 370 B.R. 161 (Bankr. N.D. Ill. 2007); see also *In re Wenberg*, 902 F.2d 768 (9th Cir. 1990) aff'g 94 B.R. 631 (B.A.P. 9th Cir. Cal. 1988); *In re Manalad*, 360 B.R. 288 (Bankr. C.D. Cal. 2007) (debtor ineligibility does not strip bankruptcy court of jurisdiction to consider other issues or enter orders); *Warren v. Wirum*, 378 B.R. 640 (N.D. Cal. 2007) (credit counseling briefing requirement of section 109(h) is not jurisdictional). Hence, when an ineligible debtor files a petition, if no party in interest timely seeks dismissal of the petition, the petition may stand.

Here, the movant does not argue that one of the enumerated causes for dismissal exists. Instead, the movant argues that 1 U.S.C. § 7, the Defense of Marriage Act, defines spouse as "a person of the opposite sex who is a husband or a wife." Therefore, the movant asserts that the case should be dismissed because the debtors, although legally married, are two women and thus, cannot be deemed spouses under federal law.

In support of this position, the movant cites *In re Jephunneh Lawrence & Assoc. Chartered*, 63 B.R. 318, 321 (Bankr. D. Colo. 1986), where the court ordered dismissal a joint petition filed by a corporation and its sole shareholder because the Bankruptcy Code only permits married persons to file a joint petition. Additionally, the movant cites *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985), where the trustee challenged the filing of a joint petition by a heterosexual couple who had never been legally married. The court did not find "cause" for dismissal of that case but instead ordered the debtors to amend their petition to include only one debtor because they were not legally husband and wife as required under section 302(a). *Id.*

The court notes that in each of these cases, the court's reasoning was dependent upon whether or not the parties were legally married. This is not in question in this case. The debtors were legally married in California on June 17, 2008 and the movant does not dispute that fact. Thus, but for the existence of DOMA's definition of spouse, the debtors would qualify under section 302(a) to file a joint petition.

In a pre-DOMA case, *In re Favre*, 186 B.R. 769 (Bankr. N.D. Ga. 1995), the issue of whether a same-sex couple, who were not legally married, qualified to file a joint petition came before the court as an objection to the confirmation of their chapter 13 plan. The court held that "in order to qualify to file a joint petition under section 302 . . . , the parties must be legally married." *Id.* at 774. However, in dicta, the court stated that a legally married same-sex couple recognized by the state "would qualify for relief under section 302." *Id.* at 773.

On the other hand, in a recently decided case from the Second Circuit, a bankruptcy court held that "cause" did not exist to dismiss a case based solely on the provisions of DOMA. *In re Somers*, 2011 WL 1709839 (Bankr. S.D.N.Y. 2011). In that case, the U.S. Trustee moved to dismiss for "cause" under section 707(a) a joint chapter 7 case filed by a same-sex couple who were legally married in Vermont. The U.S. Trustee maintained they were not spouses because they were not spouses under the DOMA definition.

The court declined to dismiss the petition, concluding that "the court has substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion must consider any extenuating circumstances, as well as the interests of the various parties." *Id.* at 4. An extenuating circumstance that the court found relevant was that the U.S. Department of Justice, "acting under the instruction of the

## Southwest Bankruptcy Conference

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Attorney General and the President of the United States," had argued "DOMA may not be constitutionally applied to legally married same-sex couples" and that office would not be defending the law in cases pending in the circuit. *Id.*; see also Docket #19, Ex.3, Letter from Attorney General Eric Holder to Speaker John Boehner.

The Somers court went on: "The mere existence of DOMA is not sufficient to remove the duty imposed on this Court by section 707(a) to find cause' prior to dismissing the case." *Id.*

The facts before this court are substantially similar to those found in Somers. The debtors are a legally married, same-sex couple who filed a joint chapter 7 petition. The movant seeks to dismiss their petition for the sole reason that DOMA does not recognize the debtors as spouses.

Without reaching DOMA's constitutionality, this court is not convinced that dismissal is in the best interest of all parties or that section 707(a) requires dismissal even if DOMA is applicable and constitutional.

First, this joint case has progressed to a near conclusion. The debtors have appeared at the meeting of creditors. The deadline for objecting to the debtors' exemptions has passed. The deadline for moving for dismissal pursuant to 11 U.S.C. § 707(b) has expired. The trustee has filed a report of no distribution. And, the hearing on the dismissal motion came on the last day to object to discharge or to file a dischargeability complaint (and the deadline expired without any such complaints being filed). In essence, but for this motion, this case is over. This motion has been brought before the court for decision much too late.

While the motion was filed on March 18, the parties failed to bring it before the court (the court's law and motion calendar permits the litigants to set their own hearings) for resolution until the end of the case.

Second, dismissing or splitting the case at this juncture would duplicate the work and costs for the debtors, the creditors, the trustee, and the court.

Third, there has been no showing of prejudice to any creditor or unfair advantage to the debtors if this case is permitted to continue. For instance, Form 22 indicates that one of the debtors earns income. That income is below the California median whether the income earning debtor is part of a one or a two-person household. See Form 22, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.

Fourth, the debtors' scheduled assets are identified as their community property, as are their debts. Hence, even if the cases were filed separately, it would make sense to consolidate them. *Cf. Fed. R. Bankr. P. 1015(b); In re Malone*, 50 B.R. at 3. The only effective difference between a joint petition and two consolidated petitions is that the former requires one filing fee and the latter requires two filing fees.

Therefore, whether or not the debtors are spouses under DOMA, because they are legally married, because their assets and liabilities belong to their community, and because it will not make any practical difference to anyone if this case proceeds as one or two cases, the court concludes that there is no cause for dismissal of this joint case.

This is not the first time a court from within the Ninth Circuit has declined to rule on the constitutionality of DOMA in the context of a federal statutory scheme. In *In re Golinski*, 587 F.3d 956 (9th Cir. 2009), a federal judicial employee was denied health benefits for her spouse because her spouse was a woman and not a man. The court held, in order to avoid difficult constitutional issues, that it should harmonize DOMA with the statutes creating the benefit program as well as the court's commitment to equal employment opportunity. The court then granted the benefits to the legally married same-sex spouse.

In *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009), a federal public defender challenged denial of the benefits, provided under the Federal Employee Health Benefits Act (FEHBA), for his same-sex spouse. The court held that excluding from benefits spouses who have entered into legally binding relationships does not serve the promulgated governmental interests DOMA was meant to advance and thus, no rational basis existed for differential treatment of opposite-sex versus same-sex spouses.

Given the above, the court concludes that dismissal is not in the best interest of the debtors or their creditors and insufficient cause exists to dismiss their joint petition. Thus, the motion will be denied.

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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re:  
Gene Douglas Balas and  
Carlos A. Morales,  
  
Joint Debtors

Case No. 2:11-bk-17831 TD  
Chapter 13  
MEMORANDUM OF DECISION  
  
Date: June 13, 2011  
Time: 2:00 p.m.  
Location: 255 E. Temple Street  
Courtroom 1345  
Los Angeles, CA 90012

**INTRODUCTION**

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

1 2008,<sup>1</sup> and remain married today, the United States Trustee (sometimes referred to  
2 simply as “trustee”) moved to dismiss this case pursuant to Bankruptcy Code § 1307(c)  
3 (Motion to Dismiss), asserting that the Debtors are ineligible to file a joint petition based  
4 on Bankruptcy Code § 302(a) because the Debtors are two males. The issue presented  
5 to this court is whether the Debtors, who are legally married and were living in California  
6 at the time of the filing of their joint petition, are eligible to file a “joint petition” as defined  
7 by § 302(a). As the Debtors state, “[T]he only issue in this Bankruptcy Case is whether  
8 some legally married couples are entitled to fewer rights than other legally married  
9 couples, based solely on a factor (the gender and/or sexual orientation of the parties in  
10 the union) that finds no support in the Bankruptcy Code or Rules and should be a  
11 constitutional irrelevancy.” Debtors’ Opp. 5:24–28. In this court’s judgment, no legally  
12 married couple should be entitled to fewer bankruptcy rights than any other legally  
13 married couple.  
14  
15

16 **BACKGROUND**

17 It is undisputed that the Debtors are a lawfully married California couple<sup>2</sup> who  
18 were married at the time they filed their bankruptcy petition. The Debtors have  
19 undertaken a lifelong commitment to each other, and wish to have their marital  
20 relationship accorded treatment in this court equal to the treatment of opposite-sex  
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25 <sup>1</sup> Motion, 3:17–18; Marriage Certificate, Ex. 3 to the United States Trustee’s Request for  
26 Judicial Notice.

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

1 married couples.<sup>3</sup> The Debtors came to this court seeking to restructure and repay their  
2 debts under chapter 13 of the Bankruptcy Code following numerous episodes of illness,  
3 hospitalization and extended periods of unemployment. The Debtors filed their  
4 bankruptcy petition jointly pursuant to § 302(a) which allows the filing of a joint petition  
5 by any eligible individual “and such individual debtor’s spouse.” It is undisputed that  
6 each Debtor is an individual and is eligible to be a debtor in this court and to file a  
7 voluntary petition for relief.  
8

9 All trustee objections to confirmation were satisfied by the Debtors at the May 17  
10 hearing on the Motion to Dismiss, and the Debtors’ proposed plan of reorganization  
11 currently is eligible for confirmation but for the pending Motion to Dismiss.  
12

13 The House Bipartisan Legal Advisory Group, acting through the United States  
14 Trustee, at the last minute orally requested a short continuance of the May 17 hearing in  
15 order to determine whether to intervene in this case to address the issues. Debtors  
16 consented and the court granted the request; yet, there have been no further pleadings  
17 and no challenge from the government to any issue raised by the Debtors. The  
18 government’s non-response to the Debtors’ challenges is noteworthy.  
19

#### 20 JURISDICTION AND VENUE

21 The court has jurisdiction over this bankruptcy case pursuant to 28 U.S.C. §§ 157  
22 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Motion to  
23 Dismiss and objections to plan confirmation that were filed concurrently herein are core  
24 matters under 28 U.S.C. §§ 157(b)(2)(A) & (L) that the court may hear and determine  
25 pursuant to 28 U.S.C. § 157(b)(1).  
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28 \_\_\_\_\_  
<sup>3</sup> See declarations of Balas and Morales, Debtors’ Opp. 36-51.

**DISCUSSION**

1  
2 The United States Trustee brought this Motion to Dismiss pursuant to § 1307(c)  
3 as the Bankruptcy Code basis for dismissal. Section 1307(c) provides, in relevant part:

4 . . . on request of a party in interest or the United States trustee and  
5 after notice and a hearing, the court may convert a case under this  
6 chapter to a case under chapter 7 of this title, or may dismiss a  
7 case under this chapter, whichever is in the best interests of  
8 creditors and the estate, *for cause*, including –

- 9 (1) unreasonable delay by the debtor that is prejudicial to  
10 creditors;
- 11 (2) nonpayment of any fees and charges required under  
12 chapter 123 of title 28;
- 13 (3) failure to file a plan timely under section 1321 of this title;
- 14 (4) failure to commence making timely payments under  
15 section 1326 of this title;
- 16 (5) denial of confirmation of a plan under section 1325 of  
17 this title and denial of a request made for additional  
18 time for filing another plan or a modification of a plan;
- 19 (6) material default by the debtor with respect to a term of  
20 a confirmed plan;
- 21 (7) revocation of the order of confirmation under section  
22 1330 of this title; and denial of confirmation of a  
23 modified plan under section 1329 of this title;
- 24 (8) termination of a confirmed plan by reason of the  
25 occurrence of a condition specified in the plan other  
26 than completion of payments under the plan;
- 27 (9) only on request of the United States trustee, failure of  
28 the debtor to file, within fifteen days, or such  
additional time as the court may allow, after the filing  
of the petition commencing such case, the information  
required by paragraph (1) of section 521;
- (10) only on request of the United States trustee, failure to  
timely file the information required by paragraph (2) of  
section 521; or
- (11) failure of the debtor to pay any domestic support  
obligation that first becomes payable after the date of  
the filing of the petition.

11 U.S.C. § 1307(c) (emphasis added).

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

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

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

14 *Id.*

15 The United States Trustee cites two cases to support his position that this case  
16 should be dismissed “for cause” under § 1307(c). The first is *In re Jephunneh*  
17 *Lawrence & Assoc. Chartered*, 63 B.R. 318, 321 (Bankr. D.C. 1986), where the court  
18 determined that a joint petition was improperly filed by a corporation and its sole  
19 shareholder. The second is *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985), where  
20 the court held that two debtors who cohabitated but had never been legally married  
21 were not entitled to file a joint petition. The decisions are neither binding on this court  
22 nor pertinent to the Debtors in this case who are two people legally married to each  
23 other. The United States Trustee provides no relevant bankruptcy case law that is  
24 controlling on this court or that supports the trustee's position. Instead, it is clear that  
25 the Motion to Dismiss simply asks for this case to be dismissed for cause under §  
26 1307(c) based on DOMA unless the Debtors consent to “voluntarily sever their joint  
27 petition by a date certain.” Motion to Dismiss 4:17–18.  
28

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1 A decision announced in *In re Somers*, No. 10–38296, 2011 WL 1709839, at \*5  
2 (Bankr. S.D.N.Y. May 4, 2011), on the other hand, determined that there was  
3 insufficient cause to dismiss the Debtors’ joint chapter 7 bankruptcy case under the  
4 “only for cause” provision of § 707(a) based on DOMA.<sup>4</sup> The same result was reached  
5 in *In re Ziviello-Howell*, Ch. 7 Case No. 11-22706, *Civil Minutes*, Docket No. 44 (Bankr.  
6 E.D. Cal. May 31, 2011) (McManus, J.) (attached to Debtors’ Reply as Tab G) (denying  
7 a motion to dismiss a joint chapter 7 case filed by two women married to each other  
8 because the court in exercise of its discretion determined from the record in the case  
9 that there was no “cause” for dismissal under § 707(a)). Similarly here, cause does not  
10 exist under § 1307(c). No creditor has sought dismissal. The trustee has cited no  
11 failure by the Debtors in performing their obligations under § 1307(c). The trustee  
12 seeks dismissal solely because the Debtors are a same-sex married couple, in violation  
13 of DOMA’s definition of “spouse” as the statute applies to Bankruptcy Code § 302(a).  
14  
15

16 The Debtors have asserted that the equal protection component of the Fifth  
17 Amendment “keeps governmental decisionmakers from treating differently persons who  
18 are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S.*  
19 *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly  
20 circumstanced shall be treated alike.”)) Debtors’ Opp. 6:1-5.  
21

22 Debtors assert:

23  
24 As a lawfully wedded couple, the Debtors are constitutionally  
25 indistinguishable from opposite-gender married couples who enjoy  
26 the rights and responsibilities attendant to joint bankruptcy  
27 petitions. DOMA’s irrational insistence to the contrary “is not within  
28 our constitutional tradition,” as it violates “the principles that  
government and each of its parts remain open on impartial terms to

<sup>4</sup> *Somers* is now on appeal.

1 all who seek its assistance.” *Romer v. Evans*, 517 U.S. 620, 633  
2 (1996). DOMA, as the U.S. Trustee seeks to apply it in this  
3 Bankruptcy Case, is inconsistent with the Constitution’s guarantee  
of equal treatment. The Motion to Dismiss should be denied and  
the Confirmation Objection should be overruled.

4 Debtors’ Opp. 6:5-12.

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

10 The court must consider Debtors’ challenge to DOMA in the context of the  
11 straightforward facts of this case and by analyzing the claims made by the Debtors. In  
12 that regard, the court finds particularly helpful the thoughtful words of Justice Jackson,  
13 concurring in a unanimous decision upholding a municipal ordinance on due process  
14 grounds in *Railway Exp. Agency v. New York*, 336 U.S. 106, 112–13 (1949), where he  
15 elucidated his view of the distinction between the function of due process versus the  
16 function of equal protection under constitutional analysis:  
17

19 The burden should rest heavily upon one who would persuade us  
20 to use the due process clause to strike down a substantive law or  
21 ordinance. . . . Invalidation of a statute or an ordinance on due  
22 process grounds leaves ungoverned and ungovernable conduct  
23 which many people find objectionable.

24 Invocation of the equal protection clause, on the other hand, does  
25 not disable any governmental body from dealing with the subject at  
26 hand. It merely means that prohibition or regulation must have a  
27 broader impact. I regard it as a salutary doctrine that cities, states  
28 and the Federal Government must exercise their powers so as not  
to discriminate between their inhabitants except upon some  
reasonable differentiation fairly related to the object of regulation.  
This equality is not merely abstract justice. The framers of the  
Constitution knew, and we should not forget today, that there is no  
more effective practical guaranty against arbitrary and

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

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

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

13  
14 **Sexual orientation.** With respect to the question of discrimination on the basis  
15 of sexual orientation, Debtors have stated that the issue is: "whether under the  
16 constitution legally married couples who are heterosexual may be granted more rights  
17 than legally married couples who are gay." Debtors' Opp. 14:11–12. Debtors believe  
18 they should not be singled out for differential treatment by DOMA; rather, that "[b]eing  
19 similarly circumstanced, they are entitled to be treated alike." Debtors' Opp. 14:15  
20 (internal quotation marks omitted).

21  
22  
23 Debtors offer strong authority for their position that the Fifth Amendment, like the  
24 Fourteenth, "includes an equal protection component" and that the Fifth Amendment in  
25 this respect "mirrors the Fourteenth Amendment." Debtors' Opp. 14: 2–16 & n. 8 (citing  
26 extensive case law). Debtors cite Justice O'Connor's concurring opinion in *Lawrence v.*  
27 *Texas*, 539 U.S. 558, 583 (2003), noting that "While it is true that the law applies only to  
28

1 conduct, the conduct targeted by [the statute at issue] is conduct that is closely  
2 correlated with being homosexual. Under such circumstances, [the] law is targeted at  
3 more than conduct. It is instead directed toward gay persons as a class.” Again, in  
4 2010, the Supreme Court rejected the claim that discrimination against gay and lesbian  
5 individuals is no more than discrimination on the basis of “conduct” when it said, “Our  
6 decisions have declined to distinguish between status and conduct in this context.”  
7  
8 *Christian Legal Soc’y v. Martinez*, 130 S.Ct. 2971, 2990 (2010).

9 **Heightened scrutiny.** The Debtors urge that heightened scrutiny of  
10 classifications based on sexual orientation is warranted and should be applied in this  
11 case, citing a letter from United States Attorney General Eric H. Holder, Jr., to Speaker  
12 of the House of Representatives John Boehner, dated February 23, 2011 (the Holder  
13 Letter), attached to Debtors’ Opposition as Tab A. The Holder Letter concludes, in part:  
14

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

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

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

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1 Holder Letter at 2 (internal quotation marks omitted) (citing *Bowen v. Gilliard*, 483 U.S.  
2 587, 602–03 (1987) and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42  
3 (1985)).

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

6 The Holder Letter demonstrates that DOMA cannot withstand heightened  
7 scrutiny. “Under heightened scrutiny, ‘a tenable justification must describe actual state  
8 purposes, not rationalizations for actions in fact differently grounded.’” Holder Letter at  
9 4 (quoting *United States v. Virginia*, 518 U.S. 515, 535–36 (1996)). “In other words,  
10 under heightened scrutiny, the United States cannot defend [DOMA] by advancing  
11 hypothetical rationales, independent of the legislative record;” rather, the government is  
12 limited to “invoking Congress’ actual justification for the law.” Holder Letter at 4. The  
13 Holder Letter states that those actual justifications are indefensible. *Id.* at 4–5 & n.7.  
14 The legislative record underlying DOMA is filled with “precisely the kind of stereotype-  
15 based thinking and animus the Equal Protection Clause is designed to guard against.”  
16 *Id.* at 4 (citing *City of Cleburne*, 473 U.S. at 448 (1985) (finding that “mere negative  
17 attitudes, or fear” are not permissible bases for discriminatory treatment); *Romer v.*  
18 *Evans*, 517 U.S. 620, 635 (1996) (rejecting the rationale that a statute was supported by  
19 “the liberties of landlords or employers who have personal or religious objections to  
20 homosexuality”); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) (“Private biases may be  
21 outside the reach of the law, but the law cannot, directly or indirectly, give them  
22 effect.”)); *Dragovich v. U.S.*, No. 10–01564, 2011 WL 175502, at \*12 (N.D. Cal. Jan. 18,  
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28

1 2011) (“The animus toward, and moral rejection of, homosexuality and same-sex  
2 relationships are apparent in the Congressional record.”)<sup>5</sup>

3 In addition to a close examination of the actual motivations and justifications for  
4 DOMA (rather than merely imagining hypothetical rationales), heightened scrutiny is  
5 distinct from rational basis review insofar as the “analysis is as-applied rather than  
6 facial.” *Witt v. Dep’t of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). Thus, when the  
7 Ninth Circuit in *Witt* applied heightened scrutiny to the “Don’t Ask, Don’t Tell” law that  
8 discriminated against gay and lesbian members of the armed services, the court  
9 refused the government’s invitation to limit its inquiry to whether the military’s policy  
10 “has some hypothetical, post-hoc rationalization in general,” such as “unit cohesion” or  
11 “troop morale.” *Id.* Instead, the Ninth Circuit’s heightened scrutiny review required the  
12 government to demonstrate that “a justification exists for the application of the policy as  
13 applied to Major Witt.” *Id.* (emphasis added). See *In re Golinski I*, 587 F.3d 901, 904  
14 (9th Cir. 2009) (describing the holding in *Witt* as requiring the military’s policy “to survive  
15 heightened scrutiny as applied to each service member discharged”). The case was  
16 remanded to the district court for trial on whether application of “Don’t Ask, Don’t Tell”  
17 “specifically to Major Witt significantly furthers the government’s interest and whether  
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25 \_\_\_\_\_  
26 <sup>5</sup> The supposed governmental interest offered in support of DOMA fails even the lowest  
27 standard of constitutional scrutiny (rational basis), and thus necessarily could not meet a  
28 heightened standard. See *In re Levenson I*, 560 F.3d 1145, 1149–51 (9th Cir. 2009); *In re  
Levenson II*, 587 F.3d 925, 931–33 (9th Cir. 2009); *Dragovich v. U.S.*, No. 10–01564, 2011 WL  
175502, at \*13, \*14 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374,  
387 (D. Mass. 2010).

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1 less intrusive means would achieve substantially the government’s interest.” *Witt*, 527  
2 F.3d at 821.<sup>6</sup>

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

7  
8 Following the direction of the Ninth Circuit in *Witt*, the court here discerns no  
9 valid, defensible governmental interest advanced by dismissing the Debtors’ bankruptcy  
10 case or requiring, as the Motion to Dismiss suggests, that the Debtors consent [under  
11 the duress of DOMA] to “voluntarily sever their joint petition by a date certain.” See  
12 Motion to Dismiss 4:17–18. The Debtors are lawfully married and are otherwise fully  
13 qualified to be joint debtors pursuant to § 302(a) of the Bankruptcy Code. The court  
14 concludes that dismissal of the bankruptcy case will not advance any of the following  
15 governmental interests:  
16

- 17 • Encouraging responsible procreating and child-bearing (the Debtors have  
18 no children, and even if they did, there is no basis in the evidence or  
19 authorities to conclude that Debtors’ joint bankruptcy filing would affect  
20 Debtors’ children (if any, later) differently from children in other “traditional”  
21 joint bankruptcy cases);  
22  
23

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

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

12  
13  
14 See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (discussing  
15 the reasons Congress offered for passing DOMA but noting that those reasons were  
16 disavowed by the government “[f]or purposes of [the Gill] litigation”).

17 The court hereby adopts the Holder Letter and the Debtors' Opposition (as  
18 discussed above). Both succinctly and cogently analyze the issues on this Motion to  
19 Dismiss. The court concludes that the Attorney General's and Debtors' analyses are  
20 sound and consistent with the legislative history of DOMA and present a sensible view  
21 of the standards that this court should apply to its constitutional analysis.  
22

23 **Discrimination against lesbians and gay men.** The Debtors have  
24 demonstrated through additional authoritative case law that lesbians and gay men have  
25 experienced a history of discrimination. *High Tech Gays v. Defense Indus. Sec.*  
26 *Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (acknowledging that “homosexuals  
27  
28

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

11  
12       **Sexual orientation is a “defining and immutable characteristic.”** Debtors  
13 cite important precedent determining that sexual orientation is recognized as a defining  
14 and immutable characteristic. *Hernandez-Montiel v. Immigration and Naturalization*  
15 *Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (finding that “Sexual orientation and sexual  
16 identity are immutable; they are so fundamental to one's identity that a person should  
17 not be required to abandon them.”), overruled in part on other grounds by *Thomas v.*  
18 *Gonzales*, 409 F.3d 1177 (9th Cir. 2005); *Karouni v. Gonzales*, 399 F.3d 1163, 1173  
19 (9th Cir. 2005) (agreeing with *Hernandez-Montiel* and acknowledging that  
20 homosexuality is “a fundamental aspect of . . . human identity. . . .”); *Perry*, 704 F. Supp.  
21 2d at 966 (“No credible evidence supports a finding that an individual may, through  
22 conscious decision, therapeutic intervention or any other method, change his or her  
23 sexual orientation.”).

24  
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27  
28 <sup>7</sup> The district court’s decision is now on appeal to the United States Court of Appeals for the  
Ninth Circuit.

1           **Lesbians and gay men face significant political obstacles.** Debtors'  
2 evidence and the authorities cited establish conclusively that lesbians and gay men face  
3 significant political obstacles. *Romer*, 517 U.S. 620 (1996) (overturning a Colorado  
4 state constitutional amendment that prohibited all legislative, executive, or judicial action  
5 designed to protect homosexual persons from discrimination); *Lawrence*, 539 U.S. 558  
6 (overturning a Texas statute making it a crime for two persons of the same sex to  
7 engage in certain intimate sexual conduct); *Strauss v. Horton*, 46 Cal.4th 364 (2009)  
8 (upholding California's Proposition 8 prohibiting same-sex marriage against a state  
9 constitutional challenge); *Lofton v. Sec'y of Dep't of Children & Family Servs*, 358 F.3d  
10 804 (11th Cir. 2004) (upholding Florida statute barring same-sex couples from  
11 adopting); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006)  
12 (upholding Nebraska state constitutional amendment establishing that two persons of  
13 the same sex could not unite in a "civil union, domestic partnership, or other similar  
14 same-sex relationship"); *Perry*, 704 F. Supp. 2d at 943 (crediting expert testimony that  
15 "gays and lesbians possess less power than groups [traditionally] granted judicial  
16 protection").

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

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

7  
8 In *Reed v. Reed*, 404 U.S. 71, 74 (1971), the Supreme Court unanimously struck  
9 down an Idaho statute as a violation of the equal protection clause of the Fourteenth  
10 Amendment, concluding that an “arbitrary preference established in favor of males by . .  
11 . the Idaho Code cannot stand in the face of the Fourteenth Amendment’s command  
12 that no State deny the equal protection of the laws to any person within its jurisdiction.”

13  
14 In *Orr v. Orr*, 440 U.S. 268, 278–79 (1979), the Supreme Court struck down an  
15 Alabama statute authorizing the imposition of alimony obligations on husbands but not  
16 on wives, thereby disallowing differential treatment on the basis of sex, under the equal  
17 protection clause of the Fourteenth Amendment. The Debtors’ argument is persuasive  
18 that DOMA’s discrimination here against a same-sex married couple warrants the same  
19 scrutiny and result.

20  
21 In *Califano v. Westcott*, 443 U.S. 76, 83–84 (1979), where a federal program  
22 provided unemployment benefits to men but not women, the Supreme Court found the  
23 law to be gender-biased where it denied benefits on the basis of the gender of a  
24 qualifying parent, a wage earner who happened to be a woman and not a man.  
25 Similarly here, this court concludes that DOMA is gender-biased because it is explicitly  
26 designed to deprive the Debtors of the benefits of other important federal law solely on  
27  
28

1 the basis that these debtors are two people married to each other who happen to be  
2 men. Further, *nothing* about the Debtors' gender affects their fitness for bankruptcy  
3 protection available to opposite-sex marital partners. Spouses should be treated  
4 equally, whether of the opposite-sex variety or the same-sex variety, under heightened  
5 scrutiny and the principles announced by the Supreme Court and other lower court  
6 rulings discussed above.  
7

8       These views have found significant recent added support in the Ninth Circuit on  
9 issues specifically affecting the Debtors in this case. For example, in *Perry*, 704 F.  
10 Supp. 2d at 996, the district court recognized that “[s]exual orientation discrimination  
11 can take the form of [prohibited] sex discrimination.” Findings of prohibited sex  
12 discrimination were made in *In re Levenson I*, 560 F.3d 1145, 1147 (9th Cir. 2009);  
13 *Perry*, 704 F. Supp. 2d at 921; *see also In re Golinski*, 587 F.3d 956, 957 (9th Cir. 2009)  
14 (*Golinski II*).  
15

16       **Rational basis review.** The goals of DOMA, according to its congressional  
17 proponents, include “encouraging responsible procreation and child-bearing,”  
18 “defending and nurturing traditional heterosexual marriage,” “defending traditional  
19 notions of morality,” and “preserving scarce resources.” Debtors’ Opp. 27:20–23; *see*  
20 Debtors’ Opp. 24:18–32:10. Debtors cite prior judicial determinations that DOMA does  
21 not withstand even a rational basis review with respect to these governmental interests.  
22 *In re Levenson I*, 560 F.3d at 1149–51; *In re Levenson II*, 587 F.3d 925, 931–33 (9th  
23 Cir. 2009); *Dragovich* No. 10–01564, 2011 WL 175502, at \*13, \*14; *Gill*, 699 F. Supp.  
24 2d at 397. *See* Debtors’ Opp. 21:18–24:17. The Debtors assert that as to each of  
25 these issues no judicial determination has fallen on the side of upholding the  
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1 constitutionality of DOMA. Debtors' Opp. 1:24–2:1–13. The United States Trustee has  
2 not cited any authoritative or persuasive decisional authority supporting the  
3 constitutional validity of DOMA as applied to the Debtors.

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

13  
14 For example, the joint petition of the Debtors will have no effect on procreation or  
15 child-bearing. It would not appear to be fair or rational for the court to conclude that  
16 allowing the Debtors to file a joint bankruptcy petition will in any way harm any marriage  
17 of heterosexual persons. Creditors in Debtors' bankruptcy case have not filed any  
18 support for the Motion to Dismiss this case; creditors in this case, as in other cases,  
19 simply hope to be paid what they are owed. Beyond that, no creditor's notion of  
20 morality concerning a same-sex marriage or what any such creditor may think about  
21 homosexuality or the question of human sexual orientation has any valid bearing on the  
22 creditor's rights in this case.  
23

24  
25 This court can conceive of no fair, just and rational basis to conclude that DOMA  
26 will contribute to the achievement of the goal of preserving scarce government  
27  
28

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

3 Although individual members of Congress have every right to express their views  
4 and the views of their constituents with respect to their religious beliefs and principles  
5 and their personal standards of who may marry whom, this court cannot conclude that  
6 Congress is entitled to solemnize such views in the laws of this nation in disregard of  
7 the views, legal status and living arrangements of a significant segment of our citizenry  
8 that includes the Debtors in this case. To do so violates the Debtors' right to equal  
9 protection of those laws embodied in the due process clause of the Fifth Amendment.  
10

11 This court cannot conclude from the evidence or the record in this case that any  
12 valid governmental interest is advanced by DOMA as applied to the Debtors. Debtors  
13 have urged that recent governmental defenses of the statute assert that DOMA also  
14 serves such interests as "preserving the status quo," "eliminating inconsistencies and  
15 easing administrative burdens" of the government. None of these *post hoc* defenses of  
16 DOMA withstands heightened scrutiny. See Debtors' Opp. 32:11–34:15. In the court's  
17 final analysis, the government's only basis for supporting DOMA comes down to an  
18 apparent belief that the moral views of the majority may properly be enacted as the law  
19 of the land in regard to state-sanctioned same-sex marriage in disregard of the personal  
20 status and living conditions of a significant segment of our pluralistic society. Such a  
21 view is not consistent with the evidence or the law as embodied in the Fifth Amendment  
22 with respect to the thoughts expressed in this decision. The court has no doubt about  
23 its conclusion: the Debtors have made their case persuasively that DOMA deprives  
24 them of the equal protection of the law to which they are entitled. The court is of the  
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28

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

3 **CONCLUSION**

4 The Debtors have demonstrated that DOMA violates their equal protection rights  
5 afforded under the Fifth Amendment of the United States Constitution, either under  
6 heightened scrutiny or under rational basis review. Debtors also have demonstrated  
7 that there is no valid governmental basis for DOMA. In the end, the court finds that  
8 DOMA violates the equal protection rights of the Debtors as recognized under the due  
9 process clause of the Fifth Amendment.  
10

11 No one expressed the Debtors' view as pertinent to this simple bankruptcy case  
12 more eloquently and profoundly than Justice William O. Douglas in the concluding  
13 paragraph of his opinion for the majority in *Griswold v. Connecticut*, 381 U.S. 479, 486  
14 (1965):  
15

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

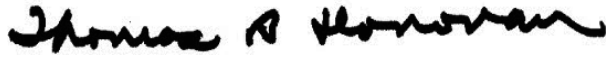
24 *Id.*

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

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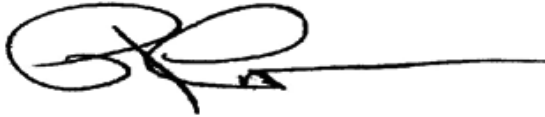
IT IS SO ORDERED.

June 13, 2011



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United States Bankruptcy Judge



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Chief Judge, United States Bankruptcy Court



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United States Bankruptcy Judge



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United States Bankruptcy Judge

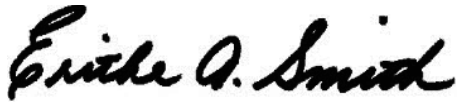


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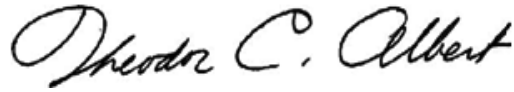
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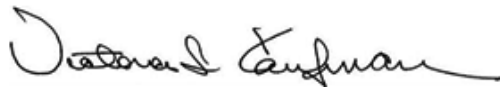
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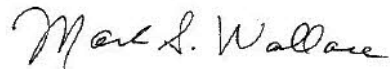
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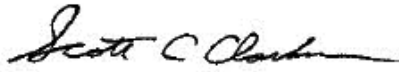


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United States Bankruptcy Judge

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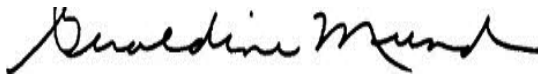
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United States Bankruptcy Judge



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United States Bankruptcy Judge



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United States Bankruptcy Judge

# American Bankruptcy Institute

Case 2:11-bk-17831-TD Doc 47 Filed 06/13/11 Entered 06/13/11 14:02:29 Desc  
Main Document Page 25 of 26

## NOTE TO USERS OF THIS FORM:

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

## NOTICE OF ENTERED ORDER AND SERVICE LIST

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

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

Kathy A Dockery (TR)  
efiling@CH13LA.com

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

Robert J Pfister on behalf of Debtor Gene Balas  
rpfister@ktbslaw.com

United States Trustee (LA)  
ustpreion16.la.ecf@usdoj.gov

Hatty K Yip on behalf of U.S. Trustee United States Trustee (LA)  
hatty.yip@usdoj.gov

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

Service information continued on attached page

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

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

Service information continued on attached page

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

## Southwest Bankruptcy Conference

Case 2:11-bk-17831-TD Doc 47 Filed 06/13/11 Entered 06/13/11 14:02:29 Desc  
Main Document Page 26 of 26

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

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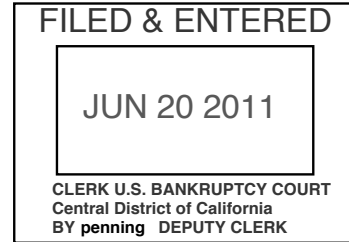
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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re:  
Gene Douglas Balas,  
Carlos A. Morales

Debtors.

Case No: 2:11-bk-17831-TD

Chapter: 13

ORDER OVERRULING THE UNITED STATES  
TRUSTEE'S OBJECTION TO  
CONFIRMATION OF PLAN

Date: May 17, 2011

Time: 1:30 p.m.

Location: Courtroom 1345

The United States Trustee's Objection to Confirmation of Plan is overruled for the reasons stated in the Memorandum of Decision entered in this case on June 13, 2011 that also denied the United States Trustee's Motion to Dismiss this case.

IT IS SO ORDERED.

DATED: June 20, 2011

  
United States Bankruptcy Judge

# Southwest Bankruptcy Conference

Case 2:11-bk-17831-NB Doc 48 Filed 06/20/11 Entered 06/20/11 11:07:43 Desc  
Main Document Page 2 of 2

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- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) ORDER OVERRULING THE UNITED STATES TRUSTEE'S OBJECTION TO CONFIRMATION OF PLAN was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 6/17/11, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Kathy A Dockery (TR)  
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Peter M Lively on behalf of Debtor Gene Balas  
PeterMLively2000@yahoo.com, PeterMLively2000@yahoo.com

Robert J Pfister on behalf of Debtor Gene Balas  
rpfister@ktbslaw.com

United States Trustee (LA)  
ustpreion16.la.ecf@usdoj.gov

Hatty K Yip on behalf of U.S. Trustee United States Trustee (LA)  
hatty.yip@usdoj.gov

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

Service information continued on attached page

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

Service information continued on attached page

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

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

In Re: Gene Douglas Balas et al,  
Debtors(s).

Case No. CV 11-05480-ODW

**ORDER OF DISMISSAL**

United States Trustee For The  
Central District of California

Appellant(s),


Gene Douglas Balas et al.,

THE COURT having been notified of an Order Dismissing Appeal of this matter by  
counsel,

THE COURT ORDERS that this action be, and hereby is, dismissed.

The Clerk shall mail, FAX or E:mail a copy of this Order to all counsel.

Dated: July 15, 2011

  
OTIS D. WRIGHT, II  
United States District Judge

## **LIST OF ADDITIONAL BANKRUPTCY CASES REFERENCING DOMA**

### **2<sup>nd</sup> Circuit:**

In re Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011)

Summary of Argument: Whether "cause" existed to dismiss the joint petition of a legally married couple because they were not members of the opposite sex. The court had substantial discretion and was required to consider extenuating circumstances as well as the interests of the various parties. One relevant extenuating circumstance was that the U.S. Department of Justice, acting under the instruction of the Attorney General and the President of the United States, argued that "DOMA may not be constitutionally applied to same-sex couples" and had stopped defending the law in cases pending in the Circuit. The mere existence of DOMA was not sufficient to remove the duty imposed by § 707(a) to find "cause" prior to dismissing the case. When dismissal was not premised upon one of the enumerated reasons in § 707(a), the U.S. Bankruptcy Appellate Panel for the Second Circuit required a case-by-case analysis to determine whether dismissal would be in the best interest of all parties in interest. The Trustee failed to convince the court on that matter. Insufficient cause existed to dismiss the petition.

Holding: Motion denied.

### **7<sup>th</sup> Circuit:**

In re Roll, 400 B.R. 674 (Bankr. W.D. Wis. 2008)

Summary of Facts/Argument: Unmarried men living together. Filed separate bankruptcy cases. Trustee moved to dismiss arguing that, based on joint income, they could pay debts and that case was filed in bad faith. Trustee suggested that the two debtors marry. Court noted that Wisconsin prohibits same sex marriage and recognition of such marriage is prohibited under DOMA.

## **9<sup>th</sup> Circuit:**

### **In re Goodale, 298 B.R. 886 (Bankr. W.D. Wash. 2003)**

Summary of Facts/Argument: Same sex couple, not married, but considered a meretricious relationship within the meaning of Washington State case law. They went through the equivalent of a divorce, with a support order made to the partner not filing bankruptcy. Debtor sought declaratory relief that his obligation to the non-filing partner was dischargeable. The non-filing partner sought relief under §§ 523(a)(5) and (a)(15). The actions were consolidated.

Holding: Washington law provides for support, but because the parties were not married and because of DOMA, §§ 523(a)(5) and (a)(15) did not apply. The obligations to the non-filing partner were discharged.

### **In re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004)**

Summary of Facts/Argument: Same sex couple married in Canada and filed a joint petition. Debtors challenged the constitutionality of DOMA arguing that excluding same-sex couples from recognition under 11 U.S.C.S. §302 violated the Tenth Amendment, principles of comity, and U.S. Const. IV and V.

Holding: The Tenth Amendment not implicated DOMA was not binding on States - no infringement on State sovereignty. Regarding comity, because the British Columbia policy and U.S. policy concerning marriage directly conflicted, the Court was required to prefer its own laws finding DOMA controlling. The Court found no Fourth Amendment violation and concluded that same-sex marriage was not a fundamental right, DOMA did not directly or substantially interfere with the ability of same-sex couples to marry, and rational basis review was appropriate to apply to the due process and equal protection analysis. DOMA did not violate either the Due Process or Equal Protection Clause. Case ordered dismissed unless debtors filed a motion to bifurcate.

### **Rabin v. Schoenmann (In re Rabin), 359 B.R. 242, 243 (B.A.P. 9th Cir. 2006)**

Summary of Facts/Argument: Same sex couple was not married, but had cohabitated for many years and jointly owned a home. Separate bankruptcy cases were filed for each. Each claimed an undivided interest and sought a full homestead exemption. Trustee objected based on the California Domestic Partner Rights and Responsibilities Act which directed that they be treated economically as if they were married.

Holding: Court agreed. Holding was affirmed on appeal.

In re Ziviello-Howell, 2011 U.S. Dist. LEXIS 57838 (E.D. Cal. May 27, 2011)

Summary of Facts/Argument: Trustee moved to dismiss a joint case. Debtors moved to withdraw the reference.

Holding: Debtors unable to show that DOMA was "rooted in interstate commerce" or was enacted under the Commerce Clause, failed to establish that Trustee's dismissal motion came within the mandatory withdrawal provision of 28 U.S.C.S. § 157(d). No cause to justify withdrawing the reference under the permissive withdrawal provision.

In re Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011)

Summary of Facts/Argument: U.S. Trustee seeks dismissal under DOMA of case filed by same sex couple legally married in California. Debtors argued equal protection.

Holding: Court agreed with debtors. No legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple. No valid, defensible governmental interest advanced by dismissing the bankruptcy case. Debtors demonstrated violation of equal protection afforded under the Fifth Amendment, either under heightened scrutiny or under rational basis review.

**Interplay Between Divorce and Bankruptcy**

**Hon. Susan V. Kelley**  
**Bankruptcy Judge**  
**United States Bankruptcy Court for the Eastern District of Wisconsin**  
**Milwaukee, Wisconsin**

**Randy Nussbaum**  
**Commercial and Consumer Bankruptcy Attorney**  
**Scottsdale, Arizona**

**David Tilem**  
**Commercial and Consumer Bankruptcy Attorney**  
**Glendale, California**

**John R. Bollinger**  
**Consumer Bankruptcy Attorney**  
**Hampton, Virginia**

### **I. Introduction**

Every attorney that practices on the consumer side of bankruptcy has been presented with facts and issues that raise questions when it comes to domestic relations. The individual, or in some limited instances, a couple, may present a situation where divorce/separation is imminent, a divorce is active and moving towards completion or a divorce is final. We as attorneys have to be prepared to provide legal guidance in accordance with the current law and we must be prepared to be a counselor. We must have compassion and empathy for the individual that is involved in seeking our assistance. The individual seeking your legal counsel may feel that they received the raw end of a deal through a divorce, child support or custody situation. The individual's opinion of lawyers or the legal system may not be a positive one under the circumstances. This provides a great opportunity for the bankruptcy attorney to provide legal counsel that may augment the individual's perspective of attorneys and place the legal system in a more favorable light.

There is no better feeling than to evaluate the facts and be able to communicate that bankruptcy will provide some relief to the individual seeking your help. This relief may arise in the form of some type of monetary relief, but sometimes and more importantly, the indirect relief from stress and negative emotional strains caused by the situation that facilitated the individual to seek legal counsel and advice.

This portion of the presentation is intended to provide some guidance and useful information to assist the practitioner in recognizing and/or addressing issues regarding legal separation and/or divorce prior to and during the representation of your client in their bankruptcy.

**II. General Overview of Applicable Bankruptcy Code Provisions**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective October 17, 2005 (“BAPCPA” or the “Bankruptcy Code”). The enactment of BAPCPA changed the playing field for many consumer debtors. There were significant changes to the law relating to domestic relations.

The commencement of a bankruptcy case under BAPCPA remains unchanged. 11 U.S.C. §§ 301, 302 and 303. Upon the commencement of a Chapter 7 or 13 bankruptcy case, an estate is created and generally the property of the estate is comprised of all legal and equitable interests in property of the debtor, all interest in debtor and debtors spouse in community property, certain recoveries made by a trustee administering the case, an interest in an certain assets acquired by the debtor within 180 days of the bankruptcy filing and any profits or income from property of the estate. 11 U.S.C. § 541. A Chapter 13 bankruptcy takes the estate a step further. Not only does the estate consist of the property provided for in Section 541, property also consists of after acquired property after commencement of the case and prior to the closing, dismissal or conversion of the case and earnings from services performed by the debtor after the commencement of the case but before the case has ended. 11 U.S.C. § 1306(a). The Debtor in a Chapter 13 will retain possession of the estate property through the end of the case. 11 U.S.C. § 1306(b). However, unless otherwise provided in the plan or an order confirming the Chapter 13 plan, all property of the estate vests in the debtor upon confirmation. 11 U.S.C. § 1327(a).

Upon the commencement of the case, an automatic stay comes into effect and protects the Debtor from further creditor process, action against property of the estate and financial recovery against the debtor. 11 U.S.C. § 362(a). Upon the enactment of

## Southwest Bankruptcy Conference

BAPCPA, the exceptions to the stay were expanded to include, but not limited to, matters pertaining to: the establishment of paternity; the establishment or modification of a DSO order; child custody or visitation; dissolution of marriage with the exception of the division of property which is property of the estate; domestic violence; collection of a DSO from property that is not property of the estate; withholding of income that is property of the estate or property of the debtor that is a DSO based upon a judicial or administrative order or statute; or interception of tax refunds. 11 U.S.C. § 362(b)(2)(A)-(G). Additionally, upon the commencement of a Chapter 13 case, there is a further extension of the automatic stay to any individual who is a co-debtor (co-signor or joint obligor) of the debtor on a consumer debt. 11 U.S.C. § 1301.

BAPCPA now defines Domestic Support Obligation (“DSO”) pursuant to Section 101(14A) of the Bankruptcy Code:

The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is – (A) owed to or recoverable by– (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or (ii) a governmental unit; (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated; (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of– (i) a separation agreement, divorce decree, or property settlement agreement; (ii) an order of a court of record; or (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A) (2005).

The definition of DSO applies to a very broad spectrum of Bankruptcy Code. What chapter of the bankruptcy is chosen will create different requirements and legal issues regarding property of the estate, relief from stay, dischargeability, lien avoidance, preferences, and fraudulent transfers, just to name a few. The Choice of filing a Chapter 13, as opposed to a Chapter 7, may provide for the super discharge of certain debts and liabilities. 11 U.S.C. §§ 523(a)(15) and 1328(a)(2). However, proceeding in a Chapter 13 also gives rise to further requirements of the debtor in order to proceed and complete the Chapter 13 successfully. The first of such requirements, is that in order for the Chapter 13 Plan to be confirmed, the debtor must have remained current with all payments on a DSO since the filing of the case. 11 U.S.C. § 1325(a)(8). Additionally, prior to the debtor receiving a discharge in the Chapter 13, the debtor must certify that he/she is current in all post-petition DSO payments. 11 U.S.C. § 1328(a). In addition to requirements of the debtors, the Chapter 7 and Chapter 13 Trustees have additional notice requirements at the beginning and conclusion (upon discharge of the debtor) when a DSO is involved. 11 U.S.C. §§ 704(a)(10), (c) and 1302(b)(6), (d).

If there is a DSO claim in a Chapter 13 case, the DSO must be provided for in the Chapter 13 Plan, unless the creditor consents otherwise. 11 U.S.C. § 1322(a)(2). There is an exception to paying back a DSO priority claim in full when the claim pertains to a claim pursuant to 11 U.S.C. § 507(a)(1)(b). 11 U.S.C. § 1322(a)(4). Additionally, the DSO will be given first priority over any other claim (debts owed to non-governmental entities have priority of over debts owed to governmental entities). 11 U.S.C. § 507(a)(1) and (2). The administrative expenses of the Chapter 13 Trustee pursuant to 11 U.S.C. § 503(b) will be paid concurrently with the disbursements of the DSO claim. U.S.C. § 507(a)(3).

Once a proposed Chapter 13 plan is filed and served, the Court, Trustee and creditors have an opportunity to review the plan and determine whether the proposed Chapter 13 plan is objectionable. The proposed Chapter 13 plan must meet certain minimal requirements that include and are not limited to: compliance with other code provisions; good faith; hypothetical liquidation test; and feasibility. 11 U.S.C. § 1325. If the creditor believes that the underlying debt is in the nature of a DSO, they must file a claim. If the creditor does not agree with the treatment of their claim through the proposed Chapter 13 plan, they should object to the proposed Chapter 13 plan to preserve their rights to determine that the debt may be payable in full. Additionally, the creditor would also need to file an adversary proceeding to have the court determine whether the debt is in the nature of alimony, maintenance or support and whether it is dischargeable. 11 U.S.C. §§101(14) and 523(a)(5).

### **III. What actions can and cannot proceed in a divorce proceeding once a bankruptcy is filed and through the duration of the bankruptcy case?**

As was briefly discussed above, 11 U.S.C. § 362(a) provides a stay to certain actions against the debtor and estate property. Certain exceptions pursuant to 11 U.S.C. § 362(b)(2) may give rise to there not being an automatic stay in place. Whether an action falls within one of the exceptions does not appear to be as easy as it may first appear. One of the key questions is whether the action being sought affects property of the estate.

#### **A. Matters relating to Property of the Estate**

Generally, property of the estate in a Chapter 7 or Chapter 13 is comprised of all legal and equitable interests in property of the debtor as provided under 11 U.S.C. § 541. This property is further expanded in Chapter 13 to include all after

acquired property after commencement of the case and earnings from services performed by the debtor after the commencement of the case until the case is closed, converted or dismissed. 11 U.S.C. § 1306(a). Lastly, in a Chapter 13, unless otherwise provided in the plan or confirmation order, the confirmation of a Chapter 13 plan vests all of the property of the estate in the debtor. 11 U.S.C. § 1327(b).

When reading Sections 1306(a) and 1327(b) together, confusion is created and this confusion has resulted in a split of authority as to the status of the estate property in Chapter 13 cases. Therefore, some practitioners, who know that a DSO claim exists, will specifically provide terms within the Chapter 13 plan, that estate property does not vest with the debtor until the plan has been completed and a discharge has been entered. The clear intention is to create more protection for the debtor and to alleviate continued actions by the DSO creditor during the active bankruptcy case against property that the debtor has or may acquire. This provision, coupled with proper notice to the affected party, should create res judicata effect and thwart future collection efforts. 11 U.S.C. § 1327(a). *Valley Historic Ltd. P'ship. v. Bank of New York*, 486 F.3d 831, 838 (4th Cir. 2007) (“A bankruptcy court's order of confirmation is treated as a final judgment with res judicata effect, binding the parties by its terms and precluding them from raising claims or issues that they could have or should have raised before confirmation.”). *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000) (“It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan.”). *In re Fort*, 412 B.R. 840 (Bankr. W.D.

## Southwest Bankruptcy Conference

Va. 2009) (Stone, J.)(Court found that the confirmed plan provided for the payment of child support in full through the plan and that the continued collection efforts by the State of Florida needed to cease due to a violation of Section 1327(a). Court determined that there were no grounds to find a violation of the automatic stay). *In re Gellington*, 363 B.R. 497, (Bankr. N.D. Tex. 2007)(Hale, J.)(Court similarly found that the State of Texas had not violated automatic stay with the continued garnishment. However, the court did find that the child support arrears that were provided for within the confirmed plan and the confirmation order pursuant to Section 1327(a) are res judicata and require the State of Texas to cease collection efforts).

The split of authority regarding confirmation of the plan and the effect of vesting upon confirmation appears to have at least four different views. The first view is Estate Preservation. This is absolute and the property upon confirmation remains property of the estate with no vesting. This view is probably the most consistent with the Bankruptcy Code's goals, with the exception of completely ignoring Section 1327(b). This approach creates more potential exposure to violations of the stay due to property of the estate still remaining in full force and effect. *In re Clouse*, 446 B.R. 690 (Bankr. E.D.Pa. 2010)(Fehling, J.)(Court concluded that postnuptial agreement effectively transferred property of the estate and was in violation of the automatic stay. The Court required that one of the parties move for relief from stay prior to entering into another agreement). *In re Chandler*, 441 B.R. 452, 465 (Bankr. E.D. Pa.2010) (Coleman, J.)(Court granted relief from stay to permit state court to determine domestic support obligation and

equitable distribution of the marital property, but stayed any distribution to the spouse until there is further inquiry by the bankruptcy court as to the parties relative positions under the equitable distributions compared to the debtor's obligations under the plan).

The second view is Estate Transformation a/k/a Partial Vesting. This is where the estate continues to exist, but the property of the estate only consists of the property that is necessary to perform under the plan and all other property becomes property of the debtor. This view creates problems with determining what property is necessary to perform under the plan. *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000), cert. denied, 531 U.S. 1073 (2001) (Debtor's confirmed plan provided for direct post-petition payments to mortgage company and the mortgage company applied payments to post-petition attorney's fees and insurance premiums. Court found that the regular loan payments were not property of the estate after confirmation and only the amount required for the plan payments remained property of the estate. Therefore, there was no a violation of section 362(a)). *In re Leavell*, 190 B.R. 536 (Bankr. E.D. Va. 1995) (St. John, J.)(Debtor obtained financing on certain personal property after the filing of her case. Debtor subsequently defaulted and the creditor obtained a judgment against the debtor and began garnishing her wages. Debtor brought a motion for finding of contempt against creditor. Court held creditor did not violate automatic stay by taking judgment and garnishing debtor's post-petition earnings. The Court concluded that although the estate continues to exist after confirmation, only post-petition earnings which are necessary to fund the Chapter 13 plan are property of

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the post-confirmation estate as defined by 11 U.S.C. § 1306(a)(2). *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008) (the Court distinguished the facts presented in *Telfair* and determined that all assets obtained post-confirmation were deemed to be property of the estate pursuant to Section 1306(a) and some of the pre-petition assets that were essential to the plan remained property of the estate until the case closed, converted or dismissed).

The third view is Reconciliation a/k/a the Refilling Estate. Upon confirmation, all property of the estate vests with the debtor, but the Chapter 13 estate continues to exist and continues to fill with property that is acquired by the debtor after confirmation, regardless of whether the property is necessary to perform under the plan. 11 U.S.C. § 1306. This approach does not fully address Section 1327(b). However, it does protect post-confirmation earnings and provides some protection to post-petition creditors. *In re Reynard*, 250 B.R. 241, 246-247. (Bankr. E.D. Va. 2000)(Mayer, J.)(Court reviewed whether homeowners association could collect post-confirmation assessments from Ch. 13 debtors and whether garnishing the debtors' wages would be permissible. The Court reasoned that the only manner 1327(b) and 1306(a) can be read in harmony would be if the assets of the chapter 13 estate as of the date of the confirmation of the chapter 13 plan vest in the debtor, the estate continues and assets set out in § 1306(a) acquired after confirmation become property of the chapter 13 estate. The after-acquired assets cease to be property of the estate if it is abandoned pursuant to Section 554, exempted pursuant to Section 522 or sold or used pursuant to Section 363).

The fourth and last view is Estate Termination. This is when estate terminates and all property of the estate becomes property of the debtor. This approach in essence renders Section 1306 a nullity. It could lead to the uncontrolled disposition of assets by the debtor and could expose the debtor to collection on post-petition debt, thus impacting the ability to complete the plan. This approach “signal[s] that § 1327(b) works a very significant change in the relationship between the bankruptcy court and the Chapter 13 debtor at confirmation. The bankruptcy estate deflates, and the debtor loses many of the protections of the automatic stay. And in important ways, the Chapter 13 case disconnects from bankruptcy court jurisdiction with respect to property and the debtor’s dealings with creditors after confirmation. These are scary outcomes for debtors who thought that their financial futures were safely protected by the stay and within the supervision of the bankruptcy court for the life of the Chapter 13 case.” Keith M. Lundin, Chapter 13 Bankruptcy, § 230.1, at 230-20 (3rd ed.). In re Dickey, 64 B.R. 3 (Bankr. E.D. Va. 1985)(Bostetter, J.)(Court concluded that upon confirmation, all property re-vests in the debtor, the estate is terminated, and the automatic stay as to any property of the estate is terminated). In re Dagen, 386 B.R. 777 (Bankr. D.Colo.,2008)(Brown, J.)(Court concluded that the estate termination approach provides for the literal terms of Section 1327(b) and that upon confirmation all property of the estate vests in the debtor. The fact that the estate terminated and the creditor was continuing to collect on pre-petition support obligations did not create a violation of the automatic stay. The court also concluded that any post-petition support obligations that accrue are not

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dischargeable, are not protected by the automatic stay (because all property vested in the debtor upon confirmation) and the creditor is free to collect post-petition support from the debtor's post-confirmation income).

### B. Matters relating to the Automatic Stay

Bankruptcy courts routinely modify the automatic stay to permit the conclusion of pending divorce proceedings to the extent necessary to administer the bankruptcy case. *In re Chandler*, 441 B.R. 452, 464 (Bankr. E.D. Pa. 2010)(Court modified the automatic stay to permit the movant and the Debtor to proceed with the Divorce Proceedings to obtain an adjudication of equitable distribution, as well as the award of alimony, counsel fees and costs, maintenance and support). *In re Secrest*, 453 BR 623 (Bankr. E.D. Va. 2011)(Venters, J.)(Court evaluated facts and determined that the movant failed to plead sufficient cause to lift the stay. Court reasoned that sale by the trustee would be create a more efficient administration than if the state court completed the property division).

Most courts have their own factors when considering whether relief from stay should be granted to proceed in another forum, the Fourth Circuit has provided guidance that when relief from the automatic stay is sought to proceed with litigation in another forum, a bankruptcy court should consider: (1) whether only issues of state law involved, so that the expertise of the bankruptcy court is unnecessary; (2) whether judicial economy will be promoted; (3) whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (4) whether the estate can be protected by requiring that any judgment obtained be enforced only

through the bankruptcy court. *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992)(the Robbins case involved a motion for relief from the automatic stay in order to finalize an equitable distribution award. The divorce had been decreed, and an equitable distribution award entered, prior to the filing of the bankruptcy petition. An appeal had been taken to determine whether the debtor's wife should receive one-half of her husband's shares in a closely-held company or instead the cash value of the shares. The matter had already been remanded to the trial court to calculate the dollar value of the shares. The bankruptcy court granted the wife relief from the automatic stay so that the trial court could enter a final judgment reflecting the equitable distribution award. *Roberge v. Buis*, 95 F.3d 42 (4th Cir. 1996) (unpublished table decision)(affirming district court order reversing bankruptcy court and granting relief from stay to allow debtor's spouse to pursue equitable distribution of the marital home in state court where the debtor had obtained an ex parte divorce in another state prior to filing bankruptcy).

Whether an action taken in violation of the automatic stay is void or voidable is an open question in many jurisdictions. *Hass v. Duncan*, 2005 WL 5714293 (E.D. Va. 2005)(Cacheris, J.)(affirming the Bankruptcy Court's ruling not to reopen case to litigate stay violation because there were no damages; regardless of the fact that the Bankruptcy Court did find that the pursuit of a petition to show cause for failing to comply with previous state court order requiring payment of child support, spousal support and attorneys fees was a violation of the stay. The Court recognized that the issue of whether a violation of the stay action is void or voidable is an open issue in the Fourth Circuit and the Court cited one of it's

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previous rulings that held such actions as voidable- *Khozai v. Resolution Trust Corp.*, 177 B.R. 524, 526-27 (E.D.Va.1995)(Cacheris, J.); *Winters v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir.1996)(the Fourth Circuit declined to decide the issue of whether an action in violation of the stay is void or voidable, however, the Court did acknowledge that the circuits were split as follows: the Third, Fifth, Sixth and Eleventh Circuits decided that actions taken in violation of the automatic stay are voidable and the Second, Ninth and Tenth Circuits have held that actions taken in violation are void).

The stay may prevent contempt actions in state court domestic relations matters. *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala. 2008), *aff'd*, 384 Fed. Appx. 882 (11th Cir. 2010)(Chapter 11 individual debtor was incarcerated post-petition for pre-petition child support arrears. The bankruptcy court found that the creditor had violated the automatic stay. The creditor knew of the bankruptcy filing, intentionally acted to have the debtor incarcerated and the debtor used estate funds to alleviate the contempt through the state court. Damages were awarded to the debtor for emotional distress, lost income, attorney's fees and punitive damages). *Lori v. Lori*, 241 B.R. 353 (Bankr.M.D.Pa.1999)(Thomas, J.)(the court awarded damages for a violation of the automatic stay when a party filed a petition for civil contempt in state court against the debtor by reason of his alleged failure to comply with a support order. The court held that while section 362(b)(2)(B) would permit collection efforts against property that was not property of the estate, such as wage attachment, the petition to hold the debtor in contempt for violating the support order was not so limited. The court reasoned that because the petition to hold the

debtor in contempt targeted the debtor himself, rather than his post-petition income, the attempt to enforce collection was not excluded from the provisions of 11 U.S.C. § 362). *In re Rook*, 102 B.R. 490 (Bankr. E.D. Va. 1989), aff'd, 929 F.2d 694 (4th Cir. 1991) (Court concluded that contempt order for incarceration did not violate Section 362(a)(1). Court determined that contempt order was entered prior to petition being filed and the sole reason for entry of the contempt citation was to uphold the dignity of the prior circuit court orders. Additionally, the Court went on to find that even if the automatic stay applied, the contempt order would still be exempt from the automatic stay under Section 362(b)(1). The court reasoned that the contempt order was initially civil and remedial in nature. However, the debtor was provided an opportunity to relieve himself from potential incarceration if he paid the sums that were due within the prescribed period of time. The debtor's failure to comply with the orders terms then resulted in the contempt citation becoming criminal and punitive in nature). *In re Yost*, 2007 WL 184674 (Bankr. N.D. Ohio Jan.19, 2007)(Harris, J.)(Unpublished)(Court recognizing split of authority in interpreting the applicability of Section 362(b)(1) when contempt proceedings pending. The first interpretation finds that the exception in paragraph 362(b)(1) is an absolute exception regardless of prosecutorial purpose or bad faith and includes the following cases: *Gruntz v. County of Los Angeles*, 202 F.3d 1074 (9th Cir. 2000); *In re Rollins*, 243 B.R. 540 (N. D. Ga. 1997); *In re Caravona*, 347 B.R. 259 (Bankr.N.D. Ohio 2006); *In re Dennison*, 321 B.R. 378 (Bankr. D. Conn.2005); *In re Pickett*, 321 B.R. 663 (Bankr. D. Vt. 2005). The second interpretation focuses on the motive behind the criminal prosecution and finds that

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the exception does not apply when the primary motivation is the collection of a debt and includes the following cases: *In re Batt*, 322 B.R. 776 (Bankr. N.D. Ohio 2005); *In re Dovell*, 311 B.R. 492 (Bankr. S.D. Ohio 2004); and *In re Williamson-Blackmon*, 145 B.R. 18 (Bankr. N.D. Ohio 1992).

Even third parties may be in violation of the stay for contempt actions. *In re Hall-Walker*, 445 B.R. 873 (Bankr. N.D. Ill. 2011) (Court concluded attorney representing debtor's ex-spouse willfully violated the automatic stay for pursuing a civil contempt action in state court. Court found that the creditor attorney was aware of pending bankruptcy case, the attorney was informed that she could moving forward with contempt action could result in be sanctions, contempt action was being used to enforce a pre-petition mortgage arrearage debt and attorney participated in drafting a portion of the contempt order. *Hass v. Duncan*, 2005 WL 5714293 (E.D. Va. 2005)(Cacheris, J.)(Court relied upon the plain language of section 362(b)(2)(B) and concluded that the creditor targeted the Debtor's person rather than property that was not property of the estate. The Court found the creditor and the creditor's attorney had violated the automatic stay by filing the petition for the rule to show cause). *In re Kearns*, 161 B.R. 701 (D. Kan. 1993), *modified*, 168 B.R. 423 (D. Kan. 1994)(Court determined that the state court judge was entitled to judicial immunity and could not be found liable for an action for violation of the automatic stay).

### C. Abstention, Preclusion and Concurrent Jurisdiction

Generally, lower federal courts are prohibited from reviewing state court decisions pursuant to the Rooker-Feldman Doctrine and federal courts should

restrain from the exercise of federal jurisdiction in the interest of comity pursuant to the Younger Doctrine. *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (Stone, J.) (bankruptcy court determined that it did not violate the Rooker-Feldman doctrine when it ruled upon an objection to a support claim filed by the State of Florida (relying upon evidence that showed a clerical error on the claim). Additionally, the bankruptcy court determined that it did not violate the Younger doctrine because the state court order was left unaltered and the objection to claim did no re-litigate child support.).

Bankruptcy courts may choose to abstain from hearing a particular matter in the interest of comity with the state court. The general test that has been created by the Fourth Circuit to determine whether a civil proceeding is “related to” the bankruptcy is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in the estate. *In re Jacobs*, 401 B.R. 202, 205 (Bankr. D. Md. 2008)(Schneider, J.)(citing *In re Celotex Corp.*, 124 F.3d 619, 625 (4th Cir.1997) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir.1984)). Additionally, the Jacobs case sets forth a twelve factor test that courts may consider when deciding whether to abstain. *In re Jacobs* 401 B.R. 207-208 (citing *In re Railworks Corp.*, 345 B.R. 529, 540, (Bankr.D.Md.2006) (Derby, J.). *Hass v. Duncan*, 2005 WL 5714293 (E.D. Va., 2005) (discussion regarding abstention). *In re Taub*, 413 B.R. 69 (Bankr. E.D. N.Y. 2009)(court decided not to abstain due to the overwhelming weight that the actions would be better served to be litigated in the bankruptcy court. Strong consideration was given to the fact that the relief being sought in the bankruptcy court was not relief being requested in the

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active state court proceedings. Additionally, the court relied heavily on the fact that the causes of action presented in the bankruptcy case are causes of action premised upon federal law and not state law).

There is concurrent jurisdiction between the state and federal courts when looking at whether a debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(5). *In re Roberson*, 187 B.R. 159 (Bankr. E.D. Va. 1995)(Shelley, J.)(Court determined that voluntary abstention was not proper when the underlying debts arising from a property settlement agreement raise issues of dischargeability and revocation of discharge). *In re Stabler*, 418 B.R. 764 (BAP 8th Cir. 2009) (Chapter 7 debtor sued creditor in state court regarding collection on an alleged discharged debt in violation of the discharge injunction. Debtor filed an adversary proceeding in the bankruptcy case on the eve of the hearing on a motion for summary judgment in the state court proceeding. Bankruptcy court chose to abstain from the matter due to the egregious nature of the adversary proceeding being filed on the eve of a potentially dispositive hearing and the state court case had been pending for almost 19 months).

# AMERICAN BANKRUPTCY INSTITUTE

## Southwest Bankruptcy Conference

September 13-14, 2012

TOPIC:

Impact of Bankruptcy on Respective Rights  
of Husbands and Wives and Significant Others

September 14, 2012, at 11:30 a.m.

By:

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of

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## **INTERPLAY BETWEEN PROPERTY OF THE ESTATE, EXEMPTIONS AND DIVORCE**

During my 32 years of practicing law, I have determined that if you want to terrorize a divorce lawyer, mention to that lawyer that his client is contemplating bankruptcy. Invariably, the attorney will start to shake and go pale. Similarly, if a bankruptcy lawyer is advised that his clients are considering a divorce, that lawyer will oftentimes lose all interest in the ongoing representation. This reaction is not just related to the variety of conflict issues that may arise when the topics of bankruptcy and divorce surface in the same proceeding, but because most practitioners understand that a variety of procedural and substantive obstacles will need to be addressed in such circumstances.

This article will primarily focus on substantive issues which need to be considered by bankruptcy lawyers in cases in which they are representing one, or in certain instances, both spouses seeking a divorce.\*

The first issue addressed is how property of the bankruptcy estate is impacted by the initiation of divorce proceedings.

### **I. DOES THE DIVORCE PROCEEDING IMPACT ON PROPERTY OF THE BANKRUPTCY ESTATE?**

As a preliminary matter, this letter is being written by an Arizona practitioner based upon Arizona community property law and Arizona having opted out of federal exemptions. This is a crucial determination because a number of different issues arise when federal exemptions apply.

However, determining what falls within the purview of property of the bankruptcy estate is normally controlled by 11 U.S.C. § 541 and/or 11 U.S.C. § 1306. In certain instances, state law may control as to what property is excluded from the bankruptcy estate, but as a general proposition, there is a fair amount of uniformity throughout the southwest in the definition of what constitutes property of the bankruptcy estate.

If only one spouse files for bankruptcy protection (keeping in mind that the bankruptcy estate includes all community property), community property that would be property of the bankruptcy estate if the couple was happily married is still community property for purposes of the Bankruptcy Code. This is the case even if upon initiating divorce proceedings, the spouses have informally divided up the property. This is a crucial understanding for two distinct reasons:

1. The spouse filing for bankruptcy would normally have had time to engage in some basic planning to try to protect as much of the property being retained as possible; and

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\* Needless to say, I do not recommend normally representing both spouses in such situations without a comprehensive conflict waiver and separate determination that it is both spouses' best interest to retain one bankruptcy lawyer.

2. If the non-filing spouse is not advised in advance of the bankruptcy filing and does not take any steps to protect his\* share of the assets, the non-filing spouse could find himself caught totally off guard and subject to a turnover order which could have been avoided if that spouse had been given notice.

Please note that the situation just described occurs prior to a formal order from the domestic relations court dividing up the family's assets. Unfortunately, many times little attention is paid to this concern when one spouse is filing for bankruptcy, which oftentimes leads to rather tragic unintended consequences as to a non-filing party. *See, In re McCoy*, 11 B.R. 276 (9<sup>th</sup> Cir. BAP 1990) (where community assets had not been divided prior to the debtor spouse's petition being filed and it was found that the non-debtor spouse's community interest was subject to claims from the debtor spouse's post-separation creditors).

## II. CLAIMING EXEMPTIONS

In Arizona, when only one spouse files for bankruptcy protection, it is customary to file a "dummy exemption schedule" for the non-filing spouse to eliminate any confusion as to how exemptions are being claimed. This is especially necessary in Arizona, which allows a married couple to stack their individual exemptions with the exception of the homestead exemption. In friendly situations, the two spouses can decide how to assert the joint exemption in a way most advantageous for both spouses, but when a divorce is pending, it is not unusual for the parties to quarrel as to claiming exemptions.

From practical experience, I have learned that one debtor cannot stack the exemption rights of the non-filing spouse without that spouse's consent. This can lead to rather unfortunate outcomes in two different ways. First of all, a non-filing spouse can refuse to allow the other spouse the right to stack exemptions even though the non-filing spouse may not have any need to claim that exemption. This strategy is malicious and counterproductive, but does occur.

More commonly, a non-filing spouse may refuse to consent to a stacking of the exemptions even if the non-filing spouse may be trying to protect an asset of inconsequential value. For example, if the filing spouse has a vehicle worth \$10,000, whereas the non-filing spouse is driving an old junker worth no more than \$1,200, common sense dictates that the spouses would agree to stack their exemptions into one \$10,000 vehicle and then negotiate a settlement with the bankruptcy trustee to retain ownership of the \$1,200 older car. But, if the non-filing spouse refuses to allow the other spouse to stack the exemptions, the filing spouse would consequently leave \$5,000 of equity exposed in his car.<sup>+</sup>

Already, the first two sections of this outline delineate when spouses cooperating can create a "win/win" result for both spouses, but if the spouses do not want to work together, a number of outcomes exist which can create havoc for either of the spouses.

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\* His and himself are interchangeable with her and herself.

<sup>+</sup> Please note that under Arizona, with the exception of handicapped vehicles, each spouse can claim a \$5,000 exemption in one vehicle.

Arizona law provides absolute protection to alimony being paid (or already paid) and child support, as well. At one time the statute governing domestic support obligations was not so broad, but in recent years, the exemption has been expanded to even include past due support and support which has already been deposited by the recipient.

This provides cooperative spouses with an amazing variety of options regarding asset protection. Unprotected money in the hands of one spouse will now be entitled to exemption protection upon receipt by the other as long as the payment is in the form of some type of support since it is absolutely protected under Arizona law. Presumably, the same is true in other states and to some extent under the federal exemptions.

As a simple example, if a man on the verge of bankruptcy has \$5,000 in his bank account, but owes his ex-wife for either child support or spousal maintenance, by paying his ex-wife past due support, that money is transformed into an exempt asset in the hands of his spouse. Even more importantly, if the payment is past due and the payment is being made pursuant to a court order, the Bankruptcy Code provides that the payment is not a preference. See, 11 U.S.C. § 547(c)(7).

The exact same strategy can be used in instances where the recipient of the support is on the verge of bankruptcy. By ensuring that the payment being received is in the form of support, a party seeking bankruptcy protection can shield monies which otherwise may be vulnerable. This allows that individual to potentially create a nest egg similar to what some clients do with social security.

Few bankruptcy trustees or judges would question the strategy just outlined, especially because normally the amount at stake is simply not worth fighting over and invariably the spouse receiving the support needs it or would not have been awarded it in the first place. But what about situations in which one party owns a sizeable amount of non-exempt assets, is subject to potential collection efforts and needs to file for bankruptcy? In that case, what options are available to that individual if he is legitimately liable to an ex-spouse for either spousal maintenance and/or child support?

In that situation, since many individuals owing support want to make sure the support is paid, why couldn't the spouse filing for bankruptcy pledge his assets to the other spouse as security for future support? Doing so is not unusual in the context of a domestic relations settlement and it is actually a prudent practice for the party owed the support to try to secure as much of a future payment as possible. If the arrangement is negotiated at arm's length and is for fair consideration, what is the fundamental problem with this type of understanding? See, *In re Ottaviano*, 63 B.R. 338 (Bkrty. D. Conn. 1986) (holding that a pre-petition division of non-exempt community property in lieu of periodic alimony payments by debtor spouse was for a reasonably equivalent exchange of value and therefore not subject to a fraudulent transfer claim initiated by the debtor's bankruptcy trustee).

My office has researched this issue and was surprised to discover that no definitive case law exists in the Ninth Circuit that we could find. If the transaction was a sham or entered into for the specific purpose of avoiding or defrauding creditors, presumably a challenge could be

mounted under 11 U.S.C. § 548. *In re Holloway*, 955 F.2d 1008 (5<sup>th</sup> Cir. 1992) (transfer of security interest to non-debtor spouse was fraudulent); *In re Kaczorowski*, 87 B.R. 1 (Bkrtcy. D. Conn. 1988) (reasonably equivalent value was not received by debtor for pre-petition transfer of debtor's one-half interest in family residence to non-debtor spouse). However, when the transaction really has been negotiated to ensure that the recipient party is protected, this strategy appears to be viable in most instances.

So what happens if one party goes overboard in the planning? The best example of what occurs in that situation can be found in the *In re Beverly* decision. *In re Beverly*, 374 B.R. 221 (9<sup>th</sup> Cir. BAP 2007) *affirmed* 551 F.3d 1092 (9<sup>th</sup> Cir. 2008). *In re Beverly* involved a lawyer who exchanged a number of communications with his wife in which he painstakingly spelled out his efforts to avoid paying his creditors by conveying non-exempt assets to his non-filing spouse and retaining otherwise exempt assets in his other name. The court ruled that the division of property was not equitable and denied the debtor's discharge among other rulings. What remains unknown is what the court would have done if a factual determination had been reached that the division was fair and equitable. One suspects that in light of the husband's clear intent to avoid paying his creditors, the trier of fact could still have found that the transfer was an improper one and set the transfer aside. The court may have still ruled the same way, but may not have denied the debtor his discharge.

### III. DEALING WITH DEBT

When one spouse files for bankruptcy protection, the ultimate discharge includes not just that spouse's sole and separate property, but community obligations as well. As a matter of law, in such instances the non-filing spouse is still only liable in a sole and separate capacity. This is fair and makes sense since invariably the other spouse did not sign on the obligation or engage in the activity resulting in the claim.

Comprehending this aspect of the law is important because when primarily one spouse has incurred the debt, having that spouse file for bankruptcy while the couple is still married could very well allow the other spouse to avoid having to file for bankruptcy. This leads to the following question: If as part of a property settlement agreement issued prior to the divorce being finalized the non-filing spouse receives community property, will that property be immune from claims of the bankruptcy trustee? Once again, there is a dearth of case law on this issue, but if a division of assets is at arm's length, one would ask why wouldn't this strategy work? For example, if the husband had incurred \$100,000 of credit card debt (which under Arizona law would be community debt) and prior to bankruptcy had exchanged \$100,000 of non-exempt assets in return for keeping \$100,000 of exempt assets as part of a property settlement agreement, if the assets conveyed to the wife are no longer part of the community property estate, this strategy may work. Of course, a lot depends upon whether the parties can engage in an absolute divestment of the community's assets prior to the divorce being entered and whether there is a finding by the Court that there was an actual intent to hinder, delay or defraud creditors and that fair consideration was provided. *See, In re Roosevelt*, 87 F.3d 311 (9<sup>th</sup> Cir. 1996) (overruled on other grounds) (where a creditor commenced an adversary proceeding seeking denial of discharge under 11 U.S.C. § 727 and the court found that the debtor spouse's pre-petition transmutation of the debtor's community property interest in his homestead through a

marital separation agreement with his non-debtor wife was not done with the intent to hinder, defraud or delay); compare with *In re Roosevelt*, 220 F.3d 1032 (9<sup>th</sup> Cir. 2000) (finding on appeal of the Chapter 7 trustee's §§ 544, 547 and 548 claims that the non-debtor spouse's "for value" defense was meritless because she did not have an interest in the assets transferred to her debtor husband as part of a marriage settlement agreement).

In many instances, even if the law is not clear, it may make sense to consider such tactics as long as the clients understand that in certain instances, the spouse filing for bankruptcy could be facing potential denial of discharge as in the *In re Beverly* case.

#### **IV. OTHER MISCELLANEOUS ISSUES**

You need to be aware of the bankruptcy trustee's ability to access even exempt assets to pay a support claim. One reason why the spouses would normally want to cooperate prior to bankruptcy is to avoid this result.

Spouses have to be careful not to engage in preferential transfers. This would commonly occur in a case in which one spouse may have legitimately owed the other spouse money and then repays that debt within one year of bankruptcy. With the exception of certain payments made pursuant to a domestic relations order, then the payment would be preferential.

Be careful not to confuse property settlement with spousal maintenance. A property settlement is not exempt and such a transfer can result in the receiving spouse having to turn that property over to a bankruptcy trustee if that spouse then decides to file for bankruptcy. Or, in other instances, if the payment from one spouse to the other is not identified as either spousal maintenance or property settlement, and if the conveying spouse then files for bankruptcy, the transfer is subject to being set aside as a preference as well. *In re Grassmueck*, 127 B.R. 869 (Bkrcty. D. Or. 1991).

#### **V. CONCLUSION**

The purpose of this outline was not to be a definitive treatise on this subject. Instead, it was simply to highlight a variety of issues that arise when individuals are undergoing the dual trauma of bankruptcy and divorce.