Vet. App. No. 11-3083

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN J. CARDONA
Appellant,

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Appellee,

BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES………………………………………………………. iii-xii

I. ISSUES PRESENTED…………..…………………………………………… 1

II. STATEMENT OF THE CASE……………………………………………….. 2

A. Jurisdictional Statement………………………………………………. 2

B. Nature of the Case…………………………………………………….. 2

C. Statement of Relevant Facts and Procedural History……………… 3

III. RELEVANT STATUTORY HISTORIES………………………………… 4

IV. SUMMARY OF THE ARGUMENT……………..…………………………… 5

V. ARGUMENT……………………………………..…………………………… 6

A. Section 3 of DOMA and section 101(31) of title 38 violate equal protection ……………………………………..……………………… 6

1. Section 3 of DOMA and section 101(31) classify on the basis of sexual orientation…………………………………………… 7

2. Classifications based on sexual orientation are subject to heightened scrutiny……………………………………………….. 8

i. The Federal Circuit holding in *Woodward* is incorrect and warrants reconsideration in light of *Lawrence v. Texas*…………………..........…………………………….. 9

ii. Gays and lesbians are members of a suspect or quasi-suspect class………………………………………………… 11

a. Gays and lesbians have been subjected to a history of discrimination……………………………………… 11

b. Gays and lesbians exhibit immutable distinguishing characteristics………………………………………….. 17

c. Gays and lesbians are minorities with limited political power………... 19

d. Sexual orientation bears no relation to legitimate policy objectives or the ability to perform or contribute to society………………………………………………. 21

3. Section 3 of DOMA and section 101(31) of title 38 fail heightened scrutiny…………………………………………… 24

i. DOMA……………………………………………………… 25

a. Defending traditional notions of morality (and promoting heterosexuality)…………………………… 25

b. Responsible procreation and child rearing…………… 27

c. Defending and nurturing the institution of traditional heterosexual marriage……………………………….. 30

d. Preserving scarce resources…………………………… 31

ii. Section 101(31)…………………………………………….. 31

a. The legislative history of section 101(31) demonstrates that the statutory definition of the term "spouse" was added only to remove gender references rendered obsolete by the enactment of Public Law 92-540……………………………………….. 33

b. Congress' historic recognition of the need to provide for veterans and their dependents and the inconsistency between this objective and the exclusion of same-sex couples from receipt of dependency benefits further evidences that it had no other actual purpose in enacting section 101(31) beyond at least tangentially supporting the expansion of the class of beneficiaries eligible for spousal dependency benefits…………………………………….. 38

B. Section 3 of DOMA and section 101(31) of title 38 do not violate the Tenth Amendment by interfering with state sovereignty….. 41

C. Neither Section 3 of DOMA nor section 101(31) of title 38 is an unconstitutional Bill of Attainder………………………………… 44

VI. CONCLUSION……………………………………………………….. 45

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Able v. United States,
968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998) 19

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504 U.S. 689 (1992) 43

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321 F.3d 220 (1st Cir. 2003) 43

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852 P.2d 44 (Haw. 1993) 4

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191 N.W.2d 185 (Minn. 1971) 8

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Jurisdictional Statement, No. 71-1027 (Sup. Ct.) 8

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110 Cal. Rptr. 916 (1973) 14

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881 F.2d 454 (7th Cir. 1989) 11

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93 F.3d 781 (Fed. Cir. 1996) 6

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688 So. 2d 1374 (Miss. 1997) 14

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483 U.S. 587 (1987) 9

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478 U.S. 186 (1986) 9, 10, 11, 12

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25 Vet.App. 178 (2012) 40

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513 F. Supp. 134 (N.D. Tex. 1981), *aff'd without opinion*, 669 F.2d 732
(5th Cir. 1982) 13

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130 S. Ct. 2971 (2010) 10

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473 U.S. 432 (1985) 6, 9, 21, 23

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846 S.W.2d 957 (Tex. App. 1993) 14

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488 U.S. 469 (1989) 7

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486 U.S. 456 (1988) 7, 24, 41

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367 U.S. 1 (1961) 44

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414 U.S. 528 (1973) 27

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411 U.S. 677 (1973) 16, 21

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7 Vet.App. 555 (1995) 8

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559 P.2d 1340 (Wash. 1977) 13

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475 U.S. 503 (1986) 23

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824 F. Supp. 2d 968 (N.D. Cal. 2012)... *passim*

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895 F.2d 563 (9th Cir. 1990) 11

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587 F.3d 925 (9th Cir. EDR Panel 2009) 30

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183 P.3d 384, 419-20 (Cal. 2008) 20

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539 U.S. 558 (2003) .... *passim*

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(9th Cir. 1983) 13

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427 U.S. 307 (1976) 22

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--- F.3d ---, Nos. 10-2204, 10-2207, 10-2214, slip op. at 6-7 (1st Cir.
May 31, 2012) .... *passim*

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427 U.S. 495 (1976) 19

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366 U.S. 420 (1961) 6

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505 U.S. 144 (1992) 41

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433 U.S. 425 (1977) 44

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451 U.S. 1 (1981) 42

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457 U.S. 202 (1982) 31

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599 P.2d 636 (Cal. 1979) 15

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23 Vet.App. 475 (2010) 2

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11 Vet.App. 255 (1998) 8

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21 Vet.App. 137 (2007) 38

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324 S.E.2d 691 (Va. 1985) 14

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517 U.S. 620 (1996) .... *passim*

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453 U.S. 57 (1981) 23

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547 U.S. 47 (2006) 23, 24

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3 Vet.App. 352 (1992) 40

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114 F.3d 1097 (11th Cir. 1997) 14

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23 Vet.App. 267 (2009) 39

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483 U.S. 203 (1987) 42, 43

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289 N.W.2d 402 (Minn. 1979) 16

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207 P.3d 48 (Cal. 2009) 20

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305 F.3d 54 (1st Cir. 2002) 43

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106 F.3d 1027 (1st Cir. 1997) 41

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312 U.S. 100 (1941) 41

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871 F.2d 1068 (Fed. Cir. 1989) 9, 10

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10 U.S.C. § 654 (2007) 12

38 Stat. 711 (1914) 37

38 U.S.C. § 101(3) 4, 5

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38 U.S.C. § 102 33

38 U.S.C. § 103(c) 39

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RBA at 145 (Notice of Disagreement) 3

RBA at 147-48 (rating decision) 3

RBA at 149-52 (application for spousal benefits) 3

RBA at 224-35 (rating decision) 3

RBA at 523-27 (rating decision) 3

RBA at 559 (DD-214) 3

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Appellee.	)	
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BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,	)	
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Intervenor.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

1. Whether section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (hereinafter, "section 3"), which defines the terms "spouse" and "marriage" for federal purposes, is consistent with the equal protection component of the Fifth Amendment Due Process Clause.

2. Whether section 101(31) of title 38, United States Code (hereafter, "section 101(31)"), is consistent with the equal

protection component of the Fifth Amendment Due Process Clause.

3. Whether section 3 or section 101(31) violates the Tenth Amendment.

4. Whether section 3 or section 101(31) is an unconstitutional bill of attainder.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants it exclusive jurisdiction to review final decisions of the Board of Veterans' Appeals (hereafter, "Board"). Further, the Court has held that it has authority to review the constitutionality of statutes. *See, e.g., Raugust v. Shinseki,* 23 Vet.App. 475, 479 (2010); *see also* 38 U.S.C. § 7261(a)(1) and (a)(3)(B).

B. Nature of the Case

Appellant, Carmen Cardona, appeals the August 30, 2011 decision of the Board which denied a claim of entitlement to additional compensation for a dependent spouse on grounds that, while validly married under state law, Appellant's spouse, being a person of the same sex, is not a "spouse" within the meaning of the term as defined in section 101(31). In her appeal to this Court, Appellant challenges the constitutionality of section 101(31), and also section 3 of DOMA, which mandates a uniform federal definition of the term "spouse" to exclude persons of the same sex and "marriage" to exclude relationships between persons of the same sex. Appellant asserts that the statutes are unconstitutional under the equal protection component of the Fifth Amendment, unconstitutional under the Tenth Amendment, and unconstitutional bills of attainder.

C. Statement of Relevant Facts and Procedural History[1]

Appellant served on active duty in the U.S. Navy from July 1988 to May 2000. RBA at 559. In September 2002, she was granted service connection for carpal tunnel syndrome in her hands. RBA at 525 (523-27). Currently, the bilateral disability is assigned a combined rating of 80%. RBA at 231 (224-35).

On May 14, 2010, Appellant married R.H. under the laws of the State of Connecticut. RBA at 17. The same month, she filed a claim of entitlement to additional compensation for a dependent spouse pursuant to 38 U.S.C. § 1115. RBA at 151 (149-52). The claim was denied by the VA Regional Office (hereafter, "RO") in June 2010 on grounds that R.H., being of the same sex as Appellant, was not a "spouse" under VA statutes and regulations. RBA at 147 (147-48). Appellant filed a Notice of Disagreement later that month, RBA at 145, and a Statement of the Case was issued in November 2010. RBA at 132-42. Appellant perfected her appeal to the Board in January 2011. RBA at 124 (124-25).

On August 30, 2011, the Board issued the decision now on appeal to this Court. RBA at 3 (3-14). Therein, it acknowledged that Appellant and R.H. were legally married under the laws of Connecticut, RBA at 8 (3-14), and found that, based on Appellant's combined evaluation for disability compensation, she was "potentially" eligible for spousal benefits. RBA at 7 (3-14). However, the Board concluded that it was bound by federal statutes and regulations that define a spouse as a person of the opposite sex and held that R.H. is not a "spouse" for VA purposes. RBA at 4, 8 (3-14).

[1] The facts of this case are not in dispute.

III. RELEVANT STATUTORY HISTORIES

A. Defense of Marriage Act

DOMA was enacted by Congress and signed into law by President Clinton in 1996.[2] Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law to include only the union of a man and a woman. It provides:

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

1 U.S.C. § 7. Section 3 excludes same-sex relationships from the definition of "marriage," and persons of the same sex from the definition of "spouse," for purposes of federal law, regardless of whether the marital relationship is recognized under state law.

B. Title 38 Provision

Title 38 of the United States Code governs VA and the veterans' benefits system. Section 101 establishes various definitions applicable to all of title 38. Included therein, section 101(31) defines the term "spouse" to mean "a person of the opposite sex who is a wife or husband" and section 101(3) defines the term "surviving spouse" to mean "a person of the opposite sex who is a widow or

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[2] In large part, DOMA was enacted in response to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), in which the Hawaii Supreme Court raised the prospect of state-sanctioned same-sex marriages. H.R. Rep. No. 104-664, 2 (H.R. 3396 is a response to a "very particular development in the State of Hawaii."); *see also Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, __ F.3d __, Nos. 10-2204, 10-2207, 10-2214, slip op. at 6-7 (1st Cir. May 31, 2012).

widower."[3] 38 U.S.C. § 101(3), (31). These definitions were added effective January 1, 1976, as part of a broad overhaul of title 38 designed to "amend title 38 of the United States Code to liberalize the provisions relating to the payment of disability and death pension and dependency and indemnity compensation, to increase income limitations, and for other purposes." Pub. L. No. 94-169, 89 Stat. 1013 (1975); *see also* S. Rep. No. 94-568, at 1 (1975), *reprinted in* 1974 U.S.C.C.A.N. 2078. The terms "spouse" and "surviving spouse" are used throughout title 38 and affect eligibility for disability compensation, death pension benefits, burial and memorial benefits, education benefits, and vocational training and placement benefits. *See, e.g.,* 38 U.S.C. §§ 1115, 1121, 1141, 1781, 2402, 3224, 3500, 3701, 4101, 5121, 5121A. By operation of these definitional provisions, a valid state-sanctioned same-sex marriage would not confer spousal status for purposes of eligibility for VA benefits and services.

IV. SUMMARY OF THE ARGUMENT

Both section 3 of DOMA and section 101(31) of title 38 unconstitutionally discriminate on the basis of sexual orientation, in violation of the equal protection component of the Fifth Amendment, with regard to same-sex couples who are legally married under state law. Both statutes establish classifications based on sexual orientation and, under the factors set forth by the Supreme Court, classifications based on sexual orientation should be subject to heightened scrutiny. Under that standard of review, neither section 3 nor section 101(31) passes constitutional muster. Accordingly, because the Board relied upon an unconstitutional statute in denying Appellant's claim for dependency compensation, its August 2011 decision should be reversed and Appellant's

[3] Section 101(3) is not at issue in this case.

claim granted. In that event, this Court need not reach the other issues presented by this case. However, if the Court holds that section 3 and section 101(31) are constitutional under the equal protection component of the Fifth Amendment, it should also hold that neither statute violates the Tenth Amendment or constitutes an unconstitutional bill of attainder.

V. ARGUMENT

A. SECTION 3 OF DOMA AND SECTION 101(31) OF TITLE 38 VIOLATE EQUAL PROTECTION.

The equal protection component of the Fifth Amendment embodies the fundamental requirement that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This requirement, however, "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," *Romer v. Evans*, 517 U.S. 620, 631 (1996), and thus, as a general rule, "legislatures are presumed to have acted within their constitutional powers despite the fact that, in practice, their laws result in some inequality." *McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961). For this reason, in general, "legislation is presumed to be valid and sustained if the classification drawn by the statute is rationally related to a legitimate government interest." *See Cleburne*, 473 U.S. at 440.

Deference to the power of the legislative branch of government, however, is not absolute and, where a classification is based upon a factor that "generally provides no sensible ground for differential treatment," the constitutional guarantee of equal protection demands that it be subjected to a more searching, heightened standard of judicial review. *Cleburne*, 473 U.S. at 440-41; *accord Black v. Secretary of Health and Human Services,* 93 F.3d 781, 787 (Fed. Cir.

1996) (recognizing that heightened standard of review must apply "when fundamental rights are at stake or when the government acts on the basis of a suspect classification"). Under this standard, a law will not survive judicial scrutiny unless, at a minimum, it furthers, and is substantially related to, an important governmental interest. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This more searching review enables courts to ascertain whether the government has employed the classification for a proper purpose and not because of impermissible prejudice or stereotypes. *See, e.g.*, *City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 493 (1989) (plurality opinion); *United States v. Virginia*, 518 U.S. 515, 533 (1996).

1. Section 3 of DOMA and section 101(31) classify on the basis of sexual orientation.

There is no dispute that section 3 of DOMA and the relevant title 38 definition of "spouse" classify on the basis of sexual orientation. *See Massachusetts v. HHS*, slip op. at 7 (among other things, DOMA "prevents same-sex married couples from filing joint federal tax returns . . . prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits" and "leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses").[4]

[4] Appellant argues that section 3 and section 101(31) are also classifications based on gender. Given that these provisions categorize between two different classes of married couples—same sex and opposite sex—they are properly analyzed as classifications based on sexual orientation.

2. Classifications based on sexual orientation should be subject to heightened scrutiny.

A challenge to a law on equal protection grounds must begin with a determination as to the "burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Reeves v. West*, 11 Vet.App. 255, 257 (1998) (quoting *Giancaterino v. Brown,* 7 Vet.App. 555, 557 (1995) (quoting *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974)).

Although the Supreme Court has not specified the appropriate level of scrutiny to be applied to classifications based on sexual orientation,[5] it has established a general framework within which a court is to determine whether a particular group warrants protected status. Specifically, the Supreme Court has

[5] In neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), did the Supreme Court opine on the applicability of heightened scrutiny to sexual orientation. In both cases, the Court invalidated sexual orientation classifications under a more permissive standard of review without having to decide whether heightened scrutiny applied (*Romer* found that the legislation failed rational basis review, 517 U.S. at 634-35; *Lawrence* found the law invalid under the Due Process Clause, 539 U.S. at 574-75).

Nor did the Court decide the question in its one-line per curiam order in *Baker v. Nelson*, 409 U.S. 810 (1972), in which it dismissed an appeal as of right from a state supreme court decision denying marriage status to a same-sex couple. *Id.* at 810. *Baker* did not concern the constitutionality of a federal law, like DOMA section 3 or 38 U.S.C. § 101(31), that distinguishes among couples who are already legally married in their own states. Moreover, neither the Minnesota Supreme Court decision, *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), nor the questions presented in the plaintiffs' jurisdictional statement raised whether classifications based on sexual orientation are subject to heightened scrutiny, *see Baker v. Nelson*, Jurisdictional Statement, No. 71-1027 (Sup. Ct.), at 2; *see also id.* at 13 (repeatedly describing equal protection challenge as based on the "arbitrary" nature of the state law). There is no indication in the Court's order that the Court nevertheless considered, much less resolved, that question.

identified four factors relevant to the inquiry: (1) whether the group in question has suffered a history of discrimination; (2) whether members of the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *Bowen v. Gilliard,* 483 U.S. 587, 602-03 (1987); *Cleburne,* 473 U.S. at 439-41. A careful consideration of these factors shows that classifications based on sexual orientation should be subject to heightened constitutional scrutiny. *See, e.g., Golinski v. Office of Personnel Management,* 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) ("Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.").

i. The Federal Circuit holding in *Woodward* is incorrect and warrants reconsideration in light of *Lawrence v. Texas.*

The Secretary is cognizant that in *Woodward v. United States,* the Federal Circuit held that gays and lesbians were not members of a protected class and upheld, under rational basis review, the policy of the Department of the Navy that required the discharge of those who engaged in homosexual conduct.[6] 871 F.2d, 1068 (Fed. Cir. 1989). However, the Secretary respectfully submits that the court's analysis in *Woodward* is incorrect and warrants reconsideration.

Woodward was predicated on *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court upheld the constitutionality of a Georgia statute that

[6] It was the stated policy of the Navy to separate gays and lesbians and "[m]embers involved in homosexuality" from the Navy. *Woodward,* 871 F.2d at 1069 n.1 (citing Secretary of the Navy Instruction 1900.9A (July 31, 1972)).

criminalized sodomy. Specifically, in concluding that the plaintiff, Woodward, was "not a member of a class to which heightened scrutiny must be afforded," the Federal Circuit reasoned:

> After [*Bowers*] it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula v. Webster* that 'there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.' 822 F.2d 97, 103 (D.C. Cir. 1987).

Woodward, 871 F.2d at 1076. The Supreme Court subsequently overruled *Bowers* in *Lawrence v. Texas,* and did so with the express admonishment that "*Bowers* was not correct when it was decided, and is not correct today." 539 U.S. at 578.

Thus, to the extent the Federal Circuit relied on *Bowers* for its conclusion that sexual-orientation-based classifications are subject only to rational basis review, that reasoning does not survive the Supreme Court's overruling of *Bowers* in *Lawrence*. And to the extent the Federal Circuit reasoned that homosexuality is not an immutable characteristic, but instead behavioral in nature, that reasoning has been called into question by subsequent Supreme Court decisions that "have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (citing, *inter alia*, *Lawrence*, 130 S. Ct. at 575). Because *Bowers* was expressly overruled and no longer withstands scrutiny, as well as for the reasons given below, *Woodward* is incorrect and warrants reconsideration.

ii. Gays and lesbians are members of a suspect or quasi-suspect class.

a. Gays and lesbians have been subjected to a history of discrimination.

It is undeniable that gay and lesbian individuals have suffered a long and significant history of discrimination in this country, and this history has been well recognized by the courts. *See Massachusetts v. HHS*, slip. op. at 18 ("[G]ays and lesbians have long been the subject of discrimination."); *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 573 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination . . . ."); *Ben-Shalom v. March*, 881 F.2d 454, 465-66 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."); *Golinski,* 824 F. Supp.2d at 986 ("There is also no dispute that courts have found that gay men and lesbians have experienced a history of discrimination."). So far as we are aware, no court to consider this question has ever ruled otherwise.

Discrimination against gay and lesbian individuals has a long history in this country, *Bowers*, 478 U.S. at 192, from colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind," *see, e.g.*, Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294–95 & n.1 (enacted Dec. 1, 1642; revised 1750), to state laws that, until very recently, have "demean[ed] the[] existence" of gay and lesbian people "by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578. In addition to the discrimination reflected in DOMA itself, as explained below, the federal

government, state and local governments, and private parties all have contributed to this long history of discrimination.[7]

The federal government for years deemed gays and lesbians unfit for employment, barring them from federal jobs on the basis of their sexual orientation, *see, e.g.*, *Employment of Homosexuals and Other Sex Perverts in Government*, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280 (81st Cong.), Dec. 15, 1950, at 9 (finding that "approximately 1,700 applicants for federal positions were denied employment because they had a record of homosexuality or other sex perversion"); Exec. Order No. 10450, 3 C.F.R. § 936, 938 (1953) (adding "sexual perversion" as a ground for investigation and possible dismissal from federal service"). It was not until 1975 that the Civil Service Commission prohibited discrimination on the basis of sexual orientation in federal civilian hiring. *See* General Accounting Office, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process* (1995) (describing the federal government's restrictions on the employment of gays and lesbians).

Likewise, serving openly in the military service as gays and lesbians was prohibited, first by regulation and then by statute, 10 U.S.C. § 654 (2007), until the recent enactment of the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No.

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

111-321, 124 Stat. 3515 (2010). In other contexts, such as immigration, gay and lesbian noncitizens were categorically barred from entering the United States on grounds that they were "persons of constitutional psychopathic inferiority," "mentally defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc. v. INS,* 541 F. Supp. 569, 571-72 (N.D. Cal. 1982) (quoting the Immigration Act of 1917, Ch. 29, § 3, 39 Stat. 874 (1917)), *aff'd by Hill v. INS,* 714 F.2d 1470 (9th Cir. 1983).

Moreover, like the federal government, state and local governments have long discriminated against gays and lesbians in public employment, with efforts, for example, to purge gay and lesbian employees from government services beginning as early as the 1940s, and outright prohibitions on gay and lesbian "employees of state funded schools and colleges, and private individuals in professions requiring state licenses" by the 1950s. Williams Institute*, Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* ("Williams Report").[8]

This employment discrimination was interrelated with longstanding state law prohibitions on sodomy; the discrimination was frequently justified by the assumption that gays and lesbians had engaged in criminalized and immoral sexual conduct. *See, e.g., Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 138, 147-48 (N.D. Tex. 1981) (holding that police could refuse to hire gays), *aff'd without opinion*, 669 F.2d 732 (5th Cir. 1982); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1342, 1347 (Wash. 1977) (upholding dismissal of openly gay

[8] *Available at* http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/

school teacher who was fired based on local school board policy that allowed removal for "immorality"); *Burton v. Cascade Sch. Dist. Union High Sch., No. 5*, 512 F.2d 850, 851 (9th Cir. 1975) (upholding dismissal of lesbian teacher after adopting resolution stating that she was being terminated "because of her immorality of being a practicing homosexual"); *Bd. of Educ. v. Calderon,* 110 Cal. Rptr. 916, 919 (1973) (holding that state sodomy statute was valid grounds for discrimination against gays as teachers). Some of these discriminatory employment policies continued into the 1990s. *See Shahar v. Bowers,* 114 F.3d 1097, 1105 & n.17, 1107-10 (11th Cir. 1997) (en banc) (upholding Georgia Attorney General's Office's rescission of job offer to plaintiff after she mentioned to co-workers her upcoming wedding to same-sex partner); *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (holding unconstitutional Dallas Police Department policy denying gays and lesbians employment).

Based on similar assumptions regarding the criminal sexual conduct of gays and lesbians, states and localities denied child custody and visitation rights to gay and lesbian parents. *See, e.g., Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J. concurring) (concurring in denial of custody to lesbian mother on grounds that "[h]omosexual conduct is . . . abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's god . . . [and] and inherent evil against which children must be protected."); *Bowen v. Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that the trial court did not err in granting a father custody of his son on the basis that people in town had rumored that the son's mother was involved in a lesbian relationship); *Roe v. Roe*, 324 S.E.2d 691, 692, 694 (Va. 1985) (holding that father, who was in a gay relationship, was "an unfit and improper custodian as a matter of law" because of his "continuous exposure of the child to his immoral and illicit relationship").

State and local laws have also been used to prevent gay and lesbian people from associating freely. For example, liquor licensing laws, both on their face and through discriminatory enforcement, were long used to harass and shut down establishments patronized by gays and lesbians. *See* William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,* 24 Fla. St. U. L. Rev. 703, 762-66 (1997) (describing such efforts in New York, New Jersey, Michigan, California, and Florida); *see also Irvis v. Scott,* 318 F. Supp. 1246, 1249 (M.D. Pa. 1970) (describing such efforts in Pennsylvania). State and local police also relied on laws prohibiting lewdness, vagrancy and disorderly conduct to harass gays and lesbians, often while gay and lesbian individuals congregated in public. *See, e.g., Pryor v. Mun. Court,* 599 P.2d 636, 644 (Cal. 1979) ("Three studies of law enforcement in Los Angeles County indicate that the overwhelming majority of arrests for violation of [the 'lewd or dissolute' conduct statute] involved male homosexuals."); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City*, 1960-1980, 12 Colum. Hum. Rts. L. Rev. 159, 162-64 (1982); FLORIDA STATE LEGISLATIVE INVESTIGATION COMMITTEE (JOHNS COMMITTEE), REPORT: HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA, at 14 (1964) ("Many homosexuals are picked up and prosecuted on vagrancy or similar non-specific charges, fined a moderate amount, and then released."). Similar practices persist to this day. *See, e.g., Calhoun v. Pennington,* No. 09-3286 (N.D. Ga.) (involving September 2009 raid on Atlanta gay bar and police harassment of patrons); *Settlement in gay bar raid,* N.Y. Times (Mar. 23, 2011) (involving injuries sustained by gay bar patron during raid by Fort Worth police officers and the Texas Alcoholic Beverage Commission).

Efforts to combat discrimination against gays and lesbians also have led to significant political backlash, as evidenced by the long history of successful state and local initiatives repealing laws that protected gays and lesbians from

discrimination. *See, e.g.,* Christopher R. Leslie*, The Evolution of Academic Discourse on Sexual Orientation and the Law,* 84 Chi. Kent L. Rev. 345, 359 (2009) (Boulder, Colorado in 1974); Rebecca Mae Salokar, Note, *Gay and Lesbian Parenting in Florida: Family Creation Around the Law*, 4 Fla. Int'l U, L. Rev. 473, 477 (2009) (Dade County, Florida in 1977); *St. Paul Citizens for Human Rights v. City Council of the City of St. Paul,* 289 N.W.2d 402, 404 (Minn. 1979) (St. Paul, Minnesota in 1978); *Gay Rights referendum in Oregon,* Wash. Post (May 11, 1978), at A14 (Wichita, Kansas in 1978); *Why the Tide Is Turning Against Homosexuals*, U.S. News & World Report (June 5, 1978), at 29 (Eugene, Oregon in 1978). The laws at issue in *Romer* and in *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) are just two of a number of more recent examples from the 1990s. Even more recently, in May 2011, the Tennessee legislature enacted a law stripping counties and municipalities of their ability to pass local nondiscrimination ordinances that would prohibit discrimination on the basis of sexual orientation, and repealing the ordinances that had recently been passed by Nashville and other localities.[9] Similar responses have followed states' decisions to recognize same-sex marriages. *See infra* at 19-21.

Finally, private discrimination against gays and lesbians in the employment and other contexts has been pervasive and continues to this day.[10] *See, e.g.,*

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

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

Williams report, ch. 5 at 8-9 (explaining that private companies and organizations independently adopted discriminatory employment policies modeled after the federal government's, and as federal employers shared police and military records on gay and lesbian individuals with private employers, these same persons who were barred from federal employment on account of their sexual orientation were simultaneously blacklisted from employment by many private companies). The pervasiveness of private animus against gays and lesbians is underscored by statistics showing that gays and lesbians continue to be among the most frequent victims of all reported hate crimes. *See* H.R. Rep. No. 11-86, at 9-10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's sexual orientation – gay, lesbian, or bisexual – constituted the third largest category reported – 1,265 incidents, or one-sixth of all reported hate crimes."); Kendall Thomas, *Beyond the Privacy Principle,* 92 Colum. L. Rev. 1431, 1464 (1992).

In sum, gays and lesbians have suffered a long history of discrimination based on prejudice and stereotypes, a history that counsels strongly in favor of the application of heightened scrutiny to classifications based on sexual orientation to ensure that such classifications are the product of legitimate government purpose and not hostility and animus.

b. Gays and lesbians exhibit immutable distinguishing characteristics.

Courts have recognized that "[s]exual orientation and sexual identity are immutable," and that "[h]omosexuality is as deeply ingrained as heterosexuality." *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (quotation omitted). *But see Woodward,* 871 F.3d at 1076 ("Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect

classes . . . exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature.") As explained by the Ninth Circuit over ten years ago, sexual orientation is "fundamental to one's identify," and gay and lesbian individuals "should not be required to abandon" it to gain access to fundamental rights guaranteed to all people. *Hernandez-Montiel*, 225 F.3d at 1093.

This conclusion is consistent with the overwhelming consensus in the scientific community that sexual orientation is an immutable characteristic.[11] *See Golinski,* 824 F. Supp. 2d at 986 ("Further, the consensus in the scientific community is that sexual orientation is an immutable characteristic."). There is also consensus among the established medical community that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being.[12]

Further, sexual orientation need not be a "visible badge" that distinguishes gays and lesbians as a discrete group for the classification to warrant heightened scrutiny. As the Supreme Court has made clear, a classification may be

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[11] For example, see G.M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bi-Sexual Adults, S*7, 176-200 (2010) (noting that in a national survey, 95 percent of the gay men and 83 percent of lesbian women reported that they experienced "no choice at all" or "small amount of choice" about their sexual orientation), *available at* http://www.springerlink.com/content/k186244647272924/fulltext.pdf.

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

"constitutionally suspect" even if it rests on a characteristic that is not readily visible. *Mathews v. Lucas*, 427 U.S. 495, 504, 506 (1976) (illegitimacy, for example). Whether or not gays and lesbians could hide their identities in order to avoid discrimination, they are not required to do so. *See Golinski,* 824 F. Supp. 2d at 987 ("The Court finds that a person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it."); *see also Hernandez-Montiel*, 225 F.3d at 1093. As the Supreme Court has recognized, sexual orientation is a core aspect of identity, and its expression is an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 576-77.

c. Gays and lesbians are minorities with limited political power.

Gays and lesbians are a minority group, *Able v. United States,* 968 F. Supp. 850, 863 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (2d Cir. 1998), and have historically lacked political power. *See Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014-15 (1985) (Brennan & Marshall, J., dissenting from denial of writ of certiorari) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."). To be sure, many of the forms of historical discrimination described herein have subsided or been repealed.

However, even legislative efforts to combat discrimination have frequently led to successful initiatives to scale back protections afforded gay and lesbian individuals. Successful ballot initiatives specifically repealing laws protecting gays and lesbians from discrimination are examples of such responses. *See, e.g., Romer*; 517 U.S. 620; *Equality Foundation v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995). Between 1974 and 1993, at least 21 referendums were held on whether to repeal or retain an existing law or executive order prohibiting sexual

orientation discrimination; in all but 6 of the cases, the majority voted to repeal the law or executive order. Robert Wintemute, Sexual Orientation and Human Rights 56 (1995).

The strong backlash in the 1970s, 1980s, and 1990s to legislative efforts to combat discrimination against gays and lesbians was followed in the 2000s with similar political backlashes against same-sex marriage. In 1996, when DOMA was enacted, only three states had statutes restricting marriage to opposite-sex couples. National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships.*[13] Today, thirty-six states have such statutes and thirty-one have constitutional amendments which explicitly restrict marriage to persons of the opposite sex. *Id.* Indeed, North Carolina became the thirty-first state to amend its constitution to prohibit same-sex marriages on May 8, 2012, during the pendency of this appeal.[14]

California and Iowa are other recent examples of backlash. In California, in November 2008, after the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage, *In re Marriage Cases*, 183 P.3d 384, 419-20 (Cal. 2008), California voters passed Proposition 8 which amended the state constitution to restrict marriage to opposite-sex couples. *See Strauss v. Horton*, 207 P.3d 48, 120 (Cal. 2009). In Iowa, in November 2010, when three state supreme court justices who had been part of a unanimous decision legalizing same-sex marriage were up for reelection, Iowa voters

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[13] *Available at* http://www.ncsl.org/defaultaspx?tabid=16430 (last updated July 2011).

[14] *See* Faith Karimi, *North Carolina's ban on same-sex marriage sparks cheers, jeers*, (June 11, 2012) http://www.cnn.com/2012/05/09/politics/north-carolina-marriage/index.html.

recalled all of them. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench,* N.Y. Times (Nov. 3, 2010). Beyond these state ballot initiatives, the relatively recent passages of anti-sodomy laws singling out same-sex conduct, such as the Texas law invalidated by the Supreme Court in *Lawrence*, indicate that gays and lesbians lack the consistent "ability to attract the [favorable] attention of the lawmakers." *Cleburne,* 473 U.S. at 445.

This is not to say that the political process is closed entirely to gay and lesbian people; however, complete foreclosure from meaningful political participation is not the standard by which the Supreme Court has judged "political powerlessness." When the Supreme Court ruled in 1973 that gender-based classifications were subject to heightened scrutiny, *Frontiero v. Richardson,* 411 U.S. 677 (1973), women had already won major political victories, including a constitutional amendment granting the right to vote and protection against employment discrimination under Title VII. As *Frontiero* makes clear, the "political power" factor does not require a complete absence of political protection, and its application is not intended to change with every political success.[15]

d. Sexual orientation bears no relation to legitimate policy objectives or the ability to perform or contribute to society.

Even where other factors might point toward the application of heightened scrutiny, the Supreme Court has declined to treat as suspect those classifications

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

which generally bear "on ability to perform or contribute to society." *See Cleburne*, 373 U.S. at 441 (holding that mental disability is not a suspect classification); *see also Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-15 (1976) (holding that age is not a suspect classification). Sexual orientation is not such a classification. Just as a person's gender, race, or religion does not bear an inherent relation to a person's ability or capacity to contribute to society, a person's sexual orientation bears no inherent relation to his or her ability to perform or contribute.

As the history described above makes clear, past discrimination against gays and lesbians was not premised on their ability to contribute to society, but on invidious and long-discredited views that gays and lesbians are, for example, sexual deviants or mentally ill. However, as the American Psychiatric Association stated more than 35 years ago, "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the Am. Psychiatric Ass'n (Dec. 15, 1973).[16]

That homosexuality bears no inherent relation to the ability to perform or contribute was elaborated upon by President Obama when he signed the Don't Ask, Don't Tell Repeal Act of 2010:

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

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[16] *See also Minutes of the Annual Meeting of the Counsel of Representatives*, 30 Am. Psychologist 620, 644 (1975) (reflecting a similar American Psychological Association statement).

White House, Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010).[17]

The Supreme Court has also recognized that opposition to homosexuality, though it may reflect deeply held personal religious and moral views, is not a legitimate policy objective. *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quotation omitted); *Romer*, 517 U.S. at 633 (noting that a law cannot broadly disfavor gays and lesbians because of "personal or religious objections to homosexuality") (internal quotation omitted). Whether premised on pernicious stereotypes or simple moral disapproval, laws classifying on the basis of sexual orientation rest on a "factor [that] generally provides no sensible ground for differential treatment," *see Cleburne,* 473 U.S. at 440, and thus such laws merit heightened scrutiny.[18]

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[17] *Available at* http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

[18] That this case involves veterans benefits does not alter this conclusion. Under Supreme Court precedent, courts generally review deferentially equal protection challenges arising in the military context, even when they involve classifications that otherwise would trigger heightened scrutiny. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981). As the Supreme Court stated in *Rostker*, courts recognize a "healthy deference to legislative and executive judgments in the area of military affairs." 453 U.S. at 66. This is because courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8." *Id.*; *see also Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 58 (2006) ("*FAIR*") (military deference grounded in Congress's authority to "raise and support armies"); *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986).

Unlike the statutes involving military judgment that gave rise to prior equal protection challenges, *see*, *e.g.*, *Rostker*, 453 U.S. at 61-62, 67-69 (involving a

3. Section 3 of DOMA and section 101(31) of title 38 fail heightened scrutiny.

Where a legislative classification is subjected to heightened scrutiny, it must, at a minimum, further an important governmental interest and be substantially related to that interest. *See Virginia,* 518 U.S. at 533; *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important government objective."). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-36. Neither section 3 of DOMA nor the relevant title 38 provision survives this analysis.[19]

challenge to draft provisions), neither section 3 of DOMA, section 101(31), nor their respective legislative histories suggest that the treatment of same sex marriages required by these provisions was enacted as an exercise of Congress' authority to regulate military forces or raise and support armies. And unlike other statutes that include explicit references to a military purpose, *see*, *e.g.*, *FAIR*, 547 U.S. at 58 (applying deferential standard of review to military recruitment policies implemented through Spending Clause), section 3 of DOMA and section 101(31) contain no such provisions and their legislative records are devoid of any military-specific rationale for treating same sex marriages differently from other marriages. Nor have the responsible federal agencies identified a military-specific purpose or need for either section 3 of DOMA or section 101(31) in this regard. Accordingly, the traditional deference to the judgments of the political branches regarding military policies does not support applying deferential review to DOMA section 3 or section 101(31) as applied in the context of providing veterans benefits to same sex married couples or sustaining its application on that basis.

[19] The Secretary takes no position on whether gays and lesbians are more appropriately characterized as a suspect class or a quasi-suspect class, and therefore whether the statutory provisions should be subject to intermediate or strict scrutiny. However, because neither section 3 of DOMA nor section 101(31) of title 38 survives even the lower threshold, the issue need not be addressed or resolved in this case.

i. DOMA

The legislative history of section 3 demonstrates that classification based on sexual orientation is not substantially related to any important governmental interest identified by Congress, and that its enactment was motivated in significant part by animus toward gays and lesbians and their intimate family relationships.

The House Committee Report on DOMA identifies four interests that Congress sought to advance by the enactment of section 3: (1) defending traditional notions of morality (and promoting heterosexuality); (2) encouraging responsible procreation and child-rearing; [20] (3) defending and nurturing the institution of traditional heterosexual marriage; and (4) preserving scarce resources. *See* H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905; *see also Golinski*, 824 F. Supp. 2d at 991; *Gill,* 699 F. Supp. 2d at 388. The First Circuit rejected each of these rationales, holding that none "provide[s] adequate support for section 3 of DOMA." *Massachusetts v. HHS*, slip op. at 28. We consider each interest in turn.

a. Defending traditional notions of morality (and promoting heterosexuality)

The House Report claims that DOMA upholds "traditional notions of morality" by condemning homosexuality and by expressing disapproval of gays

[20] The House Report did not identify promoting "responsible procreation and child-rearing" as a separate rationale for DOMA Section 3, but as the basis for its larger interest in defending "the institution of traditional, heterosexual marriage." *See, e.g.,* H.R. Rep. at 12–13 ("At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."); *id.* at 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, *society would have no particular interest* in encouraging citizens to come together in a committed relationship.") (emphasis added).

and lesbians and their committed relationships. *See, e.g.,* H.R. Rep. No. 104-644 at 15-16 (stating that "judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality, a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality); *id.* at 16 (stating that same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral" (quotations omitted)); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality.").

The House Report also explicitly states an interest in extending legal preferences to heterosexual couples in various ways to "promote heterosexuality" and discourage homosexuality. H.R. Rep. No. 104-644 at 15 n.53 ("Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality . . . Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality."). One of the goals of DOMA, therefore, was to provide gays and lesbians with an incentive to abandon, or at least to hide from view, a core aspect of their identities that legislators regarded as immoral and inferior. As stated *supra*, the legislative history of section 3 evidences the very type of animus and stereotype-based thinking that the equal protection of laws shields against. *Cf. Dep't of Agriculture v. Moreno*, 414 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."); *see also Lawrence,* 539 U.S. at 580 (O'Connor, J., concurring) ("[The Supreme Court] ha[s] consistently held . . . that some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests." (quotation and alteration omitted)).

Furthermore, the First Circuit rejected this rationale, holding that there is no "demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts v. HHS*, slip op. at 27.

Even if Congress' opposition to gay and lesbian relationships could be understood as reflecting moral or religious objections, such opposition would likewise be an impermissible basis for discrimination on the basis of sexual orientation. *See Romer,* 517 U.S. at 635 (noting that law cannot broadly disfavor gays and lesbians because of "personal or religious objections to homosexuality"). As the First Circuit noted in *Massachusetts v. HHS*, the Supreme Court in *Lawrence* "ruled that moral disapproval alone cannot justify legislation discrimination on this basis." Slip op. at 27; see also *Lawrence*, 539 U.S. at 577-78 ("[T]he fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."). In short, discouraging homosexuality is not a governmental interest that justifies discrimination against gays and lesbians on the basis of their sexual orientation.

b. Responsible procreation and child rearing

Assuming arguendo that Congress enacted section 3 on the basis of an independent and animus-free interest in promoting responsible procreation and child-rearing, such interest is not materially advanced by section 3 of DOMA and therefore cannot justify the statutory classification created thereby under a heightened-scrutiny analysis. This is so for several reasons.

First, there is no sound basis for concluding that same-sex couples who have committed to marriages recognized by state law are anything other than fully capable of responsible parenting and child-rearing. Indeed, many leading

medical, psychological, and social welfare organizations have issued policies opposing restrictions on gay and lesbian parenting based on their conclusions, supported by numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents, and such studies have been found persuasive by courts that have considered the issue.[21] *See Golinski*, 824 F. Supp. 2d at 991 (recounting evidence and concluding that "[m]ore than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents); *Gill,* 699 F. Supp. 2d at 388 ("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.").

Second, there is no evidence in the legislative record that denying federal benefits to same-sex couples legally married under state law operates in any way

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[21] *See, e.g.*, Am. Academy of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents, 190 Pediatrics 339 (2002), *available at* http://aappolicy.aappublications.org/content/109/2/339.full.pdf+html; Am. Psychological Assoc., *Sexual Orientation, Parents, & Children* (July 2004), *available at* http://www.apa.org/about/governance/council/policy/parenting.aspx; American Academy of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* (Oct. 2008), *available at* http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; Am. Medical Assoc., *AMA Policy Regarding Sexual Orientation*, *available at* http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page; Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, *available at* http://www.cwla.org/programs/culture/glbtqposition.htm.

to encourage responsible child-rearing, whether by opposite-sex or same-sex couples, and it is hard to imagine what such evidence would look like. In enacting DOMA, Congress expressed the view that marriage plays an "irreplaceable role" in child-rearing. H.R. Rep. No. 104-664 at 14. But section 3 does nothing to affect the stability of heterosexual marriages or the child-rearing practices of heterosexual married couples. *See Massachusetts v. HHS*, slip. op. at 26 ("DOMA does not increase benefits to opposite-sex couples – whose marriages may in any event be childless, unstable, or both."). Instead, it denies the children of same-sex couples what Congress sees as the benefits of a stable home life produced by legally recognized marriage, and therefore, on Congress' own account, undermines rather than advances an interest in promoting child welfare.

Finally, even assuming an important governmental interest in providing benefits only to couples who procreate, section 3 is not sufficiently tailored to that interest to survive heightened scrutiny. *See Massachusetts v. HHS*, slip op. at 26 (holding that this rationale is "not merely a matter of poor fit of remedy to perceived problem" but lacks "any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal."). Many state-recognized same-sex marriages involve families with children while many opposite-sex marriages do not. Moreover, the ability to procreate has never been a requirement of marriage or of eligibility for federal marriage benefits, and opposite-sex couples who cannot procreate for reasons related to age or other physical characteristics are permitted to marry and receive federal marriage benefits. *See Golinski*, 824 F. Supp. 2d at 993 ("The ability to procreate cannot and has never been a precondition to marriage."); *see also Lawrence,* 539 U.S. at 605 (Scalia, J., dissenting) (recognizing that "encouragement of procreation" is not a valid justification "for denying the benefits of marriage to homosexual

couples . . . since the sterile and the elderly are allowed to marry"); *cf.* House Report No. 104-664 at 14 (noting "that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children" but describing this objection to section 3 as "not a serious argument").

c. Defending and nurturing the institution of traditional heterosexual marriage

In addition to expressing bare hostility to gays and lesbians and their intimate relationships, the House Report articulated an interest in "defending and nurturing the institution of traditional, heterosexual marriage." H.R. Rep. No. 104-664 at 12. That interest does not support section 3. As an initial matter, reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. *Virginia*, 518 U.S. at 535 (invalidating longstanding tradition of single-sex education at Virginia Military Institute). Even if it were possible to identify a substantive and animus-free interest in protecting "traditional" marriage in the legislative record, there would remain a gap between means and end that would invalidate section 3 under heightened scrutiny.

Specifically, section 3 has no effect on the recognition of same-sex marriages Congress viewed as threatening to "traditional" marriage; it does not purport to defend "traditional, heterosexual marriage" by preventing same-sex marriage or by denying legal recognition to such marriages. Nor does the denial of benefits to same-sex married couples encourage gay and lesbian couples to enter into marriage with a partner of the opposite sex. *See In re Levenson*, 587 F.3d 925, 932 (9th Cir. EDR Panel 2009) (Reinhardt, J.) ("[G]ays 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.").

Instead, section 3 denies benefits to couples who are already legally married in their own states, solely on the basis of their sexual orientation and not their marital status. Accordingly, there is not the "substantial relationship" required under heightened scrutiny between an end of defending "traditional" marriage and the means employed by section 3.

d. Preserving scarce resources

Finally, the House Report identifies preservation of scarce government resources as an interest underlying section 3's denial of government benefits to same-sex couples married under state law. *See* H.R. Rep. No. 104-644 at 18. In fact, many of the rights and obligations affected by section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds, and in other cases, exclusion of state-recognized same-sex marriages actually costs the government money by preserving eligibility for certain federal benefits. More fundamentally, an interest in preserving scarce resources cannot suffice under heightened scrutiny; the government may not single out a suspect class for exclusion from a benefits program solely in the interest of saving money. *See Massachusetts v. HHS*, slip op. at 25 (rejecting the preservation of scarce resources as a rationale for DOMA because "where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction." (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982)); *Romer*, 517 U.S. at 635. *See also Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (holding that state may not advance its "valid interest in preserving the fiscal integrity of its programs" through alienage-based exclusions).

ii. Section 101(31)

Section 101(31), which defines "spouse" for purposes of title 38 as a "person of the opposite sex who is a wife or husband," was added, effective

January 1, 1976, as part of a broad overhaul designed to "amend title 38 of the United States Code to liberalize the provisions relating to the payment of disability and death pension and dependency and indemnity compensation, to increase income limitations, and for other purposes." Pub. L. No. 94-169, 89 Stat. 1013 (1975); *see also* S. Rep. No. 94-568, at 1 (1975), *reprinted in* 1974 U.S.C.C.A.N. 2078. The particular provision was added "to eliminate unnecessary gender references" in the language of title 38. *See* S. Rep. No. 94-568. Beyond that, however, no further purpose for its enactment is apparent from the legislative history. In the absence of any apparent stated purpose, the sexual-orientation-based classification created by section 101(31) cannot survive heightened scrutiny. *See Virginia,* 518 U.S. at 533 (in order to survive heightened scrutiny, government must show that classification furthers an important governmental interest and is substantially related to that interest); *id.* at 535-36 (statute must be justified based on legislature's actual purposes).

Congress not only did not offer any reason in the legislative history of section 101(31) for the inclusion of a sexual-orientation-based classification, but circumstantial evidence confirms that it had no additional actual purpose for doing so. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). First, the legislative history of section 101(31) demonstrates that it was merely a technical amendment intended to make the language of title 38 gender neutral rather than part of an effort to constrict the class of persons eligible for veterans benefits and services.[22] Second, since the

[22] As discussed in further detail *infra*, the 1975 addition of the term "spouse" in section 101(31) followed the enactment of Public Law No. 92-540 in 1972, which removed certain burdens imposed on female veterans seeking spousal benefits for their husbands (and on widowers seeking dependency benefits) that were not imposed on male veterans seeking spousal benefits for their wives (or on female widows seeking dependency benefits).

formal creation of the veterans benefits system, Congress has consistently recognized the need to provide for both veterans and their dependents, and section 101(31) was added consistent with both specific and general amendments to title 38 intended to further this objective. Ultimately, Congress not only failed to explain why section 101(31) excludes persons of the same sex from the definition of "spouse," but in light of both the specific and general context within which it was added, it is clear that no important government interest is served by such exclusion. The sexual orientation-based classification created thereby therefore fails heightened scrutiny and violates the equal protection component of the Fifth Amendment.

a. The legislative history of section 101(31) demonstrates that the statutory definition of the term "spouse" was added only to remove gender references rendered obsolete by the enactment of Public Law No. 92-540.

Public Law No. 85-857 (1958), which laid the foundation to title 38, defined a "widow" as a "woman who was the wife of a veteran at the time of his death, and who lived with him continuously from the date of marriage to the date of his death . . . and who has not remarried." *See* 72 Stat. 1105, 1106 (1958). Widows and wives of veterans were entitled to certain benefits. That same law provided for the grant of certain benefits to dependent parents and dependent husbands. *See* Pub. L. No. 85-857, 72 Stat. 1105, 1109 (1958), *codified as* 38 U.S.C. § 102. To effectuate those grants of benefits, it provided that "the term 'widow' includes the widower of any female veteran if such widower is incapable of self-maintenance and was permanently incapable of self-support due to physical or mental disability at the time of the veteran's death" and that "the term 'wife' includes the husband of any female veteran if such husband is incapable of self-

maintenance and is permanently incapable of self-support due to mental or physical disability." *Id.*

In recognition of the disparate treatment created by the imposition of additional burdens on widowers of female veterans and female veterans seeking dependency benefits for their husbands, in October 1972, Congress enacted Public Law No. 92-540, to provide for "equality of treatment for veterans and their spouses regardless of sex by deleting certain criteria which currently restrict the eligibility of a husband or widower of a female veteran for certain benefits under title 38."[23] S. Rep. No. 92-988, at 26 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4331. Public Law No. 92-540 removed the additional burdens imposed on widowers of female veterans and female veterans claiming dependency benefits for dependent husbands and redefined the terms "wife" and "widow" to include respectively "the husband of any female veteran" and "the widower of any female veteran."[24] Pub. L. No. 92-540, 86 Stat. 1074, 1092 (1972).

The definitions of "spouse" and "surviving spouse" at issue here were added three years later, effective January 1, 1976, by Pub. L. No. 94-169

[23] As reflected in the Senate Report on Public Law No. 92-540, "The American Civil Liberties Union testified before the Subcommittee as to its conclusion that the existing law was unconstitutional as an 'arbitrary distinction based solely on sex.' The Veterans Administration while not concurring in this view does favor the change contemplated by this section on the 'principle that Veterans' Administration benefits are designed to cushion family living standards for the loss of, or lessened income stemming from the veteran's disability, school attendance, or death . . . .'" S. Rep. No. 92-988, at 61 (Jul. 26, 1972).

[24] Less than one year later, in 1973, the Supreme Court ruled in *Frontiero* that the unequal distribution of military benefits based on gender violated the equal protection component of the Fifth Amendment due process clause.

(1975),[25] as part of a broad overhaul of title 38 intended "to liberalize the provisions relating to payment of disability and death pension and dependency and indemnity compensation, to increase income limitations, and for other purposes." S. Rep. No. 94-568, at 1, *reprinted in* 1974 U.S.C.C.A.N. 2078. The specific inclusion in title 38 of the definitions of "spouse" as "a person of the opposite sex who is a wife or husband," and "surviving spouse" as "a person of the opposite sex who is a widow or widower" was intended "to eliminate unnecessary gender references" in the language of title 38 created, at least in part, by the expansion of the definition of "wife" and "widow" in 1972 to include respectively "the husband of any female veteran" and "the widower of any female veteran." *See* Pub. L. No. 92-540. While the inclusion of the terms "spouse" and "surviving spouse" in 1975 had no independent substantive effect on the administration of benefits, this inclusion was consistent with decades of legislation in which Congress expressly expanded the class of beneficiaries eligible for widow and dependency benefits.

Congress not only offered no reason in the legislative history for the sexual orientation-based classification created by section 101(31), but any assumption that it had intended to do so would be at odds with Congress' long history of expanding, not contracting, veterans benefits.[26] *See, e.g.,* War Risk Insurance

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[25] Pub. L. No. 94-169, effectively struck out the terms "widow", "woman", "wife", "his", "him", "man", and "herself" and inserted in lieu thereof the terms "surviving spouse", "person of the opposite sex", "spouse", "the veteran's", "the veteran", "person", and "himself or herself."

[26] For example, due largely to the Great Depression and need for fiscal restraint by the Federal Government, Congress passed the Economy Act of 1933, which repealed all then-existing legislation concerning veterans' benefits and authorized the President to replace them through executive order. Pub. L. No. 73-2, 48 Stat. 614 (1935). The law provided that after 1935, all such executive orders would become law. *See also* Executive Order, Veterans Regulation,

Act,[27] as amended, Pub. L. No. 65-90, Art. III. § 301, 40 Stat. 398, 405 (1917) (providing monthly financial support for situations in which "the deceased leaves a widow or a child, or if he leaves a widowed mother dependent upon him for support"); War Risk Insurance Act Amendment of 1923, Pub. L. No. 67-542, 42 Stat. 1521 (1923) (extending compensation to military, Army Nurse Corp and naval service members and their dependents whose conditions either were caused or exacerbated in the line of duty); World War Veterans Act, 1924, Pub. L. No. 68-628, 43 Stat. 1302 (1925) (clarifying definition of dependent child to include children and grandchildren of veterans who are unmarried and under 18

Number 1 (Mar. 20, 1933). However, Congress thereafter restored benefits to certain veterans and superseded executive orders that were seen as inadequate. *See, e.g.,* Pub. L. No. 74-269, 49 Stat. 614 (1935) (restoring all benefits to Spanish War veterans that had been taken away under the Economy Act); Pub. L. No. 76-179, 53 Stat. 1042 (1939); Pub. L. No. 76-196, 53 Stat. 1067 (1939); Pub. L. No. 76-198, 53 Stat. 1068 (1939) (expanding and restoring benefits).

[27] The Bureau of War Risk Insurance (BWRI) was established in the Treasury Department by the War Risk Insurance Act, Pub. L. No. 63-193, 38 Stat. 711 (1914). The War Risk Insurance Act, which initially covered only businesses involved in maritime commerce, was amended in 1917 to provide benefits to veterans. *See* Pub. L. No. 65-20, 40 Stat. 102 (1917) (extending coverage to merchant marines); Pub. L. No. 65-90, 40 Stat. 398 (1917) (extending coverage to U.S. military and naval service members). The 1917 amendments to the War Risk Insurance Act "introduced the principle of insurance as part of the contract of employment between the government of the United States and millions of its citizens called upon for military and naval service." Thomas B. Love, "*The Social Significance of War Risk Insurance*, Annals Am. Acad. Pol. & Soc. Sci. 57 (1918). BWRI was abolished by the Act of August 9, 1921 and its functions were transferred to the Veterans Bureau (later renamed the U.S. Veterans Bureau) which was established by the same Act. Pub. L. No. 67-47, 42 Stat. 147 (1921). The Veterans Bureau merged with the Bureau of Pensions and National Home for Disabled Volunteer Soldiers and became the Veterans Administration by Executive Order 5398, July 21, 1930, under authority of the Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016 (1929).

years of age and over 18 years of age and permanently incapable of self-support by reason of mental or physical defect); World War Veterans Act, Pub. L. No. 70-585, 45 Stat. 964 (1928) (extending certain benefit payments to non-disabled children of veterans through the age of 21, or long enough to complete education and other training); Liberalization of Laws Pertaining to Service-Connected Benefits, Pub. L. No. 75-304, 50 Stat. 660 (1937) (liberalizing laws pertaining to service-connected death benefits and providing, *inter alia*, that "in no event shall the widow, child, or children otherwise entitled to such compensation under the provisions of [Pub. L. No. 75-304] be denied such compensation if the veteran's death resulted from a disease or disability not service-connected, and at the time of the veteran's death he was receiving or entitled to receive compensation, pension, or retirement pay for 20 per centum disability or more presumptively or directly incurred in or aggravated by service in the World War."); Liberalization with Respect to Widows, Pub. L. No. 75-514, 52 Stat. 352 (1938) (reducing degree of disability set forth in Pub. L. No. 75-304 to 10 percent); War and National Defense Act of 1940, Pub. L. No. 76-866, ch. 893, 54 Stat. 1193 (1940) (providing for apportionment of benefits to dependents not living with the veteran); Pub. L. No. 81-108, 63 Stat. 201 (1949) (codifying extension of benefits to reserve forces veterans and dependents who were disabled or killed while on active or training duty for periods of less than 30 days). Given this history, and the specific legislative history of Public Law No. 94-169, it is apparent that Congress did not intend to exclude same-sex couples from the definition of "spouse" in section 101(31) and that its only actual purpose was to eliminate unnecessary gender references from title 38.

b. Congress' historic recognition of the need to provide for veterans and their dependents and the inconsistency between this objective and the exclusion of same-sex couples from receipt of dependency benefits further evidences that it had no other actual purpose in enacting section 101(31) beyond at least tangentially supporting the expansion of the class of beneficiaries eligible for spousal dependency benefits.

The exclusion of validly married gay and lesbian veterans from receipt of spousal dependency benefits not only undermines what, for close to a century, Congress emphatically recognized as the government's imperative to provide for disabled veterans and their dependents, but is fundamentally at odds with the most elemental and core tenets of the veterans benefits system. The veterans benefits system has long served to provide monetary assistance and services to disabled veterans in order to compensate for the loss of earning capacity and reduction in quality of life due to service-connected disabilities.[28] Since its creation, it has provided benefits and pensions for survivors and dependents as well.[29] *See* War Risk Insurance Act Amendments, Pub. L. No. 65-90, 40 Stat. 398 (1917); *see also* Pub. L. No. 65-90, Art. III. § 301, 40 Stat. 398, 405 (1917) (providing monthly financial support for situations in which "the deceased leaves

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[28] As this Court stated in *Ribaudo v. Nicholson*:

> As President Abraham Lincoln so movingly and profoundly stated: "To care for him who shall have borne the battle and for his widow, and his orphan." This is not only the motto of VA, it is a core value of our Nation.

21 Vet.App. 137, 162-63 (2007).

[29] *See also* S. Rep. No. 80-1552, June 8, 1948, *reprinted in* 1948 U.S.C.C.A.N. 2268, at 2270 (noting that the principle of granting additional compensation for dependents "was embodied in the original War Risk Insurance Act of October 6, 1917").

a widow or a child, or if he leaves a widowed mother dependent upon him for support"); Pub. L. No. 73-484, 48 Stat. 1281 (1934) (providing for the compensation of widows and children of persons who died while receiving monetary benefits for disabilities with military service in World War I or in Russia prior to April 2, 1920). Indeed, Congress enacted section 1115 as part of the initial codification of title 38 to provide "additional compensation for dependents" based upon its recognition that the loss of earning capacity of the veteran impacts financially upon more than just the veteran, but on the veteran's family as well.[30] Pub. L. No. 85-857, § 315, 72 Stat. 1015, 1121 (1958); *see also* S. Rep. No. 95-1054, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3465, 3477 (stating that section 1115 was "intended to defray the costs of supporting the veteran's . . . dependents"); *Sharp v. Shinseki*, 23 Vet.App. 267, 272 (2009) (recognizing same). This consistent history of providing generous dependency compensation further suggests that Congress had no actual purpose when it enacted section 101(31) beyond providing gender-neutral language consistent with prior legislation that eliminated gender-based inequalities associated with the provision of spousal dependency benefits in an effort to promote the "equality of treatment for veterans and their spouses regardless of sex." S. Rep. No. 92-988 at 26, 61; *see also* Pub. L. No. 92-540.

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[30] Since the enactment of the Veterans Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 (1957) (Congress has repeatedly amended title 38 to either liberalize laws regarding the payment of benefits to family members or provide additional compensation in order to account for increased costs of living and inflation. *See, e.g.,* Veterans' Disability Compensation and Survivor's Benefits Act of 1978, Pub. L. No. 95-479, 92 Stat. 1560 (1978) (authorizing dependency allowances to be paid for veterans rated at 30 percent and above and increased rates of DIC for surviving spouses and dependent children of disabled veterans); *see also legislative history of* 38 U.S.C. § 1115 (reflecting increased benefits allowances), *available at* http://www.va.gov/op3/docs/ProgramEvaluations/DisCompProgram/Disability_Comp_Legislative_Histor_Lit_Review.pdf.

Indeed, with the sole exception of the definitional provisions of sections 101(31) and 101(3), since the formal creation of the veterans benefits system, Congress has instructed that VA rely on state laws to determine the validity of a marriage for purposes of entitlement to veterans benefits. 38 U.S.C. § 103(c); *see also* Pub L. No. 85-857, 72 Stat. 1109, 1110 (1958) ("In determining whether or not a woman is or was the wife of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Veterans' Administration according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."). In doing so, Congress has historically not only recognized variations in state law but has affirmatively ignored those variations as they relate to eligibility for veterans benefits based on valid state marriages. *See, e.g., Scott v. Principi*, 3 Vet.App. 352, 354-55 (1992) (concerning validity of common law marriage for purposes of VA benefits under Alabama state law). Indeed, as this Court recognized, the "opposite sex" language contained in these sections impose the "only Federal restriction with regard to VA benefits and marriages for VA purposes," *Burden v. Shinseki*, 25 Vet.App. 178, 185 n.3 (2012), and stands in stark contrast with "the fact that Congress [otherwise] explicitly required marital determinations . . . to be based on State law." *Id.* at 185.

To the extent that it could be argued that Congress might hypothetically have intended the title 38 provision to follow on the military's then-existing prohibition against homosexuality, it is actual purposes and not hypothesized reasons that are relevant to a heightened-scrutiny analysis. *See Virginia*, 518 U.S. at 535-36. Nevertheless, it is hard to imagine how a denial of benefits to *veterans* in same-sex marriages legally recognized under state law could serve to further any particular *military* interest related to the exclusion of gays and lesbians from service especially considering that gay and lesbian veterans who

were honorably discharged have *never been* prohibited from receiving any other VA benefit. *See* 41 FR 12656 (Mar. 26, 1976) (clarifying that former 38 C.F.R. 3.12(d), which indicated that a discharge or release because of homosexual acts was considered dishonorable, did not apply to honorable and general discharges because VA "does not develop the facts and circumstances behind honorable or general discharge[s].") And even if Congress might have intended the language of 101(31) to conform to the military's prohibition on gay and lesbian service members the military has since reversed that policy. *See* Don't Ask Don't Tell Repeal Act of 2010, *supra.* Thus, section 101(31) would no longer further that interest.

In sum, Congress offered no reason behind its use of the "opposite sex" language in section 101(31) and the legislative history and other circumstantial evidence indicate that the actual purpose of section 101(31) was simply to remove unnecessary gender references. Denying benefits to same-sex couples validly married under state law is not "substantially related," *Clark*, 486 U.S. at 461, to this purpose. The Court should therefore hold that the sexual-orientation-based classifications created by section 101(31) do not survive heightened scrutiny.

B. SECTION 3 OF DOMA AND SECTION 101(31) OF TITLE 38 DO NOT VIOLATE THE TENTH AMENDMENT BY INTERFERING WITH STATE SOVEREIGNTY.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Under Supreme Court precedent, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth

Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *Id.,* quoting *United States v. Darby*, 312 U.S. 100, 124 (1941). The Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power." *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *see also United States v. Lewko*, 269 F.3d 64, 66–70 (1st Cir. 2001); *United States v. Meade*, 175 F.3d 215, 224 (1st Cir. 1999).

DOMA section 3 and 38 U.S.C. § 101(31) prescribe the terms and conditions of federally funded programs and federal tax schemes, and thus are within the Spending Clause's general grant of authority to Congress. The Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. It is well-settled that "Congress may attach conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), and "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). However, the obligations imposed by Congress may not violate any independent constitutional provision. *See Dole*, 483 U.S. at 208. Because section 3 of DOMA and section 101(31) of title 38 are inconsistent with the equal protection component of the Fifth Amendment, neither is authorized by the Spending Clause; that is, Congress cannot force a State to violate equal protection, applicable to such state through the Fourteenth Amendment, as a condition of receipt of federal funds. Accordingly, the Court need not reach Appellant's Tenth Amendment argument.

In the event this Court determines that section 3 and section 101(31) do not violate equal protection, it should also hold that section 3 of DOMA and section 101(31) do not violate the Tenth Amendment. Appellant claims that section 3 and section 101(31) violate the Tenth Amendment because they "violate Connecticut's right to define and regulate marriage." App. Br. 28. The premise of appellant's Tenth Amendment claim is flawed. As the First Circuit held in *Massachusetts v. HHS*, DOMA "section 3 governs only federal programs and funding" and therefore, does not violate the Tenth Amendment. slip. op. at 21. The same is true of section 101(31).

While it may be true that domestic relations have traditionally been regulated by the states—states traditionally set the rules regarding who may marry, the dissolution of marriage, division of marital property, child custody, and the payment and amount of alimony or child support, *see, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (describing limited and statutory domestic relations exception to federal court jurisdiction)—neither section 3 of DOMA nor section 101(31) of title 38 in any way displaces any state laws in these areas. The statutes at issue leave entirely unaffected a state's interest in defining family relations under its own law within its own borders. A state, such as Connecticut, can still issue marriage licenses on whatever terms it decides are appropriate and can grant same-sex couples all of the same benefits under state law it grants to opposite-sex couples.

The essence of Appellant's claim is a contention that DOMA section 3 and section 101(31) violate the Tenth Amendment by interfering with an asserted sovereign power of a state to define the meaning of the words "marriage" and "spouse" under *federal* law. While the Constitution reserves various powers to the states, defining the meaning and scope of federal statutes is certainly not among them. A federal statute's meaning and terms are defined by Congress.

See, e.g., *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 223–24 (1st Cir. 2003); *United States v. Ahlers*, 305 F.3d 54, 57–58 (1st Cir. 2002). And as the First Circuit recognized, "Congress surely has an interest in who counts as married" in defining the terms of federal benefits. *Massachusetts v. HHS*, slip op. at 21. Nor does DOMA section 3 or section 101(31) violate the requirement that conditions on federal funds must be related to federal purposes, *see Dole*, 483 U.S. at 207-08, as this "requirement is not implicated where, here, Congress merely defines the terms of the federal benefit." *See Massachusetts v. HHS*, slip op. at 21. Accordingly, neither section 3 of DOMA nor section 101(31) of title 38 impermissibly interferes with state sovereignty, and in the event this Court determines that these provisions do not violate equal protection, it should also hold that the provisions do not violate the Tenth Amendment.

C. NEITHER SECTION 3 OF DOMA NOR SECTION 101(31) OF TITLE 38 IS AN UNCONSTITUTIONAL BILL OF ATTAINDER.

The Constitution provides that "[n]o Bill of Attainder . . . shall be passed." U.S. Const., art. I, § 9, cl. 3. To be considered invalid under the Bill of Attainder Clause, a statute must, at the very least, target an identifiable individual or group of individuals based on name or prior conduct. *See Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86-87 (1961) ("[The] singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons."); *see also Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 468 (1977) (describing bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.").

Neither section 3 of DOMA nor the title 38 provision targets a specific individual or group of individual based on name or past conduct, and therefore neither constitutes an unconstitutional bill of attainder. Both provisions are laws of general applicability. There is no evidence Congress had any knowledge or intent to target an identifiable group of individuals based on prior conduct. Indeed, it would have been impossible for Congress to do so, as, at the time both of these statutes were enacted, no state recognized same-sex marriage. Moreover, the category of individuals impacted by the laws was not identifiable at the time the laws were enacted, and is not identifiable today, as it encompasses a prospective class that is likely to grow over time. To be sure, these statutes discriminate prospectively against an open classification of married people based on their status as gays or lesbians. But discriminating against an open-ended classification of people does not constitute retroactive punishment for prior conduct, as a bill of attainder must.

VI. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should hold that section 3 of DOMA and section 101(31) of title 38, U.S.C., violate the equal protection component of the Fifth Amendment and reverse the Board's August 2011 denial of a claim of entitlement to additional compensation for a dependent spouse.

Respectfully submitted,

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