UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JOANNE PEDERSEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 3:10-cv-01750 (VLB)**
	)	
OFFICE OF PERSONNEL MANAGEMENT, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Plaintiffs are not entitled to judgment as a matter of law. Their claims to summary judgment fail at the threshold: Contrary to their arguments, no form of heightened scrutiny applies to Section 3 of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7. Rather, DOMA is subject only to rational basis review. And, as made clear in the memorandum of law simultaneously filed by the United States House of Representatives' Bipartisan Legal Advisory Group (the "House") in support of its motion to dismiss, DOMA easily passes the rational basis test and does not violate the Equal Protection component of the Fifth Amendment.

Plaintiffs ask this Court to make a radical decision, disregarding clear persuasive precedent and the accumulated wisdom of the ages. In effect, they ask this Court to hold that an overwhelming majority of Congress, a large portion of the American populace, and most people during the last two millennia have supported or adhered to a view of marriage that is patently irrational. This Court should reject this invitation. Any effort to redefine the institution of marriage as something other than the union of one man and one woman is a matter best left in the hands of the elected, politically accountable branches of the federal and state governments and the citizenry through the democratic process. As the Ninth Circuit has noted, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve

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[1] This summary judgment opposition also serves as a rebuttal of the Plaintiffs' Separate Statement of Non-Adjudicative Facts (July 15, 2011) (ECF No. 62).

themselves if there is an alternative." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 681 (9th Cir. 2006). And there is an alternative: Determining the federal rights of same-sex couples "remains a fit topic for [Congress] rather than the courts." *Id.* at 684 n.34 (citing several bills pending in the 109th Congress). In short, the question at issue in this case is not the sort of question that is "unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see infra* pp. 12-21 (discussing significant political power of gays and lesbians). This is a quintessential legislative and democratic question that should be decided by the people, not by the courts. Accordingly, this Court should deny Plaintiffs' motion for summary judgment and instead grant the House's motion to dismiss.

BACKGROUND

Plaintiffs are various residents of Vermont, Connecticut, and New Hampshire. Am. Compl. (Jan. 14, 2011) (ECF No. 33) ¶ 2. Each of the plaintiffs is (or was, in the case of Gerald V. Passaro II whose partner died) considered legally married to a person of the same-sex by state law. *Id.* Each plaintiff or plaintiff's partner has attempted at one time or another to be treated as married for the sake of federal health care benefits, the Family Medical Leave Act (FMLA), federal taxes, Social Security, or state—or—company run pension or retirement benefits that are subject to federal law. *Id.* ¶¶ 4, 6-10. Pursuant to DOMA, the relevant agencies or administrators have denied married status to the plaintiffs. *Id.* ¶¶ 5-10. Plaintiffs brought this action seeking declaratory and injunctive relief and alleging that DOMA, as applied to them, violates the equal protection component

of the Fifth Amendment's due process clause and asking this Court to declare DOMA unconstitutional. *Id.* ¶ 11.

STANDARD OF REVIEW

Summary judgment should be granted where the pleadings, discovery, and any affidavits show there to be "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In ruling on a motion for summary judgment, a court 'is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments.'" *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (quoting *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996)). "[I]t is generally established that 'the trial court is not precluded from entering summary judgment for the non-movant if, in reality, no factual dispute exists and the non-movant is entitled to summary judgment as a matter of law.'" *Ramsey v. Coughlin*, 94 F.3d 71, 73 (2d Cir. 1996) (quoting 6 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 56.12, at 56-165 (2d ed. 1995)). "It is the movant's burden to show that no genuine factual dispute exists and all reasonable inferences must be drawn in the non-movant's favor." *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003) (citations omitted). "[W]here the movant 'fail[s] to fulfill its initial burden' of providing admissible evidence of the material facts entitling it to summary judgment, summary judgment must be denied, 'even if no opposing evidentiary matter is presented,' for the non-movant

is not required to rebut an insufficient showing." *Id.* at 140-41 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970)).

A legal classification such as DOMA is subject to review under the equal protection component of the Fifth Amendment. In *Massachusetts Board of Retirement v. Murgia*, the Supreme Court summarized well-settled doctrine in stating that "equal protection analysis requires strict scrutiny of a legislative classification *only when* the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." 427 U.S. 307, 312 (1976) (emphasis added). Where laws do not implicate a suspect class or fundamental right, such laws "will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58 (1988).[2]

The Supreme Court has made clear that rational review involves a low bar over which legislation must pass. "This standard of review is a paradigm of judicial restraint." *FCC v. Beach Commnc'ns, Inc.*, 508 U.S. 307, 314 (1993). A law reviewed under rational basis "must be upheld against equal protection

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[2] Between strict scrutiny and rational basis review lies intermediate scrutiny. The Supreme Court has recognized two classifications that fall within this category: Classifications based on sex and those based on illegitimacy. A law classifying on the basis of sex will only survive if "it is substantially related to a sufficiently important governmental interest." *City of Cleburne*, 473 U.S. at 441 (internal citation omitted); *see also Clark v. Jeter*, 486 U.S. 456, 461 (2008). A classification based on illegitimacy will only survive where it is "substantially related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 441 (quotation marks omitted). Such heightened or intermediate review "inevitably involves substantive judgments about legislative decisions . . . ." *Id*. at 443.

challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. "On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity." *Id.* at 314; *City of Cleburne*, 473 U.S. at 440 ("legislation is presumed to be valid" under rational review standard). Those who attack a classification that does not implicate a suspect class or a fundamental right "have the burden 'to *negative* every conceivable basis which might support it.'" *Beach Commnc'ns*, 508 U.S. at 315 (emphasis added) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). "Moreover, . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315 (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). This means that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. Courts are also "compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *see also id.* ("A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.") (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

ARGUMENT

I. THE CLASSIFICATION AT ISSUE IN DOMA IS NOT SUBJECT TO ANY FORM OF HEIGHTENED SCRUTINY.

Plaintiffs argue that DOMA is subject to strict scrutiny for two independent reasons: (1) that homosexual orientation constitutes a suspect class; and (2) that DOMA burdens a fundamental right, namely "the integrity of one's family." For the reasons stated *infra*, Plaintiffs' arguments fail.

A. Persuasive Authority Unequivocally Supports the Conclusion That Homosexuals Are Not a Suspect or Quasi-Suspect Class.

Plaintiffs argue that DOMA is subject to either strict or intermediate scrutiny. Pls.' Mem. Summ. J. (July 15, 2011) (ECF No. 63) at 15-17. In other words, Plaintiffs ask this Court to create a new suspect or quasi-suspect classification. This Court should decline that invitation and instead follow every circuit to have addressed the issue and hold that homosexuality does not constitute a suspect or quasi-suspect class.

Sexual orientation *never* has been viewed as a suspect or quasi-suspect classification by the federal courts. First, "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006). On the contrary, it has applied the rational basis test to equal protection challenges of classifications based on sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Second, every federal Court of Appeals that has addressed the question—and nearly every Circuit has—has concluded that homosexuals are not a suspect or quasi-suspect class. No fewer

than *eleven* federal circuits have held that homosexuals are not a suspect class. *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) ("Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read *Romer* as recognizing homosexuals as a suspect class for equal protection purposes."), *cert. denied sub. nom.*, *Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009); *Citizens for Equal Prot.*, 455 F.3d at 866-67; *Lofton v. Sec. of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing cases from the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits) ("[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.")[3]; *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("Our review compels us to agree with the other circuits that have ruled on this issue and to hold that homosexuals do not constitute a suspect or quasi-suspect class."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("[W]e must depart from [the district court's] analysis in which [it] found that homosexuals constitute a suspect class, justifying heightened scrutiny of the regulation."). Indeed, a number of courts have applied rational basis review not only to classifications based on homosexuality in general, but have done so in the specific context of laws defining marriage as between a man and a woman. *See Citizens for Equal Prot.*, 455 F.3d at 866-67; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (holding that *Lawrence* did "not

[3] **The only two Courts of Appeals not to have addressed the question are the Second and Third Circuits.**

eviscerate" Ninth Circuit's holding in *High Tech Gays* that homosexuals do not constitute a suspect or quasi-suspect class); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005) (stating that DOMA "does not make a suspect or quasi-suspect classification"), *vacated in part for lack of standing on the DOMA Section 3 issue*, 447 F.3d at 686, *cert. denied*, 549 U.S. 959 (2006).

Plaintiffs would have this Court disregard this consistent, substantial, and persuasive authority. They invite this Court to take such a radical step while eliding this substantial precedent. This Court should decline this invitation to depart from this substantial body of persuasive authority.

B. <u>Based on the Traditional Criteria Used to Determine Suspect or Quasi-Suspect Classes, Homosexuals Clearly Are Not a Suspect or Quasi-Suspect Class</u>.

Even putting this on-point precedent to one side, Plaintiffs' arguments for applying some form of heightened scrutiny fail under the standards articulated by the Supreme Court for determining whether heightened scrutiny is appropriate.

Plaintiffs argue that the four factors used to determine whether a classification is suspect or quasi-suspect "weigh heavily in favor of subjecting DOMA to heightened scrutiny." Pls.' Mem. Summ. J. at 17. Plaintiffs further assert that this "is a question of first impression in the Second Circuit as well as at the Supreme Court." *Id.* As demonstrated above, as to the Supreme Court, this is simply wrong: The Supreme Court has considered classifications based on sexuality in two cases and applied rational basis scrutiny in each instance. *See supra* p. 6 (citing *Romer* and *Lawrence*).

The traditional criteria for determining whether a class is suspect or quasi-suspect are: (1) whether the class has suffered a history of discrimination; (2) whether the classification at issue relates to one's "ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); (3) whether the class at issue is politically powerless; and (4) whether the class demonstrates immutable characteristics. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class" because, "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; *and* they are not a minority or *politically powerless*") (emphasis added).

1. <u>History of Discrimination</u>.

Plaintiffs first argue that DOMA is subject to strict scrutiny because "[i]t is beyond dispute that 'for centuries there have been powerful voices to condemn homosexual conduct as immoral,' and that 'state-sponsored condemnation' of homosexuality has led to 'discrimination both in the public and in the private spheres.'" Pls.' Mem. Summ. J. at 19 (quoting *Lawrence*, 539 U.S. at 571, 575) (citations omitted). While the House does not dispute that homosexuals have been subject to discrimination, it is important to note that even Plaintiffs' own expert has admitted that, "[a]lthough . . . antigay discrimination is popularly thought to have ancient roots, in fact it is a unique and relatively short-lived product of the twentieth century." George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* 14 (2004). According to Dr.

Chauncey, "all of the [discrimination] was put in place between the 1920s and 1950s, and most [was] dismantled between the 1960s and the 1990s." Owen Keehnen, *The Case for Gay Marriage: Talking with* Why Marriage? *Author George Chauncey* (2004), GLBTQ.com, http://www.glbtq.com/sfeatures/interviewgchauncey.html; *see also id.* ("It's really dangerous—and it hurts us—that we are so unfamiliar with this history because the opponents of gay rights and certainly same-sex marriage like to claim that history is on their side and that discrimination and hostility against gay people is age old."). Plaintiffs' expert agrees with the Supreme Court's observation in *Lawrence v. Texas* that the relatively short history of anti-gay discrimination is a consequence of the fact that homosexuality—as a distinct category or class—was not even recognized in the United States until the late nineteenth century. 539 U.S. at 568-69 (relying on scholarly position that "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century"); Aff. of George Chauncey, Ph.D. (July 15, 2011) (ECF No. 74) ("Chauncey Aff.") ¶¶ 10, 20-21; Dep. of George Chauncey, Ph.D. (July 12, 2011) ("Chauncey Dep.") at 48:24-51:24, attached as Ex. A to Decl. of Conor B. Dugan ("Dugan Decl.").

Moreover, whatever the historical record of discrimination, the most striking factor is how quickly things are changing through the normal democratic processes on issues ranging from same-sex marriage to "Don't Ask Don't Tell" and beyond. *See infra* pp. 12-21. Historical discrimination alone never has been a basis for heightened scrutiny. Courts apply a multi-factor test that focuses on

current reality and cautions courts against unnecessarily taking issues away from the normal democratic process. *See, e.g.*, *City of Cleburne*, 473 U.S. at 440 (stating that strict scrutiny applies where group faces "discrimination [that] is unlikely to be soon rectified by legislative means").

2. Ability to Participate in or Contribute to Society.

Plaintiffs next argue that "there can be no credible dispute about whether sexual orientation bears relation to one's 'ability to perform or contribute to society.'" Pls.' Mem. Summ. J. at 20 (quoting *Frontiero*, 411 U.S. at 686). Yet, according to the Supreme Court in *Frontiero*, "[c]lassifications treated as suspect tend to be *irrelevant* to any *proper legislative goal*." 411 U.S. at 686 (quoting *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982)) (emphasis added).

That is not the case when it comes to defining marriage to cover only the traditional definition. The Congress that enacted DOMA and the President who signed it obviously thought that the classifications drawn by DOMA were relevant and rationally related to several legitimate legislative goals. *See also* House Mem. in Supp. of Mot. to Dismiss (Aug. 15, 2011) at 26-52. If that is the case, then DOMA survives rational basis review. If that were not the case, then DOMA would fail rational basis review, and the application of heightened scrutiny would be superfluous.

Moreover, as with historical considerations, Plaintiffs' question-begging contention that homosexuality is never a relevant or rational basis for classification is hardly the sum total of the heightened scrutiny analysis. The questions whether a classification involves an immutable characteristic and

whether the class is politically powerless are also essential to the heightened scrutiny analysis. *See Lyng*, 477 U.S. at 638; *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992).

3. Political Powerlessness.

Plaintiffs also argue that lesbians and gay men lack political power. Plaintiffs, citing their expert, state that "[g]ay men and lesbians do not possess a meaningful degree of political power, and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests." Pls.' Mem. Summ. J. at 21. Plaintiffs further argue that the "obstacles to political power for gay men and lesbians are manifold." *Id.* This is a difficult claim to maintain in light of recent political, legal, and cultural events. Plaintiffs cannot maintain that they are part of a class that faces "discrimination [that] is unlikely to be soon rectified by legislative means." *City of Cleburne*, 473 U.S. at 440.

Plaintiffs appear oblivious to the irony of maintaining that homosexuals have limited political power in a case in which their position is supported by the United States Department of Justice. In light of the latter's longstanding duty to defend the constitutionality of federal statutes, its decision to decline to defend the constitutionality of DOMA, and instead adopt the very position advocated by Plaintiffs, is particularly telling. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, at 3 (Feb. 23, 2011) (ECF No. 10-2) (stating that he and President Obama "concluded that classifications based on sexual orientation warrant heightened scrutiny"). In fact,

President Obama's decision came after he received a letter from the Human Rights Campaign criticizing his Administration's defense of DOMA. Dep. of Gary Segura, Ph.D. (July 8, 2011) ("Segura Dep."), Ex. 5, attached as Ex. C to Dugan Decl. And the Human Rights Campaign seemed to believe that it had helped persuade the President to change his mind. *See* Press Release, *Victory! Administration Drops DOMA Defense*, Human Rights Campaign, https://secure3.convio.net/hrc/site/Advocacy?cmd=display&page=UserAction&id=1045 (stating that "HRC supporters have written tens of thousands of letters to President Obama" and that it was now "time to thank the president for what he's done").

A spate of recent news stories only confirms the conclusion that homosexuals are far from politically powerless. A recent poll showed that more than two-thirds of Americans would vote for a "well-qualified gay candidate for president if he or she were nominated by their [sic] party."[4] In the last two months alone, the first openly gay male federal judge was confirmed by an overwhelming majority of the Senate[5]; President Obama nominated his fourth openly-gay candidate for a United States District Court judgeship[6]; the Governor

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[4] **Susan Page, *Gay Candidates Gain Acceptance*, USA Today, July 19, 2011, http://www.usatoday.com/news/politics/2011-07-19-gay-candidates-politics_n.htm.**

[5] **Dana Milbank, *In A 'Quiet Moment' Gay Judge Makes History*, Wash. Post, July 18, 2011, http://www.washingtonpost.com/opinions/in-a-quiet-moment-gay-judge-makes-history/2011/07/18/gIQAo7PhMI_story.html (stating that final vote was 80-13 and that "remarkable thing about what happened" vis-à-vis the nomination "was that it was utterly unremarkable").**

[6] **Abby Phillip, *Obama to Nominate Fourth Openly Gay Judicial Candidate, Politico*, July 20, 2011, http://www.politico.com/news/stories/0711/59489.html.**

of California signed legislation requiring California's public school textbooks to include the historical contributions of lesbian, gay, bisexual, and transgendered ("LGBT") Americans[7]; Rhode Island passed a bill instituting civil unions for same-sex couples[8]; the State of New York passed a law legalizing gay marriage over the opposition of the New York Catholic Conference and other groups[9]; President Obama took the final step in repealing the so-called "Don't Ask, Don't Tell" policy[10]; and, finally, President Obama announced his support of a Senate bill to repeal DOMA.[11] Again, this remarkable collection of political victories covers *just the past two months*. Accordingly, gays and lesbians cannot be labeled "politically powerless" without draining that phrase of all meaning.

Gays and lesbians have wielded considerable power in corporate America as well. The Human Rights Campaign publishes a yearly Corporate Equality Index by which it rates American businesses on lesbian, gay, bisexual, and

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[7] **Wyatt Buchanan, *New State Law Requires LGBT History in Textbooks*, S.F. Chron., July 15, 2011, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/07/14/BAL61KAHVQ.DTL.**

[8] **Abby Goodnough, *Rhode Island Lawmakers Approve Civil Unions*, N.Y. Times, June 29, 2011, http://www.nytimes.com/2011/06/30/us/30unions.html.**

[9] **Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. Times, June 25, 2011, http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all.**

[10] **Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. Times, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html; *see also* Reid J. Epstein, *John Kerry Backs Gay Marriage*, Politico, July 22, 2011, http://www.politico.com/news/stories/0711/59643.html; Phil Reese, *O'Malley Backs 2012 Push for Marriage Equality*, Wash. Blade, July 22, 2011, http://www.washingtonblade.com/2011/07/22/omalley-backs-2012-push-for-marriage-equality/.**

[11] **MJ Lee, *Obama Backs Bill To End DOMA*, Politico, July 19, 2011, http://www.politico.com/politico44/perm/0711/all_due_respect_52655160-80d9-4749-a26a-3525888f615a.html.**

transgender equality.[12] The most recent index showed that "an unprecedented 337 major U.S. businesses earned [the] top rating of 100 percent, up from 305" in 2010.[13] Far from being ashamed or abashed about such ratings, companies tout them on their websites.[14] Even nearly five years ago this trend was recognized. In a November 2006 *Fortune* article, Marc Gunther wrote: "Last June the gay rights movement quietly achieved a milestone: For the first time, more than half of *Fortune* 500 companies—263, to be precise—offered health benefits for domestic partners, according to the Human Rights Campaign. Ten years ago only 28 did."[15] There is even a gay chamber of commerce dedicated to certifying businesses as gay owned.[16] As one author describes:

> **Today the Washington-based gay chamber, which has 24,000 members, certifies small businesses as gay-owned so that they can qualify for supplier-diversity programs at big companies. Think about that: Homosexuality, once a career-killing secret, has become enough of a competitive advantage in some circles that certification is needed to deter straight people from passing as gay.[17]**

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[12] **See Corporate Equality Index 2011, http://www.hrc.org/documents/HRC-CEI-2011-Final.pdf.**

[13] ***Id.*, http://www.hrc.org/cei2011/index.html.**

[14] ***See, e.g.*, Perfect Score on HRC Corporate Equality Index - 2008, 2009, 2010, 2011, Bryan Cave, http://www.bryancave.com/2011-national-lgbt-equality-survey-10-04-2010/; Esurance Earns Perfect Score in 2011 Human Rights Campaign Corporate Equality Index, esurance, http://www.esurance.com/news/2010-esurance-esurance-earns-perfect-score-2011-hrc-index-press-release; Dorsey Receives Top Score on HRC's Corporate Equality Index, Dorsey & Whitney LLP, http://www.dorsey.com/hrc_corp_equity_2010/.**

[15] **Marc Gunther, *Queer Inc.: How Corporate America Fell in Love with Gays and Lesbians*, Fortune, Nov. 30, 2006, http://money.cnn.com/magazines/fortune/fortune_archive/2006/12/11/8395465/.**

[16] ***Id.***

[17] ***Id.***

Companies also proudly feature such programs on their websites.[18]

Indeed these victories signal a trend that has been occurring for some time. *See* Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. Rev. 1537, 1537 (June 2010) (stating that "evidence supports" 1999 statement that "it seems likely that the movement for gay identity and gay rights has come further and faster, in terms of change, than any other that has gone before it in this nation") (quotation marks omitted) (quoting Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 13 (1999)). As Professor Yoshino states: "A 'gay tipping point' occurred in the United States in the latter decades of the twentieth century." *Tipping Point* at 1537. This has led to a situation in which gays and lesbians "are increasingly powerful." *Id.* at 1542.

The Gay and Lesbian Victory Fund, a group devoted to electing gays and lesbians to office, stated in its 2008 annual report that "[i]t's hard to dispute the statement that 2008 was a watershed year in American politics."[19] The report details evidence of how 2008 constituted a watershed: The Victory Fund endorsed "80 successful candidates" and "more than 70% of Victory-endorsed

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[18] ***See*, *e.g.*, gleam: Gay, Lesbian, Bisexual, and Transgender Employees at Microsoft, Microsoft Corp., http://www.microsoft.com/about/diversity/en/us/programs/ergen/gleam.aspx; Raytheon Featured in New Book by Bestselling Author, Raytheon, http://www.raytheon.com/newsroom/feature/rtn08_tsandersbk/ (detailing author's "story of how Raytheon came to offer a liberal domestic-partner benefits policy").**

[19] **The Gay & Lesbian Victory Fund and Leadership Institute, 2008 Annual Report at 2, http://www.victoryfund.org/files/victory_annual_08.pdf.**

candidates won their elections in 2008."[20] The Human Rights Campaign also touted the 2008 election results and the money it spent on the campaign:

> **During this historic election cycle, the Human Rights Campaign launched its nationwide $7 million "Year to Win" electoral initiative to mobilize 5 million LGBT and allied voters to help elect fair-minded candidates and defeat discriminatory ballot measures. HRC deployed staff to key election campaigns in 22 states and helped train hundreds of activists in 17 cities in crucial battleground states throughout the nation. In 2008, the LGBT community and the entire social justice movement are poised to make significant gains in the representation of fair-minded candidates throughout all levels of government.[21]**

The Human Rights Campaign noted that it had been "ranked the second most successful" political organization in the entire country by National Journal.[22] In the 2010 election, more than two-thirds of the Victory Fund endorsed candidates won election, accounting for 107 electoral positions.[23] The Victory Fund reports that only four states "have no openly gay elected officials at any level."[24]

Significant sums of money also have been spent by gay and lesbian advocacy groups. Between 1990 and the beginning of the 2012 election cycle, nearly $20 million was spent to lobby for gay and lesbian rights.[25] By way of

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[20] ***Id.***

[21] **Human Rights Campaign Lauds 2008 Election Results (Nov. 4, 2008), http://www.hrc.org/11517.htm.**

[22] ***Id.*** **(citing Reversal of Fortune, Nat'l J., Nov. 11, 2006).**

[23] **The Gay & Lesbian Victory Fund and Leadership Institute, 2010 Annual Report at 5-6, http://www.victoryfund.org/files/victory_annual_10.pdf.**

[24] **Page, *supra* note 4.**

[25] **Gay & Lesbian Rights & Issues: Long-Term Contribution Trends, OpenSecrets.org, http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=j7300 (crediting Center for Responsive Politics).**

contrast, from the 1990 election cycle through the beginning of the 2012 election cycle, pro-life groups have donated less than $11 million to anti-abortion advocacy.[26] Thus, for an allegedly politically powerless group, gays and lesbians have achieved and continue to achieve substantial political success.

Plaintiffs and their experts also attempt to use marriage referenda as evidence of political powerlessness. Pls.' Mem. Summ. J. at 22. This approach would transform the inquiry from a search for "political powerlessness" into a search for a "lack of political omnipotence." Even—perhaps especially—in the debate over marriage, gay-rights groups have proven to be a major political force well-equipped to wage and, very often, to win major policy battles—and who have gained more political ground in less time than just about any other interest group in American political history. According to Gallup polling, between 1996 and 2011 the portion of the United States population that believed that same-sex marriage should be recognized increased from 27% to 53%.[27] In the campaign over Proposition 8, California's traditional-marriage constitutional amendment, pro-homosexual forces were able to outspend proponents of traditional marriage.[28] In the space of only half a decade, this popular and financial support has translated into legislation recognizing same-sex marriage in Vermont, New York,

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[26] **Abortion Policy/Pro-Life: Long-Term Contribution Trends, OpenSecrets.org, http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=Q14 (crediting Center for Responsive Politics).**

[27] **Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay- Marriage.aspx.**

[28] **Michelle Minkoff et al., *Proposition 8: Who Gave in the Gay Marriage Battle?*, L.A. Times, July 13, 2011, http://projects.latimes.com/prop8/.**

New Hampshire, Connecticut, and the District of Columbia,[29] and offering legal rights for same-sex couples substantially equal to those of marriage in Delaware, Hawaii, Illinois, Rhode Island, Colorado, Oregon, California, Washington, and Nevada.[30] When jurisdictions where such rights have been imposed judicially are added, a full 37% of the United States population lives in states that substantively treat same-sex relationships identically to traditional marriages.[31] As a result, no less a political personage than the Vice President of the United States, Joseph Biden, believes that, far from gays being locked out of marriage as a result of political powerlessness, "a national consensus in support of gay marriage" is "an inevitability."[32]

Moreover, case law supports the conclusion that homosexuals are not politically powerless. Courts—long before the most recent and dramatic gains—have rejected the contention that gays and lesbians are politically powerless. For instance, the Ninth Circuit in *High Tech Gays* declared that "homosexuals are not without political power; they have the ability to and do 'attract the attention of

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[29] **Vt. Stat. Ann. tit. 15, §8, *et seq.* (West 2011); N.Y. Dom. Rel. § 10-a (McKinney 2011); N.H. Rev. Stat. Ann. § 457:1-a, *et seq.* (2011); Conn. Gen. Stat. Ann. §§ 46b-20, § 46b–25 ("The registrar shall issue a license to *any* two persons eligible to marry under this chapter.") (emphasis added); D.C. Code § 46-401, *et seq.* (2011).**

[30] **Del. Code Ann. tit. 13 § 212 (2011); Haw. Rev. Stat. § 572C-1 (2011); 750 Ill. Comp. Stat. 75 / 20 (2011); 2011 R.I.H.B. 6103 (July 2, 2011); Colo. Rev. Stat. § 15-22-105 (2011); Or. Rev. Stat. § 106.305 (West 2011); Cal. Fam. Code § 297.5 (West 2011); Wash. Rev. Ann. Code § 26.60.010 (West 2011); Nev. Rev. Stat. Ann. § 122A.010, *et seq.* (2011).**

[31] **Calculated from census data available at U.S. Census 2010, http://2010.census.gov/2010census/data/.**

[32] ***Joe Biden: 'National Consensus' on Gay Marriage Inevitable*, LGBTQ, Nation (Dec. 25, 2010), http://www.lgbtqnation.com/2010/12/joe-biden-national-consensus-on-gay-marriage-inevitable-video/.**

lawmakers.'" 895 F.2d at 574 (quoting *City of Cleburne*, 473 U.S. at 445). The Seventh Circuit more than 20 years ago stated that "[i]n these times homosexuals are proving that they are not without growing political power." *Ben-Shalom*, 881 F.2d at 466. The court held that "[i]t cannot be said 'they have no ability to attract the attention of the lawmakers'" and that the "political approach is open to them." *Id.* (quoting *City of Cleburne*, 473 U.S. at 445); *see also Steffan v. Cheney*, 780 F. Supp. 1, 7-8 (D.D.C. 1991) ("[I]t is still very clear that homosexuals as a class enjoy a good deal of political power in our society, not only with respect to themselves, but also with respect to issues of the day that affect them."), *rev'd on other grounds sub nom*. *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993). As made clear above, the political power of homosexuals only has increased—exponentially—in the past 20 years. Thus, Plaintiffs' argument that gays and lesbians are politically powerless must fail.

As Plaintiffs note, women already had obtained legal protections through the political process when they were recognized as a protected class. Pls.' Mem. Summ. J. at 23 (citing *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008)). But, by contrast, the mentally handicapped and the poor have been held not to be politically powerless. *City of Cleburne*, 473 U.S. at 445; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). And the very significant gains made by homosexual-rights groups both in legislative terms and in popular opinion—and the phenomenal speed at which these victories have come—demonstrate that they have ample ability to attract the favorable attention of lawmakers. In addition, Plaintiffs' attempts to equate the situation of

homosexuals in this regard with that of women elides the fact that homosexuals make up a much smaller portion of the population than do women. *See* Dep. of Letitia Anne Peplau, Ph.D. at 19:2 – 19:4 (July 8, 2011) ("Peplau Dep."), attached as Ex. B to Dugan Decl. (stating that "between 1 and 2 percent of [American] women identified as lesbian, and somewhere between 2 and 3 percent of [American] men identified as gay"). The ability to make real political gains despite relatively small numbers bespeaks a proportionate political power significantly greater than that of protected classes.

Where a group is not lacking in political power, it hardly can claim the "extraordinary protection from the majoritarian political process" provided by heightened scrutiny. *Rodriguez*, 411 U.S. at 28. Political powerlessness and immutability are "traditional indicia of suspectedness." *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974); *see also Lyng*, 477 U.S. at 638 (holding that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class" because, "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; *and* they are not a minority or *politically powerless*") (emphasis added). Homosexuals are not "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process." *Disabled Am. Veterans*, 962 F.2d at 141. Accordingly, DOMA is not subject to strict scrutiny or intermediate scrutiny.

4. Immutability.

Plaintiffs next argue that "courts are particularly suspicious of laws that discriminate based on 'obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group.'" Pls.' Mem. Summ. J. at 24 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)) (alteration by Plaintiffs). They further argue that "there is a widespread scientific consensus, increasingly adopted by courts, that sexual orientation *is* immutable under any reasonable interpretation of that term." *Id.* at 25. Whether a classification is "immutable" for purposes of equal protection jurisprudence is of course a legal conclusion—not a scientific one—and Plaintiffs' selective reading of scientific evidence warrants no deference from this Court. Moreover, Plaintiffs' arguments are both wrong.

Plaintiffs' claims run headlong into the differing definitions of the terms "sexual orientation," "homosexual," "gay," and "lesbian" supplied by Plaintiffs' own experts. *See* Peplau Dep. at 11:19-13:3 (declining to use term homosexuality and defining terms "sexual orientation," "gay," and "lesbian"); Segura Dep. at 14:17-16:15 (defining terms "gay," "lesbian," and "homosexual"); Chauncey Dep. at 12:15-15:15 (acknowledging that some people distinguish "gay" and "homosexual," but stating that he uses them synonymously; defining terms "gay," "lesbian," "homosexuality," and "homosociality"); *see also* Lisa Diamond, *New Paradigms for Research on Heterosexual & Sexual-Minority Development*, 32 J. of Clinical Child & Adolescent Psychol. 492 (2003) ("There is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual."); *Gay Histories*

and Cultures: An Encyclopedia **452 (George E. Haggerty ed., 2000) ("[T]he single word *homosexuality* has come to condense a variety of mutually conflicting ideas about same-sex sexual attraction and an assortment of conceptual models for understanding it . . . . [I]t is less useful to insist on any one definition of *homosexuality* than it is to describe and to account for the conceptual incoherence that now has become inseparable from both the term and the category."). These differing definitions show that these terms are amorphous and do not adequately describe a particular class.**

Moreover, Plaintiffs' argument also conflicts with the admissions by one of their experts that homosexuality cannot be determined at birth, *see* Peplau Dep. at 25:20-23 ("[L]ooking at a newborn, I would not be able to tell you what that child's sexual orientation is going to be."), and that a significant percentage of gays and lesbians believe they exercised some or a great deal of choice in determining their sexuality, *id.* at 36:24-37:24. Plaintiffs' own evidence indicates that more than 12% of self-identified gay men and nearly one out of three lesbians reported that they experienced some or much choice about their sexual orientation. *Id.*, Ex. 4 at 186. This contrasts with actual suspect classes, which involve "immutable characteristic[s]" determinable at birth and "determined *solely* by the *accident* of birth." *Frontiero*, 411 U.S. at 686 (emphasis added) (plurality op.). Moreover, according to multiple studies, a high number of persons who experience sexual attraction to members of the same sex early in their adult lives later cease to experience such attraction. Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among*

***Young Women*, 56 J. of Soc. Issues 301 (2000) ("50% [of respondents] had changed their identity label more than once since first relinquishing their heterosexual identity"); Nigel Dickson et al., *Same Sex Attraction in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1611-12 (2003). Even Plaintiffs' own expert discusses and recognizes the concept of sexual plasticity and fluidity—that "individuals have reported changes in their sexual orientation in midlife." Aff. of Letitia Anne Peplau (July 15, 2011) (ECF No. 73) ("Peplau Aff.") ¶ 23.**

Plaintiffs' claim concerning immutability also fails to account for the courts that have rejected this argument in the past. For instance, the Federal Circuit has held that

> **[h]omosexuality, 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, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature. . . . The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups.**

***Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (citations omitted); *see also High Tech Gays*, 895 F.2d at 573 ("Homosexuality is not an immutable characteristic.").**

*** * ***

A review of the facts and law thus confirms the entirely unsurprising conclusion that the eleven circuits that have applied rational basis to classifications based on homosexuality have gotten the issue correct. Indeed, the one relevant factor in the analysis that is most subject to change over time—

political powerlessness—has only underscored the validity of the precedent. Rational basis review applies here.[33] That rational basis applies shows the extent to which the factual record developed by Plaintiffs is beside the point. *See Beach Commc'ns*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

C. DOMA Does Not Implicate A Fundamental Right.

Grasping at straws, Plaintiffs also argue that DOMA is subject to and fails heightened scrutiny because DOMA "selectively burdens the integrity of those most intimate family relationships and disadvantages them relative to others." Pls.' Mem. Summ. J. at 27. Plaintiffs argue that the "right to maintain family relationships free from undue government restrictions is a long-established and fundamental liberty interest." *Id.* at 28. Plaintiffs cite several Supreme Court cases and one Second Circuit case in support of this proposition. Each of these cases is inapposite.

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[33] As made clear in the House's simultaneously filed memorandum in support of its motion to dismiss, DOMA clearly passes the rational basis test. *See* House Mem. in Supp. of Mot. to Dismiss at 31-52. As explained therein, under that test the government "has no obligation to produce evidence to sustain the rationality of a statutory classification," *Heller*, 509 U.S. at 320, and "a statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis that might support it, whether or not the basis has a foundation in the record." *Id.* at 320-21 (quotation marks, brackets, and citations omitted). Under rational basis review, a court must accept a legislature's generalizations even when there is an imperfect fit between means and ends. *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009) (citing *Heller*, 509 U.S. at 320).

Moreover, while the House does not concede in the least that any form of heightened scrutiny is applicable to DOMA, even under a more searching standard DOMA's classification is constitutional.

First, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the government action at issue limited dwelling places to single families "[b]ut the ordinance contain[ed] an unusual and complicated definitional section that recognize[d] as a 'family' only a few categories of related individuals." *Id.* at 495-96. The petitioner had faced criminal sanction because she lived with her son and grandsons (who were first cousins). The Supreme Court recognized that "the family is not beyond regulation." *Id.* at 499. In the case in front of it the Supreme Court stated that it was dealing with an "intrusive regulation of the family"—a regulation that "intrude[d] on choices concerning family living arrangements." *Id.* Because of this the Court needed to examine the questioned regulation with special care. DOMA, however, intrudes on no family arrangements, prevents no family arrangements, and thus is nothing like the ordinance at issue in *East Cleveland*. There is nothing intrusive in the least about DOMA. It is simply a definitional statute that guides how *federal* law discussing marriage and spouses is to be interpreted. Furthermore, *East Cleveland* did not articulate a nebulous right to "family integrity." Rather, it cited a well-established right of "freedom of personal choice in matters of marriage and family life." *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).[34]

Second, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the unwed father of children sought certiorari because Illinois law considered him presumptively unfit as a parent. It is near impossible to see the relevance of that case to the one

[34] ***LaFleur* involved the question of mandatory maternity leave—a subject that hardly could be further from the instant case.**

before this Court: Certainly DOMA does not declare anyone an unfit parent. Moreover, *Stanley* did not even apply a form of heightened scrutiny.

Third, the case of *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982), also is easily distinguishable. *Rivera* involved the state intruding and breaking up a long-term family arrangement in which a much older half-sister cared for her two half-siblings. It involved affirmative action on the part of the government to break up the family unit. Again, nothing of the sort is at issue here: DOMA does not prohibit anyone from entering into living arrangements of their preference, nor does it break up such arrangements once entered.

Plaintiffs also attempt to leverage *Lawrence* for their benefit, citing that portion of *Lawrence* that states that "[p]ersons in a homosexual relationship may seek autonomy" for "personal decisions relating to marriage, procreation, contraception, . . . family relationships, child rearing, and education." Pls.' Mem. Summ. J. at 28 (citing 539 U.S. at 574). Unfortunately for Plaintiffs, even if the right recognized in *Lawrence* were to be read as expansively as Plaintiffs suggest, the *Lawrence* Court pointedly declined to apply heightened scrutiny to invasions of this right. Additionally, even on Plaintiffs' expansive reading of *Lawrence* as creating a right to autonomy in homosexual relationships, it is unclear how DOMA implicates this right. DOMA neither prevents the formation of same-sex marriages where they are allowed nor breaks them apart once entered, nor does it limit a person's autonomy in any way. DOMA simply defines "marriage" for the purpose of assigning federal benefits and burdens; it is not the sort of regulation at issue in a case like *Lawrence*—a criminal sanction for

homosexual sodomy. Thus, Plaintiffs' argument fails. Even if there were a fundamental right to family integrity—which is not clear from the cases Plaintiffs cite, which are totally inapposite to the circumstances here—that right is not implicated by DOMA.

II. PLAINTIFFS' ADDITIONAL EQUAL PROTECTION ARGUMENTS ALSO FAIL.

In addition to the above arguments, Plaintiffs also make several other attacks upon DOMA throughout the course of their memorandum of law in support of summary judgment. None of those arguments can support a grant of summary judgment.

A. The Federal Government Has Involved Itself in Marriage Law in Circumstances of Deviation from the Traditional Definition.

Plaintiffs argue that "any claims that the federal government has an interest in a federal definition of marriage . . . share a common characteristic: encroachment by the *federal* government into an area traditionally reserved entirely to the states." Pls.' Mem. Summ. J. at 32 (emphasis in original). This observation, even if true, would be irrelevant: Novelty does not amount to irrationality. But in all events, this contention is wrong. While it is true that regulating the details of traditional marriage historically has been left to the states, it also is true that the federal government has been involved with and injected itself into marriage law when states have deviated from the traditional definition. Thus, for instance, the United States Congress banned polygamy in the United States territories when faced with widespread plural marriage in the Utah Territory. Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (codified as amended at U.S. Rev. Stat. § 5352) (repealed prior to codification in

the U.S.C.); *see also Reynolds v. United States*, 98 U.S. 145, 165-67 (1878). After the Civil War, during Reconstruction, the Freedmen's Bureau promoted and supported the marriages of former slaves. Aff. of Nancy F. Cott, Ph.D. (July 15, 2011) (ECF No. 75) ("Cott Aff.") ¶ 77. The federal government also worked to support the marriages of American Indians. Dep. of Nancy Cott, Ph.D. (July 6, 2011) ("Cott Dep.") at 17:20-18:1, attached as Ex. D to Dugan Decl. (stating that "in dealing . . . with native Americans through the Bureau of Indian Affairs, the form of marriage observed by these populations was of concern to that federal agency").

Furthermore, as Plaintiffs' own experts admit, the implicit understanding of marriage through the nineteenth century until at least the 1970s was that marriage was between a man and a woman. Chauncey Dep. at 84:20-23; Cott Dep. at 28:20-29:8. Thus, faced with the possibility of a few state courts tinkering with the centuries-old definition of marriage, Congress' effort to maintain the traditional definition was consistent with its historical role and hardly lacked precedent. Moreover, with respect to Section 3 in particular, Congress' decision to preserve the same definition of marriage—namely, the traditional one—that prevailed at the time Congress passed innumerable statutes granting benefits and imposing burdens on marriages and spouses is a classic use of federal power to ration federal benefits and burdens.

Thus, Plaintiffs' claim that "DOMA uniquely breaks from our federalist tradition with respect to family law by *rewriting* wholesale the U.S. Code, the Code of Federal Regulations, and various other rules to disadvantage married

same-sex couples" is patently false. Pls.' Mem. Summ. J. at 34 (emphasis added). Every federal law involving marriage, spouses, or husbands and wives was written against the unequivocal backdrop of the centuries-old, traditional understanding of marriage. It is not the federal government that has done the rewriting. Rather, DOMA was simply a preservative measure to ensure that the will of previous Congresses was respected. Nor is it true that "DOMA eviscerates the historic power of the States to say who is 'married.'" *Id.* at 37. States maintain their power to define marital relationships. But the federal government certainly was entitled to preserve the definition of marriage that, for federal law purposes, had governed all American law for centuries.

B. Plaintiffs Misstate the Science on Same-Sex Parenting.

Plaintiffs spend much of their argument attacking Congress' stated justifications for DOMA. Pls.' Mem. Summ. J. at 41-58. In particular, Plaintiffs argue that "Congress's purported interest in encouraging 'responsible procreation and child rearing' . . . does not withstand any level of review." *Id.* at 41. In support of this contention, Plaintiffs assert that there is an "overwhelming consensus '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.'" *Id.* at 41 (quoting *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 388-89 (D. Mass. 2010)).

There are two fundamental problems with this argument. First, the universe of rational bases that support DOMA is hardly limited to concerns about child rearing. Second, as one would expect on such a divisive issue, Plaintiffs'

claim of a clear expert consensus is overstated. Indeed, the evidence relied upon by Plaintiffs' own expert demonstrates that studies comparing gay or lesbian parents to heterosexual parents have serious flaws. Dep. of Michael Lamb, Ph.D. (June 24, 2011) ("Lamb Dep."), Ex. 6 at 327, attached as Ex. E to Dugan Decl. ("Studies of children raised by same-sex parents have almost *exclusively focused* on families headed by lesbian mothers rather than gay fathers.") (emphasis added); *id.*, Ex. 8 at 526 ("We still have *relatively few studies* of adolescent offspring of lesbian or gay parents, however, and some have advised caution when generalizing the results of research conducted with young children to adolescents.") (emphasis added); *id.*, Ex. 9 at 254 ("Future research on gay and lesbian couples needs to address several key issues. One is sampling. Because most studies have used convenience samples of mostly white and well-educated partners, the extent to which findings generalize to the larger population of gay and lesbian couples is *unknown*. . . . Most studies on gay and lesbian couples have used self-report surveys. Future work could address some of the *biases* associated with self-report data . . . .") (emphasis added). Numerous studies have pointed to methodological flaws in those studies comparing heterosexual and homosexual parents. *See Lofton*, 358 F.3d at 825 nn.24-25 (listing studies demonstrating serious methodological problems in gay parenting studies); Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 26-27 (2004) (stating that studies of same-sex parenting are flawed in large part because "the studies [of same-sex parents] have not used large and carefully matched comparison groups of parents and children in intact heterosexual families"); *id.*

at 27 (stating that "research that would provide relevant evidence" of similarities or differences between same-sex and opposite-sex parents "has not been done, and, because it would be expensive and difficult, is not likely soon to be done"); *see also* Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate (Mar. 12, 2004), http://www.slate.com/id/2097048/ (stating that both camps in gay marriage debate "have converged lately on a very basic point: The existing science is methodologically flawed and ideologically skewed"). The Eleventh Circuit explicitly recognized the limitations of gay parenting research in *Lofton*, stating that

> **[o]penly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults. Scientific attempts to study homosexual parenting in general are still in their nascent stages and so far have yielded inconclusive and conflicting results. Thus, it is hardly surprising that the question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree.**

358 F.3d at 826; *see generally* George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting*, ___ Ave Maria L. Rev. ___ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184.

C. DOMA Was Supported by a Concern About Scarce Federal Resources.

Plaintiffs argue that DOMA is not "supported by any interest in 'preserving scarce resources.'" Pls.' Mem. Summ. J. at 47 (quoting H. Rep. at 18). Contrary to Plaintiffs' argument, all that the Congressional Budget Office ("CBO") did in 2004 was give an *estimate* as to what would occur if same-sex marriage were legalized in *every* state and recognized by the federal government. In short, the

CBO simply opined that treating same-sex couples as married under federal law would result in so many becoming ineligible for federal means-tested benefits (after the incomes of their same-sex partners were included) that it would actually result in a net benefit to the Treasury, even after consideration of the resultant tax revenue decrease. Douglas Holtz-Eakin, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf. This report is a little more than nine pages in length, lacks a high degree of detailed analysis, and, of course, did not exist in 1996. In any event, its estimate—and that is all it claims to be—that being married would actually constitute a net fiscal *detriment* to same-sex couples as a class is implausible enough that Congress rationally could have chosen to reject it even if it had existed in 1996.

D. DOMA Is Not Based on Animus.

Plaintiffs assert that, in the "final analysis, DOMA makes sense only as an attempt to express disapproval of gay people and same-sex couples." Pls.' Mem. Summ. J. at 49. This argument fails for numerous reasons. First, as explained more fully in The House's memorandum of law in support of its motion to dismiss, Congress had numerous rational bases for enacting DOMA. But, perhaps more importantly, for this Court to accept Plaintiffs' contention requires the Court to hold that the 427 members of Congress who voted for DOMA (including then-Senator Biden), President Clinton who signed it into law, and the vast masses of humanity who have supported the centuries-old definition of

marriage did so with nothing more than "a bare congressional desire to harm a politically unpopular group." *USDA v. Moreno*, 413 U.S. 528, 534 (1973).

Plaintiffs make an elementary philosophical error contending that support of a centuries-old understanding of marriage must include a desire to harm those who do not adhere to that definition. As a matter of plain logic, this is not true. The historical definition of marriage by no means singles out homosexual relationships: Rather, it identifies one type of relationship (traditional marriage) as especially important and excludes *every* other kind of relationship from the definition of "marriage." A person can respect, honor, and affirm homosexuals while still believing that this traditional definition that stretches back for millennia ought not be easily discarded. In short, DOMA is not about animus against homosexual persons as a class. Rather, it is about a simple reaffirmation of a centuries-old tradition that is supported by multiple rational grounds.[35]

III. THOSE PLAINTIFFS WHO CLAIM AN INJURY BECAUSE THEY COULD NOT FILE THEIR TAXES JOINTLY DO NOT HAVE STANDING.

Those plaintiffs—Geraldine Artis, Suzanne Artis, Bradley Kleinerman, and James Flint Gehre—who claim that DOMA prohibits them from filing their taxes under the classification "married, filing jointly" lack standing in this case. The statute that governs joint filing of married persons, 26 U.S.C. § 6013, does not on

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[35] To the extent that this opposition to summary judgment does not address certain arguments made by Plaintiffs concerning rational basis—*e.g.*, that DOMA cannot be justified as preserving tradition, that DOMA cannot be justified as continuing the historic limitation of federal marital benefits to opposite-sex couples, and that DOMA cannot be justified as promoting consistency—these points are made in the House's memorandum of law in support of its motion to dismiss, are incorporated by reference, and are not duplicated here for the sake of judicial economy.

its own extend to same-sex couples: "A husband and wife may make a single return jointly of income taxes . . . ." Therefore, those plaintiffs who attack DOMA's effect on that statute lack standing because the joint filing statute itself offers an independent ground to deny them joint, married filing status.

Plaintiffs predicate their constitutional attack on DOMA on their allegation that, in the absence of DOMA, the words "marriage" and "spouse" as they appear in the applicable federal statutes would include same-sex relationships recognized as marriages under state law. The Artises, Kleinerman, and Gehre do not assert a claim that the joint-filing statute itself is constitutionally invalid to the extent it does not recognize same-sex marriages. Thus, the ability of these four plaintiffs to obtain any tangible relief from this proceeding depends entirely on whether the joint filing statute would recognize same-sex marriages if DOMA were taken off the books.

The jurisdictional requirement of standing contains three elements: The plaintiff (1) must have suffered an injury in fact that (2) was caused by the conduct complained of and (3) is likely to be redressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court clearly has indicated that a plaintiff lacks standing to launch a constitutional challenge against one statute if, even after a hypothetical ruling striking down the challenged statute, another unchallenged statute would still visit an identical injury on the plaintiff. The reason is straightforward: In such a situation the plaintiff's injury would not be redressed by the relief she seeks.

Thus, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court considered, among many other things, a First-Amendment challenge to Section 307 of the Bipartisan Campaign Finance Reform Act ("BCRA"), which specified limits on the amount of certain campaign contributions. The plaintiffs claimed that Section 307's exemptions for the institutional press infringed their First Amendment rights, but the Court held that they lacked standing to bring this claim because, even before BCRA's enactment, the same exemptions had been contained in the Federal Election Campaign Act ("FECA"), which BCRA did not repeal:

> **[Section] 307 merely increased and indexed for inflation certain FECA contribution limits. . . . [I]f the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged. A ruling in the Paul plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing.**

***Id.* at 229; *see also Renne v. Geary*, 501 U.S. 312, 319 (1991) (noting, in First-Amendment challenge to local government's removal of party endorsements from materials submitted by political candidates for distribution by county, that there was "reason to doubt . . . that the injury alleged by these voters can be redressed by a declaration of [the ordinance's] invalidity or an injunction against its enforcement" because a separate and unchallenged state statute likely also required the redaction); *Transp. Workers of Am., AFL-CIO v. TSA*, 492 F.3d 471, 475-76 (D.C. Cir. 2007); *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006); *Galindo-Del Valle v. Att'y Gen.*, 213 F.3d 594, 598 (11th Cir. 2000), *superseded by statute on other grounds as stated in Balogrun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1359 (11th Cir. 2005).**

Therefore, the standing of the Artises, Kleinerman, and Gehre in this case depends entirely on the antecedent legal question of whether, if DOMA were struck down, they would qualify as "spouses" and their relationships as "marriages" within the meaning of the federal statute governing joint filing of taxes. With regard to 26 U.S.C. § 6013, the answer is unequivocally no. Subsection (a) of that statute provides that a "*husband* and *wife* may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided" in other provisions of Section 6013. (Emphasis added). By the plain text of Section 6013, it is clear that same-sex couples are not entitled to joint filing status. Despite the verbal gymnastics that often occur in this area of the law, it still remains the case that a "husband and wife" are made up of one man and one woman. Thus, even if DOMA were not on the books, the Artises, Kleinerman, and Gehre, who allege that they were injured by being unable to file jointly, have failed to challenge an independent basis upon which their claims must be denied. Accordingly, these plaintiffs must be dismissed from the case for lack of standing.

IV. PORTIONS OF PLAINTIFFS' EXPERT EVIDENCE OFFERED THROUGH AFFIDAVITS SHOULD BE DISREGARDED.

Portions of Plaintiffs' expert evidence offered through affidavits should be disregarded by the Court as they include conclusory assertions, unsupported by any identification of the facts (if any) upon which they are based. As this Court has recognized, "expert affidavits that fail to demonstrate their underlying reasoning are not useful to summary judgment analysis." *McClain v. Pfizer, Inc.*, 3:06-cv-01795 (VLB), 2010 WL 746782, at *2 (D. Conn. Feb. 26, 2010) (citing

Iacobelli Constr'n, Inc. v. Cnty. of Monroe, 32 F.3d 19, 25 (2d Cir. 1994); _Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi._, 877 F.2d 1333, 1338-39 (7th Cir. 1989)).[36] The reason is simple: "Possbility and speculation . . . do not suffice on a motion for summary judgment, even if voiced by an expert." _O'Neill v. JC Penney Life Ins. Co._, No. CV-97-7467 (CPS), 1998 WL 661513, at *6 (E.D.N.Y. Aug. 6, 1998). Even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method." _Clark v. Takata Corp._, 192 F.3d 750, 759 n.5 (7th Cir. 1999). This is particularly true where, as is self-evidently the case here, experts have "arrived at [] legal conclusion[s] in the guise of scientific expert opinion." _New York v. Solvent Chem. Co._, 225 F. Supp. 2d 270, 286 (W.D.N.Y. 2002).

"Accordingly, this Court will disregard excerpts of an expert's affidavit, where the affiant clearly fails to demonstrate the inferential process and factual basis underlying the affiant's conclusions, therefore, making the opinion unreliable or unhelpful." _McClain_, 2010 WL 746782 at *2. In _McClain_, this Court struck the assertion of a genetics expert that "there [was] an inexplicable lack of

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[36] Federal Rule of Civil Procedure 56(e) formerly included an express requirement that expert statements submitted in support of a summary judgment motion "set forth specific facts" that reinforce the conclusions offered by those experts. _See Iacobelli_, 32 F.3d at 25. Although these precise words were removed from Rule 56 in the most recent revision, there is no reason to think that the caselaw requiring experts to explain the bases for their conclusions is not still valid. Rule 56 continues to require that expert affidavits or declarations "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." _See_ Fed. R. Civ. P. 56(c)(4). The rationale of the authorities cited—that conclusory expert assertions are "unreliable or unhelpful," _McClain_, 2010 WL 746782 at *3—is based more generally on these criteria of personal knowledge, admissibility, and competency.

internationally recognized procedures for the containment of recombinant DNA molecules which resulted in [plaintiff's] exposure to a genetic [sic] engineered virus" because this statement "fail[ed] to explain [the expert's] underlying reasoning and the inferential process underlying his conclusion." *Id.* at 3; *see also id.* (striking additional, similar statement). Several assertions offered by Plaintiffs' experts are at least as conclusory as this one.

For example, Dr. Peplau asserts in her affidavit that "[b]y denying federal recognition to married same-sex couples, DOMA both reflects and perpetuates stigma against lesbians, gay men, and same-sex couples." Peplau Aff. ¶ 41. This assertion is made without any demonstration of "the inferential process and factual basis underlying" it. *McClain*, 2010 WL 746782 at *3. Indeed, in her deposition, Dr. Peplau admitted that she personally had not studied DOMA's allegedly stigmatizing effect and that she knew of no studies that had examined whether DOMA affects attitudes towards gays and lesbians. Peplau Dep. at 54:14-55:2. Peplau's affidavit has several other instances of unsupported contentions. For instance, she writes that the estate tax, which is applicable to persons who are not married for the purposes of federal law, "not only imposes an additional economic burden, but also *stigmatizes* the relationship . . . ." Peplau Aff. ¶ 35 (emphasis added). Peplau does not demonstrate her reasoning or the facts upon which she relied in coming to this conclusion. *See also id.* ¶ 24 (stating that gays and lesbians have entered into "ostensibly 'heterosexual' marriages for diverse reasons" and concluding that it is "psychologically harmful" for lesbians and gays to "deny a core part of their identity by ignoring

their" same-sex attraction, but giving no factual or inferential background as to how she reached this conclusion).

Dr. Cott's affidavit includes similarly conclusory statements. She writes:

> **The notion that the main purpose of marriage is to provide an ideal or optimal context for raising children was never the prime mover in states' structuring of the marriage institution in the United States, and it cannot be isolated as the main reason for the state's interest in marriage today.**

Aff. of Nancy F. Cott, Ph.D. (July 15, 2011) (ECF No. 75) ("Cott Aff.") ¶ 21. She gives no background about the inferences and facts that led her to this loaded and controversial statement. Elsewhere she merely asserts that the "federal government has accepted the states' differing definitions of marriage for purposes of federal law." Cott Aff. ¶ 24. Later, when writing about failed efforts to establish uniform federal marriage and divorce laws, she contends that the reason such measures did not pass was because "[f]ew members of Congress were willing to supersede their own states' power over marriage and divorce." *Id.* ¶ 30. Cott fails to give any sense of context or to explain what drives her conclusion. The issue she raises is one of some interest, but she does nothing to back up her contention that Members of Congress voted against federal marriage laws because of concerns about their home states' power. *See also id.* ¶ 73 (asserting that "marriage has been transformed from an institution rooted in gender inequality . . . to one in which the contracting parties decide on appropriate behavior").

Dr. Lamb's affidavit raises similar concerns. For instance, he baldly asserts:

> **It is beyond scientific dispute that the factors that best account for the adjustment of children and adolescents are the quality of the youths' relationships with their parents, the quality of the relationship between the parents or significant adults in youths' lives, and the availability of economic and socio-economic resources.**

Aff. of Michael Lamb, Ph.D. (July 15, 2011) (ECF No. 71) ("Lamb Aff.") ¶ 13. Dr. Lamb points to no facts to support this assertion. He does not tell the Court or the House the inferential process that led to this assertion. Dr. Lamb writes: "There also is no empirical support for the notion that the presences of both male and female role models in the home enhances the adjustment of children and adolescents. Society is replete with role models from whom children and adolescents can learn about socially prescribed male and female roles." Lamb Aff. ¶ 27. This contention is short on facts, but long on confidence. Despite being counterintuitive on its face, Dr. Lamb gives no factual or inferential background on this assertion. Finally, Dr. Lamb asserts that "it is in the best interests" of the children of gays and lesbians "for their parents to have equal access to the federal protections and benefits afforded through marriage." *Id.* ¶ 41. Besides being a legal conclusion, Lamb gives no account of how he reaches this contention. *See also id.* ("DOMA may convey to children of married same-sex couples that their parents' relationships are less valid or legitimate than the marriages of heterosexual couples.").

The affidavits of Dr. Segura and Dr. Chauncey suffer from the same infirmities. For instance, Dr. Segura states that "many gay and lesbian activists' [sic] fear that the reactive post-initiative policies will be worse than the status quo, thereby forcing them to consider whether not seeking legislative policy

change in the first instance is actually in the best interests of the group." Aff. of Gary Segura, Ph.D. (July 15, 2011) (ECF No. 72) ("Segura Aff.") ¶ 19. Professor Segura gives no factual context for his assertion. He does not explain whether he relied upon anecdotal evidence, rigorous scientific studies, or his own suppositions of how gay and lesbian activists might act in reaching this conclusion. Later, he simply asserts with no factual backing that the "initiative process has now been used specifically against gay men and lesbians more than against any other social group." Segura Aff. ¶ 43; *see also id.* ¶ 50 (simply asserting that AIDS epidemic diverted "resources that could otherwise [have] be[en] used to fight discrimination"); *id.* ¶ 58 (asserting without any backing that "the number of gays and lesbians perceived by the general public . . . is artificially low").

On the whole, while Dr. Chauncey's affidavit is less conclusory, he still wanders into unsupported territory. He writes that "most gay men and lesbians responded to the escalation in policing after the Second World War by keeping their homosexuality carefully hidden from non-gay people." Chauncey Aff. ¶ 57, yet does not explain the basis, if any, for this conclusion. *See also id.* ¶ 68 (asserting that Florida gay adoption ban meant that "[t]housands of children who might otherwise have had loving parents were thus denied the stability of family life"); *id.* ¶ 95 (asserting that "threat of violence continues to lead many gay people to hide their identities").

This Court should disregard these and other conclusory statements in Plaintiffs' expert affidavits. Portions of these affidavits simply "are not useful to summary judgment analysis." *McClain*, 2010 WL 746782, at *2.

CONCLUSION

For all of the foregoing reasons, the House respectfully requests that Plaintiffs' motion for summary judgment be denied.

Respectfully submitted,

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August 15, 2011

CERTIFICATE OF SERVICE

I certify that on August 15, 2011, I served one copy of the Memorandum of Law in Support of Intervenor-Defendant's Opposition to Plaintiffs' Motion for Summary Judgment by CM/ECF and by electronic mail (.pdf format) on the following:

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