UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

JOANNE PEDERSEN & ANN MEITZEN,	)	
GERALD V. PASSARO II,	)	
LYNDA DEFORGE & RAQUEL ARDIN,	)	
JANET GELLER & JOANNE MARQUIS,	)	
SUZANNE & GERALDINE ARTIS,	)	
BRADLEY KLEINERMAN & JAMES GEHRE, and	)	
DAMON SAVOY & JOHN WEISS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**CIVIL ACTION**
OFFICE OF PERSONNEL MANAGEMENT,	)	**No. 3:10 CV 1750 (VLB)**
TIMOTHY F. GEITHNER, in his official capacity	)	
as the Secretary of the Treasury, and	)	
HILDA L. SOLIS, in her official capacity as the	)	
Secretary of Labor,	)	
MICHAEL J. ASTRUE, in his official capacity	)	
as the Commissioner of the Social Security	)	
Administration,	)	
UNITED STATES POSTAL SERVICE,	)	
JOHN E. POTTER, in his official capacity as	)	
The Postmaster General of the United States of	)	
America,	)	
DOUGLAS H. SHULMAN, in his official	)	
capacity as the Commissioner of Internal	)	
Revenue,	)	
ERIC H. HOLDER, JR., in his official capacity	)	
as the United States Attorney General,	)	
JOHN WALSH, in his official capacity as Acting	)	
Comptroller of the Currency, and	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

This case is ready to be decided. As the House said in its Rule 56(a)(2) statement, there are no material disputes of fact. In fact, the House has put forward no evidence at all to defend DOMA, much less any *admissible* evidence. While the House quibbled with the admissibility of a few statements by Plaintiffs' experts, those quibbles do not affect the weight of their testimony, much less preclude summary judgment. This matter is thus ripe for decision. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (granting summary judgment finding DOMA unconstitutional, and denying cross-motion to dismiss).

Plaintiffs' expert testimony shows why laws that discriminate based on sexual orientation, like DOMA, are constitutionally suspect. Because gay men and lesbians contribute equally to society, but have traditionally been the targets of discrimination, laws burdening them raise an inference of being discriminatory, and they should not be entitled to the normal presumption of constitutionality. The political barriers faced by gay men and lesbians and the centrality of sexual orientation to a person's identity confirm the appropriateness of heightened review. Because DOMA cannot survive heightened review – or, for reasons explained in Plaintiffs' Opposition to the House's Motion to Dismiss, any level of review at all – summary judgment should be granted.

ARGUMENT

I. THERE IS NO MATERIAL DISPUTE OF FACT AS TO THE MERITS OF PLAINTIFFS' CLAIMS AND THIS CASE CAN BE DECIDED NOW.

A. The House Presents No Admissible Evidence.

Plaintiffs' Summary Judgment Memorandum ("MSJ") (Dkt. No. 63) is

supported by Plaintiffs' affidavits (Dkt. Nos. 64-70) as well as extensive expert testimony. *See* Affidavits of George Chauncey, Ph.D.; Nancy F. Cott, Ph.D.; Michael Lamb, Ph.D.; Letitia Anne Peplau, Ph.D.; and Gary Segura, Ph.D. (Dkt. Nos. 71-75). This evidence establishes the appropriateness of heightened scrutiny, and shows the absence of any factual basis for rationales put forward by Congress and the House. *See* Part II, *infra*; *see also* Plaintiffs' Opposition to House's Motion to Dismiss. ("MTD Opp.") (filed concurrently) at Part II.[1]

In response, the House has been unable to come forward with any qualified expert testimony or admissible evidence at all. Instead, all it has done is refer to a number of articles and opinion pieces by third parties, none of which is under oath, none of which has been subjected to the adversarial process, none of which has been subject to *Daubert* review, and none of which would be admissible at trial. Although the House relies upon third-party sources for a number of assertions, such as the purported mutability of sexual orientation, the notion that parenting by same-sex couples is less effective, and the bizarre claim that marrying same-sex couples makes opposite-sex couples have more children out of wedlock, *see* Part II.A.5, *infra* and House Motion to Dismiss Memorandum

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[1] These affidavits are "highly probative." Each expert relied on materials "of the sort ordinarily relied on by experts in forming opinions within their field of expertise" as well as "past scientific studies," and employed "the methodology and data typically used and accepted" in such matters. *B.F. Goodrich v Betkoski*, 99 F.3d 505, 525-26 (2d Cir. 1996). In addition to their decades of expertise in their respective fields, each expert also provided an extensive bibliography of scholarly or scientific materials underlying his or her opinions. The House's reliance on *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1338-39 (7th Cir. 1989), House's Opposition to Summary Judgment ("MSJ Opp.") at 38, where the declaration in question was a seven-sentence-long conclusion devoid of factual references or reasoning, is completely inapt.

("MTD") (Dkt. No. 81) at 43-46, 47-48, the non-evidentiary materials cited by the House lack any reliability and should be given no weight by this Court.[2] The House's desire to shield these materials from the light of the adversarial process is understandable – as Plaintiffs discuss below, the House's sources are written by lawyers, advocates, and journalists rather than people with any expert qualifications,[3] some say something different from what the House cites them for,[4] and in at least one instance, the author has come forward and protested that the House has outright mischaracterized her work. *See* Diamond Aff. at ¶¶ 5-6.

B. The House's Evidentiary Objections To Small Portions Of Plaintiffs' Evidence Are Meritless And Immaterial.

Lacking any admissible evidence of its own, the House seeks to poke holes in the testimony by Plaintiffs' experts. The irony of this effort should not be lost: the House is relying *entirely* upon inadmissible evidence. The rules of evidence are not a one-way street. The House's attacks on "portions" of Plaintiffs' experts' testimony as "unsupported" and "conclusory," House's Opposition to Summary Judgment ("MSJ Opp.") (Dkt. No. 82) at 37-42, are also meritless. In any event, the House's attacks largely go to collateral points that the House has either admitted or cannot reasonably dispute. Such evidentiary "objections" do not create a material dispute of fact that would prevent entry of summary judgment.

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[2] The House's failure to offer qualified evidence is no accident. Where anti-gay claims of the sort made by the House's hearsay materials have been exposed to the light of the adversarial process, they have fared poorly. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944-53 (N.D. Cal. 2010) (finding purported expert testimony proffered by proponents of ballot initiative to deprive gay men and lesbians of marriage rights to be unreliable).

[3] *See* Part II.A.4, *infra*; MTD Opp. at. Parts II.C.1 & II.D.2.

[4] *See* Part II.A.5, *infra*.

Dr. Letitia Anne Peplau: Dr. Peplau testified regarding the immutability of sexual orientation – testimony the House leaves essentially unchallenged. Instead, the House seizes upon her comment that DOMA's denial of recognition to married same-sex couples "reflects and perpetuates stigma against lesbians, gay men and same-sex couples," and her testimony that the disadvantageous tax treatment of same-sex couples "not only imposes an additional economic burden, but also stigmatizes the relationship." MSJ Opp. 39. Leaving aside the collateral nature of these comments, her testimony is fully supported. She identified the psychological definition of "social stigma" and applied that definition here. Peplau Aff. ¶¶ 40-41; Peplau Dep. Tr. 52:22-53:22; attached to Second Affidavit of Gary Buseck ("Second Buseck Aff.") as Ex. A; *see also id.* at 51:17–52:10.[5] Given that DOMA's official legislative history touted a purpose of expressing "moral disapproval of homosexuality," it is hard to see how Dr. Peplau's testimony is even disputable, much less inadmissible. H.R. No. 104-664, at 11 (1996) (First Buseck Aff. Ex. B) ("H. Rep.").

Nancy Cott, Ph.D.: Prof. Cott addressed the history of the institution of

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[5] The House relatedly takes issue with Dr. Peplau's testimony that it is "psychologically harmful" for gay men and lesbians to "deny a core part of their identity by ignoring their" same-sex attraction. *See* MSJ Opp. 39-40. Paragraph 24 of her affidavit grounds this opinion in the undisputed history of anti-gay discrimination and the centrality of sexual orientation to a person's identity, where sexual orientation directs the "most important personal relationships that adults form with other adults in order to meet their basic human needs for love, attachment and intimacy." Peplau Aff. ¶¶ 18, 24. The House's objection to this statement is hard to swallow in light of its own admission, in other litigation involving DOMA, that it "likely would be psychologically harmful to force lesbians or gay men to take these steps or attempt to persuade them to do so against their will." Second Buseck Aff. Exs. E & F (House Rule 56.1 Response in *Windsor v. OPM*), No. 58.

marriage in the U.S. – again, without meaningful objection from the House. Instead, the House objects to her summary that, given the multitude of policies that have historically driven state regulation of marriage, providing "an ideal or optimal context for raising children" has not historically been its "main purpose." Cott Aff. ¶ 21. This summary is backed by Prof. Cott's discussion of the multiple purposes that have historically driven state marriage law, in particular the central role played by the promotion of economic and social stability. *See* Cott Aff. ¶¶ 15, 17, 19. Her testimony also discusses and illustrates the historical (and present) absence of marital regulations requiring any ability to bear or beget children. *See id*. ¶ 20 (marriage historically considered desirable for widows and widowers "although it was often clear that no children would result" because "a married couple together had the wherewithal to carry on a stable household"); *accord* Second Buseck Aff. Ex. B (Cott Dep. Tr. 22:6-20).[6]

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[6] Prof. Cott's other statements challenged by the House are likewise supported. While the House takes issue with her summary that the "'federal government has accepted the states' differing definitions of marriage for purposes of federal law,'" MSJ Opp. 40 (quoting Cott Aff. ¶ 24), that is grounded in Paragraphs 29-30 of her affidavit, wherein she discusses failed attempts to create national marriage and divorce standards. Cott Aff. ¶¶ 29-30. Her testimony that the failure of such national measures can be attributed to a desire to preserve state authority, *see* MSJ Opp. 40, is backed by her discussion of the differing political and economic policies pursued by the states and the diversity of their marriage rules. Cott Aff. ¶¶ 24-73; *see also* Cott Tr. (Second Buseck Aff. Ex. B) at 52:24–53:5. Her discussion that "marriage has been transformed from an institution rooted in gender inequality . . . to one in which the contracting parties decide on appropriate behavior," Cott Aff. ¶ 73, is likewise backed by her discussion of the common law tradition of coverture (which viewed the marital couple as headed by the husband, with the wife having no separate legal or economic existence), and the cultural, policy, and legal changes that dismantled coverture over time, resulting in greater gender equality within the marital relationship. *See id*. ¶¶ 65-73; *see also* Cott Dep. Tr. (Second Buseck Aff. Ex. B) at 26:2-17 (explaining reference to "gender neutrality" in her expert affidavit).

Michael Lamb, Ph.D.: Dr. Lamb addressed the factors that can predict the healthy adjustment of children – backed by over a thousand studies over the past 50 years.[7] Here, the House inexplicably claims that Dr. Lamb "points to no facts" for his "bald" "assertion" of a scientific consensus that the adjustment of children turns on the quality of their relationships with their parents, the quality of the parents' (or other significant adults) relationship with each other, and the availability of socio-economic resources.[8] MSJ Opp. 41. The studies discussed in his following paragraphs provide the foundation. *See* Lamb Aff. ¶¶ 14-16.

The House also challenges Dr. Lamb's testimony that there is "no empirical support for the notion that the presence of both male and female role models in the home enhances the adjustment of children and adolescents." MSJ Opp. 40-41 (quoting Lamb Aff. ¶ 27). This testimony is supported by Dr. Lamb's summary of the studies referenced, consistently finding that the three factors identified – and *not* family structure, the sex or sexual orientation of the parents, or the existence of a biological relationship between parent and child – control child adjustment. Lamb. Aff. ¶¶ 18-22, 23-37, 38-40; Lamb Supp. Aff. ¶¶ 20-21.[9]

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[7] Dr. Lamb is submitting a Supplemental Affidavit responding to the House's distortions of his testimony.

[8] The House has admitted that "these [same] factors affect the 'adjustment' of children and adolescents." Second Buseck Aff. Exs. E & F, No. 42.

[9] The House's other attacks on Lamb – which attack *logical inferences* in his testimony rather than factual claims – are similarly misplaced. For instance, his conclusion 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'" flows directly from his discussion of the expert consensus that socio-economic resources are one of the three key factors for child adjustment. MSJ Opp. 41 (paraphrasing Lamb Aff. ¶ 41); Lamb Aff. ¶ 13; *see also id*. ¶ 41 (identifying various federal marital benefits that will "protect the family's economic security" and "which thereby protect children"). And his

Gary Segura, Ph.D.: Dr. Segura addressed political disadvantages faced by gay men and lesbians, and his testimony goes largely unchallenged. Instead, the House narrowly takes issue with his statement about the vulnerability of gay men and lesbians to the ballot initiative process, noting that it "'has now been used specifically against gay men and lesbians more than any other social group,'" and that "'many gay and lesbian activists' fear that 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.'" MSJ Opp. 41-42 (quoting Segura Aff. ¶¶ 19 [sic 40], 43). The disproportionate use of the ballot initiative process against gay men and lesbians is well-documented. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-58 (1997) ("Gay men and lesbians have seen their civil rights put to a popular vote more often than any other group."). Dr. Segura backed his conclusion by discussing numerous anti-marriage ballot initiatives and instances where policy changes in favor of gay men and lesbians was followed by backlash leading to worse policies. Segura Aff. ¶¶ 32, 36-37.[10]

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statement that "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," MSJ Opp. 41, quoting from Lamb Aff. ¶ 41, flows obviously from the federal government's denial that those marriages even exist.

[10] Dr. Segura's statement that the AIDS epidemic diverted "resources that could otherwise [have] be[en] used to fight discrimination,'" MSJ Opp. at 42 (quoting Segura Aff. ¶ 50), is a logical inference. And his testimony that "'the number of gays and lesbians perceived by the general public . . . is artificially low,'" MSJ Opp. at 42 (quoting Segura Aff. ¶ 58), is backed by his discussion of how some gay men's and lesbians' concealment of their sexual orientation makes them less visible. *See* Segura Aff. ¶¶ 56-64. This phenomenon is documented in an article relied upon by Dr. Segura and cited in his bibliography. *See* Scott S. Gartner & Gary M. Segura, *Appearances Can Be Deceptive: Self-Selection, Social Group*

George Chauncey, Ph.D.: Dr. Chauncey addresses the history of discrimination against gay men and lesbians in the United States. Instead of challenging that history, the House nitpicks at his comment 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." MSJ Opp. 42 (quoting Chauncey Aff. ¶ 57). This statement is supported by his prior paragraphs documenting the escalating persecution of gay men and lesbians following the war. Chauncey Aff. ¶¶ 42-57; *see also id.* ¶¶ 3-4 & Ex. A.[11] And the House's objection to his recognition that a "'threat of violence continues to lead many gay people to hide their identities'" is truly bizarre. MSJ Opp. 42 (quoting Chauncey Aff. ¶ 95). The House has admitted *in this litigation* that gay men and lesbians remain subject to violence, a fact Congress itself acknowledged by adding sexual orientation to the hate crimes law in 2009. House Amended Admissions No. 23 (Second Buseck Aff. Ex. G); 18 U.S.C. § 245(b)(2).

II. PLAINTIFFS' EQUAL PROTECTION CLAIMS REQUIRE HEIGHTENED SCRUTINY.

A. Sexual Orientation Discrimination Warrants Heightened Scrutiny.

The House's arguments against the application of heightened scrutiny to

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***Identification, and Political Mobilization*, 9 Rationality & Soc'y 131 (1997).**

[11] The same is true of Dr. Chauncey's statement that a Florida ban on adoption by gay men and lesbians meant that "[t]housands of children who might otherwise have had loving parents were thus denied the stability of family life.'" MSJ Opp. 42 (quoting Chauncey Aff. ¶ 68). The existence of thousands of children in need of adoption in Florida is a matter of public record, *see Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804, 823 (11th Cir. 2004), and the House has admitted that two adoptive parents can be "effective in raising children" and that "some same sex couples have raised healthy children." *See* House Amended Admissions Nos. 28 & 34 (Second Buseck Aff. Ex. G).

discrimination on the basis of sexual orientation are unpersuasive. As explained in Plaintiffs' Motion, the Supreme Court has traditionally concentrated on two factors in determining the level of scrutiny warranted: (1) a history of discrimination and (2) the ability to participate fully in society. *See* MSJ at 17, 21; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *United States v. Virginia*¸ 518 U.S. 515, 531-32 (1996); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 427-28 (Conn. 2008). As discussed below, the House fails to offer any substantial argument that these two factors do not apply. For this reason alone, heightened scrutiny is warranted. The Court has sometimes considered two other factors as well – (3) minority status or political powerlessness and (4) immutability – although the Court has applied heightened scrutiny even when these factors are absent. *See* MSJ at 21 (citing cases involving discrimination against women, white people, and resident aliens capable of changing their status). These supplemental factors also weigh in favor of heightened scrutiny.

1. <u>The Level of Scrutiny Is A Question Of First Impression.</u>

It is a question of first impression for this Court – and in the Second Circuit – whether or not courts should apply heightened scrutiny to claims of sexual orientation discrimination, as the House is forced to concede. *See* MSJ Opp. at 7 n.3. The House's suggestion that this issue has been settled by other courts outside this circuit, *id*. at 6-8, ignores the severe limitations of that caselaw.

Certainly, the House's notation that the Supreme Court applied rational basis in *Lawrence* and *Romer* has no force. *See* MSJ Opp. at 6. In neither case was there a need to address the level of review, because the laws would fail any standard. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (discriminatory law "fails,

indeed defies" rational basis scrutiny); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (law "furthers no legitimate state interest which can justify its intrusion").[12]

Nor is the out-of-circuit case law on which the House relies persuasive. *See* MSJ Opp. at 6-8. The cases fall into two categories: cases that arose before *Lawrence* and whose reasoning is inextricably tied to the now-overruled *Bowers v. Hardwick*,[13] and post-*Lawrence* cases that rely unthinkingly on pre-*Lawrence* caselaw without analysis of the relevant factors.[14] These holdings are not persuasive. And the House ignores post-*Lawrence* case law that actually analyzes the relevant factors to find heightened scrutiny the appropriate standard. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ("The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation.");

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[12] The Second Circuit has in fact noted its belief that *Romer* applied some degree of "bite." *Able v. United States*, 155 F. 3d 628, 634 (2d Cir. 1998) ("The analysis set forth in *Romer*…differed from traditional rational basis review because it forced the government to justify its discrimination.").

[13] *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F. 2d 563, 574 (9th Cir. 1990) (relying in part on *Bowers*); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized [as in *Bowers*], then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny..."). Cases from other Circuits uniformly suffer from the same defect. *See Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (relying on *Bowers*); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267-68 (6th Cir. 1995) (same), *summarily vacated*, 518 U.S. 1001 (1996); *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (same); *Padula* v. *Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (same); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same).

[14] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (noting that *Romer* and *Lawrence* applied rational basis review without analyzing the factors used by the Supreme Court to determine whether sexual orientation is a suspect class); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (same); *Lofton*, 358 F. 3d at 818 & n.16 (declining without analysis to find a suspect class by relying on sister circuit decisions, all pre-*Lawrence* and most pre-*Romer*).

***Kerrigan*, 957 A.2d at 431-62 (over thirty pages of analysis showing heightened scrutiny is warranted); *Varnum v. Brien*, 763 N.W.2d 862, 889-96 (Iowa 2009) (same; over seven pages of analysis). As shown below, addressing this question in the first instance, heightened scrutiny is the correct standard of review.**

2. <u>Gay Men And Lesbians Have Suffered A History Of Discrimination.</u>

A history of discrimination, in the equal protection context, creates an inference that classifications that continue to disadvantage the group remain improperly motivated. The House "does not dispute that homosexuals have been subject to discrimination." MSJ Opp. at 9-10. All it argues is that *facially* discriminatory laws against gay men and lesbians did not begin until the 20th Century. *Id*. Putting aside whether more than a century of *de jure* discrimination can be fairly characterized as "relatively short," *id.*, or the House's strange notion that the historical *denial of the existence of a minority group as a class* is somehow *less* indicative of discrimination, such discrimination has a long provenance stretching back at least to Colonial America. *See* Chauncey Aff. ¶¶ 17-55. As the Supreme Court explained, "[t]he absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century….This does not suggest approval of homosexual conduct." *Lawrence*, 539 U.S. at 568-69. Regardless of the terminology used, "for centuries there have been powerful voices to condemn homosexual conduct as immoral," *id.* at 571, with a concomitant history of discrimination. *See generally* Chauncey Aff. (detailed description of centuries of

discrimination); Chauncey Dep. Tr. 53:11–53:25 (Second Buseck Aff. Ex. D) (explaining connection between government hostility to same-sex sexual conduct since Colonial era and current anti-gay discrimination).[15]

3. Sexual Orientation Has No Impact On The Ability To Contribute To Society.

The House also does not dispute that gay men and lesbians are fully woven into the fabric of everyday America, working, paying taxes, raising families, and participating in communities. *See* MSJ at 20-21; House's Amended Admissions No. 24 (Second Buseck Aff. Ex. G) (acknowledging "contributions to society … made by heterosexual, gay, lesbian, and bisexual people"). Nor can it dispute the longstanding consensus of the psychological and medical communities that sexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational abilities." MSJ at 20 (quoting 1973 Resolution of Amer. Psych. Ass'n). Gay men and lesbians satisfy this factor.

The House instead offers that Congress *believed* DOMA to be rationally related to legitimate goals. MSJ Opp. at 11-12. That is irrelevant. Levels of Equal Protection scrutiny apply to classifications *in general*, not specific statutes. Where the Supreme Court analyzes this factor, it does so *generally*, such as finding that the mentally disabled have a "reduced ability to cope with and function in the everyday world," *Cleburne*, 473 U.S. at 442; *see also id.* at 440-41 (''[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability" is that former "frequently bears no relation to ability to

[15] The House asserts "how quickly things are changing." MSJ Opp. at 10. At best, this goes to a different factor – minority status or political power – and not the history of discrimination. In any event, as detailed below, the House ignores the pervasive discrimination gay men and lesbians continue to experience.

perform or contribute to society." (quotation marks omitted; alternations in original)); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314–15 (1976) (elderly not suspect class because of diminished physical capacity). Clearly the House cannot assert that gay men and lesbians bear any similar disability. *See Kerrigan*, 957 A.2d at 434 (quoting *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994)) (''If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of 'staying in the [c]loset' and of 'coming out' would not exist; their impediment would betray their status.'').

The House's argument – that gay men and lesbians might be situated differently from heterosexuals *for purposes of DOMA* – goes to whether DOMA can survive equal protection scrutiny, not the level of scrutiny applicable in the first instance to *all* classifications on the basis of sexual orientation. Gender, for instance, may sometimes be related to interests the Supreme Court has deemed legitimate, but often is not – which is why heightened review is applied to separate legitimate from illegitimate uses of the classification.

In sum, DOMA triggers heightened scrutiny because gay men and lesbians have suffered a history of discrimination and sexual orientation bears no relationship to one's ability to contribute to society. The presence of the two supplemental factors, discussed below, only strengthens this conclusion.

4. <u>Gay Men And Lesbians Constitute A Minority With Little Political Power To Respond To Measures Like DOMA.</u>

As detailed below and in Plaintiff's Motion, the long history of discrimination against gay men and lesbians has been, and continues to be,

encoded in law. The House seems to argue that any movement away from that *de jure* discrimination – no matter how modest, or geographically isolated, or hard-won, or subject to reversal – is evidence of robust political power. That argument is not credible. There can be no doubt that gay men and lesbians are still unable to win adequate guarantees of equality through the political process.

The House perceives irony in the fact that the President and Attorney General have sided with Plaintiffs in this case, which the House views as indicative of considerable political power. MSJ Opp. at 12. This argument cynically assumes that the Attorney General was lying when he explained that the United States was declining to defend DOMA based on a good-faith assessment of its unconstitutionality. *See* Dkt. No. 39-2 at 1-2 (Holder Letter). But also missing is what happened next – powerful political interests rushed in to defend DOMA. It is hardly indicative of political power when a House of Congress sees political benefit in depriving a group of equal treatment under the law.[16]

Unfortunately, this is a familiar narrative. Looking only at recent progress, it is easy to form an incomplete and inaccurate picture of the relative political power of gay men and lesbians. Although there have been movements toward equality in certain places on certain issues, the overall political landscape remains hostile. Indeed, the House has admitted in other DOMA litigation that "[t]o this day, lesbians and gay men are subjected to continued public opprobrium from leading political and religious figures" and, "[l]ike other

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[16] For the same reason, the House's suggestion that gay men and lesbians can look to the political process to repeal DOMA anytime soon, MSJ Opp. at 20, is almost humorous. The House's intervention in this litigation is a useful indication of how such a repeal effort will fare in Congress.

minority groups, gay men and lesbians often must rely on judicial decision to secure equal rights." Second Buseck Aff. Exs. E & F (House Rule 56.1 Response in *Windsor v. OPM*), Nos. 29 & 32.

DOMA illustrates that this dynamic is far from unique: discrimination against gay men and lesbians continues to abound notwithstanding the handful of highly publicized successes of the past two years. The number one goal of the Human Rights Campaign, an organization the House touts in its papers as emblematic of the "power" of the gay and lesbian community, is the passage of an employment non-discrimination act – a goal it has failed to achieve for 20 years. *See* MSJ at 21-22; SN-AF, Dkt. No. 62, Nos. 67, 70 (no federal protection against sexual orientation discrimination; no protection in 29 states); *id.* No. 71 (anti-marriage statutes or amendments passed in 41 states).

The House predicts a "gay tipping point," MSJ Opp. at 16, but on closer examination, few of the "victories" it points to are legislative. *See, e.g., id.* at 15 (corporate employment policies increasingly fair); *id.* at 13 (first openly gay male judge confirmed). While gay men and lesbians are surely happy to see the election of some "fair-minded candidates," *id.* at 17, compelling elected officials to accomplish legislative objectives is the test of political power, and those accomplishments are still few in number. *See* Segura Aff. ¶ 8 (many candidates well-disposed to gay rights fail to deliver concrete accomplishments). Moreover, the number of openly gay or lesbian elected officials is still far under-representative. *Id*. ¶ 45. Even if that were not so, gay men and lesbians constitute a small minority of the population and thus need to rely on political

allies outside their community, leading time and again to setbacks. *Id.* ¶ 8. In short, the House mistakes modest steps toward power with its achievement.

At root, the House's argument seems to be that a classification cannot be suspect or quasi-suspect class unless the affected group is completely unable to achieve any sort of political protection. That unworkable test is incompatible with Supreme Court precedent. By the time the Supreme Court found that gender classifications were subject to heightened scrutiny, women had already achieved significant political victories. *See Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (citing Civil Rights Act prohibiting employment discrimination based on sex, Equal Pay Act, and Equal Rights Amendment passed by Congress).[17] Today, women and racial minorities have won political power and protections far exceeding those won by gay men or lesbians, yet discrimination based on gender and race continues to warrant heightened scrutiny.[18]

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[17] These political victories by women make the examples of progress the House cites pale in comparison, including the appointment of an openly gay judge, one openly gay nominee for judge, the passage of a civil unions law in Rhode Island rather than marriage, repeal of an exclusion from the military without a promise of non-discrimination, and a California education bill that requires students to be advised of the existence of the historical contributions of lesbian, gay, bisexual, and transgender Americans (which opponents seek to repeal through the referendum process). MSJ Opp. at 13-14. The few cases denying heightened scrutiny for laws that discriminate on the basis of sexual orientation based on the purported "political power" of gay men and lesbians utterly fail to address this disparity between the achievements of those groups and the achievements of women acknowledged in *Frontiero*. *See High Tech Gays*, 895 F.2d at 574 & n.10 (citing small number of anti-discrimination laws).

[18] The House points out that while women were recognized as a quasi-suspect class despite some political power, other groups with less power have not been recognized. *See* MSJ Opp. at 20. This only reinforces Plaintiffs' point that political powerlessness is not an essential determinate of heightened scrutiny whereas a history of discrimination and the ability to contribute to society, which are undisputed here, are. *See* MSJ at 17, 21.

Finally, the House's argument that gay men and lesbians have achieved political gains out of proportion to their numbers, *see* MSJ Opp. at 21, attempts to turn a political disadvantage – a very small minority of the population – into a show of strength. But of course, it is a group's actual political power that matters, not how much political influence its members have per capita. That is the only way to achieve real political protections, and today's political landscape shows that gay men and lesbians are rarely able to win those victories on the national stage or in large regions of the country. This is a paradigmatic instance of the need for heightened judicial scrutiny.

5. <u>Sexual Orientation Is An Enduring And Defining Characteristic.</u>

There can be no dispute that gay men and lesbians are sufficiently identifiable as a class to be targeted by discriminatory legislation, or that they have enduring identities that it would be unjust to require them to change to avoid discrimination. *See* MSJ at Part 1.A.4. The House counters that "more than 12%" of gay men and "nearly one out of three lesbians" in one study reported "some or much" choice about their sexual orientation. MSJ Opp. at 23. Even these figures would show that sexual orientation is immutable for the majority. *See* MSJ at 25-27; *see also* Peplau Aff. ¶ 23 ("The significant majority of adults exhibit a consistent and enduring sexual orientation"; "[T]he fact that a small minority of people may experience some change in their sexual orientation over their lifetime [does not] suggest that such change is within their power to effect"); Peplau Dep. Tr. 100:18-23 (Second Buseck Aff. Ex. A) (study showing that 74.8% of gay, lesbian and bisexual persons identified no choice or a small amount of choice about their sexual orientation).

The House cites three academic articles to argue that sexual orientation can vary during one's life. MSJ Opp. at 23-24. The author of two of those articles has submitted an affidavit contesting the House's mischaracterization of her work, none of which "support the propositions for which BLAG cites them," and demonstrating the irrelevance of the third article. Diamond Aff. ¶¶ 6-9; *see also id.* (quotation cited by BLAG "says nothing whatsoever about the immutability of sexual orientation itself").[19] Dr. Diamond testifies plainly that "[i]f the question is whether gay, lesbian and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes." *Id.* ¶ 11.

More fundamentally, the House fails to engage Plaintiffs' argument demonstrating that absolute immutability is not, and never has been, a precondition to heightened scrutiny. *See* MSJ at 24-25. Sexual orientation is such a central element of one's identity that it would be wrong to ask a person to change to avoid discrimination. Courts inquire into whether a trait is immutable because of a basic concern about fairness – one should not be punished for a trait that one has not chosen and which one cannot change. *See Frontiero*, 411 U.S. at 686 ("[L]egal burdens should bear some relationship to individual responsibility") (quotation marks omitted). It is equally unjust when governments draw invidious distinctions based on traits that persons could only change at great personal cost.[20] *See* MSJ at 26 (APA task force concluding that attempts to

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[19] *See also* Supplemental Affidavit of Letitia Ann Peplau, ¶ 6 (data in third article shows ½ to 1% of men and 1.3% of women change from major opposite sex attraction to same sex or vice versa; data shows that the significant majority of adults exhibit a consistent and enduring sexual orientation).

[20] The House also missteps in arguing that sexual orientation is not immutable

change sexual orientation are ineffective and potentially harmful).

The House fares no better in arguing that laws that discriminate on the basis of sexual orientation should not be subjected to heightened scrutiny because different persons use different labels to describe sexual orientation, such as "gay," "lesbian," "bisexual," and "homosexual." *See* MSJ Opp. at 22-23. It cannot seriously be disputed that DOMA draws a classification based on sexual orientation. Indeed, the House has conceded as much before another federal district court, *see* First Buseck Aff. Ex. D (House's Motion to Dismiss in *Golinski* conceding that "[I]t is reasonable to regard DOMA as drawing a line based on sexual orientation."). Whatever subtle semantic distinctions persons may employ to describe their sexual orientation, no one could seriously dispute that DOMA, by targeting persons married to persons of the same sex, draws a classification against persons romantically attracted to members of the same sex.[21]

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because it is purportedly "behavioral," unlike race and gender. MSJ Opp. at 24 (quoting *Woodward*, 871 F.2d at 1076). The Supreme Court's "decisions have declined to distinguish between status and conduct in this context." *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see Lawrence*, 539 U.S. at 575 (O'Connor, J., concurring) ("[The] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). Moreover, the characteristics to which heightened scrutiny already apply are not as rigid or stable as the House suggests. People can convert religions, aliens can become naturalized, individuals can change their sex, and race is defined differently over time. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987). Each of these classifications warrants heightened constitutional scrutiny, and no one would assert that those subject to discrimination on the basis of these traits should work to mask or modify them.

[21] The House also argues in its Motion to Dismiss that DOMA does not constitute impermissible gender-based discrimination and does not violate the fundamental right to marry. *See* MTD at Parts I.C.1 & I.C.2. Plaintiffs have not raised either of those legal theories and this Court should not consider them.

B. DOMA's Purpose Is To Interfere With Plaintiffs' Family Integrity.

DOMA should be independently subjected to heightened scrutiny because it disparately burdens Plaintiffs' right to the integrity of their families. MSJ at Part I.B. Plaintiffs have chosen to order their families under legally recognized bonds of marriage, but DOMA does everything in the federal power to erase their state-sanctioned marriages. To deny this effect, the House argues that DOMA "neither prevents the formation of same-sex marriages where they are allowed nor breaks them apart once entered." MSJ Opp. at 27. The House's position, in essence, is that since DOMA does not *physically* tear Plaintiffs' families asunder or interfere with their rights and relationships under purely state law, Plaintiffs' families have not been subject to the kind of burden meriting heightened review.

This argument is incompatible with the clear purpose and effect of DOMA. DOMA was overtly intended to repudiate and disavow marriages entered into by same-sex couples and sanctioned by the states. Congress stated specifically in DOMA's legislative history that it was not "supportive of (or even indifferent to) the notion of same-sex 'marriage'," and that DOMA was intended to further Congress's interest in "defend[ing] the institution of traditional heterosexual marriage," and to express "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. at 2, 9, 11; *see also* MSJ at 13 (quoting floor debate describing homosexuality is "immoral," "depraved," and "unnatural," and arguing that marriage by gay men and lesbians would "demean" and "trivialize" heterosexual marriage). In its Motion to Dismiss, the House now argues that DOMA serves to promote a social understanding of marriage that excludes gay

men and lesbians. *See* MTD at 42-43, 51. The House also goes to some lengths to avoid even acknowledging that Plaintiffs are married. *See* MTD at 3 (referring to a Plaintiff's "partner," rather than husband, wife, or spouse); *id.* (characterizing Plaintiffs as "*considered* legally married") (emphasis added).

In short, DOMA does more than deprive Plaintiffs of selected rights and benefits. It does everything in the federal government's power to erase their marriages altogether. Although the selective attempt to erase Plaintiffs' family lives and relationships may occur through a different set of policies than those that have triggered heightened equal protection review in the past, the burden on their families is unmistakable and entirely purposeful. As Congress intended, DOMA does everything within the federal government's power to deny Plaintiffs' marriages. This is an affront to Plaintiffs' choice to order their families under marriage, and it is a burden on their right to maintain the integrity of their families. Such a law demands heightened scrutiny.

III. DOMA FAILS HEIGHTENED SCRUTINY.

As articulated in Plaintiffs' Motion, if any form of heightened scrutiny applies, DOMA fails. *See* MSJ at Part II. The House makes no effort to contend otherwise, reserving to a cursory footnote a claim that DOMA survives heightened review, *see* MSJ Opp. at 25 n.33, unsupported by any analysis. The House's failure to present any argument or evidence is fatal. While under rational basis review the government has some leeway to support classifications using argument alone, heightened scrutiny requires it to actually establish the importance of the claimed interests and their nexus to the classification. *See Virginia*, 518 U.S. at 531-33. The House has not put in any evidence supporting its

arguments for the statute, most of which are post-hoc arguments invented by counsel and supported by only speculation and platitudes. *See* Part I.A *supra* and MTD Opp. at Part II. Under heightened scrutiny DOMA must be struck down.

IV. DOMA FAILS RATIONAL BASIS REVIEW.

Were the Court to instead apply the rational basis standard, the statute still could not be constitutionally applied. As explained in detail in Plaintiffs' Opposition to the House's Motion to Dismiss, the discrimination effected by DOMA is wholly irrational and arbitrary, and none of the arguments invoked in its defense – whether they were reported by the contemporaneous Congress or cooked up by the House's litigation counsel to defend this lawsuit – both make sense and reflect legitimate governmental objectives. *See* MTD Opp. at Part II.[22] For the reasons stated in that brief, DOMA fails rational basis review as well.[23]

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

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[22] The House's briefing divided across two briefs (its Motion to Dismiss and its Opposition to Plaintiffs' Motion for Summary Judgment) its discussion regarding the legitimacy and rationality of various interests asserted on behalf of DOMA. In the interests of avoiding duplicative briefing, Plaintiffs have consolidated the entire discussion into their Opposition to the House's Motion to Dismiss. Plaintiffs incorporate that discussion by reference herein.

[23] Plaintiffs address in their Opposition to the House's Motion to Dismiss the House's argument that the Tax Code deprives certain Plaintiffs of standing.

Respectfully submitted,

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DATED: September 14, 2011

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 14, 2011.

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