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.	)	
OFFICE OF PERSONNEL MANAGEMENT, 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,	)	**CIVIL ACTION No. 3:10 CV 1750 (VLB)**
Defendants.	)	

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO MOTION TO DISMISS

The House's Reply in Support of its Motion to Dismiss does not respond at all to the core points Plaintiffs made in their Opposition. It ignores them. Plaintiffs have explained time and again that the issue here is *not* whether a state may refuse to marry same-sex couples. It is whether the *federal* government (which marries no one) was justified in drawing a line, for all federal purposes, to create two classes of *actually married couples* – same-sex and different-sex married couples. The House's effort to conjure up a rational basis for Section 3 of DOMA depends on obscuring – indeed, ignoring entirely – the differences between these two very distinct issues. That is why the effort fails.

1. The House's argument from *Baker v. Nelson*, for example, falls apart if one focuses on what is at issue – discrimination by the federal government among married couples. Nothing in *Baker*, which involved the exclusion of unmarried same-sex couples from marriage by a state, remotely speaks to that question. The classes advantaged and disadvantaged here are entirely different. And the interests that might justify the discrimination are different as well, since (a) the federal government cannot erase the fact that the plaintiffs are married; and (b) the federal government has no constitutional role in setting family law. *Baker* would be irrelevant even if it were still good law – which it is not.

2.a. When the House tries to defend the rationality of Congress's discrimination, it says that Congress faced a choice between deference to state law and a "uniform" federal definition of marriage. But the latter is *not* what Congress did. It continued to incorporate by reference all state marriage laws

with all of their variations,[1] with one exception. Congress did not create uniformity; it created a separate rule excluding only gay men and lesbians, while continuing to let state law govern the marital status of everyone else.

2.b. The House argues that Congress had an "obvious federal interest" in creating such a novel exclusion – its "interest in allocating federal benefits." House Reply at 4. But it does not even try to suggest how the diverse federal policies underlying more than a thousand separate federal laws could all be served by excluding married couples of the same sex. That failure is the fundamental problem with the House's defense: an exclusion this broad can *only* be justified as an intrusion into marriage policy (or as an equally impermissible targeting of married same-sex couples). It cannot, and obviously does not, have anything to do with the actual policies of the affected programs.

2.c. And in fact, most of the justifications the House offers assume that Congress does have a legitimate role in setting marriage policy. It says that Congress (1) was concerned about the "unknown consequences" of the "redefinition" of marriage to include same-sex couples, *id.*, (2) wanted to "foster the link between marriage and childbearing," *id*. at 8, (3) was concerned that heterosexuals would stop marrying if gays and lesbians could marry, *id.* at 9, and (4) preferred families with both a mother and a father, *id.* at 9-10. But these are all substantive attempts to define family relationships, not "federal interests." They are an effective admission that DOMA § 3 is an unprecedented power grab by the federal government to trump family law decisions made by the sovereign states.

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[1] ***See* Plaintiffs' Separate Statement of Non-Adjudicative Facts ¶¶ 4-8.**

2.d. Even assuming these interests were cognizable as a basis for federal legislation, they all have a second problem: since the same-sex couples disadvantaged by DOMA *are still all married*, there is a missing explanation in the House's brief of *how* DOMA is supposed to advance the family-law policies on which the House relies. Is the House trying to suggest that the purpose of the law was to deter same-sex couples from marrying in those states where they can do so? Or that the purpose was to deter additional states from granting marriage rights to same-sex couples? It is hard to imagine less persuasive justifications for *federal* legislation punishing private citizens than trying to influence the marital decisions of other people or the family law policies of other states.

3.a. To be sure, the House also points to two interests that sound more legitimately federal in nature – protecting the "public fisc" and creating "consistency" in allocation of federal benefits. But the fiscal argument ignores the question of why it was rational for Congress to try to save money by culling out *this particular subset* of married couples for across-the-board disqualification from federal benefits. It might also save money to exclude from federal recognition every twentieth marriage celebrated in Montana, but more would be required to explain why such a line is rational. The same is true here. The argument makes even less sense when one considers that the House also argues that gay men and lesbians are a tiny fraction of the population (and therefore the fiscal impact of recognizing their marriages would be small).

3.b. As for the consistency argument, as already noted, Congress did not create "national uniformity in the substantive definition of federal marriage." *Id*.

at 7-8. Every variation of state marriage laws remains incorporated in federal law save one. In effect, Congress made sure that all same-sex couples would be treated the same – as unmarried – while continuing to distinguish between married and unmarried straight couples. Throwing around platitudes like "uniformity" and "consistency" does not explain the rationality of these choices.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 11, 2011, a copy of the foregoing Plaintiffs' Sur-Reply in Opposition to Motion to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Gary D. Buseck
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