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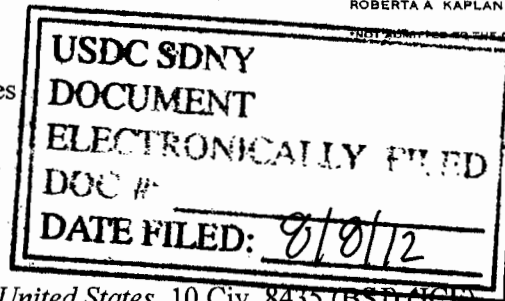
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January 23, 2012

By Hand

The Honorable Barbara S. Jones
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007



Windsor v. United States, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

We write on behalf of the plaintiff, Edith Schlain Windsor, in the above-captioned matter to bring to the Court's attention two recent developments since the submission of the materials in connection with plaintiff's motion for summary judgment.

First, in the affidavit submitted by our expert Professor Michael Lamb on June 24, 2011, he cited as "in press" an article by Charlotte J. Patterson and Jennifer L. Wainwright entitled "Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health." That article has since been published by Oxford University Press in a book entitled Adoption by Lesbians and Gay Men: A New Dimension in Family Diversity (David M. Brodzinsky & Adam Pertman eds., 2012), a copy of which we enclose for the Court's reference.

We submit this article to the Court because the issue of whether there has been sufficient academic study of adolescents (as opposed to younger children) raised in families with same-sex parents was disputed by the Bipartisan Legal Advisory Group ("BLAG") in this case. (See, e.g., Opp'n to Pl.'s Mot. for Summ. J. at 23-24.) In the

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enclosed article, the authors conclude that the “results do not support the idea that adolescent outcomes are shaped by parental sexual orientation” (Patterson & Wainwright, *supra* at 108.)

Second, as Your Honor may recall, in the papers it submitted in opposition to plaintiff’s motion for summary judgment, BLAG made certain arguments regarding the role of the federal government, as opposed to state governments, in the area of domestic relations. (*See, e.g.*, BLAG’s Local Rule 56.1 Response to Pl.’s Statement of Material Facts ¶ 83 (disputing plaintiff’s assertion that “[m]arriage in the United States has been defined and controlled historically at the state level”).) However, during a recent oral argument in a related case in the Northern District of California, in response to a question on this issue posed by the district court judge, counsel for BLAG made the following material concession:

THE COURT: The few unique examples cited by BLAG . . . when Congress legislated in the area of domestic relations occurred when Congress was explicitly acting in the role of state government. Are there any historical examples in which Congress legislated on behalf of the federal government, in the area of domestic relations?

[. . .]

MR. DUGAN: Your Honor, our research hasn’t shown that there are historical examples which Congress has legislated on behalf of the federal government in the area of domestic relations.

(Tr. of Oral Arg. at 10:15–20, 18:2–5, *Golinski v. Office of Pers. Mgmt.*, No. C 10-257 (JSW) (N.D. Cal. Dec. 16, 2011).) We enclose a copy of the entire transcript for the Court’s reference as well.

Respectfully submitted,



Roberta A. Kaplan

Enclosures

cc (via email): Paul D. Clement, Esq.
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ADOPTION BY LESBIANS AND GAY MEN

A New Dimension
in Family Diversity



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Adoption by Lesbians
and Gay Men

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Adolescents with Same-Sex Parents

*Findings from the National Longitudinal Study
of Adolescent Health*

CHARLOTTE J. PATTERSON AND JENNIFER L. WAINRIGHT ■

Should the sexual orientation of prospective adoptive parents be considered as a factor when making placements of minor children into adoptive homes? This question is one of several legal and policy controversies surrounding lesbian and gay parents and their children (Patterson, 2007, 2009; Patterson, Fulcher, & Wainright, 2002). Like others, it is of special interest to many people, including social workers, attorneys, child advocates, prospective adoptive parents, and, most of all, children in need of permanent homes. Some have argued that there should be a presumption against placing children with adoptive parents who are not heterosexual (e.g., Wardle, 1997). Others have argued that sexual orientation should be considered irrelevant to such decisions (e.g., Mallon, 2004; Wald, 2006). The question of how children fare in adoptive homes provided by nonheterosexual parents is prominently featured in these debates.

There is considerable variation in laws and policies governing adoptions by lesbian and gay adults across the United States (Appell, this volume; Brodzinsky, this volume; Gates, Badgett, Macomber, & Chambers, 2007; Wald, 2006). At the time of this writing (i.e., October 2009), adoption of minor children by these adults is specifically barred by statute only in Florida; a challenge to this law is currently in the courts.¹ Adoption of minor children by same-gender couples is forbidden in Mississippi. In Utah, adoption by unmarried couples is forbidden; since same-sex couples do not have access to the legal institution of marriage in that state, this law effectively excludes same-sex couples. In other states, such as California, Maryland, Massachusetts, and New York, the law allows adoptions by

1. In 2008, the Florida supreme court declared the state's ban on gay/lesbian adoption to be unconstitutional.

openly lesbian and gay prospective adoptive parents. For instance, in a landmark New York adoption case, the court noted that "(t)he fact that the petitioners here maintain an open lesbian relationship is not a reason to deny adoption. . . . A parent's sexual orientation or sexual practices are presumptively irrelevant. . . ." (In re *Adoption of Ewan*, 1992, pp. 1001–1002).

In many other jurisdictions, there is active debate of issues relevant to sexual orientation and adoption. Bills to bar lesbian or gay applicants from becoming adoptive or foster parents have been introduced in a number of states (e.g., Kentucky, Tennessee, and Virginia) in the past several years. To date, all of these efforts have been defeated, but observers expect more may emerge in the future.

In these debates, there is agreement among the parties that the interests of children should be considered ahead of other concerns. For this reason, discussions about sexual orientation and adoption often resolve to debates about how parental sexual orientation may affect children. Advocates of allowing adoptions by lesbian and gay adults argue that many children need homes, that sexual orientation is unrelated to parenting abilities, and that, therefore, lesbian and gay parents should be allowed to adopt children. Opponents of such adoptions suggest that lesbian and gay adults do not provide safe, supportive homes for children, and that any children adopted by them will suffer. In short, all agree that children's welfare should be paramount, but the two sides of the debate disagree about what policies best serve children's interests.

In this discussion, reliable information about the actual development and adjustment of children who are being reared by lesbian and gay parents can be useful. The most directly relevant research would assess the growth and development of children who have been adopted by lesbian or gay parents. Also relevant, however, are data about the development of children who have been born to lesbian or gay parents and who are being reared by them. In the next section, we consider the findings of such research.

RESEARCH ON OFFSPRING OF LESBIAN AND GAY PARENTS

At the time of this writing (i.e., October 2009), only two studies of children adopted by lesbian and gay parents have been published (Erich, Leung, & Kindle, 2005; Ryan, 2007). Working with a convenience sample of 68 families in which parents were lesbian or gay and 43 families in which parents were heterosexual, Erich and his colleagues studied family functioning and behavior problems of 6-year-old children. Their findings revealed that children and families were adapting well. They reported no significant differences in children's conduct or in family functioning associated with parental sexual orientation (Erich, Leung, & Kindle, 2005; for related information about this study, see also Erich, Leung, Kindle, & Carter, 2005; Kindle & Erich, 2005; Leung, Erich & Kanenberg, 2005).

Ryan (2007) studied 53 lesbian-parent and 41 gay-parent families with adoptive children. He found that not only did parents describe their parenting in positive terms, but they also described their children as having many strengths. Despite the fact that many children had histories of maltreatment, they were rated

by their parents as being within the normal range of functioning, both at home and at school.

The studies by Erich and his colleagues (2005) and by Ryan (2007) are the only published research to date to compare the adjustment of adopted children in both types of families, but there is no reason to expect that children adopted by lesbians and gay men should fare any differently than children adopted by heterosexual individuals. Furthermore, the findings reported in this study are quite consistent with those of a substantial literature on the development and adjustment of children with lesbian and gay parents. Both in longitudinal and in cross-sectional studies, in the United States and abroad, children of lesbian and gay parents have been found to show good adjustment and to develop in ways that are very similar to other children (Gartrell, Peyser, & Bos, this volume; Gartrell, Deck, Rodas, Peyser, & Banks, 2005; Patterson, 2000, 2006, 2009; Perrin & Committee on Psychosocial Aspects of Child and Family Health, 2002). Many questions have been studied, including children's adjustment at home, at school, with peers, and in other domains of their lives. In all these domains, the strength of parent-child relationships has been an important predictor of child adjustment, but parental sexual orientation has been less important (Patterson, 2006, 2007). When small differences have been found in child outcome or parenting behavior as a function of parental sexual orientation, the data have indicated no risk of harm for children of lesbians and gays.

The strength of these findings has been reflected in statements by many mainstream professional organizations. For instance, after a careful review of the research findings, the American Psychological Association (2004) went on record opposing "any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care and reproductive health services." After their review of the research in this area, the American Academy of Pediatrics (2002) similarly recognized "that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment and development as can children whose parents are heterosexual." These and other respected professional groups, including the American Bar Association, the Child Welfare League of America, the National Association of Social Workers, and the Ewan B. Donaldson Adoption Institute have based their conclusions on findings from social science research suggesting that parental sexual orientation is not a good predictor of parenting ability or child adjustment.

Very little research, however, has been conducted on adolescent offspring of lesbian or gay parents, and it has been suggested that caution be used when generalizing the results of research conducted with young children to adolescents (e.g., Perrin & Committee on Psychosocial Aspects of Child and Family Health, 2002). Because adolescence is a time during which issues such as personal identity, peers, and dating become very important, and because of concerns about the possible effects of same-sex parenting during adolescence (e.g., Baumrind, 1995), it is an especially important period in which to examine the development of youth with nonheterosexual parents.

A small body of research exists that focuses on the development of adolescent offspring of families headed by lesbian couples. Huggins (1989) reported a study

of 18 adolescents with divorced heterosexual and 18 with divorced lesbian mothers, in which she found no differences in adolescent self-esteem as a function of mothers' sexual orientation. O'Connor (1993) studied 11 young men and women who were the offspring of divorced or separated lesbian mothers. Her participants expressed strong loyalty and protectiveness toward their mothers, but also described worries about losing friends or being judged by others due to their mothers' sexual orientation. Gershon, Tschann, and Jernirn (1999) studied self-esteem, perception of stigma, and coping skills among 76 adolescent offspring of lesbian mothers, and reported that adolescents who perceived more stigma related to having a lesbian mother had lower self-esteem in five of seven areas, including social acceptance and self-worth.

A recent study of adolescents parented by same- and opposite-sex couples in the United Kingdom assessed victimization, social support, and psychosocial functioning (Rivers, Poteat, & Noret, 2008). Rivers and his colleagues reported that adolescents with same-sex parents did not differ from those with opposite-sex parents or from the general student population at their school on measures of peer victimization and bullying, psychological symptoms, or use of social support. They also did not differ in their reports of common adolescent concerns, such as school work, appearance, and relationships with teachers (Rivers et al., 2008).

A slightly older population was studied in Tasker and Golombok's (1997) longitudinal study of 23 young adult offspring of lesbian mothers and a matched group of 23 young adult offspring of heterosexual mothers. In this generally well-adjusted sample, young men and women who were treated by lesbian mothers were no more likely than those raised by heterosexual mothers to experience depression or anxiety, or to have sought professional help for psychiatric problems. They reported having close friendships during adolescence, and were no more likely to remember peer group hostility than were those from other families. Offspring of lesbian mothers were also no more likely to report same-sex sexual attraction or a gay/lesbian/bisexual identity than were those from heterosexual families. They were, however, more likely to have considered a gay or lesbian relationship as a possibility for themselves and to have been involved in a same-sex relationship, suggesting that although sexual attraction and identity may not be related to parental sexual identities, the likelihood of considering or entering a same-sex relationship may be associated with parents' sexual orientation.

In general, like the literature on younger children, the studies of adolescents have found few differences in adjustment as a function of parental sexual orientation. Research on younger children (e.g., Chan, Raboy, & Patterson, 1998) has found that variables representing families' organization of daily life, such as division of household labor and childcare, are more likely than parental sexual orientation to be associated with children's outcomes. The research on adolescent offspring of same-sex couples described above, however, did not address this issue.

A substantial body of research indicates that parenting style influences the effectiveness of parents' efforts to socialize their children (Steinberg & Silk, 2002). In particular, a warm and accepting style of parenting is related to optimal outcomes for adolescents (Rohner, 1999), especially if it is combined with appropriate

limit setting and monitoring of adolescent behavior (Steinberg, Lamborn, Dornbusch, & Darling, 1992). The relationship between parental warmth and positive outcomes has been found for adolescents from a wide variety of ethnic, socioeconomic, and family structure backgrounds, and by researchers working with a variety of different methodological approaches (Khaleque & Rohner, 2002). That these linkages have been found among such a diverse group of adolescents suggests that they might also be expected among the offspring of gay and lesbian parents.

In summary, the research on adolescent and young adult offspring of lesbian mothers suggests that they are developing in positive ways. However, the research has been limited and most studies were based on small samples, the representativeness of which can be difficult to assess (Stacey & Biblarz, 2001). One recent study assessed adjustment of 7-year-old children with lesbian and heterosexual mothers, using data from a large geographic population study (Golombok et al., 2003), and another focused on a representative sample of adolescents drawn from schools in the United Kingdom (Rivers et al., 2008). To the best of our knowledge, however, the research described here is the first to assess adjustment of adolescents living with same-sex parents with data drawn from a large national sample. Our sample is drawn from the National Longitudinal Study of Adolescent Health (Add Health), which includes participants from many different backgrounds, from many parts of the United States (Bearman, Jones, & Udry, 1997; Resnick et al., 1997).

Examination of the existing research indicates that there is a need for analysis of a comprehensive set of outcomes for adolescents who live with same-sex parents. The Add Health study assessed adolescent adjustment in many different ways, including various aspects of psychosocial well-being, school functioning, romantic relationships and behaviors, risky behaviors such as substance use, and peer relations. This study also examined several family and relationship variables that have not been included in past research, such as adolescents' perceptions of parental warmth, care from adults and peers, integration into the neighborhood, and autonomy, as well as parental assessment of the quality of the parent-child relationship. The Add Health database thus afforded a broad overview of adolescent adjustment.

Our research assessed normative levels of adjustment among adolescent offspring of same-sex parents, and also explored factors that are associated with individual differences in adjustment and behavior within this group. We assessed structural variables such as family type (i.e., whether the parent has a same-sex or opposite-sex partner), as well as family and relationship variables such as adolescents' perceptions of parental warmth, care from adults and peers, autonomy, and integration into the neighborhood, as well as the parents' perceptions of the quality of their relationship with their child. Based on the previous findings with children (e.g., Chan et al., 1998; Flaks et al., 1995; Golombok et al., 2003), we expected to find few differences in adjustment between youth living with parents who had same-sex versus opposite-sex partners. Consistent with the literature on sources of individual differences among adolescents (e.g., Steinberg & Silk, 2002), however, we did expect to find associations between family and relationship variables and adolescent adjustment outcomes.

In summary, this chapter describes our research on adjustment and development among adolescents living with same-sex couples. Our data were drawn from the Add Health study, which provided a nearly representative sample of adolescents and their parents in the United States during the 1990s. By selecting those youngsters in Add Health who were living with same-sex parents, and comparing them both to a matched group of youngsters living with other-sex parents and to the overall sample, we aimed to address questions about adjustment among teens living with same-sex parents.

INTRODUCTION TO THE NATIONAL LONGITUDINAL STUDY OF ADOLESCENT HEALTH

For this research, participating families were drawn from a large national sample of adolescents in the United States collected by Quality Education Data for the National Longitudinal Study of Adolescent Health (Add Health; Bearman, Jones, & Udry, 1997). Add Health is a school-based study of the health-related behaviors of adolescents in grades 7–12. A sample of 80 eligible high schools was initially selected. Schools were stratified to ensure that this sample was representative of U.S. schools with respect to region of country, urbanicity, school type, ethnicity, and school size. More than 70 percent of the originally sampled high schools were recruited by Add Health. If a school refused to participate, a replacement within its stratum was selected. Participating schools provided rosters of their students and, in most cases, agreed to administer an In-School Questionnaire during one class period. They also assisted in identifying their feeder schools (i.e., those schools that include seventh grade and send their graduates to that high school). The final sample consisted of a pair of schools in each of 80 communities, with the exception of some high schools that spanned grades 7 to 12 and therefore functioned as their own feeder schools (Bearman et al., 1997).

All students who completed an In-School Questionnaire, plus those who did not complete a questionnaire but who were listed on a school roster, were eligible for selection into the core in-home sample. Students in each school were stratified by grade and gender, and approximately 17 were randomly chosen from each stratum, so a total of about 200 adolescents were selected from each of the 80 pairs of schools. A total core sample of 12,105 adolescents was interviewed.

Most interviews were conducted in 1995 in the participants' homes. All data were recorded on laptop computers. For less sensitive sections, the interviewer read the questions and entered the respondent's answers. For more sensitive sections, the respondent listened to prerecorded questions through earphones and entered the answers directly.

A parent, preferably the resident mother, was asked to complete a questionnaire covering topics including parents' marriages and marriage-like relationships; neighborhood characteristics; involvement in volunteer, civic, or school activities; education and employment; household income; and parent-adolescent relationships.

Data employed in the studies, described below, were collected through the in-home interviews and surveys, as well as in-school surveys of students (Wave 1, collected in 1994–1995) and through the in-home questionnaires of parents.

IDENTIFICATION OF CURRENT SAMPLE AND OF COMPARISON GROUPS

Offspring of same-sex couples were identified using a two-step process. We first identified families in which parents reported being in a marriage or marriage-like relationship with a person of the same sex. Because no data had been collected on parents' sexual identities as such, families headed by gay, bisexual, or lesbian parents who did not report that they were in a marriage or marriage-like relationship at the time of data collection could not be identified.

In the second step, the consistency of parental reports about gender and family relationships was examined. To guard against the possibility that some families may have been misclassified due to coding errors, we retained only those cases in which parental reports of gender and family relationship were consistent (e.g., a parent reported being female and described her relationship to the adolescent as "mother"). This procedure was designed to ensure that insofar as possible, only adolescents whose parents reported being involved in a marriage or marriage-like relationship with a person of the same sex were selected for further study.

The number of families headed by *male* same-sex couples was very small ($n = 6$). Results of preliminary analyses that included these families were nearly identical to those including only families headed by female same-sex couples. Because of their small numbers, and to simplify interpretation of results, however, we excluded these six families from the final sample.

The focal group of families identified through this process included those of 44 adolescents, 23 girls and 21 boys. Approximately 68 percent of the adolescents identified themselves as European-American or white, and 32 percent identified themselves as nonwhite or as biracial. On average, the adolescents were 15 and their parents were 41½ years of age. Average household income for families in the focal group was approximately \$45,500 per year, and 48 percent of the parents in this group had been college educated. Because only two adolescents in the focal group had been adopted, their data are not reported separately here.

The resources of the Add Health database allowed the construction of a well-matched comparison group of adolescents. Each of the offspring of same-sex parents was matched with an adolescent from the Add Health database who was reared by opposite-sex parents. This matching was accomplished by generating a list of adolescents from the Add Health database who matched each target adolescent on the following characteristics: sex, age, ethnic background, adoption status (identified via parent reports), learning disability status, family income, and parent's educational attainment. The first matching adolescent on each list was chosen as the comparison adolescent for that target adolescent. The final sample included

88 families, including 44 families headed by mothers with female partners and 44 comparison families headed by opposite-sex couples.

To assess the degree to which our focal group of 44 families with same-sex parents was representative of the overall population from which it was drawn, we compared the demographic characteristics of the focal group with those for the entire Add Health core sample ($n = 12,105$). Using one-sample t -tests and χ^2 tests, as appropriate, we compared adolescent age, parent age, household income, adolescent gender, racial identification, adoption status, and parental education in the two groups. None of these comparisons was statistically significant. We conclude that our focal group of 44 families was demographically similar to the population from which it was drawn.

PSYCHOSOCIAL ADJUSTMENT, FAMILY RELATIONSHIPS, AND SCHOOL OUTCOMES AMONG ADOLESCENTS LIVING WITH SAME-SEX COUPLES

Our first set of questions concerned psychosocial adjustment and school outcomes among adolescents with same-sex parents. How strong was the adolescents' self-esteem? To what extent did these youth experience depressive symptoms, or anxiety? What were their grades at school? How much trouble had they encountered at school, and how connected did they feel to other people in their school environments? And how close were their relationships with parents? Information addressing these questions allowed us to obtain an overview of adolescent functioning in different domains of life.

Assessment of Psychosocial Adjustment, Family Relationships, and School Outcomes

We examined data from Add Health regarding different aspects of adolescent adjustment and relationships with parents. Composite variables were created from the Add Health Home Interviews and In-School Questionnaires for adolescents' self-reported levels of depressive symptoms, anxiety, self-esteem, school grades, trouble at school, and school connectedness. Composite variables were also formed for adolescents' reports of their perceptions of parental warmth, caring from adults and peers, their integration into their neighborhood, and their autonomy. Adolescents' romantic attractions, relationships, and behaviors were assessed with individual items. Unless otherwise specified, these are all self-report variables. Parent reports about their relationships with adolescent offspring were also included.

PSYCHOSOCIAL ADJUSTMENT

Adolescent depressive symptoms were assessed with a 19-question version of the CES-D (Radloff, 1977) scale from the In-Home Interview. This scale of depressive

symptoms included questions about the frequency of symptoms such as feeling lonely, depressed, or too tired to do things. Possible scores on this scale, based on the sum of the 19 items, ranged from 0 to 57, with higher scores indicating greater levels of depressive symptoms. Cronbach's alpha for this scale was 0.85 for this sample.

Adolescent anxiety was measured with a seven-item scale that included questions about the frequency of symptoms such as feeling moody or having trouble relaxing. Items were measured on a scale of 0 (never) to 4 (every day), with scores ranging from 0 to 28, and higher scores indicating higher levels of anxiety. Cronbach's alpha for this anxiety scale was 0.68 for this sample.

Self-esteem was assessed using a six-item scale that included items such as feeling socially accepted and feeling loved and wanted. Items were measured on a scale of 1 (strongly disagree) to 5 (strongly agree), with scores ranging from 6 to 30, and higher scores indicating higher self-esteem. Cronbach's alpha for this scale was 0.80 for this sample.

SCHOOL FUNCTIONING

School outcomes measured included grade point average (GPA), school connectedness, and trouble in school. GPA was measured on a four-point scale where 4 = A, 3 = B, 2 = C, and 1 = D or lower. It was assessed by taking the mean of grades received in four school subjects (English, Mathematics, History/Social Studies, and Science) in the current or most recent school year. Cronbach's alpha for GPA was 0.79 in this sample.

School connectedness was measured using a five-item scale that assessed respondents' feelings of integration into their school. Items, which were averaged to form the adolescent's score, included the degree to which they felt close to other students, felt like part of their school, and felt teachers treated students fairly. Possible scores ranged from 1 (strongly disagree) to 5 (strongly agree). Cronbach's alpha for the school connectedness scale in this sample was 0.82.

Trouble at school was assessed with a four-item scale that included items such as problems getting homework done and in getting along with classmates. Items were measured on a scale of 0 (never) to 4 (every day) and the mean of the four items was taken, with higher scores indicating more trouble in school. Cronbach's alpha for this scale was 0.71 for this sample.

ROMANTIC RELATIONSHIPS, ATTRACTIONS, AND BEHAVIORS

Adolescents' romantic attractions were assessed with two yes/no questions, "Have you ever been attracted to a female?" and "Have you ever been attracted to a male?" Females who answered yes to the first question and males who answered yes to the second question were classified as having had a same-sex attraction. To assess dating behavior, adolescents were asked three yes/no questions: whether they had a romantic relationship in the past 18 months, whether they had a same-sex romantic relationship in the past 18 months, and whether they had ever engaged in sexual intercourse.

FAMILY AND RELATIONSHIP VARIABLES

Parental warmth toward the adolescent was assessed using the mean of five items from adolescent reports. Self-report items included adolescents' perceptions of parents' warmth and caring toward them, perceived level of family's understanding and attention, and feelings of closeness to parents. For questions in which adolescents were asked about each parent, we used the response for the one described as more warm and loving. Scores ranged from 1 (not at all) to 5 (very much), with higher scores indicating greater warmth. Cronbach's alpha for the parental warmth scale was 0.70.

Adolescents' perceptions of their integration into their neighborhoods were measured using a scale of three yes/no (1 = Yes, 0 = no) items. Items included whether they knew people in their neighborhood, talked with neighbors, or felt their neighbors look out for each other. The three items were summed, and possible scores ranged from 0 to 3, with higher scores indicating greater neighborhood integration. Cronbach's alpha for neighborhood integration was 0.54.

Adolescents' perceived autonomy was assessed with a scale of seven yes/no (1 = Yes, 0 = no) items that addressed the extent to which they were allowed to make decisions about aspects of their lives such as food, bedtime, TV viewing, and friends. The seven items were summed, and possible scores ranged from 0 to 7, with higher scores indicating greater autonomy. Cronbach's alpha for autonomy was 0.60.

Adolescents' perceived care from adults and friends was measured with three items regarding how much they believed that adults, teachers, and friends cared about them. The mean of the three items was taken as the adolescent's score, and possible scores ranged from 1 (not at all) to 5 (very much), with higher scores indicating perceptions of more caring. Cronbach's alpha for this scale was 0.58 for this sample.

Parental perceptions of the quality of their relationship with their child were assessed with a scale of six items from the parent's in-home interview. Items included questions about the parent's assessment of trust, understanding, communication, and the general quality of their relationship with their child, and were measured on a scale of 1 to 5; scores ranged from 6 to 30, with higher scores indicating closer relationships. Cronbach's alpha was 0.70 for this scale.

Results for Psychosocial Adjustment, Family Relationships, and School Outcomes

We conducted analyses in two steps. The first set of analyses evaluated the degree to which adolescents living with same-sex couples differed in their adjustment from the comparison group. The second set of analyses explored associations of adolescent adjustment with assessments of family and relationship processes. We expected that the makeup of adolescents' households would be less important than the strength of family relationships in accounting for variation in adolescent adjustment.

Adolescents with Same-Sex Parents

Overall, adolescents reported positive psychosocial outcomes, with low levels of anxiety and depressive symptoms, and high levels of self-esteem. Similarly, adolescents reported positive school outcomes, with average GPAs of 2.8, high levels of school connectedness, and low levels of trouble in school.

As expected, we found no differences in adolescents' psychosocial adjustment—which included depressive symptoms, anxiety, and self-esteem—between offspring of same-sex couples and offspring of comparison families headed by opposite-sex couples. We found a significant multivariate effect for family type for the school outcomes, which was also significant in the univariate analyses for school connectedness. Unexpectedly, adolescents with same-sex parents reported feeling more connected at school than did those living with opposite-sex parents, but we found no differences as a function of gender for psychosocial adjustment or school functioning. As expected, there were no significant interactions between gender and family type for psychological adjustment or school outcomes. Demographic covariates (e.g., adolescent age, family income, and parent's education) were not associated with these outcomes.

Analyses of adolescents' reports of romantic attractions and behaviors revealed no differences between the groups in the percentage of adolescents who reported ever having engaged in sexual intercourse (34 percent of adolescents living with same-sex couples and 34 percent of those living with other-sex couples). There was also no significant difference between the groups in the percentage of adolescents who had had a romantic relationship in the past 18 months (68 percent of adolescents living with same-sex couples and 59 percent of those living with other-sex couples). Fewer than 10 adolescents reported same-sex attractions and same-sex romantic relationships in the previous 18 months, so under stipulations that permit use of these data, group comparisons are not presented. Reports of romantic relationships, attractions, and behaviors did not differ as a function of age or gender, except that older adolescents were more likely than younger ones to report having had a romantic relationship in the past 18 months. In summary, adolescent psychosocial, romantic attractions and behaviors, and school adjustment did not differ as a function of family type or adolescent gender.

Overall, adolescents reported positive family relationships. Adolescents' reports of parental warmth were high. Adolescents' perceptions of others' (teachers, adults, and friends) care for them were also high, as were their reports of autonomy. Their average assessment of their integration into their neighborhoods was just above the middle of the scale, with higher scores indicating greater integration. Parents' perceptions of the quality of the parent-child relationship were also high. In short, this was a well-adjusted sample.

Consistent with results for psychosocial and school outcomes, we found no differences in adolescent reports of family and relationship processes, including parental warmth, care from others, personal autonomy, or neighborhood integration, as a function of family type. We did, however, find a significant multivariate difference in family and relationship processes that was attributable to adolescent gender. Further analysis revealed, as expected from earlier research, that girls reported higher levels of care from adults and peers than did boys.

To what degree did outcomes for adolescents in our focal and comparison samples differ from those for the population from which the samples were drawn? To explore this question, we obtained mean scores (or percentages for categorical variables) for each of the dependent variables. Using one-sample *t*-tests and χ^2 tests, as appropriate, we compared means for our focal sample to those for the entire Add Health core sample. None of these comparisons was statistically significant. Thus, outcomes for adolescents with same-sex parents in our focal sample did not differ significantly from those for a representative group of adolescents.

Having found almost no associations between family type and adolescent adjustment, we wanted to examine possible associations between outcomes and processes in the adolescent's environment. In particular, we examined correlations among adolescents' perceptions of parental warmth, care from adults and peers, autonomy, and neighborhood integration; parents' perceptions of the quality of the parent-child relationship; and measures of adolescent adjustment. We also conducted simultaneous multiple regression analyses to determine whether these family and relationship variables were significant predictors of adolescent adjustment, while controlling for family type, adolescent gender, and socioeconomic status. Regression analyses were conducted separately for adolescents' depressive symptoms, anxiety, self-esteem, GPA, school connectedness, and trouble in school. Family type, adolescent's gender, parental education, and family income were also included as predictors. We did not examine romantic attractions and behavior because of the small number of adolescents in either group reporting same-sex attractions or romantic relationships.

Our results showed that, as expected, quality of family relationships was significantly associated with many adolescent outcomes, including school connectedness, anxiety, and trouble in school. The association between adolescents' depressive symptoms and parental report of the quality of the parent-adolescent relationship was not statistically significant. There was, however, a nonsignificant trend in the expected direction, with more positive relationships associated with lower levels of depressive symptoms. Levels of self-esteem were significantly associated with the adolescents' reports of caring from adults and peers, with more care associated with higher self-esteem. Adolescents' anxiety was associated with adolescent gender, with boys reporting lower levels of anxiety. Adolescents' reports of trouble in school were associated with the quality of the parent-child relationship and level of parental education; less trouble in school was associated with more positive relationships with parents and having parents with higher levels of education. School connectedness was associated with family type, the quality of the parent-child relationship, and care from adults and peers, with a significant interaction between family type and care from adults and peers. Greater school connectedness was associated with having same-sex parents, reporting higher levels of care from adults and peers, and having parents who reported a more positive parent-child relationship. Adolescents' perceived care from adults and peers had a stronger effect on school connectedness for adolescents living with same-sex parents than for those living with opposite-sex parents. Adolescents' GPAs were not associated with any family and relationship

variable or socioeconomic status variable. In summary, adolescents' and parents' reports of family and relationship processes, such as quality of the parent-child relationship and care from adults and peers, were associated with several measures of adolescent functioning and were better predictors of adolescent adjustment than was family type or adolescent gender.

SUBSTANCE USE, DELINQUENCY, AND VICTIMIZATION AMONG ADOLESCENTS LIVING WITH SAME-SEX COUPLES

We also studied substance use, delinquency, and victimization among youngsters living with same-sex couples. To what extent did youth use alcohol, tobacco, or illegal drugs? To what extent did youth participate in delinquent activities? And to what extent were they victimized by others? Our methods and findings for these questions are described below.

Assessment of Substance Use, Delinquency, and Victimization

Substance Use

All of the substance use assessments were based on adolescents' self-reports. Adolescents' use of tobacco was assessed with a composite self-report variable (Sieving et al., 2000) that uses four items to classify adolescents into one of seven levels of tobacco use (1 = "never smoked," 3 = "currently smoking 1-2 cigarettes/day," 5 = "currently smoking 6-10 cigarettes/day," 7 = "currently smoking >20 cigarettes/day"). Friends' use of tobacco was assessed by asking how many of their three best friends smoked at least one cigarette per day.

Use of alcohol was assessed with three variables. We used a composite variable (Sieving et al., 2000), which uses two items to create an eight-level variable about adolescents' use of alcohol in their lifetime and in the past 12 months (1 = "2-3 drinks in their lifetime," 3 = "drank alcohol on 1 or 2 days in the past 12 months," 5 = "drank 2-3 days a month in the past 12 months," 7 = "drank 3-5 days a week in the past 12 months," 8 = "drank every day or almost every day in the past 12 months"). Adolescents were instructed to exclude "a sip or taste of someone else's drink." Individual items measured how often in the past 12 months adolescents had binge-drank on alcohol (5+ drinks in a row) and had gotten drunk. Scores for these items ranged from 1 (never) to 7 (every day or almost every day).

Lifetime and current marijuana use were assessed with a composite variable (Sieving et al., 2000), which uses two survey items to form a seven-level variable (1 = "never used marijuana," 3 = "more than three times in their lifetime, no use in the past 30 days," 5 = "two or three times in the past 30 days," 7 = "more than five times in the past 30 days").

Adolescents' risky use of alcohol and drugs was assessed with a scale of eight items (1 = yes, 0 = no; Cronbach's alpha = 0.78) that asked whether the respondent

had driven a car, gone to school, gotten into a fight, or carried a weapon while consuming alcohol or drugs. The sum of the eight items was taken, with higher scores indicating more risky use.

Relationship and physical problems caused by adolescents' use of alcohol were assessed with a scale of nine items (Cronbach's alpha = 0.84), asking about the frequency of being hung over, sick, in a fight, in a situation that was later regretted, or in trouble with parents, school, or friends or dates because of alcohol use in the past 12 months. Items were measured on a scale of 0 (never) to 4 (five or more times) and the mean of the nine items was taken, with higher scores indicating more problems.

Joint occurrences of substance use and sexual activity were assessed using a scale of six items (1 = yes, 0 = no; Cronbach's alpha = 0.68) asking whether the adolescents had used drugs, alcohol, or been drunk the first time (three items) or most recent time (three items) they had sexual intercourse. The sum of the six items was taken, and higher scores indicated more joint occurrences.

DELINQUENT BEHAVIOR

Adolescent delinquent behavior was assessed with 10 items (Cronbach's alpha = 0.74) in which they listened to questions through headphones and recorded their answers on a laptop computer. These items ask about the occurrence of activities such as damaging others' property, shoplifting, or getting into fights in the past 12 months. Scores on this scale were the sum of the 10 items (1 = yes, 0 = no), with higher scores indicating more delinquent behaviors.

VICTIMIZATION

Adolescents' experiences as victims and witnesses of violence were assessed with five items (Cronbach's alpha = 0.97) asking how often they had been shot at, cut, or jumped, had a gun or knife pulled on them, or had seen someone shot or stabbed. Scores were the sum of five items (1 = yes, 0 = no). Higher scores indicated more victimization.

FAMILY AND RELATIONSHIP VARIABLES

Adolescents' perceived care from adults, teachers, and friends was measured with three items (described above) regarding how much they believed that others cared about them, with higher scores indicating perceptions of more caring. Parental perceptions of the quality of their relationships with their adolescents were assessed with a scale described above, on which higher scores indicated closer relationships.

Results for Substance Use, Delinquency, and Victimization

Twenty-five percent of the adolescents reported that they had ever smoked regularly and 44 percent reported that they had consumed alcohol when they were not in the company of their parents. Reports of adolescents' frequency of alcohol or tobacco use were low. Adolescents also reported low levels of alcohol abuse, including binge

drinking and getting drunk. Their reports of physical and relationship problems because of alcohol use were also low, as were their reports of risky use of drugs or alcohol and their reports of joint occurrences of sexual activity and drug or alcohol use. They also reported low levels of delinquent behavior and victimization.

As expected, we did not find a statistically significant difference in adolescents' reports of their frequency of alcohol, tobacco, or marijuana use as a function of family type. In addition, our analyses revealed no significant difference in the number of three best friends who smoked or frequency of getting drunk or binge drinking. Consistent with results for the substance use, we found no significant difference in problems arising from alcohol or drug use (relationship and physical problems, risky use of alcohol and drugs, and sex while under the influence of alcohol or drugs) as a function of family type. Analyses also revealed no difference in adolescents' delinquent behavior between offspring of same-sex couples and offspring of comparison families headed by different-sex couples. Similarly, we found no difference in adolescents' experiences as victims or witnesses of violence as a function of family type.

Having found no associations between family type and adolescent risk behavior, we explored possible associations between processes in the adolescent's environment and adolescent outcomes. We conducted regression analyses separately for use of tobacco, alcohol, and marijuana, as well as victimization and delinquent behavior. Family type, gender, parental education, and family income were included as predictors. Variables and interactions that were not statistically significant predictors were removed from the models.

Results showed that, as expected, quality of family relationships was significantly associated with many adolescent outcomes. Adolescents' tobacco use was significantly associated with parental report of the quality of the parent-adolescent relationship and with adolescents' reports of caring from adults and peers. As expected, greater perceived care from others and more positive relationships were associated with lower levels of tobacco use. Adolescents' use of alcohol, use of marijuana, and delinquent behavior were significantly associated with adolescent report of the quality of parent-adolescent relationships. Closer parent-adolescent relationships were associated with less alcohol use, less marijuana use, and less delinquent behavior on the part of youth. Boys reported more victimization than did girls, but interactions between family type and predictor variables were not significant. In summary, adolescents' reports of family and relationship processes, such as quality of parent-child relationships and care from adults and peers, were associated with several measures of adolescent outcomes and were better predictors of adolescent risk behavior than was family type.

PEER RELATIONS AMONG ADOLESCENTS LIVING WITH SAME-SEX COUPLES

Another important dimension of adolescent adjustment is peer relations. To explore experiences with peers among the offspring of same-sex and other-sex

couples, we studied not only the adolescents' self-reported friendships but also their popularity among their peers, as described by their peers. In this way, we sought a comprehensive view of peer relations among adolescents living with same-sex couples.

Assessment of Peer Relations

Adolescents' reports of the quality of their peer relationships were measured with a scale of nine items, including questions about how much the adolescent felt friends cared about him or her, felt close to people at school, and felt like a part of school, as well as frequency of trouble getting along with other students, feeling that people were unfriendly, getting into any physical fights or serious physical fights, and being jumped. Negative items were reverse coded. These items were standardized ($M = 0$, $SD = 1$) and the sum was taken, with higher scores indicating more positive relationships. Cronbach's alpha was 0.68 for this sample.

Perceived support from and amount of time spent with the adolescent's five best male friends and five best female friends were measured with 10 yes/no items (three items each about time with male friends and time with female friends; two items each about support from male friends and support from female friends). The support items asked whether the adolescent had talked to the friend about a problem or talked to the friend on the telephone during the past 7 days. The time items asked whether the adolescent had gone to the friend's house, hung out with the friend during the past 7 days, or spent time with the friend during the past weekend. The three support items were summed for all five friends of each gender, and possible scores ranged from 0 to 15. The two time items were summed for all five friends of each gender, and possible scores ranged from 0 to 10. Higher scores indicated more support from or time spent with friends. Cronbach's alpha was 0.88 for time with female friends, 0.83 for time with male friends, 0.82 for support from female friends, and 0.70 for support from male friends.

Adolescents' self-report data on their friendship networks were available for a subset ($n = 56$) of those in our sample. Analyses revealed that this subset of adolescents did not differ on family income or parental education from those for whom these data were not available. Our analyses of network variables are limited to this smaller sample.

The number of friends the adolescent reported having in school was measured as the number of friendship nominations (up to 10) the adolescent made for students in school. The presence of a best female friend was assessed with a yes/no item indicating whether the adolescent nominated a female in the school as a best friend. Similarly, the presence of a best male friend was assessed with a yes/no item that indicates whether the adolescent nominated a male in school as a best friend.

Peer-report network data were available to augment the information provided by adolescents regarding their friendship networks. As with the adolescent

self-report network data, analyses of these data are limited to the subset of adolescents ($n = 56$) for whom network data were available. Variables constructed by Add Health staff (Carolina Population Center, 1997) from peer-report data include adolescent popularity, network centrality, network density, network heterogeneity, and several network traits.

Popularity was calculated as the number of times an adolescent was nominated as a friend by other students in school, with higher scores indicating greater popularity in the adolescent's several network traits. Adolescents' centrality within their friendship network (Bonacich, 1987; Carolina Population Center, 1997) assesses whether they are located in prominent positions within their friendship network and connected to many peers in their peer group. Higher numbers indicate greater centrality.

The density of adolescents' friendship networks, including students who were nominated by the adolescent as a friend and students who nominated the adolescent as a friend, assesses how many interconnections exist among students in the peer group, which is related to how likely adolescents are to know others in their school (Haynie, 2000). Higher numbers indicate greater network density.

To assess the degree of diversity in friendship networks, which included students who were nominated as friends by the adolescent and students who nominated the adolescent as a friend, we used heterogeneity measures of grade, age, and race computed by Add Health staff. Higher numbers indicate greater diversity in a trait. We assessed two characteristics of friendship networks, with the mean value on that characteristic or behavior for students in the adolescent's peer network. These characteristics included grades and number of extracurricular activities. Higher scores indicate higher grades or more activities (Carolina Population Center, 1997).

Adolescents' perceived care from adults and friends was measured with three items regarding how much they believed that adults, teachers, and friends cared about them. The mean of the three items was taken as the adolescent's score, and possible scores ranged from 1 to 5, with higher scores indicating perceptions of more caring. Cronbach's alpha for this scale was 0.58 for this sample.

Perceived parental warmth toward the adolescent was assessed using the mean of five items from adolescent reports. Self-report items included adolescents' perceptions of parents' warmth and caring toward them, perceived level of family's understanding and attention, and adolescents' feelings of closeness to parents. For questions in which adolescents were asked about each of their parents, the response for the parent who was described as more warm and loving was used. Scores ranged from 1 to 5, with higher scores indicating greater warmth. Cronbach's alpha for the parental warmth scale was 0.70 for this sample.

Adolescents answered eight yes/no items describing activities adolescents sometimes engage in with their mothers. Adolescents reported whether or not they had engaged in each of the activities with their resident mother in the previous 4 weeks. These items included going shopping, playing a sport, talking about someone the adolescent is dating, going to the movies, discussing a personal problem, talking about grades, talking about a school project, and talking about

other things going on in school. The eight items were summed, with possible scores ranging from 0 to 8. Cronbach's alpha for this variable was 0.67 for this sample.

Results for Peer Relations

Analyses were conducted in two major steps. The first set of analyses evaluated the degree to which adolescents living with same-sex couples differed in their family relationships and peer relations from the comparison group, and they employed two-way (family type: same-sex versus opposite-sex parents \times gender of adolescent) ANOVAs and MANOVAs. The second set of analyses explored associations of adolescent peer relations with assessments of family and relationship processes. Simultaneous multiple regression analyses were used to determine whether these processes were significant predictors of adolescent adjustment, while controlling for family type, adolescent gender, and socioeconomic status. We expected that family type would be less important than family relationships and processes in accounting for variation in the quality of adolescent peer relations, and that processes related to positive outcomes for adolescents would be similar, regardless of family type, and that no interactions between family type and relationship processes would emerge.

Overall, this sample reported positive peer relations, with adolescents reporting an average of about five friends in school. Adolescents also reported spending time with between one and two male friends and between one and two female friends, on average, in the past week, engaging in activities such as going to the friend's home, hanging out, and talking on the phone.

As expected, there were no differences in the number of friends that adolescents nominated in their schools, nor in the quality of their peer relations as a function of family type. Girls rated the quality of their peer relations slightly more positively than did boys, but this comparison did not reach statistical significance. There was no significant difference between groups in the percent of adolescents who reported having a best male friend, 64 percent of adolescents with same-sex parents and 68 percent of those with opposite-sex parents reported this. Adolescents who reported having a best female friend (68 percent of adolescents with same-sex parents and 40 percent of adolescents with opposite-sex parents, *ns*) were somewhat more likely to be living with same-sex couples, but this difference did not reach statistical significance. Analyses of adolescents' reports of time spent with and support received from male and female friends also revealed no significant differences as a function of family type. There was, however, a significant effect for gender: girls reported more support from female friends than did boys. All of the analyses were run again with family income and parents' education as covariates. As the results did not differ between the two analyses and the influence of demographic characteristics was not a focus of our research, demographic results are not presented here. Overall, adolescent reports of peer relations did not differ as a function of family type.

With regard to peer reports of peer relations, adolescents in this sample were nominated as a friend by an average of almost five schoolmates. As expected, analyses of peer reports of the adolescent's peer relations, including popularity, network centrality, and network density, revealed no significant differences as a function of family type. There was, however, a significant effect for adolescent gender, with girls having higher popularity ratings than did boys.

We also used peer report data to calculate the heterogeneity of the adolescent's friendship network with respect to age, race, and school grades. On average, this sample of adolescents had networks that were moderately diverse, and there were no significant differences as a function of family type or adolescent gender. In summary, adolescents living with same-sex parents had friendship networks that were very similar in heterogeneity and member characteristics to those of adolescents living with opposite-sex parents.

In line with our expectations, there were no significant differences in adolescent reports of family and relationship processes, including parental warmth, activities with mother, or care from others as a function of family type. Girls did, however, report higher levels of care from adults and peers, and greater participation in activities with their mothers, than did boys. To assess the degree to which outcomes for adolescents in our focal and comparison samples differed from those for the population from which the samples were drawn, we obtained mean scores from the Add Health Core Sample for each of the dependent variables. Using one-sample *t*-tests and chi-squared tests, we compared means for our focal sample to those for the entire Add Health core sample. None of these comparisons was statistically significant. Thus, peer relations for adolescents with same-sex parents in our focal sample did not differ significantly from those of a nationally representative group of American adolescents.

We also explored possible associations between processes in the adolescent's environment and adolescent peer relations. Simultaneous multiple regression analyses were used to determine whether these family and relationship variables were significant predictors of adolescent peer relations, while controlling for family type, adolescent gender, and socioeconomic status. Regression analyses were conducted separately for adolescents' reports of the quality of their peer relations and the number of friends nominated by the adolescent as friends, as well as for peer reports of popularity, network centrality, and network density. Family type, adolescent's gender, parental education, and family income were also included as predictors, with family type and adolescent gender remaining in all models for comparison. Demographic variables and family and relationship variables that were not statistically significant predictors were removed from the models.

Results showed that, as expected, family and relationship variables were significantly associated with many measures of adolescent peer relations. Adolescents' reports of the quality of their peer relations were significantly associated with parents' reports of the quality of the parent-adolescent relationship and with the adolescents' reports of caring from adults and peers, with more positive parent-adolescent relationships and more perceived care from adults and peers associated with more positive peer relations. Similarly, the number of school friends

reported by adolescents was associated with the quality of the parent-adolescent relationship and the number of activities done with mother, with more positive parent-adolescent relationships and more activities with mother associated with having more friends at school.

Peer reports of adolescent peer relations were also significantly associated with family and relationship variables. Peer reports of adolescents' popularity were significantly associated with the number of activities with mother, with more activities with mother associated with greater popularity. Adolescents' centrality in their peer networks was associated with the quality of the parent-adolescent relationship; more positive relationships were associated with greater network centrality. There was also a significant association between network centrality and parental education, with higher levels of parental education associated with greater network centrality. There were no significant associations among the density of adolescent's peer networks and family and relationship variables.

In summary, adolescent peer relations were associated in expected ways with several family and relationship variables. Adolescent reports of care from adults and peers and number of activities with mother, as well as parental reports of the quality of the parent-adolescent relationship, were significantly associated with numerous measures of adolescent peer relations. Also as predicted, family type was not significantly associated with any measure of adolescent peer relations, but several associations were found among these measures and adolescent gender. Overall, these results suggest that family and relationship process variables are more important predictors of adolescent peer relations than is family type.

DISCUSSION

The results of this research—which is the first to draw participants from a large, national sample to examine the adjustment, school outcomes, substance use, family, and peer relations of adolescents living with same-sex couples—have revealed few significant differences in adolescent functioning as a function of family type. Regardless of family type, however, family and relationship variables such as the quality of the parent-adolescent relationship were significantly associated with many aspects of adolescent functioning. These results, which are consistent with the findings of past research on children living with lesbian mothers, suggest that qualities of relationships within the family are more important in predicting adolescent psychosocial adjustment, substance use, school outcomes, family, and peer relations than is family type (Chan et al., 1998; Patterson, 2006).

Our research included assessments of multiple facets of adolescent adjustment, including psychosocial adjustment, school outcomes, substance use, and relationships with parents and peers. Indeed, assessments of each of these variables were themselves multifaceted. For instance, our assessments of peer relations included adolescents' perceptions of the number of friends they have in school, the quality of their peer relations, and the amount of support they receive from both male and female friends. Our assessments of peer relations also included peer reports

about adolescent popularity within the school, centrality within peer networks, network density, and network heterogeneity. The consistency of our results, which did not reveal significant differences among adolescents living with same-sex parents versus those living with opposite-sex parents in a geographically, racially, and economically diverse sample, leads to the conclusion that adolescents living with same-sex parents are developing well (e.g., Wainright & Patterson, 2006, 2008; Wainright, Russell, & Patterson, 2004).

We did not find significant associations between adolescents' functioning and family type, but we did uncover associations between several aspects of adolescent social and personal adjustment, on the one hand, and family and relationship variables, on the other. For instance, parents' reports of the quality of the parent-adolescent relationship were significantly associated with adolescents' self-reports of the quality of their peer relations, number of friends in school, and peer network centrality. Also supporting the view that adolescent peer relations are strongly associated with qualities of other relationships, results revealed that adolescents' reports of care from others were significantly associated with their reports of the quality of their peer relations. Similarly, adolescents who reported participating in many activities with their mothers were also likely to report having more friends in school. Peer reports of popularity showed the same associations: those who described more activities with their mothers were also described as more popular by peers. Overall then, these results support past findings that suggest that family processes are more important predictors of adolescent functioning than are structural variables such as family type (e.g., Allen, Moore, Kuperminc, & Bell, 1998).

Major theories of human development have often been interpreted as predicting that offspring of same-sex parents would encounter important difficulties in their adjustment, especially during adolescence (Baumrind, 1995). Results from this large sample of American adolescents have failed to confirm these predictions, suggesting that the theories may need reevaluation, especially in their application to outcomes for offspring of same-sex parents (Patterson, 2000, 2006). Results of numerous recent studies on children and adolescents who do not live with heterosexual parents (e.g., Gartrell, Peyser, & Bos, this volume; Patterson, 2000, 2006; Perrin & Committee on Psychosocial Aspects of Child and Family Health, 2002; Stevens, Golombok, Beveridge, & the ALSPAC Study Team, 2002), as well as those of the current research, suggest that theorists may need to reconsider the importance of being reared by opposite-sex parents for human personal and social development.

Our confidence in the present findings is bolstered by the strengths of the Add Health study (Bearman et al., 1997) from which the data have been drawn. The Add Health study was designed and conducted by experienced researchers who did not collect data for the purpose of studying adolescents living with same-sex parents. This fact addresses one of the concerns sometimes expressed about some earlier studies, namely that samples may have been biased toward lesbian mothers who have higher incomes and greater educational attainment, as well as toward those families whose children are developing well. Regardless of whether earlier

samples were or were not biased in any way, the present sample cannot have been subject to any such limitations.

The use of the Add Health database has allowed us to identify an ethnically, economically, and geographically diverse sample of adolescents living with same-sex couples. This is one of the most heterogeneous samples employed in research with this population to date. The continuing but understandable reluctance of some same-sex parents to identify themselves as such, however, limits our ability to assess the exact degree to which the current sample is representative of all lesbian-headed families. In addition, the Add Health database does not make it possible to determine how long adolescents have lived in their current family situations, so we cannot reach any conclusions on that topic. Despite these limitations, the Add Health database was a useful resource for this research.

This research is the first to involve information collected from parents and peers, as well as from adolescent self-reports, in the study of adolescent peer relations among youth reared by same-sex couples. This feature of the study allowed us to evaluate the possibility that self-reports might provide overly optimistic estimates of adolescent development. To the contrary, we found that both adolescents themselves and their peers at school described the peer relations of youngsters reared by same-sex couples as satisfactory. Thus, our peer report data represent a major asset that is helpful in ruling out possible alternative interpretations of our findings.

Despite the issues in past research that were addressed by the design of our study, the current research has some limitations. Among these is the fact that parents were not asked directly about their sexual identities. As a result, we were forced to rely on indirect assessments of sexual identity such as parent-report items that asked parents whether they were in a "marriage or marriage-like relationship," together with information about the gender of that partner. The design of the Add Health study allowed identification and study of adolescents living with mothers who have female romantic partners, but not adolescents with lesbian mothers who lived in other types of households (e.g., single lesbian mothers or mothers who did not consider their relationship with a female romantic partner to be a marriage or marriage-like relationship). The current research would have been strengthened if parents had been asked to describe their sexual identities in terms of their sexual attractions, fantasies, behaviors, and identities. As in all studies with gay and lesbian populations, it is likely that some parents chose not to disclose their same-sex relationships and therefore could not be identified for study in this research. Despite limitations, the research makes a valuable contribution to knowledge about adolescent development in the context of diverse families.

ADOPTION LAW AND POLICY IN LIGHT OF RESEARCH FINDINGS

The current findings have implications for public policies that involve children of lesbian mothers (Patterson, 2007, 2009). Inasmuch as these findings suggest

adolescents living with same-sex parents develop in much the same way as do those living with opposite-sex parents, they provide no justification for discrimination on the basis of sexual orientation in matters such as adoption, foster care, and/or child custody. Our results suggest that relationships and processes that occur within the family are more important in the adolescents' personal and social development.

Those who argue against allowing lesbian and gay adults to become adoptive parents (e.g., Wardle, 1997) suggest that placement in such homes would not be in the children's best interests. This argument would seem to rest on demonstrations of harm for the children of lesbian or gay parents. After more than 25 years of research, however, evidence of any such harm has yet to emerge. Meanwhile, in jurisdictions that do not permit adoptions by lesbian and gay adults, children are being denied homes and families. Minimizing children's chances of finding adoptive homes is not a credible way to pursue their best interests, and as the results of research on sexual orientation and parenting continue to accumulate, this position becomes increasingly difficult to defend.

Those who argue that sexual orientation should be seen as irrelevant to the qualifications of prospective adoptive parents (e.g., Wald, 2006), on the other hand, would appear to be responding to the actual needs of children. In the United States today, many thousands of children do not have homes. Prospective adoptive parents are in short supply. Children who grow up with lesbian and gay parents appear to develop well compared to others. In these circumstances, to deny adoptions to otherwise qualified prospective adoptive parents on the basis of sexual orientation alone is to deny loving homes to children who need them.

To suggest that the sexual orientation of prospective adoptive parents should be considered irrelevant is not to abandon careful evaluation of those adults who wish to adopt. Methods that have been found to be useful in screening other candidates should be applied in the screening of lesbian and gay prospective adoptive parents as well. It is important that such work be done carefully, so as to protect children's interests. What is not justified is any special scrutiny or added screening for lesbian or gay individuals.

In the United States today, lesbian and gay adults are less likely than others to have had children who are biologically related to them (Patterson, 2000). This greater frequency of childlessness may make lesbian and gay adults a relatively untapped resource for adoption professionals. Compared with heterosexual adults, lesbian and gay individuals and couples may be especially likely to have an interest in becoming parents through adoption. Recent research suggests that lesbians do indeed express greater interest in adopting children than do heterosexual women (Gates et al., 2007). In many parts of the country today, adoption agencies are open to this possibility, and children are being adopted into loving homes by lesbian and gay adults (Brodzinsky, Patterson, & Vaziri, 2002; Mallon, 2004). As the numbers of such families increase, and as knowledge about them grows, it is likely that sexual orientation and parenting will increasingly be seen as unrelated. Indeed, the sexual orientation of prospective parents is likely some day to be seen as irrelevant to the placement of minor children into adoptive homes.

As the numbers of placements of children into lesbian and gay parent homes continue to increase, new issues are beginning to emerge (Malton, 2004). For instance, how can agencies assist lesbian and gay adoptive families in coping with the special challenges that they encounter? What postadoption services would best support lesbian and gay adoptive parents and their children, and how do these vary as a function of the legal and policy climates in which families live? Some individuals and groups are beginning to tackle such questions (e.g., Human Rights Campaign Fund, 2008). The results of such work should be valuable in supporting lesbian and gay adoptive parents and their children in the future.

CONCLUSIONS

The present study has assessed several aspects of overall functioning among adolescents living with same-sex versus opposite-sex couples. Although family type had few significant linkages with any aspect of adolescent social or personal development, the qualities of adolescents' relationships with parents were associated with many aspects of their personal adjustment, substance use, delinquent behavior, and relations with peers. Whether they lived with same-sex or opposite-sex couples, adolescents whose parents reported having close relationships with them were likely to report higher self-esteem, fewer depressive symptoms, less use of alcohol and tobacco, and less delinquent behavior. They were also likely to have more friends in school, to have more supportive friends, and to achieve greater centrality within their friendship networks than other adolescents. These results do not support the idea that adolescent outcomes are shaped by parental sexual orientation, but they are consistent with views that emphasize the importance of relationships with parents. Overall, the results suggest that important decisions about adolescents—such as placement into adoptive homes—should focus not on parental sexual orientation, but on the qualities of adolescents' relationships with parents.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE

KAREN GOLINSKI,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 10-00257 JSW
)	
UNITED STATES OFFICE OF PERSONNEL)	
MANAGEMENT and JOHN BERRY,)	
Director of the United States)	
Office of Personnel Management, in)	
his official capacity,)	
)	San Francisco, California
Defendants.)	Friday
)	December 16, 2011
)	9:56 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(Appearances continued, next page)

APPEARANCES, CONTINUED:

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**Reported by: BELLE BALL, CSR #8785, RMR, CRR
Official Reporter, U.S. District Court**

1 **FRIDAY, DECEMBER 16, 2011**

9:56 A.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Case No. C-10-257, Karen Golinski versus
4 United States Office of Personnel Management, et al.

5 Counsel, please step forward to the podiums and state
6 your appearances.

7 **MS. LIN:** Your Honor, Rita Lin, I'm an associate at
8 Morrison & Foerster, for Plaintiff Karen Golinski.

9 **THE COURT:** Good morning.

10 **MS. LIN:** I'll be addressing Your Honor's Questions 6
11 through 10.

12 **THE COURT:** All right. Do me a favor, since I might
13 not remember two minutes from now, you can stand up and tell me
14 who -- the primary counsel or the first counsel that's arguing
15 can say, "I'm going to defer to Ms. Lin," or whatever. Okay?

16 **MS. LIN:** Your Honor, I'd also like to introduce
17 Ms. Golinski and her wife, Amy Cunninghis, who are here today.

18 **THE COURT:** Welcome.

19 **MR. MCGUIRE:** Good morning, Your Honor. James
20 McGuire, Morrison & Foerster, for Plaintiff Golinski.

21 **THE COURT:** Good morning.

22 **MS. BORELLI:** Good morning, Your Honor. Tara Borelli
23 with Lambda Legal, on behalf of the Plaintiff. And I will be
24 addressing Questions 1 through 5.

25 **THE COURT:** Good morning.

1 **MR. DAVIDSON:** Good morning, Your Honor. Jon
2 Davidson from Lambda Legal.

3 **THE COURT:** Good morning.

4 **MR. DRESSER:** Good morning, Your Honor. Gregory
5 Dresser, Morrison & Foerster, for Plaintiff Karen Golinski.

6 **THE COURT:** Good morning. Welcome.

7 **MR. WEST:** Good morning, Your Honor. Tony West,
8 Assistant Attorney General for the Civil Division, on behalf of
9 the United States.

10 **THE COURT:** Good morning. Welcome.

11 **MR. DUGAN:** Good morning, Your Honor. Conor Dugan
12 for the intervenor.

13 **THE COURT:** Good morning.

14 Counsel, would you mind having a seat at this point,
15 because I want to make a statement just to put the matter in
16 context.

17 Procedurally -- and you don't have to come forward, I
18 just want to make sure for housekeeping reasons -- I assume
19 this is correct, based upon having received additional
20 information from the parties, but just for the Record, Ms. Lin,
21 have you received and had an opportunity to review the Court's
22 questions?

23 **MS. LIN:** We have, Your Honor.

24 **THE COURT:** And, Mr. West?

25 **MR. WEST:** Yes, Your Honor, we have.

1 **THE COURT:** And --

2 **MR. DUGAN:** Yes, Your Honor.

3 **THE COURT:** Okay, very well. Thank you.

4 So, I just want to read a statement -- or make a
5 statement that puts this in context, and maybe gives the
6 parties a little bit more of the Court's thinking as you
7 approach these questions, and then we will go forward from
8 there.

9 Some of these things may be obvious, but this is
10 what -- the facts and the matters that the Court has taken
11 notice of as it prepared for this very important hearing.

12 Ms. Golinski, an employee of the office of staff
13 attorneys for the Ninth Circuit Court of Appeals, is, under the
14 laws of the State of California, married to her long-time
15 domestic partner and co-parent. After seeking to enroll her
16 spouse in the family coverage plan by her employer, the
17 Administrative Office of the Courts advised Ms. Golinski that
18 her election form would not be processed because her spouse
19 shared her gender and the extension of coverage to her spouse
20 would violate the Defense of Marriage Act, or DOMA, D-O-M-A,
21 and that's at 1 United States Code, Section 7.

22 Notwithstanding multiple orders requiring the
23 extension of coverage authored by Chief Judge Kozinski, sitting
24 as the Ninth Circuit administrator, the Office of Personnel
25 Management instructed Ms. Golinski's health insurance carrier

1 not to enroll her spouse on the basis that DOMA prohibited such
2 coverage.

3 Ms. Golinski filed a mandamus action to enforce Chief
4 Judge Kozinski's orders, which was dismissed by this Court.
5 Following dismissal of her original suit based on the
6 procedural complexities of the mandamus action, Ms. Golinski
7 filed an amended complaint presenting a direct challenge to the
8 constitutionality of Section 3 of DOMA as applied.

9 Specifically, Ms. Golinski alleges that, by operation
10 of DOMA, she has been denied marriage-based federal benefits
11 that are available to similarly-situated heterosexual married
12 persons, in violation of her rights to equal protection and due
13 process as secured by the United States Constitution.

14 I want to say a word about the Equal Protection
15 Clause because it is something that is central to the case.
16 The history of the Equal Protection Clause is a colorful and
17 storied one. After nearly a century of sanctioning slavery, in
18 amending the Constitution, the American people sought to
19 guarantee equality to all persons, thereby expanding the
20 breadth of the promise of equality founded in the Declaration
21 of Independence. The amendment changed the Constitutional text
22 to read that all persons were created equal, not just that all
23 men were created equal. Redeeming the Constitution from the
24 sins of slavery, the phrase, quote, "We the People," unquote,
25 made equality a binding guarantee of the Constitution and

1 extended protection to all persons.

2 This historical transformation is marked by rulings
3 of the Supreme Court honoring the promise of equality for all
4 persons, including *Brown versus Board of Education*, striking
5 down racial segregation; *Reed versus Reed*, prohibiting
6 discrimination against women; and most recently, *Romer v.*
7 *Evans*, striking down discrimination based on sexual
8 orientation.

9 Here, the Court is faced with enforcing the Equal
10 Protection Clause in the context of a fundamental right, that
11 is marriage. As far back as 1888, our Supreme Court recognized
12 that marriage is "the most important relation in life," and
13 "the foundation of the family and of society, without which
14 there would be neither civilization nor progress." More
15 recently, the Court established that the right to marry and to
16 establish a home and bring up children, quote, "is a central
17 part of the liberty protected by" unquote, the Constitution.
18 The question before this Court is whether the law denying gay
19 men and lesbians equal access to the benefits of marriage
20 contravenes the Constitution's guarantee of the equal
21 protection and due process of law.

22 The purpose of this hearing is to have the parties
23 help the Court resolve the constitutionality of Section 3 of
24 DOMA, as applied to a lawfully married same-sex couple. In
25 light of the Executive's pronouncement that DOMA is

1 unconstitutional and will no longer -- and will no longer
2 defend it in court, the Bipartisan Legal Advisory Group, or
3 BLAG, has taken up the defense of the statute. The Court is,
4 frankly, concerned about the defense of the statute by a
5 non-party.

6 In this case, the Court is confronted with an issue
7 of equal access to one of the most central fundamental freedoms
8 of our time: the freedom to marry the person of our choice.
9 Interestingly, the Court must resolve the issue as presented by
10 all three branches of government.

11 Now, just a housekeeping point here. The Court
12 instructs the parties to refrain from rearguing the material
13 covered in their extensive briefing on the issues, and rather,
14 to focus on the Court's questions. Once the parties have
15 addressed the Court's specific questions, the parties will have
16 an opportunity to address any other issues they may wish to
17 bring to the Court's attention.

18 With that, let us begin, and let us bring forward
19 counsel who are going to be dealing with the initial questions,
20 or the first question.

21 Now, before we -- even before we do that, counsel
22 has -- the parties have filed additional materials in response
23 to the Court's questions, which thereby manifests what this
24 Court calls its vacuum theory, which is, nature hates a vacuum
25 and lawyers hate a vacuum, and when given an opportunity to

1 fill that vacuum with briefing or argument which was invited by
2 the Court, will do so.

3 And so the Court has reviewed -- although briefly,
4 given the amount of time involved -- the additional authorities
5 submitted late yesterday afternoon by both parties. The Court
6 has concerns that some of the authorities indicate that perhaps
7 the parties may have misunderstood or misinterpreted some of
8 the questions posed. Accordingly, the Court would like to
9 clarify its position with respect to those questions.

10 Although it is clear that the parties have received
11 the Court's proposed questions for this hearing, for the sake
12 of those in the gallery and the completeness of the oral record
13 for whatever court may review this matter, the Court will read
14 into the Record each of the questions before engaging the
15 parties' arguments. I don't normally do that but, given the
16 nature of the case, I thought it would be helpful to do so.

17 And I'm going -- I'll read the questions in their
18 entirety, although I would obviously like counsel to respond to
19 the subparts. And I'm going to leave out the specific pin
20 cites and just mention the names of the cases, since the
21 citations are in the Record since the Court e-filed its
22 questions.

23 Question No. 1: The passage of Section 3 of the
24 Defense of Marriage Act ("DOMA") marks a unique departure from
25 the recognition the federal government historically has

1 afforded to State marital status determinations. And I have
2 this citing, *Elk Grove Unified School District versus Newdow*
3 case, N-E-W-D-O-W, holding that "the whole subject of the
4 domestic relations of husband and wife, parent and child,
5 belongs to the laws of the States and not to the laws of the
6 United States." See also *Boggs v. Boggs*, B-O-G-G-S, holding
7 that family law, including "declarations of status, for
8 example, marriage, annulment, divorce, custody and paternity,"
9 is the archetypal area of local concern.

10 Question 1.a: As DOMA represents a stark departure
11 from the federalist tradition and implicates a core State power
12 to govern domestic relations, is there any authority for the
13 Court to subject the statute to a more rigorous constitutional
14 scrutiny?

15 1.b: The few unique examples cited by BLAG --
16 B-L-A-G -- when Congress legislated in the area of domestic
17 relations occurred when Congress was explicitly acting in the
18 role of state government. Are there any historical examples in
19 which Congress legislated on behalf of the federal government,
20 in the area of domestic relations?

21 Now, I usually don't do this much talking, ever, but
22 certainly not in court, except when I'm giving jury
23 instructions. But I think it's important because the parties
24 have given the Court additional materials.

25 With respect to Question 1.a, and as interpreted by

1 BLAG, Question 7.a, which the Court shall have the parties
2 address separately, the Court has received the authorities from
3 BLAG, and is concerned that the group, this group seeks to
4 reframe the question posed. The Court is not concerned about
5 federal officials in any particular case having any authority
6 to determine whether any particular individual is validly
7 married under state law. In other words, the Court is
8 concerned, not with the specific adjudication, whether
9 individuals are married under state law, as there is no contest
10 here that Ms. Golinski is validly married under California law.
11 Rather, the Court is concerned with the new proposition that
12 the federal government should be involved with the
13 determination, whether any particular state's set of
14 requirements defining marriage is inherently valid, and thus
15 deserving of recognition for the purposes of federal benefits.
16 The Court's question addresses the introduction of the federal
17 definition and requirements for marriage, which have
18 historically been an area of exclusive state dominion.

19 So, with that, I'm going to start with Question 1.a,
20 and I think it is appropriate to have Plaintiff initially
21 respond to Question 1.a. And would you mind, as you get up,
22 restate your name, just so the Record's clear who's speaking.

23 **MS. BORELLI:** Sure. Thank you, Your Honor. My name
24 is Tara Borelli.

25 And, with respect to Question 1.a, we think that

1 Romer versus Evans speaks particularly powerfully to the
2 Court's question. Romer, just as this case presents,
3 confronted a question about an amendment to the Colorado
4 Constitution that was an unprecedented enactment. And the
5 Court noted that, and said that the absence of precedent from
6 the two is instructive. Discriminations of an unusual
7 character especially suggest careful consideration to determine
8 whether they are obnoxious to the constitutional provision.

9 We think this also makes sense, just as a matter of
10 first, principles, Your Honor, if we step back for a moment and
11 consider why it is that the courts subject some actions of
12 other branches of government to more exacting scrutiny. It's
13 when a branch might overreach, like the legislative branch, by
14 singling out a vulnerable minority group for deferential
15 treatment. And that's particularly a circumstance when the
16 ordinary political process is unlikely to correct that kind of
17 a problem.

18 This unprecedented action by Congress presents a
19 similar problem. Where the federal government overreaches in a
20 way that targets a vulnerable minority group, that similarly is
21 quite unlikely to be rectified by the ordinary political
22 process, and that's why it's certainly appropriate for the
23 Court to subject DOMA, at a minimum, to a careful and searching
24 form of rational-basis review.

25 **THE COURT:** All right. Thank you, Counsel.

1 I think it's appropriate at this point, given the
2 Executive Branch's position, to ask Assistant Attorney General
3 West to respond next to address the Court's question next, 1.a.

4 **MR. WEST:** Your Honor, we certainly believe that this
5 Court ought to subject DOMA to a heightened scrutiny analysis.
6 We think it's appropriately done under the Equal Protection
7 Clause.

8 With respect to this specific question that the Court
9 asks, we have not been able to find any authority on point for
10 the proposition that a -- a statute that deals with domestic
11 state relations should be subjected to more rigorous scrutiny.
12 But, we don't think that means DOMA should not get that
13 scrutiny from this Court.

14 We think that, as a matter of -- of course, that
15 there's a distinction to be made, and the *Srail* case made this
16 distinction. The District Court in the Central District of
17 California made this distinction between the issue of
18 allocating benefits, which we think is exactly what this case
19 is about, and sanctifying a relationship, which is more toward
20 the question of domestic relations that the Court -- the Court
21 discusses.

22 And, we would also note that there are federal laws
23 which do not adopt wholesale the state definition of marriage,
24 Social Security laws, tax laws, retirement laws. Those are
25 just some examples. But, again, we think that's why this is

1 probably a case that is better analyzed on the equal protection
2 context and, therefore, meriting (Inaudible).

3 **THE COURT:** Would you re-identify yourself.

4 **MR. DUGAN:** Your Honor, Connor Dugan, for BLAG.

5 **THE COURT:** Thank you. Welcome.

6 **MR. DUGAN:** If I could just pass out -- we have a lot
7 of cases, I realize, Your Honor, and I brought copies for --

8 **THE COURT:** Are these more than the ones that you
9 cited --

10 **MR. DUGAN:** No, these are the ones that went in
11 yesterday.

12 **THE COURT:** All right. I have copies of all of
13 those. I actually have a binder with each case.

14 (Off-the-Record discussion)

15 **THE COURT:** Certainly enough paper. We don't need to
16 add to that.

17 **MR. DUGAN:** Your Honor, we agree with Mr. West. We
18 have not been able to find any string of case law that would
19 subject this statute to more rigorous scrutiny because of --
20 because of what it says about marriage. We also would, with
21 all due respect, say that this is not a stark departure. As
22 Mr. West said, there are statutes on the books right now,
23 besides DOMA, that decide whether or not to recognize a state
24 marriage for immigration benefits, for tax benefits, for a
25 variety of things which we briefed. And, I'm not going to

1 reargue those here, Your Honor.

2 We also cited the *De Sylva* case, in which the Court
3 said that a state wouldn't be entitled to use the word "child"
4 or "children" any way it wanted, but rather, would -- if it was
5 strange to the familiar way of using it. And in that case, in
6 concurrence, Justices Douglas and Black made clear that whether
7 or not Congress had to -- was going to adopt the state law, was
8 -- was a question for Congress to make.

9 **THE COURT:** But there are certain -- there are other
10 statements in the majority opinion in that case, albeit --
11 dictum, that say if the Court were to begin to making fine
12 distinctions about what constitutes marriage and what doesn't,
13 that would have constitutional implications.

14 Do you agree with that? Did you find those cites as
15 well?

16 **MR. DUGAN:** I --

17 **THE COURT:** For example, Page 581.

18 **MR. DUGAN:** Yeah, no, just -- in terms of
19 specifically what -- what you are asking Your Honor, I just
20 want to make sure I understand the question.

21 **THE COURT:** Well, you understood the question
22 correctly, but you were citing concurrence. And I was saying
23 that there was -- although, again, I only had an opportunity to
24 review these matters briefly, these cases, there was language
25 in those cases about making -- that it's problematic from a

1 constitutional standpoint, where the state -- where the federal
2 government is making definitions with respect to what is
3 marriage, what is -- what is parenthood, et cetera.

4 And so I'm saying, those cases, you cited concurrence
5 in those cases. I'm not sure that they stand for the
6 proposition that you're citing them for.

7 **MR. DUGAN:** Well, the first quotation wasn't from the
8 concurrence. It was actually from the majority. And the
9 majority said states can't just define "children" any way they
10 want. If they went beyond sort of the common usage, Congress
11 could step in, and it could define.

12 Here, we already have Congress deciding which
13 marriages it will recognize for purposes of many different --
14 excuse me, several different laws. So this is not -- this
15 isn't an injection into domestic law, this is simply a question
16 of recognizing -- what Congress is going to recognize.

17 **THE COURT:** All right. All right.

18 Would you like to reply?

19 **MS. LIN:** Yes. And, I think this begins to take us
20 into the territory of Question 1.b, if that is okay with the
21 Court.

22 **THE COURT:** All right, then let's do that. And, I
23 appreciate that.

24 But before I get into that, to keep this on the same
25 track, Mr. West, is there anything would you like to say

1 further in response to what BLAG has stated?

2 **MR. WEST:** No, Your Honor.

3 **THE COURT:** All right.

4 **MS. LIN:** I'm sorry.

5 **THE COURT:** Let's go to Question 1.b, and I was going
6 to put that question, in the first instance, to BLAG.

7 **MS. BORELLI:** Sure. And, just to tack on to what was
8 discussed --

9 **THE COURT:** Yes.

10 **MS. BORELLI:** -- we agree with the Court's reading of
11 *De Sylva versus Ballentine*. In the majority opinion, the Court
12 says: There is no federal law of domestic relations; it is a
13 matter of state law. So we agree with the Court's reading on
14 that.

15 **THE COURT:** All right.

16 **MS. BORELLI:** To turn to Question b --

17 **THE COURT:** Actually, I actually wanted BLAG to
18 answer this in the first instance.

19 **MS. BORELLI:** I apologize.

20 **THE COURT:** I'll give you an opportunity, because I
21 think the questions, the way I framed the question was to
22 challenge one side or the other, and then give the other an
23 opportunity to say, you know, whatever they want to say.

24 So I'll start with BLAG, and then you will have an a
25 full opportunity.

1 Counsel?

2 **MR. DUGAN:** Your Honor, our research hasn't shown
3 that there are historical examples which Congress has
4 legislated on behalf of the federal government in the area of
5 domestic relations. We would, of course, go back to fact that
6 the federal government today does, and has in the past, drawn
7 lines about which particular relationships that states define
8 that they'll recognize.

9 **THE COURT:** All right.

10 Mr. West?

11 **MR. WEST:** But, what is not the case, we have not
12 seen historically, is the federal government picking and
13 choosing which set of legally married couples, similarly
14 situated, may receive benefits and be denied benefits simply on
15 the basis of sexual orientation or simply on the basis of
16 something that might be unpopular. And so, we've not seen that
17 historically, and that is why we think this case, which
18 presents that question squarely, is particularly a good one for
19 that analysis.

20 **THE COURT:** All right. Counsel?

21 **MS. BORELLI:** Your Honor, to the extent the Court is
22 not aware of it, there was an amicus brief submitted on behalf
23 of family law professors in the *Commonwealth* and *Gill* cases on
24 appeal before the First Circuit, and it addresses in great
25 detail this particular question. And that brief actually takes

1 upon itself the task of cataloging all of the examples of
2 federal statutes, and cases that have been cited by BLAG,
3 previously by DOJ, and by amici, supporting their position.

4 We did not submit that as additional authority
5 because it, of course, contains argument. But we have copies
6 today, and would be happy to file a copy electronically if the
7 Court would find that helpful.

8 What this brief explains -- and each and every one of
9 the supplemental authorities submitted yesterday by BLAG can
10 fit into these particular categories -- is that we have
11 categories of federal treatment of state marital status, but
12 absolutely none of them displace the requirement of a valid
13 state marriage.

14 So, for example, there is one category which is the
15 vast majority of federal statutes and regulations. They may
16 use terms such as "spouse," "marriage," or even "parent."
17 There is no federal definition. They implicitly and always
18 rely on state definitions of those terms.

19 There's a second category of some small number of
20 statutes that rely explicitly on state status. And they do so
21 by incorporating whether a marriage is valid according to place
22 of celebration or place of domicile.

23 There is a third category, and I think this is where
24 some of the controversy or argument has arisen by BLAG. But,
25 these are equal -- easily understood as cases that again do not

1 displace state marital status. This third category of statutes
2 where a valid state marriage is treated as necessary but not
3 sufficient, and these have to do with particular areas, like
4 immigration or Social Security, where the federal government
5 may have particular policy interest and applies additional
6 requirements for a person to qualify for particular benefits or
7 for particular immigration status.

8 So, for example, the Immigration and Nationality Act
9 imposes additional requirements on top of the requirement of
10 state marriage. That parties have been present for the
11 marriage and that they live together. Those are neutral
12 requirements. They apply equally to all spouses, and they
13 relate to particular policy reasons that the government has in
14 making sure people are not entering fraudulent marriages for
15 purposes of getting those benefits.

16 Again, each and every category does not begin to
17 displace state marriages. Instead, they all rely on it and
18 incorporate the requirement of valid marital status as
19 determined by the States.

20 **THE COURT:** So that's where you -- the Plaintiffs
21 would stick with those cases, where the federal -- federal
22 statutes and Congress purport to actually impose their own
23 requirements with respect to what they view as a valid marriage
24 for purposes of meeting those statutes such as Social Security
25 or immigration.

1 **MS. BORELLI:** That's precisely right. The Court --
2 rather, the federal government might have an interest in saying
3 a couple must not only have been married, they must have been
4 married for a particular period of time in order to receive a
5 certain Social Security benefit. That does not displace the
6 state marital status; it relies upon it, and imposes an
7 additional policy-specific neutral requirement for eligibility
8 for benefits.

9 **THE COURT:** All right, thank you.

10 Any reply?

11 **MR. DUGAN:** Yes, Your Honor.

12 **THE COURT:** Briefly, please.

13 **MR. DUGAN:** Yeah, briefly.

14 The idea that that -- that the Social Security
15 statute, for instance, isn't displacing something I think is
16 false. And, and DOMA -- if DOMA is displacing, in this case.
17 DOMA does not displace any state law. Congress can draw lines
18 about where it wants to give benefits and to give burdens.

19 **THE COURT:** How does it not displace it when,
20 basically, the State of California or other states say marriage
21 can be between a -- same-sex marriage is valid, and the federal
22 government says "That's is all well and good, but we're not
23 going to recognize that, for very important federal purposes"?
24 How is that not a displacement?

25 **MR. DUGAN:** Because, in this case, Ms. Golinski and

1 her wife are still married. It hasn't displaced their
2 marriage.

3 **THE COURT:** But it's displaced the benefits of their
4 marriage.

5 **MR. DUGAN:** Well, and Congress gets to draw the lines
6 of where benefits -- what benefits it wants to give. It
7 certainly can't be the case that Congress has to, basically,
8 rubber-stamp any definition that is given by a state. And I
9 think that was what I was alluding to with the *De Sylva* case.

10 **THE COURT:** All right. Mr. West, do you want
11 anything?

12 **MR. WEST:** No, Your Honor.

13 **THE COURT:** All right. Let's go to Question No. 2.
14 And this again will be, in the first instance, addressed to
15 BLAG:

16 Why should the Court not subject DOMA to heightened
17 scrutiny for impacting marriage, as a basic fundamental freedom
18 and an exercise of personal decision-making protected by the
19 right of privacy?

20 And I'm citing, for example, *Loving versus the*
21 *Commonwealth of Virginia; In re Levenson.*

22 **MR. DUGAN:** For a number of reasons, Your Honor. The
23 first being that these questions were specifically in the
24 jurisdictional statement of *Baker v. Nelson*. The question of
25 freedom, the question of privacy. This does not -- also, DOMA

1 does not implicate the concerns that Justice -- excuse me. The
2 joint opinion in Casey talked about that "At the heart of
3 liberty is the right to define one's own concept of existence
4 of meaning of the universe and the mystery of human life."
5 That's still allowed here. This is simply a question of what
6 Congress is going recognize for purposes of benefits.

7 And, and, it also is the case in *Harris versus McRae*,
8 which we cited yesterday, that it's established that the
9 government cannot infringe on a fundamental right just by
10 declining to subsidize that fundamental right. And I think
11 that's the distinction we would point to.

12 **THE COURT:** All right. Mr. West?

13 **MR. WEST:** Well, Your Honor, I think it is true that
14 no married couple, regardless of their sexual orientation,
15 enjoys a Constitutional right to federal benefits. Which is
16 why I think viewing this in a substantive due-process frame I
17 think may collapse the inquiry in such a way that -- that
18 complicates it, instead of making it more straightforward like
19 it's presented.

20 So, the question is not, you know, whether or not
21 someone has a right to benefits because of the way that --
22 because of -- of their marriage status. And the question is
23 not really one of sanctifying the particular relationship. I
24 think the question is squarely whether the federal government
25 can use this classification to make determinations amongst

1 otherwise similarly-situated legally married couples.

2 And that is also the reason why *Baker V. Nelson*,
3 which is cited by BLAG, is of no precedential value here in
4 this case because that's a case, a per curiam decision, a
5 one-sentence per curiam decision, which deals with a question
6 that's not at issue here. It deals with a question from a
7 Minnesota State Supreme Court about whether or not a same-sex
8 union was going to be recognized as marriage under the laws of
9 the State of Minnesota. That is nowhere at issue in this case.
10 Ms. Golinski and her wife are already married.

11 So, the only question is whether or not the federal
12 government has a good reason to be able to make these
13 distinctions, to draw these lines. And, we think the federal
14 government does not.

15 **THE COURT:** All right. Counsel?

16 **MS. BORELLI:** Your Honor, the Court cited in its
17 question, Footnote 5 in the *Levenson* decision. And we would
18 suggest to the Court that it could do what that decision did,
19 which is to say the only question before the Court is whether
20 the federal government has any adequate interest in denying,
21 for the first time in 230 years, federal recognition to a valid
22 state marriage just because of the sexual orientation of the
23 couples married.

24 We don't believe that the Court needs to reach the
25 question of whether this infringes the fundamental right to

1 marry. As the Court is aware, that's a question with broad
2 implications. It touches the marriage laws of 44 states. And
3 we think there are other grounds that are more than adequate to
4 hold the DOMA unconstitutional. Of course, the equal
5 protection grounds we have raised, but also impression to have
6 liberty interest identified in *Lawrence* and applied by the
7 Ninth Circuit in *Witt*, as well as the right to family autonomy.

8 To be clear, we do believe that the Constitution
9 equally protects the fundamental right of same-sex couples to
10 marry, just as it protect that right for different-sex couples.
11 But we don't believe that is presented by this case. And to
12 say a bit more specifically about why, we're not arguing about
13 the fundamental right to marry. We've not presented that claim
14 in this case, because she is married. Instead, we view this
15 law as having to do with penalizing her choice of the person
16 with whom she's built her family life.

17 So, the Court might think of this as among those who
18 are married, the government disapproves of and burdens those
19 who form that family life with a same-sex partner.

20 I concur with Mr. West's statements about *Baker*
21 *versus Nelson*, and I won't repeat our briefing. But if the
22 Court had additional questions about it, then we would be happy
23 to address them.

24 **THE COURT:** No, that's fine.

25 Do you want to say anything more on this, Counsel?

1 **MR. DUGAN:** Just briefly on the *Baker v. Nelson*
2 point, Your Honor. We put the jurisdictional statement in the
3 record -- or, excuse me, attached it to our motion to dismiss.
4 The question was squarely presented on whether or not Equal
5 Protection Clause requires a state to recognize a same-sex
6 union. We believe it is on all fours with the question here.
7 And, I would just urge you to look at that jurisdictional
8 statement.

9 **THE COURT:** All right. I understand Counsel's
10 argument on that. Let's move on to Question No. 3.

11 **MS. BORELLI:** Your Honor?

12 **THE COURT:** Yes.

13 **MS. BORELLI:** I apologize for interrupting the Court.
14 Would it be possible to address the *Harris v. McRae*?

15 **THE COURT:** Please.

16 **MS. BORELLI:** So, another case that's been cited for
17 the same proposition in the briefing already is *Regan versus*
18 *Taxation with Representation*. And that is a paradigmatic case
19 in which the Court distinguishes the arguments the plaintiffs
20 were making there as having to do with the subsidy because in
21 that case, for example, and in *Harris versus McRae*, the
22 plaintiffs were saying, "If the government provides me with a
23 particular subsidy, I can engage in more of this fundamental
24 right."

25 So *Regan*, in ruling on that, said this is quite

1 different from a case that involves a government-created
2 obstacle.

3 That is precisely what DOMA is. There is no question
4 that DOMA is a government-created obstacle. That is why this
5 is not merely a case about subsidizing a fundamental right;
6 this is about removing an obstacle that the government has
7 created without any adequate reason.

8 **THE COURT:** All right.

9 **MR. DUGAN:** Can I say one more word, Your Honor?

10 **THE COURT:** Probably more than one word.

11 **MR. DUGAN:** Probably one or two sentences.

12 **THE COURT:** You'd be the first lawyer that -- that
13 could do that.

14 **MR. DUGAN:** *Harris versus McRae* did involve a statute
15 which said that the government was not going to fund a
16 fundamental right. It was the Hyde Amendment. And so I don't
17 think the distinction that has just been put forward actually
18 gives a lot of daylight between that case and this.

19 **THE COURT:** Well, I'll read that, and Counsel's given
20 me what I need to decide that specific issue.

21 Question No. 3: In *Lawrence versus Texas*, the
22 Supreme Court, in overruling *Bowers v. Hardwick*,
23 H-A-R-D-W-I-C-K, noted that the *Bowers* court had
24 "misapprehended the claim of liberty presented to it," and had
25 failed "to appreciate the extent of the liberty at stake."

1 Here, BLAG advocates defining the right at issue as the right
2 to same-sex marriage.

3 And my question is, is that too narrow -- I'll read
4 all of the parts, and then you can respond to those, Counsel,
5 both sides -- is that too narrowly defining the right at issue?
6 What is the authority for the position that only the right to
7 opposite-sex marriage is fundamental, as opposed to the right
8 to marriage generally?

9 I'll start with you. Yes, please, Counsel. Thank
10 you.

11 **MR. DUGAN:** Your Honor, there are a couple of
12 responses to that. First --

13 **THE COURT:** I assume the first question, the answer
14 to the first question is no, it's not too narrowly --

15 **MR. DUGAN:** No, that's right, it's not too narrowly.
16 It's hard to understand how government could have a legitimate
17 state interest in preserving the traditional institution of
18 marriage, as Justice O'Connor said in her concurrence in
19 *Lawrence*, if there's a fundamental right to same-sex marriage.

20 In *Glucksberg*, the court -- which we cite in our
21 briefs, *Glucksberg* says that you look to the fundamental rights
22 and liberties which are objectively deep-rooted in this
23 nation's history and tradition, and implicit in the concept of
24 order of liberty, to discover whether or not something is a
25 fundamental right. But it added also that they required -- the

1 Court is required, in substantive due-process cases, a very
2 careful description of the right at issue.

3 So we would say that *Lawrence*, because of *Baker*, also
4 because of what Justice Kennedy said in terms of what this is
5 not reaching, and also what Justice O'Connor says in her
6 concurrence, does not indicate that we have defined the right
7 too narrowly here.

8 **THE COURT:** All right. Mr. West?

9 **MR. WEST:** Your Honor, I think *Lawrence* is
10 instructive here for a number of reasons, but I don't think it
11 is for the reasons of defining what the right at issue is in
12 this case. And so, with respect, I disagree certainly with
13 *BLAG*, that the right at issue is the right to same-sex
14 marriage.

15 But, we don't believe the right to marriage is at
16 issue in this case at all. Again, Ms. Golinski is already
17 married. There's no Constitutional right to federal benefits,
18 so that -- there's no issue there about whether or not there's
19 a fundamental right that's implicated there.

20 What is at issue is whether or not the federal
21 government can use sexual orientation as the basis to grant
22 health benefits to some legally married couples, yet deny them
23 to others.

24 **THE COURT:** All right. Counsel?

25 **MS. BORELLI:** Your Honor, so let me jump for a moment

1 to the concurrence of Justice O'Connor that was cited by
2 Mr. Dugan. That reference comes up in an entirely different
3 context, where she talks about, in the hypothetical, the
4 interest in preserving traditional marriage in an
5 equal-protection claim. And, Your Honor, what BLAG has not
6 explained in this case is what that has to do with excluding
7 same-sex couples from recognition at the federal level.

8 But, to answer the Court's question, obviously we
9 disagree with BLAG, and we think that some of the Court's
10 seminal freedom-to-marry cases address this. In *Loving*, it was
11 not about the right to interracial marriage. *Zablocki v.*
12 *Redhail* was not about the right to have a child-support --

13 **THE COURT:** What was that case you just cited?

14 **MS. BORELLI:** *Zablocki v. Redhail* was not about the
15 right to have a child-support debtor's marriage. *Turner versus*
16 *Safley* was not about the right to have a prisoner marriage.
17 These were cases about the right to marry. One does not define
18 the right by who was excluded. When women won the right to
19 vote, they did not win the right to female vote. They won the
20 right to vote.

21 To the extent that *Washington versus Glucksberg* is
22 something the Court might look to, I want to make a strong
23 distinction, a different argument about how the Court should
24 understand that decision, and its application here. *Glucksberg*
25 said there's not a right to assisted suicide that is

1 fundamental in nature. The court looked at the specific way in
2 which that right would apply in a particular context, but it
3 did not define that right by the characteristics of any
4 particular plaintiff who sought to exercise it.

5 And, that is exactly the mistake that BLAG makes in
6 their argument that there is no right to same-sex marriage
7 (Indicating quotation marks).

8 **THE COURT:** All right. Counsel, would you like to
9 reply?

10 **MR. DUGAN:** No, thank you.

11 **THE COURT:** All right. Mr. West?

12 **MR. WEST:** No, Your Honor.

13 **THE COURT:** All right. So, Question No. 4, and the
14 question is -- and then I'm going to have a comment based upon
15 the additional authority that the parties have given the Court.

16 Question 4: Are classifications based on religious
17 affiliation treated as suspect class and subject to heightened
18 scrutiny under an Equal Protection analysis? And the next
19 subpart of that is: How does BLAG distinguish the line of
20 authority treating classifications based on religious
21 affiliation as a suspect class from classification based on
22 sexual orientation?

23 Now, with respect to that question, let me add a
24 thought the Court had, in light of the Court's -- presentation
25 to the Court by counsel. With respect to Question 4, the Court

1 does not dispute and is not concerned with the line of
2 authority supporting the proposition that discrimination
3 against religious groups is subject to heightened scrutiny
4 based on the group's exercise of religion, which is
5 unquestionably a fundamental freedom. Rather, the Court is
6 concerned with the line of authority indicating that religious
7 groups are afforded heightened security where they are treated
8 as a suspect class under Equal Protection Clause. A number of
9 the additional authorities cited blur this distinction, and the
10 Court is concerned only with the treatment of
11 religiously-affiliated groups as a suspect class.

12 So I don't know if that helps BLAG, but I wanted to
13 elucidate a little bit more the Court's thinking, having read
14 your authorities.

15 **MR. DUGAN:** Would you like BLAG to go first again?

16 **THE COURT:** Absolutely, please.

17 **MR. DUGAN:** Okay. I have --

18 **THE COURT:** And if these are the same cases,
19 Counsel --

20 **MR. DUGAN:** That's right, I'm not giving you any.

21 **THE COURT:** Thank you.

22 **MR. DUGAN:** Your Honor, we're aware of no line of
23 authority in which -- in which religious affiliation or
24 religion is considered a suspect class. We could find no case
25 that goes through the -- the various factors that cases -- the

1 courts need to go through to determine whether or not a group
2 is a suspect class.

3 For instance, the analysis that is in *High Tech Gays*,
4 one of the cases we rely on in our briefs, goes through and
5 asks --

6 **THE COURT:** Which the Plaintiffs argue has been
7 severely undercut.

8 **MR. DUGAN:** Well, it's still binding precedent, Your
9 Honor. So, that's another reason that this isn't a suspect
10 class, though, because the Ninth Circuit has decided that
11 sexual orientation is not a suspect class.

12 But, going back to the question of religion. There
13 are no cases that we could find in which courts actually go
14 through that same analysis: Asking whether or not a group is
15 politically powerless, asking whether or not they have
16 immutable characteristics. And I think part of that is because
17 they have looked at it, as you were indicating earlier, as a
18 fundamental right. They've looked at it in that context. So
19 we don't think that there's this body of religious suspect
20 class case law that would be helpful here.

21 **THE COURT:** All right. Mr. West?

22 **MR. WEST:** Well, Your Honor, certainly, I think this
23 highlights the fact that the Supreme Court factors are an
24 important balance. No one factor is dispositive. And, it's
25 not like, if you add up three or four you get suspect class,

1 and if you only have two, you don't. I think there are clear
2 parallels between sexual orientation and religious affiliation.

3 I think the Court, when looking at religion and
4 treating it as a suspect classification for equal-protection
5 purposes, does so because of the very unique role that
6 religious affiliation plays throughout the history of this
7 country. It -- one of the reasons that this nation was founded
8 was because of religious persecution, and religious-freedom
9 concerns.

10 And we think something that -- that fundamental to
11 the United States, where it has been absolutely clear since the
12 founding of the country that discrimination based on religious
13 affiliation is something to be disfavored, I think puts it
14 squarely within the equal-protection analysis that the Court is
15 sort of -- has sort of articulated.

16 The point is, you know, what is the Court trying to
17 do when it is setting forth this equal-protection analysis?
18 So, we think sexual orientation has many parallels there, just
19 as it does with other quasi-suspect or suspect classes like
20 gender, race, national origin, lineage.

21 **THE COURT:** Counsel?

22 **MS. BORELLI:** Your Honor, of course, as a preliminary
23 note, we strongly disagree that *High Tech Gays* is still
24 binding. As the Court noted, it has been severely undercut.
25 If the Court were to have any questions about our arguments

1 about *High Tech Gays*, we would appreciate the chance to address
2 them.

3 But, as the Court noted, all of the sources that have
4 been submitted to the Court that have to do with religious as a
5 suspect classification fall into two categories. One set
6 recognizes it as a fundamental right, and that infringements on
7 that right are subject to strict scrutiny. But there is a
8 significant amount of, admittedly, dicta, and yet it is
9 repeated over a significant period of time by both the Supreme
10 Court and the Ninth Circuit, which treat as obvious the idea
11 that religion constitutes a suspect classification.

12 We think it is a particularly apt analogy here, Your
13 Honor. There are all kinds of reasons to think that the
14 arguments that BLAG has made about sexual orientation -- the
15 fact that some small minority can experience a change that's
16 not necessarily an obvious trait, that it's about conduct --
17 each and every one of these things can be said about religion,
18 as well. Some people convert their religion. Some people, you
19 can't identify their religion by looking at them. The only way
20 you might know is by conduct.

21 So, in the way that you might be able to surmise
22 sexual orientation of someone as holding the hand of a same-sex
23 partner, you might be able to able to infer religion possibly
24 by religious practices, if someone is wearing a cross or a
25 Yarmulke, or praying to Mecca.

1 You can tell what some people's religion is by their
2 conduct. And yet, some people have a religious identity, and
3 yet never engage in the practices of that particular religion,
4 in the same way that some people identify as gay or
5 heterosexual, and might be celibate.

6 But, if the Court found that this was a hard ground
7 to analogize to because of doubts in the case law -- and we
8 don't think that case law leaves any room for doubt -- alienage
9 is another apt example, and there's no question that alienage
10 is a suspect classification. People can change, they can
11 become citizens, they can renounce their citizenship. You
12 cannot tell whether someone is a citizen by looking at them.
13 Alienage is determined by conduct, conduct of coming to the
14 United States under certain circumstances. And, likewise,
15 citizenship is determined by the conduct of naturalizing.

16 The ultimate point with all of these criteria is that
17 this is the kind of core defining and fundamental trait that
18 the government does not have the right to judge or to require a
19 person to change as a condition of equal citizenship.

20 **THE COURT:** Thank you.

21 Do you want to say anything in rebuttal, Counsel?

22 **MR. DUGAN:** Yes, Your Honor. I don't know how *High*
23 *Tech Gays* isn't binding, but dicta; talking about religion as a
24 suspect class is. That makes no sense to me.

25 The other thing I would say, in response to something

1 Mr. West said is, the analysis for a suspect class is a
2 conjunctive analysis. If you look at *High Tech Gays*, look at
3 *Lenning*, which the Supreme Court decided, you need all the
4 factors or the factors that the Court decides to actually
5 review in that particular case.

6 But it would make no sense that someone would be
7 considered a suspect class if they have political power. You
8 wouldn't need the courts to step in to rectify problems.

9 **THE COURT:** All right. Mr. West?

10 **MR. WEST:** Yes, Your Honor. I think this underscores
11 exactly why *High Tech Gays* is just not viable authority. We
12 recognize its precedent. It's Ninth Circuit authority that
13 this Court is going to have to address in its opinion.

14 But frankly, it's on its last legs. And that is
15 because it is based -- the linchpin of that case is based on a
16 case, *Bowers*, that has been categorically overruled by the
17 Supreme Court. So to continue to think that its reasoning has
18 any viability, I think, is to engage in a fiction.

19 The other thing that this conversation is
20 highlighting, it seems that BLAG seems to be pressing -- again,
21 this is reasoning in *High Tech Gays*, as well -- this idea that
22 because homosexuality might be behavior -- these are the words
23 of *High Tech Gays* -- as opposed -- or conduct, that therefore,
24 it is not somehow deserving of a suspect classification.

25 And the Supreme Court has, when it comes to sexual

1 What is the statutory authority for an evidence of
2 compliance with the role that Bipartisan Legal Advisory Group
3 has assumed in this matter? Is this group actually bipartisan?
4 Does BLAG have the support -- and funding for the increasing
5 cost of defending DOMA -- from a majority of Congress, or just
6 from the House of Representatives? See *Immigration and*
7 *Naturalization Service versus Chadha*, C-H-A-D-H-A, holding that
8 Congress is the proper party to defend the validity of a
9 statute when an agency of the government charged with enforcing
10 the statute agrees that the statute is unconstitutional.

11 Now, the additional authority cited by BLAG regarding
12 the group's authority to support the statute in court are, for
13 the most part, frankly, not helpful. The Court is not
14 concerned about enforcement of the disciplinary rules of the
15 House of Representatives. Rather, the Court is concerned about
16 the authority of the House alone, rather than the majority of
17 both houses of Congress, to defend this statute in court. This
18 Court is also concerned whether the House followed correct
19 protocol in hiring and continuing to fund the group that
20 appears here.

21 And, I'll give you an opportunity to respond first.

22 **MR. DUGAN:** Thank you. Thank you, Your Honor. I
23 think that question is probably most centrally directed to us,
24 so I'll get to it.

25 There is no statutory authority. There's

1 constitutional authority, and that authority is the rule-making
2 clause that each house can make rules that determine its
3 proceedings. And, under those rules, the House has -- has
4 established an Office of General Counsel for the purpose of
5 providing legal assistance and representation to the House.
6 And the Office of General Counsel shall function pursuant to
7 the direction of the Speaker, who shall consult with the
8 Bipartisan Legal Advisory Group, which shall include the
9 majority and minority leaderships.

10 So, to answer your question, Your Honor, is it
11 bipartisan? Yes, it is. It is made up of five members. And,
12 in a three-to-two vote, BLAG decided to defend a law that the
13 Department of Justice decided it wasn't going to defend
14 anymore.

15 **THE COURT:** Let me ask you this. I'll let you finish
16 your argument --

17 **MR. DUGAN:** Sure.

18 **THE COURT:** But, I read the cases that you cites.
19 And, again, it is a little bit of an academic discussion,
20 because the Court has granted BLAG's motion to intervene. The
21 Court is going to consider the very eloquent arguments that
22 Counsel has made. It is very helpful to the Court.

23 But, we're dealing with the three branches of
24 government. And I think, as one of the coequal branches --
25 some might not always agree with that, but we are a coequal

1 branch -- I'm obliged to ask that.

2 And, I didn't see any case where -- that you've cited
3 that's right on point, where only the House which happens to
4 have a majority in its favor on this question brings the
5 action, and it is upheld on constitutional basis, that the
6 House is the appropriate party to defend a statute in the
7 absence of the Senate that is not supported by the executive
8 branch.

9 So, that's really where the question comes from.

10 **MR. DUGAN:** And, Your Honor, there are several
11 answers to that. First of all, the -- the statute that
12 requires notification from the Department of Justice when it's
13 not going to defend a law that it's constitutionally obligated
14 to defend contemplates that either the House or the Senate,
15 alone or jointly, will be able to defend laws.

16 The one case that we cited, and I -- Your Honor, I
17 think maybe it's because the question wasn't actually answered
18 there, but this *Coors* case, which the House went at it alone.
19 The Senate was not involved; the House was.

20 And another thing I would like to address is just
21 this idea of the bipartisanship. And, we can provide this to
22 the Court. But, we have gone searching through the House
23 briefs. We have discovered and we know of at least nine
24 separate occasions when there's been a split vote in the
25 BLAG -- usually three to two, one time four to one -- where the

1 House has still filed briefs.

2 **THE COURT:** All right. I don't know if the executive
3 branch has a dog in this race, but I'll certainly give you an
4 opportunity to respond.

5 **MR. WEST:** Your Honor, I just wanted to correct one
6 thing -- or probably several things, but I'll only take the
7 opportunity to correct one -- that BLAG made. And that is the
8 Department of Justice, the Executive, is not constitutionally
9 obligated to defend the statute that it believes is
10 unconstitutional. And, we can certainly imagine cases where it
11 would be important for both the House and the Senate to be of
12 one mind if they were to take up the defense of the
13 constitutionality of the statute.

14 We think, however, this is not a case where the Court
15 needs to resolve that issue because the United States, which is
16 the Defendant here, has taken steps to perfect the ability for
17 BLAG to come in and make these arguments for the benefit of the
18 Court, for the benefit of the Record. And certainly, no party
19 has objected to BLAG's participation for the specific purpose
20 of presenting arguments in defense of the Defense of Marriage
21 Act.

22 **THE COURT:** Do you wish to say anything at this
23 point?

24 **MS. BORELLI:** To be clear, Your Honor, BLAG does not
25 represent the House. They are a five-member committee

1 operating here by a vote of three of their members, and I think
2 it is important for that to be clarified.

3 **THE COURT:** Although, in fairness to them, the rules
4 provide that, in effect, they are representing the House when
5 they constitute this group, and there was a majority vote of
6 that group, correct?

7 They may not, sort of in a macro sense, represent the
8 entire House, each and every member. But that's the way
9 democracy works. Isn't that true?

10 **MS. BORELLI:** You know, I have counsel here who's
11 actually a bit more versed with the rules. And if the Court
12 wanted to hear more, he would be happy to address it.

13 **THE COURT:** Well, I would, actually. I would like to
14 complete the Record on this issue. Again, it's a little bit,
15 one would say, academic, but I don't think so, given the
16 important features implicated and the way this case has been
17 litigated.

18 Counsel, would you identify yourself, also.

19 **MR. DAVIDSON:** Sure. John Davidson.

20 The rule of the House that refers to BLAG, and it's
21 really the only thing that we've been able to find that
22 describes BLAG in any fashion, it's -- BLAG is not identified
23 in any statute or in anything other than the one roll of
24 Congress which was submitted by BLAG, refers to BLAG as an
25 advisory committee to the Speaker, and says that the Speaker

1 may direct the House counsel to take action.

2 But it does not give any authority to BLAG to take
3 any action, other than to advise the Speaker. So, I think that
4 does raise a question about BLAG's authority to do anything on
5 behalf of the House, itself.

6 But again, we, too, don't have much of a dog in this
7 race. That is, we -- we have not objected to BLAG intervening
8 in this, before this Court, and that's because we do believe
9 it's important to have a full-throated explanation of the
10 position of even some members of Congress, on this position, so
11 that the Court really considers all of the arguments that could
12 be considered on this very important issue.

13 **THE COURT:** All right, fair enough. Let's move on.
14 I have all I need on that question.

15 Let's move on to Question No. 6: How does BLAG
16 distinguish the ruling in *Gill versus Office of Personnel* --
17 that's G-I-L-L -- *versus Office of Personnel Management*, which
18 is obviously the District of Massachusetts case, which found
19 that DOMA does not pass constitutional muster under even
20 rational basis scrutiny?

21 Start with you, again.

22 **MR. DUGAN:** We get to start again, Your Honor, thank
23 you.

24 **THE COURT:** You're on the hot seat.

25 **MR. DUGAN:** Well, we don't distinguish, and we think

1 it's wrong, and here's why we think it's wrong. The court in
2 that case relied, to a great extent, on a very strange
3 conclusion: That Congress has no power to define the words it
4 uses in its own statutes. It said, quote (As read):

5 "The states alone have the authority to set
6 forth eligibility requirements as to familial
7 relationship..."

8 **THE COURT:** Slow down a little bit.

9 **MR. DUGAN:** Oh, sorry.

10 **THE COURT:** Thank you.

11 **MR. DUGAN:** "... to set forth eligibility
12 requirements as to familial relationships. And the federal
13 government cannot, therefore, have a legitimate interest in
14 disregarding those family status determinations." Close quote.

15 As I think we've said earlier in the argument,
16 Congress gets to draw the lines of which benefits it wants to
17 give. And, and has done this in other cases. We talked about
18 the Social Security context, we've talked about the immigration
19 context, and we've talked about, sort of, benefits context.

20 This is something Congress does all the time. So we
21 think that that part of *Gill*, which seems to be central to its
22 holding, is -- is simply flat-out wrong.

23 **THE COURT:** By the way, has the case been argued
24 before the First Circuit yet?

25 **MR. DUGAN:** No, it has not, Your Honor.

1 **THE COURT:** All right. Mr. West?

2 **MR. WEST:** Congress gets to draw the lines, but it
3 can't draw those lines in a way that is arbitrary or
4 discriminatory and disfavors a group which may be unpopular,
5 which is what's happening with here with the Defense of
6 Marriage Act.

7 With regard to the *Gill* case, we have -- it would --
8 it would be good to see -- and, in fact, we would invite this
9 Court to do this -- an opinion that actually engages the
10 Supreme Court's well-established factors in the
11 equal-protection analysis.

12 The Bankruptcy Court down in the Central District of
13 California, in *Balas*, has done that, finding that DOMA was
14 unconstitutional on both rational basis and alternative --

15 (Reporter interruption)

16 **MR. WEST:** The Bankruptcy Court in *Balas* did that,
17 finding that DOMA was unconstitutional on both rational basis
18 and, alternatively, heightened-scrutiny grounds.

19 Judge Reinhardt, in *Levenson*, noted that he believed
20 heightened scrutiny was applicable in finding DOMA
21 unconstitutional on rational-basis grounds.

22 Judge Walker, in an analogous case, of course, gave
23 both of those alternative bases.

24 **THE COURT:** Do you want me to cite Judge Reinhardt to
25 invite Supreme Court scrutiny?

1 (Laughter)

2 **THE COURT:** Do you have any other suggestions?

3 **MR. WEST:** My guess is that no matter what you do,
4 this case will invite Supreme Court scrutiny.

5 **THE COURT:** Thank you. All right.

6 **MR. WEST:** So, but we would actually add that we
7 think it would be helpful as this case moves as inevitably it
8 will through the appellate process, for the Court to lay out
9 the analysis, the equal-protection analysis, and why sexual
10 orientation merits heightened scrutiny.

11 **THE COURT:** Thank you.

12 Ms. Lin?

13 **MS. LIN:** Your Honor, Rita Lin. We would obviously
14 disagree with BLAG's characterization of the federal government
15 as having a long-standing role in defining marriage in any
16 fashion. It is true that sometimes in granting federal
17 benefits, as -- as has already been discussed, the federal
18 government layers requirements on top of marriage. So it's not
19 enough that you're married under state law; you also have to
20 have been married for a certain amount of time to qualify for
21 benefits. Or you have to show that your marriage isn't a sham
22 marriage in order to qualify for a particular right.

23 The reasons for those, though, are those are neutral
24 criteria that are targeted to the particular policies of the
25 particular federal statutes at issue. They are not, as in the

1 case of DOMA, an attempt to displace a state's determination of
2 who is and is not validly married.

3 DOMA is the first attempt to engage in a blunderbuss
4 legislation that changes over 1,000 federal rights all in one
5 fell swoop, without looking at the particular policy
6 implications as to each particular federal right or benefit at
7 issue. And in that sense, it's an unique attempt to displace
8 state law in defining what is or isn't marriage.

9 The other point I would like to make, Your Honor, is
10 that *Gill* is not a case that is based solely on that ground.
11 *Gill* systematically goes through each and every one of the
12 government interests that BLAG has identified in this case in
13 support of DOMA, and explains why each of them fails even
14 rational-basis scrutiny. So, it's not an opinion that's based
15 solely on the notion of federalism.

16 **THE COURT:** Anything you want to say in reply?

17 **MR. DUGAN:** Yeah, Your Honor. First of all, we were
18 not defending the law at that point. And we would disagree
19 with the contention that all the same bases were before the
20 Court, and rejected.

21 The other thing I would say is that this Court is
22 still bound in terms of that -- in terms of the
23 suspect-classification analysis that I think Mr. West would
24 like this Court to get into, by *High Tech Gays*. That Ninth
25 Circuit precedent is unequivocal on this.

1 And, and *Witt versus Air Force Department*,
2 reemphasizes the fact that, I think, *Bowers* and *Lawrence* had
3 not been -- had not undercut that analysis.

4 **THE COURT:** Yes, Mr. West.

5 **MR. WEST:** Your Honor, we think it's helpful for this
6 Court not only to engage the equal-protection analysis, but
7 also to say that *High Tech Gays* is no longer viable. We
8 recognize that it's precedent this Court has to deal with, but
9 it is no longer viable.

10 And with regard to *Witt*, what *Witt* has is a one --
11 the equal-protection analysis consists of a one-paragraph
12 citation to *Philips*. When you read *Philips*, *Philips* relies
13 entirely on *High Tech Gays*, on the -- on the discredited *Bowers*
14 rationale, as well as there's a lot of talk in there about
15 deference to the military.

16 But, with regard to the earlier point that BLAG made
17 in terms of the rationales or the reasons that Judge Tauro)
18 considered in *Gill*, Judge Tauro decided that there was no
19 rational basis that could sustain this statute. So, it really
20 didn't matter what arguments BLAG might be able to put forward
21 now because, at bottom, Judge Tauro decided that there was no
22 rational basis that could be imagined that could sustain the
23 constitutionality of the statute. Now, if this Court decides
24 that as well, this Court ought to strike it down.

25 **THE COURT:** Do you want to say anything else?

1 **MS. LIN:** Your Honor, just on the *Witt* point.
2 *Witt* -- in *Witt*, the equal-protection claim that was brought
3 was not the claim is brought before the Court today. In *Witt*,
4 the plaintiff was saying that the military draws an improper
5 distinction in the way it treats the discharge of gay soldiers,
6 versus the discharge of child molesters, for example.

7 It was not -- the plaintiff in that case did not
8 advance an equal-protection argument based on the distinction
9 in the treatment between heterosexual and homosexual soldiers.

10 **THE COURT:** Let's move on to Question No. 7. And
11 I'll read the entire question. It's a long question; there's
12 four parts to it. And then I have a comment to make about
13 Question 7, and the authorities cited by the parties.

14 What are BLAG's proffered bases for upholding the
15 constitutionality of DOMA?

16 Question 7.a: BLAG argues that DOMA provides
17 consistency in the definition of marriage. However,
18 traditionally, marriage has been defined by the states. Under
19 DOMA, for the first time, federal officials are now tasked with
20 determining the validity of particular marriages that have been
21 sanctioned under state law. How does treating some
22 state-sanctioned marriages different from others promote
23 consistency or maintain the status quo?

24 7.b: The fact that marriage traditionally has been
25 defined as between a man and a woman merely describe what has

1 been. How does codifying this description constitute a
2 justification, reason, or basis for restricting marriage?

3 And, see *Heller versus Doe*, holding that, quote,
4 "ancient lineage of a legal contract does not give it immunity
5 from attack for lacking a rational basis," unquote. Also
6 citing the concurrence in *Lawrence*.

7 Does BLAG have any authority for the proposition that
8 codification of a long-standing tradition independently
9 constitutes a rational basis?

10 7.c: In support of miscegenation laws, proponents
11 argue that the long-standing tradition of the separation of the
12 races provided justification for prohibiting interracial
13 marriage. How does BLAG's argument about the tradition of
14 heterosexual marriage differ from the miscegenation context?

15 7.d: How does the withholding of federal benefits to
16 children of families with same-sex parents encourage
17 responsible parenting and child rearing?

18 And what I want to say with respect to question 7.c,
19 the Court has received from BLAG in response to the question a
20 citation to a law review article authored by a professor from
21 Brigham Young University. This is not legal authority.

22 Further, the article reads more like a treatise on
23 the morality of homosexuality than a legal analysis of the
24 analogy of the Court's holding in *Loving versus Virginia* to the
25 issue of same-sex marriage. The Court is concerned that BLAG

1 cited this article for the proposition that homosexuality is,
2 as the author of the article explicitly contends, quote
3 "immoral," unquote. The article quotes Martin Luther King,
4 Jr., when he famously said, quote, "I have a dream that my four
5 children will one day live in a country where they will not be
6 judged by the color of their skin but by the content of their
7 character."

8 The conclusion of the article is that same-sex
9 marriage, quote, "is a character issue where we cannot tolerate
10 compromise... Marriage is a prime example of a moral
11 relationship, a relationship of conjugal, complementarity" --
12 that's C-O-M-P-L-I-M-E-N-T-A-R-I-T-Y -- "that benefits all
13 society, and particularly the children and other dependent
14 members of a specific family. Same-sex relations come from a
15 different ethic and represent a different morality, manifest in
16 the infidelity and promiscuity that characterizes gay and
17 lesbian relationships much more than conjugal unions."

18 So I want to know, when BLAG responds, for what
19 purpose does BLAG submit this law review article? Does BLAG
20 have any legal authority in response to 7.c, i.e. that the
21 tradition of heterosexual marriage differs from the arguments
22 used in the miscegenation context?

23 So, I'll open the floor to you.

24 **MR. WEST:** Do you want me to start with 7.c, Your
25 Honor?

1 **THE COURT:** Why don't you start with 7.c, please,
2 because that's more recent, based upon what you said to the
3 Court.

4 **MR. WEST:** We cite that article for the simple
5 proposition -- not the proposition, the facts that it lays out
6 in terms of -- in terms of the laws dealing with mis- --

7 **THE COURT:** Miscegenation.

8 **MR. DUGAN:** Yeah, miscegenation law. That's why we
9 cite it. We're not citing it because of the conclusions the
10 author comes to. We don't -- we wouldn't say on the Record
11 that we agree with the author's conclusions. But it gives, in
12 the back, an appendix table that lays out the various laws, and
13 when they changed, and what states did. That's a simple reason
14 we used that citation.

15 **THE COURT:** All right. Would you please -- now,
16 would you mind --

17 **MR. DUGAN:** 7.a?

18 **THE COURT:** Well, let me, since you've just raised
19 that, and I want to keep it in context in my mind, is there
20 anything that the Executive Branch, Mr. West, you wish to say
21 on that, on 7.c?

22 **MR. WEST:** The only thing I would say, Your Honor, is
23 that your summary of that law review article did not sound
24 dissimilar to the House report and the justifications offered
25 for DOMA by the House. And while understandably, BLAG would

1 want to distance themselves from those arguments which are
2 based on animus, the fact is they are there, they are reasons,
3 justifications that Congress gave for passing this law. And we
4 think that this Court ought to entertain those and analyze
5 those justifications, and determine whether or not they are
6 valid as part of the equal-protection analysis.

7 **THE COURT:** Ms. Lin?

8 **MS. LIN:** The only thing we want to -- we would want
9 to say on 7.c, Your Honor, is that if one looks back on the
10 arguments that were made against interracial marriage back in
11 the forties, fifties, and sixties, those arguments in many ways
12 are remarkably similar to the arguments that are being made
13 today against same-sex marriage.

14 We submitted the opinion of *Perez v. Lippold* last
15 night, and the reason that we did that is, if you look to the
16 dissent in *Perez*, you can see that the interests advanced in
17 support of the anti-miscegenation statute there were that
18 interracial marriage is a divisive social issue, that it -- it
19 goes against a long history of prohibitions on -- on mixing of
20 the races dating back to, quote, the early colonial era
21 (Indicating quotation marks), that it's harmful to children,
22 and it's not an optimal environment for child-rearing. Those
23 are the same arguments that are advanced today against same-sex
24 marriage.

25 **THE COURT:** Is there anything you want to say --

1 **MR. DUGAN:** I don't think that either the Department
2 of Justice or the Plaintiff have ever alleged that the
3 reason -- or that traditional marriage, itself, was based on
4 animus. And I think that that's an important point. We're not
5 simply making a tradition-based argument here.

6 We would -- one of the ways we would differentiate
7 *Loving* from this case is, of course, you have binding Circuit
8 precedent and Supreme Court precedent that have said that equal
9 protection does not require same-sex marriage. So, that is a
10 clear distinction between the two.

11 Another point I would make on that is -- is a
12 response to Mr. West. That in the rational-basis analysis, you
13 don't have to look at the reasons Congress gave. It's any
14 conceivable basis. And they --

15 **THE COURT:** Are you backing off from the reasons
16 Congress gave, and disavowing those?

17 **MR. DUGAN:** Not disavowing all of them. But, those
18 were not the reasons we put forward in our briefing. And the
19 other thing is, not only does it need to be conceiv- -- can it
20 be conceivable, it has to be debatable. So, you and I may not
21 find the reasons put forward to be all that compelling. But if
22 there's a legitimate debate to be had, then, then that's a
23 rational basis.

24 **THE COURT:** All right. Would you -- why don't you
25 move on to Question 7.a, please.

1 **MR. DUGAN:** Okay. The first, the first part in 7.a
2 that we would take issue with is that we don't think this is a
3 new task. I think that there's a -- there is a fundamental
4 disagreement here between the parties in terms of what the
5 federal government does when it looks at -- and I'll move on,
6 Your Honor, but I -- but, when it looks at the lines it draws
7 for benefits. And so, it already does this.

8 **THE COURT:** All right.

9 **MR. DUGAN:** In terms of the consistency, there is a
10 larger point of consistency here, consistent with practice and
11 tradition. And, again, that is something Justice O'Connor said
12 was legitimate state interest in her concurrence in *Lawrence*.
13 So's it's not simply just is it consistent with what states are
14 doing today. It's a question of what are most states doing?
15 What have most states done?

16 And that, and that's simply not consistency for
17 consistency's sake. It's realizing and recognizing that this
18 institution has given us great benefits. And -- and having
19 caution as we proceed forward, opening it up to new
20 definitions.

21 **THE COURT:** All right. Mr. West?

22 **MR. WEST:** With regard to the consistency point, Your
23 Honor, we don't believe this is a justification that is
24 sufficient to save the statute because, as Your Honor points
25 out in the question, it actually creates inconsistency in the

1 distribution of benefits to couples whose unions are recognized
2 under state law.

3 With regard to the point about consistency with
4 tradition, I still -- it's hard to understand exactly how
5 that's not an argument, consistency for consistency's sake, or
6 consistency with tradition because that's the way things have
7 always been. We know from *Virginia Military Institute* that
8 tradition alone is not enough to sustain a statute, one that
9 discriminates.

10 And with regard to a marriage creating great
11 benefits, as BLAG has argued, we certainly don't disagree with
12 that. The question is, why can't those benefits be realized by
13 same-sex marriages just like heterosexual marriages in the
14 context of benefits being provided by the federal government?

15 And that's the distinction that we are still
16 contesting is -- is not a legitimate distinction in the
17 equal-protection context.

18 **THE COURT:** All right. Ms. Lin?

19 **MS. LIN:** Your Honor, the notion that there's
20 something new about the -- the inconsistency (indicating
21 quotation marks) between the states in whether or not they're
22 recognizing marriages between same-sex couples, it's not one
23 that makes sense.

24 There have been inconsistencies and there's been a
25 patchwork among the states for years about numerous marital

1 issues, and many of them hotly contested. Interracial marriage
2 is a great example of that. In 1948, when the laws started
3 falling that were banning interracial marriages, many states
4 had laws on the books that banned such marriages.

5 By 1967, when *Loving* was decided, there were still
6 16 states banning interracial marriages. It was a
7 hotly-contested, socially-divisive debate. The federal
8 government never stepped in to create consistency (Indicating
9 quotation marks) between state definitions.

10 Same thing with no-fault divorce. Throughout the
11 sixties, seventies, and eighties, there was a shift of many
12 states to no-fault divorce. There was a concern that people
13 were moving to states in order to get divorced under more
14 lenient standards. Again, federal government never intervened,
15 even though those were hotly contested social issues.

16 The true inconsistency, as Mr. West points out, is
17 that DOMA creates a situation where, for the first time, people
18 are treated as being married under state law, but denied all
19 the benefits and protections of marriage under federal law.

20 To the point about the consistency with tradition,
21 it's -- that's simply another way, Your Honor, of saying that,
22 "Well, we've discriminated against same-sex couples for a long
23 time in this area, so we're just going to keep doing it."

24 That's not an answer to a citizen who comes to the
25 government and says, "Why is this classification being drawn

1 this way?"

2 It's not an answer for the government to say, "Well,
3 we've been discriminating against you for a very long time."

4 **THE COURT:** Do you want to say anything in reply,
5 Mr. Dugan?

6 **MR. DUGAN:** Well, that begs the question, of course,
7 whether or not this is a fundamental right or this is a suspect
8 class. So, the -- the other side assumes the answers to those
9 things.

10 The question is whether or not Congress has -- if
11 we're going to look at this under the rational-basis test, did
12 Congress have a rational basis, any conceivable rational basis,
13 for making this distinction?

14 **THE COURT:** Can you cite me a couple?

15 **MR. DUGAN:** Yeah, I'll cite you several. One is
16 to -- to rationally maintain bargains that were decided upon by
17 previous Congresses. Every Congress prior to 1996 had enacted
18 laws dealing with marriage, defining marriage against the
19 background assumption that marriage was between a man and a
20 woman.

21 There's also the concern of the public fisc. And,
22 that's attached to that previous reason. There were bargains
23 made, and there were calculus made in terms of how -- how are
24 we going to -- what benefits are we going to give, what burdens
25 are we going to put on people? And to maintain that

1 consistency over time is certainly a rational basis.

2 Another rational basis would be that -- I guess -- I
3 want to step back, because this an answer that can cause some
4 tension. But, when -- the other side has not said why a
5 redefinition of marriage that has never existed before wouldn't
6 change people's understanding, actions towards, and how they
7 enter in or deal with marriage. Congress could have said,
8 "Let's take break, let's give this some time."

9 In fact, that's what Senator Leahy has done. Senator
10 Leahy voted yes on DOMA. Now he's brought legislation to the
11 Senate to repeal DOMA. There's a rational basis in caution.
12 Not because this is going to be something that's going to do
13 something horrible; we just don't know what it's going to do.
14 And so that's certainly a rational basis when Congress is faced
15 with something new that had never existed before.

16 **THE COURT:** All right.

17 Do you want to say anything further?

18 **MR. WEST:** No, Your Honor.

19 **THE COURT:** Ms. Lin, do you want to say anything
20 further on this point?

21 **MS. LIN:** Just briefly on the points about the public
22 fisc and the consistency with -- that we just need to give this
23 some time.

24 On the public fisc point, the question here is why
25 same-sex married couples should be the one to bear the burden

1 of reducing the benefits that are coming out of the public
2 fisc. The question is: Why are we drawing this decision, why
3 do we draw the line here? When for, for generations, we, the
4 federal government has simply accepted state marital status as
5 the appropriate place to draw the line.

6 **THE COURT:** All right --

7 **MS. LIN:** The --

8 **THE COURT:** I'm sorry.

9 **MS. LIN:** Just --

10 **THE COURT:** I was going to say, just so counsel know,
11 after this subpart I'm going to take a short break, give people
12 a chance to stretch their legs. But, please continue.

13 **MS. LIN:** Just on the idea that we ought to just give
14 this some time. Your Honor, this is the same argument that was
15 advanced in *Romer v. Evans*. There, the State of Colorado said,
16 "We're going to withdraw anti-discrimination protections based
17 on sexual orientation. We're going to withdraw those, because
18 we want to focus on other forms of discrimination, and this
19 form of discrimination is just too socially divisive. We want
20 some time to handle this issue calmly."

21 The Supreme Court rejected that as a legitimate
22 rational basis for the federal government. There's no reason
23 to act with more caution here than there has been for any other
24 change in state marriage law over the years.

25 **THE COURT:** Anything further on this point?

1 **MR. WEST:** Not on the merits, Your Honor. Just as a
2 point of order, though, this Court can certainly take judicial
3 notice of the GAO report which, on this very question of
4 whether or not it would cost the federal government more money
5 to extend benefits to same-sex married couples as it does to
6 heterosexual couples, completely inconclusive.

7 **THE COURT:** All right. Let's take a ten-minute
8 break, and we will continue with the subparts of 7, and then we
9 will complete. Thank you, Counsel.

10 (Recess taken from 11:13 a.m. to 11:27 a.m.)

11 **THE COURT:** You may all be seated, and have counsel
12 come forward. And we are up to Question 7.b. And, I will ask
13 BLAG once more to, for consistency's sake, --

14 **MR. DUGAN:** Understood, Your Honor.

15 **THE COURT:** -- to start off.

16 **MR. DUGAN:** The first point I would make in regards
17 to 7.b is this: We have not argued in our briefs that
18 tradition alone is a rational basis. But I think it's also
19 important to look at the line in *Heller*, right after the line
20 that you quoted, Your Honor.

21 It reads (As read):

22 "That the law has long treated the classes as
23 distinct, however, suggests that there is a
24 common-sense distinction between the classes
25 that were there at issue."

1 Justice O'Connor, in her *Lawrence* concurrence, again,
2 said that there is a legitimate state interest in preserving
3 the traditional institution of marriage. But this is not
4 simply a question of lineage, that we've always done this.
5 We've done it, and great things have flowed from it.

6 And the common-sense distinction that I think we can
7 talk about here --

8 **THE COURT:** Great things have flowed from it? What?

9 **MR. DUGAN:** From marriage.

10 **THE COURT:** Oh, okay.

11 **MR. DUGAN:** Sorry. The institution of marriage.

12 **THE COURT:** Right.

13 **MR. DUGAN:** The common-sense distinction I think that
14 we can point to is the fact that heterosexual couples have
15 accidental pregnancies. They make babies without technological
16 means.

17 And, Congress could have had a rational basis to say,
18 "We think the understanding of what is important about marriage
19 will be undercut if we don't focus on these particular
20 couples."

21 **THE COURT:** Wait. Time out. I'm missing the point.

22 Are you saying accidental marriage is a rational
23 basis -- accidental -- I'm sorry -- accidental pregnancy is a
24 rational basis, and there's no technology involved. I have to
25 admit, I'm just sort of tongue-tied. I don't understand that

1 argument at all.

2 **MR. DUGAN:** No, this, in our briefs, comes under the
3 heading, I think, "Responsible Procreation." So that's where
4 I'll direct you.

5 **THE COURT:** Oh.

6 **MR. DUGAN:** The idea is this: That heterosexual
7 couples can make babies spontaneously -- not spontaneously, but
8 they can make babies. And, that Congress wants there to be a
9 linkage between those two. It doesn't have to be a perfect --

10 **THE COURT:** But, is that rational?

11 How can the Court avoid the fact that same-sex
12 couples can, based upon impulse or whatever, by virtue of the
13 science available, decide to have a child and do it relatively
14 quickly, maybe faster than the -- you know, shall we say, is
15 the Biblical way, if you will.

16 **MR. DUGAN:** Well, Your Honor, again, it has to be a
17 rational basis. It doesn't have to be a perfect fit. It
18 doesn't have to be something that you or I are compelled --

19 **THE COURT:** But, help the Court determine what is
20 rational -- just because the Congress says it is rational --

21 **MR. DUGAN:** No, not just because Congress has said
22 so, but because law has a pedagogical effect. And I think the
23 other side would concede that. That's one of the reasons the
24 Plaintiff wants her marriage to be recognized on the federal
25 level. And so, Congress could say that law has a pedagogical

1 effect. And we believe that if we open marriage to beyond
2 heterosexuals who have this capacity to have accidental
3 pregnancies, we're going to untether the connection between
4 marriage and children.

5 Now, it doesn't have to compel you, you and me. But
6 it certainly is a debatable thing that provides a rational
7 basis for the decision Congress made here.

8 **THE COURT:** All right. Mr. West?

9 **MR. WEST:** Of course, Your Honor, the United States
10 is no longer defending the statute on rational basis or on any
11 other basis. But we would note that, even when the United
12 States was most recently defending the statute, we disavowed
13 the procreation argument because it -- we didn't believe it was
14 viable under rational basis.

15 **THE COURT:** Ms. Lin?

16 **MS. LIN:** Your Honor, what it sounds like this boils
17 down to is an argument that -- that DOMA somehow connects
18 marriage and child-rearing in a new way. Or, maintains a
19 connection between marriage and childbearing.

20 But really what DOMA does is undermine that
21 connection, because it takes the 270,000 children that are
22 being raised by same-sex couples today, and it puts them
23 outside of federally-recognized wedlock. So it disconnects
24 marriage and child-rearing.

25 The other point, Your Honor, is that procreation and

1 the ability or intent to procreate has never been a condition
2 of marriage in this country. There's undisputed expert
3 testimony from Professor Contin (Phonetic) on this point.
4 That's never been a criterion for marriage in any state in this
5 union since -- and there's never been any suggestion that
6 different-sex couples that can't procreate or end up -- or end
7 up having children through adoption or assisted reproduction,
8 there's never been any suggestion that their marriages are
9 somehow lesser or diminished compared to heterosexual couples
10 who happen to have the ability to procreate biologically. In
11 fact, the federal government subsidizes adoption by giving
12 people tax credits for adoption expenses, for example.

13 It's important, yes. The fit between the ends and
14 the means doesn't have to be exact, if we were under
15 rational-basis scrutiny. But there has to be some connection,
16 some rational connection, some reason to distinguish between
17 heterosexual couples who do not or cannot procreate and
18 same-sex couples.

19 **THE COURT:** Go ahead.

20 **MS. LIN:** I would point the Court toward the Supreme
21 Court's decision in *Cleburne*. In *Cleburne*, the city said that
22 homes for the mentally retarded had to get a special-use permit
23 that other types of buildings didn't need to get. The city
24 justified that by saying, "Oh, this is really about
25 overcrowding."

1 And the court, applying rational-basis scrutiny,
2 rejected that. And the court said, "Well, if it's really about
3 overcrowding, you don't require a special-use permit for
4 nursing homes, you don't require a special-use permit for
5 hospitals. Why are you applying a different standard for --
6 for homes for the mentally retarded?"

7 There's not a fit between the ends and the means.
8 That is exactly the type of situation we have here.

9 **THE COURT:** I would like you to respond to that,
10 Mr. Dugan, which, let's assume the hypothetical or the basis --
11 one of the so-called rational bases for this statute is what
12 you said, how does denying benefits to same-sex couples further
13 this what you argue to be a rational basis?

14 **MR. DUGAN:** This is, I think this is what you asked
15 in 7.d, Your Honor?

16 **THE COURT:** It's covered, to some extent. Why don't
17 you do this: Why don't you begin responding to Question d,
18 about how withholding federal benefits to children of families
19 with same-sex parents encourage responsible parenting and
20 child-rearing, but also to the specific point that you made,
21 and responded to by Ms. Lin, with respect to how does DOMA
22 promote the specific so-called rational purpose that you
23 mentioned to the Court before.

24 **MR. DUGAN:** Sure, Your Honor.

25 With regard to 7.d, the first thing I would say is

1 the proper question that needs to be asked is whether there is
2 any legitimate --

3 **THE COURT:** Well, they're all proper.

4 (Laughter)

5 **THE COURT:** By definition.

6 **MR. DUGAN:** I'm not always proper, Your Honor.

7 **THE COURT:** All right.

8 **MR. DUGAN:** -- is whether or not there is any
9 legitimate state interest that will be furthered by recognizing
10 opposite-sex marriages, but not same-sex marriages.

11 Recognizing the opposite-sex marriages, what benefits them? It
12 looks to what the benefits of those who are within -- within
13 the actual extension of benefits have.

14 Now, one of the things we quoted in our briefing --
15 not briefing last night, but our notice last night, is that
16 classifications are valid where the inclusion of one group
17 promotes a legitimate government -- governmental purpose, and
18 the addition of other groups would not.

19 So the focus is on is this -- and that's in *Johnson*
20 *v. Robinson*, or *Robinson* (sic). The focus is on the group
21 within the benefits circle. And so, going to the question of
22 how -- how does this further the rational basis of procreation.
23 Well, one -- one point to make in response to Ms. Lin is that
24 the expert, Nancy Cott, who I deposed, did say that impotence
25 has -- has been a reason for not -- for annulling marriages and

1 divorcing marriages in some places.

2 So there is a sense in which marriage is still tied
3 up with children in the fact that that sort of requirement or
4 that sort of -- that reason could be a basis for annulling a
5 marriage.

6 The connection on the procreative side is this,
7 that -- again, I mean, the Court can take notice, and we all
8 know that children can be born of a --

9 **THE COURT:** Is there any conclusion by that -- I read
10 that report -- any conclusion that determining that what you
11 thought was your opposite-sex partner was same-sex, that that's
12 a ground for annulment?

13 **MR. DUGAN:** I don't think we got into that in the
14 report or in the --

15 **THE COURT:** Wouldn't that be the appropriate inquiry,
16 though? Whatever the so-called expert says, wouldn't that be
17 the inquiry?

18 **MR. DUGAN:** I don't think so, Your Honor. I must not
19 be following here.

20 **THE COURT:** Well, this expert says that impotence is
21 a ground for annulment and, therefore, somehow -- what, now?

22 **MR. DUGAN:** Well, that that ties this to the idea
23 that marriage is about children, and children that can be --
24 spontaneously be generated by a union between a man and woman.

25 **THE COURT:** I understand the argument. All right,

1 disregard what I said.

2 All right, Mr. West.

3 **MR. WEST:** Your own words with regard to -- actually,
4 just with regard to this issue, certainly, I don't know whether
5 impotence can be a ground for annulling a marriage, but it's
6 certainly not a requirement to be married. And the federal
7 government certainly does not typically make decisions on which
8 benefits it's going to give married couples on the basis of
9 whether or not they can procreate. It doesn't make that
10 distinction. It's one of the reasons why, why even when --

11 **THE COURT:** Can Congress rationally make that --

12 **MR. WEST:** Well, we disavowed that argument, under
13 rational basis, when we were defending the statute, because we
14 didn't think it was a viable argument. And certainly, for the
15 same reasons, obviously, under heightened scrutiny, it would --
16 it would fail that test as well, because of the overwhelming
17 evidence that same-sex parents are every bit as capable of
18 raising happy, healthy children as -- as heterosexual parents.

19 **THE COURT:** All right. Ms. Lin, anything further on
20 this point?

21 **MS. LIN:** Just to respond first to the -- the
22 impotence point. I think that that speaks to the notion that
23 sexual intimacy is a fundamental important part of marriage.
24 It doesn't say anything about procreation.

25 But to address BLAG's larger point about -- about the

1 way equal-protection analysis --

2 **THE COURT:** I see your point. I'm sorry. I'm a
3 little slow on the uptake here.

4 What you are saying -- and I wasn't being facetious
5 about your argument, but you are saying, basically, impotence
6 is different than infertility, and there's no argument that
7 infertility is a basis for annulment.

8 **MS. LIN:** Exactly.

9 **THE COURT:** Is that the Plaintiff's argument?

10 **MS. LIN:** Exactly.

11 **THE COURT:** All right.

12 **MS. LIN:** The other point, Your Honor, is that BLAG
13 pointed to this notion that equal-protection analysis should
14 just look at the favored group, and not consider why it is that
15 that disfavored group hasn't been included.

16 That's not how the Supreme Court has conducted
17 equal-protection analysis. I would point Your Honor to *Romer*
18 and *Moreno*. In *Romer*, the State wanted to focus resources on
19 combating certain forms of discrimination. They said, "Sex
20 discrimination and race discrimination are big problems. We
21 want to focus resources on that. We don't want to deal with
22 sexual-orientation discrimination."

23 The court said, "You have to have some purpose, you
24 have to have some basis for drawing the line between the forms
25 of discrimination that are included and those that are not."

1 And *Moreno* is the same thing. Households with
2 unrelated people were excluded from food stamp programs.
3 There, the court said Congress had to justify why it was that
4 households with related people should be included, while
5 households with unrelated people should be excluded. In other
6 words, Congress had to justify a reason for the exclusion.

7 The case that BLAG cites, *Johnson v. Robison*, really
8 just reinforces that analysis. That case involved
9 conscientious objectors who completed alternative service. The
10 question was, should people who do alternative service get the
11 same veterans benefits as those who complete active military
12 duty.

13 And the court said no, because active -- it is
14 rational for Congress to give different benefits to people who
15 complete active military duty, because active duty inherently
16 involves hazards and disruptions that alternative service does
17 not.

18 In reaching that conclusion the court said, and I
19 quote (As read):

20 "Of course, merely labeling the class of
21 beneficiaries under the act as those having
22 served under active duty cannot rationalize
23 statutory discrimination against
24 conscientious objectors who have performed
25 alternative civilian service if, in fact, the

1 lives of the latter were equally disrupted
2 and equally in need of readjustment."

3 That's the point. There has to be a reason, a goal
4 that is advanced by excluding a disfavored group.

5 **THE COURT:** Mr. Dugan, do you want to reply?

6 **MR. DUGAN:** No.

7 **THE COURT:** All right. Let's move on to Question
8 No. 8, which is: How does the sharing of benefits with another
9 group of lawfully married persons denigrate the importance of
10 the benefits already conferred upon the original group? In
11 other words, how are heterosexual lawfully married persons
12 affected by the sharing of benefits with lawfully married
13 homosexual persons?

14 And, I want to get a little more elucidation on this
15 question. The Court is inclined to refer to this proposition
16 as the -- what it would call the kindergarten principle. This
17 is -- that is, not sharing benefits with another group somehow
18 makes the benefits already conferred to the original group that
19 much better. The Court is concerned about how depriving rights
20 to a minority somehow improves the rights already bequeathed
21 upon or bestowed upon the majority.

22 So, Mr. Dugan, I'll give you a chance to respond.

23 **MR. DUGAN:** I'm not entirely sure I understand
24 everything that the Court is saying, but the first thing I
25 would say is that --

1 **THE COURT:** Well, that makes us even.

2 **MR. DUGAN:** Well, I don't understand myself most of
3 the time.

4 **THE COURT:** Right. Go ahead.

5 **MR. DUGAN:** What I would say is this: That we have
6 not made an argument that -- that allowing benefits to same-sex
7 couples would denigrate heterosexual couples. I'm not sure
8 where -- where the Court's concern is coming from. And so
9 that's why I'm having trouble understanding.

10 **THE COURT:** Maybe I'm just trying to find out -- if
11 you're not making that argument, then I think we can move on.

12 **MR. DUGAN:** Okay. We are not making the argument
13 that heterosexual couples' benefits or marriage as an
14 institution will be denigrated if the benefits are extended to
15 others.

16 **THE COURT:** All right. Do you want to saying say
17 anything about that?

18 **MR. WEST:** Well, importantly, that is the argument
19 that the House makes in passing DOMA.

20 **THE COURT:** That's why I asked it.

21 **MR. WEST:** And, in fact, it's one of the arguments,
22 this idea of defending the traditional notion of marriage, it's
23 one of the arguments that, again, when the United States was
24 defending most recently the statute, we also disavowed as not a
25 viable argument to make under rational basis.

1 But it does -- I think this conversation does
2 underscore, really, the central question in this case, which is
3 that what justifies the federal government denying this couple
4 of federal benefits as -- when they are similarly situated with
5 all other legally married couples.

6 **THE COURT:** Ms. Lin?

7 **MS. LIN:** I don't have anything to add.

8 **THE COURT:** All right. Very well.

9 Last question, Question No. 9: To the extent that
10 the Court decides the issues presented on the motion for
11 summary judgment, does BLAG contend the motion to strike
12 evidentiary materials is still applicable?

13 **MR. DUGAN:** Well, your Honor, obviously we think this
14 should be decided on a motion to dismiss, and we think the
15 motion for summary judgment should be denied. But we don't
16 contend that the evidence needs to be stricken, if you're going
17 to decide it on a motion for summary judgment.

18 **THE COURT:** All right. I assume the government --
19 you have no dog in that race.

20 **MR. WEST:** No dog in the fight.

21 **THE COURT:** And, do you agree?

22 **MS. LIN:** That's fine.

23 **THE COURT:** Okay. All right.

24 So, this is the point where the Court sort of asks
25 advisedly, just, with the vacuum approach being invoked here,

1 is there anything that we missed that the parties wish to
2 either sum up -- I don't need a Fourth-of-July speech about --
3 you know, I've already heard all the arguments. It's been very
4 helpful. But if there's anything that counsel feeds the need
5 to go forward with, to leave ringing in the Court's ears, I'll
6 be glad to hear.

7 And I'll start with Plaintiffs, because they are
8 Plaintiffs. So, who would like to speak for the Plaintiffs?

9 **MS. BORELLI:** Well, I have one housekeeping matter,
10 Your Honor. I had mentioned to the Court earlier an amicus
11 brief, and neglected to actually offer copies of it. It's also
12 available in PACER. It was filed in the *Commonwealth* and *Gill*
13 cases in the First Circuit. I believe it was filed on
14 November 3rd. I.

15 It is called the Brief of Amici Curiae Family Law
16 Professors in Support of Affirmance of the Judgment Below. And
17 if the Court would like paper copies, we would have that --

18 **THE COURT:** All right. I will allow you to lodge the
19 copies.

20 Do you have a position on that at this point?

21 **MR. DUGAN:** No, Your Honor.

22 **THE COURT:** So you don't object.

23 **MR. DUGAN:** No. I think that -- these are things
24 like legislative facts that we have -- we have said are
25 perfectly -- excuse me, perfectly allowed for the Court to

1 take --

2 **THE COURT:** Does the government have any objection?

3 **MR. WEST:** No objection.

4 **THE COURT:** All right. They will be admitted for
5 purposes of this hearing.

6 **MR. DUGAN:** Thank you.

7 **THE COURT:** And my clerk will talk to you about how
8 to do that, in the appropriate way. We will mark, as
9 Plaintiff's Exhibit 1 for the purpose of this hearing only, the
10 argument. It will be considered as part of the Record on
11 summary judgment.

12 (Plaintiff's Exhibit 1 marked for identification and
13 received)

14 **THE COURT:** So, anything further the Plaintiffs wish
15 to say?

16 **MS. LIN:** No, Your Honor.

17 **MR. DUGAN:** Your Honor, just briefly. Obviously,
18 we've briefed this, and we have told you what -- what standards
19 we think you need to decide this case on.

20 The final point I would make is, it seems that the
21 other side is saying that the only basis for this law is
22 animus. And I think this Court should think long and hard
23 before it decides that Senator Wellstone, Senator Biden,
24 Senator Mikulski, Senator Levin, Senator Dodd, and numerous
25 others voted for this law solely out of animus.

1 **THE COURT:** All right. I'm sure the government has
2 something to say about that.

3 **MR. WEST:** Very briefly, Your Honor. We've certainly
4 not contended that the only basis for this law is animus, but
5 we do think, under heightened scrutiny analysis, this Court
6 ought to consider the actual motivations of Congress as
7 expressed in the House report. And there's no shortage of
8 examples that animus was one of the motivations for this law,
9 we would even submit, a major motivation for this law.

10 But just briefly, Your Honor, it's clear that the
11 Court is grappling from the questions and from the conversation
12 with this issue of federalism, Congress legislating, and
13 domestic relations. And I would just offer the Court, if it's
14 helpful, to look at the briefs that we have filed in the *Gill*
15 case.

16 We agree with Plaintiffs in that case, on the
17 equal-protection claim. And, it's the same argument that I'm
18 making here. We do disagree with them on the Tenth Amendment
19 and spending-clause claims. And, you know, we think that
20 substantive due-process federalism claims, we think that those
21 unnecessarily complicate the inquiry here. That -- that, first
22 of all, that's not the way this case has been pled by
23 Ms. Golinski.

24 But, we think that this case actually presents the
25 equal protection -- the equal-protection inquiry in a fairly

1 straightforward way, and that it would be enormously helpful to
2 whatever court is reviewing this case and this Record for this
3 case -- for this Court to engage in the equal-protection
4 analysis, to engage in the factors analysis, because it will be
5 -- if the Court does that, it will be one of the only courts
6 that has done so in this circuit since *High Tech Gays*.

7 **THE COURT:** All right. Do you want to say anything
8 in response, Ms. Lin, or --

9 **MS. LIN:** I think Ms. Borelli wanted to briefly
10 address the --

11 **THE COURT:** Yes.

12 **MS. BORELLI:** On the point of animus, Your Honor, if
13 ever there were a picture of animus, we think that the
14 legislative record of DOMA is it. But I also think it's
15 important to note that when the Supreme Court has talked about
16 what animus is, it's been careful to say that it doesn't
17 require malice.

18 As Justice Kennedy said, concurring in *Alabama versus*
19 *Garrett*: "It can be insensitivity caused by simple want of
20 careful, rational reflection, or an instinctive mechanism to
21 guard against others who appear to be different." And *Cleburne*
22 defined it as "a view that others are less worthy or less
23 deserving." And, that's all we would add.

24 **THE COURT:** The Court is impressed that you knew that
25 by heart, but --

1 (Laughter)

2 **THE COURT:** -- that's -- it's not -- that has no
3 weight, but it's just impressive.

4 All right. The matter is submitted. Thank you,
5 Counsel, to all, for a very excellent argument and being
6 helpful to the Court. And thanks particularly the Justice
7 Department for sending its chief. Thank you.

8 **MR. WEST:** Thank you.

9 **THE COURT:** I'll state, I'm going to direct the
10 parties to order a transcript of these proceedings and equally
11 share the cost. All right, thank you.

12 **MR. WEST:** Thank you, Your Honor.

13 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 10-00257 JSW, Golinski v. US OPM, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

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_____/s/ Belle Ball _____

Belle Ball, CSR 8785, RMR, CRR

Tuesday, January 17, 2012

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