

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

CIVIL ACTION
NO. 3:10 CV 1750 (VLB)

JOANNE PEDERSEN & ANN MEITZEN,)
GERALD V. PASSARO II,)
LYNDA DEFORGE & RAQUEL ARDIN,)
JANET GELLER & JOANNE MARQUIS,)
SUZANNE & GERALDINE ARTIS,)
BRADLEY KLEINERMAN & JAMES GEHRE, and)
DAMON SAVOY & JOHN WEISS,)

Plaintiffs,)

v.)

OFFICE OF PERSONNEL MANAGEMENT,)
TIMOTHY F. GEITHNER, in his official capacity)
as the Secretary of the Treasury, and)
HILDA L. SOLIS, in her official capacity as the)
Secretary of Labor,)
MICHAEL J. ASTRUE, in his official capacity)
as the Commissioner of the Social Security)
Administration,)
UNITED STATES POSTAL SERVICE,)
JOHN E. POTTER, in his official capacity as)
The Postmaster General of the United States of)
America,)
DOUGLAS H. SHULMAN, in his official)
capacity as the Commissioner of Internal)
Revenue,)
ERIC H. HOLDER, JR., in his official capacity)
as the United States Attorney General,)
JOHN WALSH, in his official capacity as Acting)
Comptroller of the Currency, and)
THE UNITED STATES OF AMERICA,)

Defendants.)
_____)

SEPARATE STATEMENT OF NON-ADJUDICATIVE FACTS

Plaintiffs have separately submitted a Statement of Undisputed Facts in accordance with Local Rule 56(a)1 setting forth the adjudicative facts material to the issues before the Court. See Fed. R. Evid. 201, Advisory Committee Note ("Adjudicative facts are simply the facts of the particular case.") In addition to these adjudicative facts, there are also legislative, or "constitutional," facts relevant to certain issues. See *id.* ("Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of legal principle or ruling by a judge or court or in the enactment of a legislative body."). Although legislative facts need not be introduced into evidence, and although Plaintiffs need not demonstrate the absence of dispute concerning legislative facts, Plaintiffs set forth legislative facts below to assist the Court. *United States v. Fernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995); ("[W]hile courts may take judicial notice of either legislative or adjudicative facts, only notice of the latter is subject to the strictures of Rule 201"); *Mass. Med. Soc'y v. Dukakis*, 637 F. Supp. 684, 692 (D. Mass. 1986) (courts, "in making non-adjudicative fact findings, are free to draw upon sources of knowledge beyond evidence that is admissible under the formal rules of evidence that apply to adjudicative fact finding"); *Bio-Med. Applications of Lewiston v. Bowen*, 677 F. Supp. 51, 53 (D. Mass. 1987) (Fed. R. Civ. P. 56 "does not apply to nonadjudicative facts, as to which, if genuinely disputed, courts in any event may proceed to resolve them outside the constraints that apply to genuinely disputed and material adjudicative facts.")

Part I sets forth constitutional background facts. Part II sets forth facts relevant to whether any form of heightened scrutiny applies to Plaintiffs' equal protection claim challenging the classification of married couples based on sexual orientation pursuant to the Defense of Marriage Act, 1 U.S.C § 7 ("DOMA Section 3").

I. Background Non-Adjudicative Facts.

1. The institution of marriage in the United States is a particular, not a universal, form of the institution and it has been defined and controlled historically at the state level. Expert Affidavit of Nancy F. Cott, Ph.D. ("Cott Aff.") ¶¶ 8, bullet 2, 24-28.

2. Since 1789, States (and their localities) have issued marriage licenses and established the rules and requirements for entry to and exit from marriage. *Id.* ¶¶ 8-11, 58.

3. Whether a marriage is recognized by a religion does not dictate its legality or validity. Religious authorities have been authorized to act as deputies of civil authorities in performing marriage ceremonies, but not to determine qualifications for entering or leaving a legally valid marriage. *Id.* ¶ 11.

4. State marriage rules have been a patchwork quilt, changing substantially over time in response to local and regional preferences, political and economic environments, religious forces, changes in the composition of a state's residents, and many other local conditions. *Id.* ¶¶ 24-28.

5. States have differed from one another in defining the basic elements of marriage, including whether or not ceremonies are required for validation, age

at marriage, what other “race” may marry a “white” person, how and on what grounds marriage may be dissolved, and how spousal roles shall be defined and enforced. *Id.* ¶¶ 31-73.

6. Examples of this variation have arisen and remain today in the context of recognition of common law marriage, age of consent to marry, “hygienic” restrictions on who can marry (including degrees of relatedness between spouses), and marriage dissolution rules – yet the federal government has never stepped in to create uniform requirements for purposes of federal law. *Id.* ¶¶ 31-44, 58-64.

7. Heated controversy often surrounded changes to terms of marriage on which state laws diverged in the past. Distinctive features of contemporary marriage that we take for granted (including the ability of both spouses to act as individuals while married, the freedom to marry a spouse of any race, and the liberal availability of divorce) were fiercely resisted when first introduced and were viewed by opponents as threatening to destroy the institution of marriage itself. *Id.* ¶¶ 8 (at p. 5), 86. *See also id.* at ¶¶ 49-51, 57, 60-62.

8. The controversies today focusing on marriage between persons of the same sex, and state variance on the matter, resemble past disagreements about changes to marriage. *Id.* ¶¶ 8 (at p. 5), 86. *See also id.* at ¶¶ 49-51, 57, 60-62.

9. Marriage in the United States has served numerous complementary purposes, the salience of which has changed over time, including creating stable and economically viable households, assigning providers to care for any

dependents (including the very young, the very old, and the disabled) and thus limiting the public's liability to care for the vulnerable, and shaping the body politic. *Id.* ¶¶ 15-17, 20, 23.

10. The ability to procreate has never been an eligibility criterion to enter into marriage. *Id.* ¶¶ 19-23.

11. Nor has a biological link between parents and children been a necessary foundation for marriage or the principal or sole reason why marriage is good for society. *Id.* ¶¶ 19-23.

12. State marriage rules have been more concerned about supporting children once they exist than the producing of them. The notion of providing an ideal or optimal context for raising only biological children has never been the prime mover in states' structuring of the marriage institution in the United States. *Id.* ¶ 21.

13. Over time, marriage has developed a social meaning in which the state places a unique value on the couple's choice to join in marriage, to remain committed to one another, to form a household based on the couple's relationship, and to join in an economic partnership and support one another. *Id.* ¶¶ 18, 85

14. The federal government has involved itself in marriage regulation in exceptional circumstances only, such as briefly after the Civil War when state governments had not yet been reconstituted in order to encourage marriage among the freed persons, and where the federal government exercises plenary power, e.g., regulating marriage in territories. *Id.* ¶¶ 74-80.

15. Marriage confers tangible legal benefits on and protections to spouses, in addition to imposing responsibilities. Expert Affidavit of Letitia Anne Peplau (“Peplau Aff.”) ¶¶ 13, 34-35; see also Memorandum of Points and Authorities in Support of the Bipartisan Legal Advisory Group of the U.S. House of Representatives’ Motion to Dismiss, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 3:10-cv-257 (N.D. Cal. June 3, 2011), ECF No. 119-1, at 14 (Affidavit of Gary D. Buseck (“Buseck Aff.”) Ex. D) (stating, “DOMA deprives same-sex couples of certain benefits that are tied to marital status.”).

16. Since the Revolutionary War, the federal government has used marriage as a vehicle to convey benefits to adult citizens and their dependents. Cott Aff. ¶¶ 81-83; see also Report of the U.S. General Accounting Office, Office of General Counsel, January 31, 1997 (GAO/OGC-97-16), (Buseck Aff. Ex. C); Report of the U.S. Government Accountability Office, Office of General Counsel, January 23, 2004 (GAO-04-353R) (Buseck Aff. Ex. A).

17. The extent of federal laws and policies using marriage as a vehicle to convey benefits has grown to cover vast and important areas, including income tax, Social Security, and citizenship and naturalization privileges and limits. Cott Aff. ¶ 82.

18. Prior to DOMA’s enactment in 1996, the federal government accepted states’ determinations of marital status, including the diversities among state marriage law and their continual evolution, for purposes of federal law. *Id.* ¶ 88.

19. Despite substantial variation among the States regarding marriage eligibility requirements, Congress never created a blanket federal definition of

“marriage” or “spouse” for states before enacting DOMA. *Id.* ¶¶ 8 (at p. 5, bullets 2-3), 24-31, 32-44, 58-64, 83, 88.

20. DOMA represents a substantial deviation from all the prior history of federal-state relations in marriage regulation. *Id.* ¶ 88.

21. In 2004, the Congressional Budget Office concluded that federal recognition of marriages of same-sex couples, even if such marriages were authorized in every State, would *reduce* non-discretionary outlays.

Congressional Budget Office, “The Potential Budgetary Impact of Recognizing Same-Sex Marriages,” Jan. 21, 2004, at 1 (Buseck Aff. Ex. E).

II. **Non-Adjudicative Facts Relevant to the Level of Scrutiny for Plaintiffs’ Equal Protection Claim That DOMA Discriminates on the Basis of Sexual Orientation.**

Plaintiffs set forth facts for purposes of determining whether their claim of an Equal Protection violation should be subject to heightened scrutiny because DOMA takes the existing class of couples married in Connecticut, Vermont, and New Hampshire and divides it in two: those who are “married” under federal law, and those whose marriages do not exist for any federal purposes.

(A) **Gay Men and Lesbians Have Experienced a History of Discrimination.**

22. Gay men, lesbians and bisexual people have suffered a history of discrimination in the United States by both governmental and private actors. Expert Affidavit of George Chauncey, Ph.D. (“Chauncey Aff.”) ¶ 9; see *generally id.* ¶¶ 5-6, 10-55, 65-86, 90-103.

23. In early colonial America, the strong influence of Puritanical clergy and the adoption of anti-sodomy legislation verbatim from the book of Leviticus led to the execution of several men for the crime of sodomy. *Id.* ¶ 19.

24. In the early twentieth century, the medical community condemned homosexuality as a “mental defect” or “disease,” with this ostensibly scientific view (now rejected) helping to legitimize much anti-gay bias. *Id.* ¶¶ 26–27.

25. The early twentieth century also saw the promulgation and selective enforcement of state and local ordinances against disorderly conduct, vagrancy, lewdness, and loitering directed at lesbians and gay men who attempted to gather together. *Id.* ¶ 29.

26. In addition to subjecting lesbians and gay men to police harassment, states and localities embarked upon widespread censorship campaigns designed to suppress gay people’s freedom of speech and ability to discuss gay issues. *Id.* ¶¶ 31–34.

27. During and after World War II, the military systematically attempted to screen out lesbians and gay men from the armed forces, and discharge and deny benefits to those who served and were “discovered” later. *Id.* ¶¶ 39–41.

28. By the middle of the twentieth century, all federal agencies were prohibited from hiring lesbians and gay men, and the federal government engaged in far-reaching surveillance and investigation to identify and purge supposed “homosexuals” from the federal civil service. *Id.* ¶¶ 42–50.

29. Lesbians and gay men were also demonized by the media between the late 1930s and late 1950s. *Id.* ¶¶ 51–53.

30. The modern anti-gay rights movements commenced as a response to the slightest advancements in the direction of equality for lesbians and gay men in the 1970s. *Id.* ¶¶ 66–68.

31. Campaigners against rights for gay people have spread false stereotypes of lesbians and gay men as child molesters, unfit parents, and threats to heterosexuals—stereotypes that linger to this day. *Id.* ¶¶ 68–74.

32. The anti-gay movement has endeavored to repeal and block even basic nondiscrimination protections for lesbians and gay men, and has contributed to the promulgation of overtly discriminatory legislation at the state and federal level, including restrictions on adoption by same-sex couples and marriage rights. *Id.* ¶¶ 75–86.

33. To this day, lesbians and gay men are subjected to continued public opprobrium from leading political and religious figures and the ever-present threat of anti-gay violence. *Id.* ¶¶ 91–102.

34. Despite social and legal progress in the past thirty years towards greater acceptance of homosexuality, gay men and lesbians continue to live with the legacy of historical anti-gay measures and the attitudes that motivated those measures; this legacy is evident both in laws that remain on the books and in the many legal protections that have not been enacted. *Id.* ¶¶ 7, 8.

35. The civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. *Id.* ¶¶ 9, 15, 103.

36. Like other minority groups, gay men and lesbians often must rely on judicial decisions to secure equal rights. *Id.* ¶ 9.

(B) Sexual Orientation is Unrelated to One's Ability to Contribute to or Perform in Society.

37. Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women or both sexes. Although sexual orientation can range along a continuum from exclusively heterosexual to exclusively homosexual, it is most often discussed in terms of three categories: *heterosexual* (having emotional, romantic, or sexual attractions to members of the other sex), *homosexual* (having attractions to members of one's own sex), and *bisexual* (having attractions to both men and women). Peplau Aff. ¶¶ 14-15.

38. Being gay or lesbian has no inherent association with a person's ability to perform, contribute to, or participate in society. *Id.* ¶¶ 11, 29-33.

39. The U.S. House of Representatives (the "House") admits that "[t]here are or have been openly gay or lesbian Members of Congress," federal judges, and employees of the Executive Branch of the federal government and within state government. The Bipartisan Legal Advisory Group of the U.S. House of Representatives' Objections and Responses to Plaintiffs' First Set of Requests for Admissions (hereinafter "The House's Admissions") (Buseck Aff. Ex. F), No. 16.

40. Being gay or lesbian is a normal expression of human sexuality. Peplau Aff. ¶¶ 11, 29.

41. Being gay or lesbian is not a mental illness. *Id.*

42. Empirical evidence and scientifically rigorous studies have consistently found that lesbians and gay men are as able as heterosexuals to form loving, committed relationships. *Id.* ¶¶ 22, 29, 31.

43. Like their heterosexual counterparts, many lesbian, gay, and bisexual individuals form loving, long-lasting relationships, including marriage, with a partner of the same sex. *Id.* ¶ 12.

44. There is a scientific consensus that the same factors affect the adjustment of children, whatever the sexual orientation of their parents. Expert Affidavit of Michael Lamb, Ph. D. (“Lamb Aff.”) ¶¶ 28-37.

45. Over the last 50 years, more than 1000 studies have examined the factors that predict healthy adjustment in children and adolescents. As a result of this significant body of research, psychologists have reached consensus on the factors that predict healthy development and adjustment. These are the quality of the youths’ relationships with their parents, the quality of the relationship between the parents or significant adults in the youths’ lives, and the availability of economic and socio-economic resources. *Id.* ¶¶ 13, 14-20.

46. Numerous studies of youths raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that children and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents, including “biological” parents. *Id.* ¶¶ 12, 28-37.

47. The parent's sex or sexual orientation does not affect the capacity to be good parents or their children's healthy development. *Id.* ¶¶ 13, 18-20.

48. There is a consensus in the scientific community that parental sexual orientation has no effect on children's and adolescents' adjustment. *Id.* ¶ 31.

49. Since the enactment of DOMA, numerous organizations representing mental health and child welfare professionals have issued policies or statements confirming that same-sex parents are as effective as heterosexual parents in raising well-adjusted children and adolescents and should not face discrimination. *Id.* & Lamb Aff. Ex. B.

50. There is no empirical support for the notion that the presence of both male and female role models in the home promotes children's adjustment or well-being. *Id.* ¶¶ 13, 21-27.

51. Both men and women have the capacity to be good parents. The House's Admissions No. 39.

52. Empirical research demonstrates that the absence of a male or female parent in the home does not impair a child's development because men and women both have the capacity to be good parents; it is not harmful to children when parents (male or female) do not assume traditional gender roles with respect to parenting styles; and society is replete with male and female role models. Lamb Aff. ¶¶ 23-27.

53. DOMA affects children raised by married gay and lesbian couples by denying the federal marital protections that protect the family's economic

stability and by conveying to the children of married same-sex couples that their parents' relationships are less valid or legitimate than the marriages of heterosexual couples. *Id.* ¶ 41.

54. Despite the pervasive social stigma and particular social stresses lesbians and gay men must endure, the vast majority of gay and lesbian individuals cope successfully with these challenges and lead healthy, happy, well-adjusted lives. Peplau Aff. ¶¶ 32-33.

(C) **Gay Men and Lesbians Are a Minority and Face Significant Obstacles to Achieving Protection from Discrimination Through the Political Process.**

55. Gay men and lesbians are a minority in the United States. Peplau Aff. ¶ 40; The House's Admissions No. 35 (stating "Defendant admits that openly gay men, lesbians, and bisexual people are a minority in the United States.").

56. At any level above a local precinct or neighborhood, there is no geographic place in the United States where gay people are a majority. Expert Affidavit of Gary Segura, Ph.D. ("Segura Aff.") ¶ 49.

57. Political power is the demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system. *Id.* ¶¶ 13; *see generally id.* at ¶¶ 10-27.

58. Gay men and lesbians do not possess a meaningful degree of political power and are politically vulnerable. *Id.* ¶¶ 9, 26; *see generally id.* at ¶¶ 9-80.

59. Gay men and lesbians frequently lack the political power to secure basic rights within the normal political processes or to defend themselves and their civil rights against a hostile majority. *Id.* ¶¶ 9, 26.

60. In the political arena, gay men and lesbians must rely almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. *Id.* ¶¶ 9, 75-77.

61. Positive policy outcomes that remediate or repeal express, *de jure* discrimination and bias against the group do not demonstrate a group's affirmative political power but should rather be viewed as a sign of political powerlessness. *Id.* ¶ 25.

62. The political powerlessness of gay men and lesbians is evidenced by their inability to bring an end to pervasive prejudice and discrimination, and to secure desired policy outcomes and prevent undesirable outcomes on fundamental matters that closely and directly impact their lives. *Id.* ¶ 28.

63. The demonstrated vulnerability of occasional and geographically confined policy gains to reversal or repeal is indicative of the role played by "affinity" or sympathy, rather than the exercise of meaningful political power by gay men and lesbians. *Id.* ¶ 28.

64. Even when gay men and lesbians have successfully secured minimal protections in state courts and legislatures, opponents have aggressively used state ballot initiatives and referenda to repeal favorable laws and even amend state constitutions to preclude favorable court decisions. *Id.* ¶¶ 22-23, 28, 34-44.

65. These direct democracy provisions have been used against gay men and lesbians more than any other social group. *Id.* ¶ 43.

66. Other groups that have obtained the protection of heightened scrutiny from the courts possessed greater political power at the time those decisions were handed down than gays and lesbians do today. *Id.* ¶¶ 81; see generally *id.* ¶¶ 81-85.

67. There is no national-level legislation prohibiting discrimination against gay men and lesbians in employment, education, public accommodations or housing despite decades of effort. *Id.* ¶ 29.

68. Until sexual orientation was added to the federal hate crimes law in 2009 (over significant opposition), no federal legislation had ever been passed to protect people on the basis of sexual orientation. *Id.* ¶ 31.

69. Congress only recently authorized the repeal of the military's ban on gay and lesbian service members, and it did so in a lame duck session and after two courts had declared the policy unconstitutional. *Id.* ¶ 32.

70. On the state level, there is no statutory protection against discrimination in employment and public accommodations for gay men and lesbians in twenty-nine states. *Id.* ¶ 33.

71. Since 1990, 41 states enacted constitutional amendments (30), or statutes (11), or both, excluding gay men and lesbians from civil marriage. *Id.* ¶ 34.

72. In 2008, seventy-three percent of all hate crimes committed against gay men and lesbians included an act of violence; seventy-one percent of all

hate-motivated murders in the United States were of gay men and lesbians; and fifty-five percent of all hate-motivated rapes were against gay men and lesbians.

***Id.* ¶ 53. See also Chauncey Aff. ¶¶ 94-96; The House’s Admissions No. 23 (stating, in relevant part, “Defendants admit that in the twentieth century and thereafter, some gay men and lesbians have faced violence in the United States because of their sexual orientation.”).**

73. Nationwide, gay men and lesbians face outspoken denunciation by elected officials that may be made to gain electoral support and would be unthinkable if directed toward most other social groups. Segura Aff. ¶¶ 72-73; Chauncey Aff. ¶¶ 8, 91.

74. There has never been an openly gay or lesbian President, U.S. Senator, Cabinet-level appointee, or Justice of the United States Supreme Court. Segura Aff. ¶ 46; The House’s Admissions No. 16 (stating “Defendant admits that it is not aware at this time of any openly gay or lesbian person having held any of the listed positions within the federal government [President, U.S. Senator, Cabinet level appointee, or Justice of the United States Supreme Court] ...”).

75. The fact that sexual orientation is not a visible trait has undermined gay men and lesbians’ ability to mobilize and exercise meaningful political power. Segura Aff. ¶¶ 56-64.

(D) Sexual Orientation is a Defining Characteristic of a Person’s Identity.

76. Sexual orientation is a characteristic of an individual, like their biological sex or race. It also is about relationships because sexual orientation is not merely about sexual behavior but also about building enduring intimate relationships. Peplau Aff. ¶¶ 14, 18.

77. There is a scientific consensus that accepts that sexual orientation is a characteristic that is immutable. *Id.* ¶¶ 19-28; Letter of Att’y Gen. Holder to Speaker Boehner of the U.S. House of Rep., at 3 (Feb. 23, 2011) (Docket Entry 39-2).

78. The factors that cause an individual to become heterosexual, homosexual, or bisexual are not currently well understood. Most social and behavioral scientists regard sexual orientation as resulting from the interplay of biological, psychological, and social factors. Peplau Aff. ¶ 19.

79. Most adults are attracted to and form relationships with members of only one sex. *Id.* ¶¶ 10, 20.

80. A significant number of adults exhibit a consistent and enduring sexual orientation. *Id.* ¶ 23.

81. A vast majority of lesbian and gay adults report that they experience no choice or very little choice about their sexual orientation. *Id.* ¶ 25.

82. Marrying a person of a different sex is not a realistic option for gay men and lesbians. *See id.* ¶ 24.

83. Efforts to change a person’s sexual orientation through religious or psychotherapy interventions have not been shown to be effective. *Id.* ¶¶ 10, 26 & n. 14, 28; see *a/so* The House’s Admissions No. 37 (“Defendant admits that some

people who have attempted to change their sexual orientation have experienced difficulty in doing so.”).

84. Interventions to attempt to change one’s sexual orientation can be harmful to the psychological well-being of those who attempt them; no major mental health professional organization has approved interventions to change sexual orientation and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments. *Id.* ¶¶ 26-28.

85. The fact that a small minority of people may experience some change in their sexual orientation over their lifetime does not suggest that such change is within their power to effect. *Id.* ¶ 23.

86. It is psychologically harmful to ask lesbians and gay men to deny a core part of their identity by ignoring their attraction to same-sex partners and instead marry a different-sex partner. *Id.* ¶ 24.

87. Sexual orientation is centrally linked to the most important human relationships that adults form with other adults in order to meet their basic human needs for love, attachment and intimacy, and is an essential part of an individual’s personal identity. *Id.* ¶ 18.

Respectfully submitted,

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DATED: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, a copy of the foregoing Separate Statement of Non-Adjudicative Facts was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Gary D. Buseck
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