2009 WL 2251796 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California,
Southern Division.

Arthur SMELT, et al., Plaintiffs,
v.
UNITED STATES OF AMERICA, et al., Defendants,
and
Dennis Hollingsworth, et al., Defendant-Intervenors.

No. SACV-09-286 DOC (MLGx).
July 27, 2009.

Intervenors' Memorandum of Points And Authorities in Support of United States of America's Motion to Dismiss

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Footnotes

The Honorable David O. Carter.

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INTRODUCTION

This is the second time Plaintiffs have tried to challenge the constitutionality of the federal Defense of Marriage Act. The Ninth Circuit dismissed their first attempt because they lacked standing. *Smelt v. County of Orange,* 447 F.3d 673, 683-686 (9th Cir. 2006). Plaintiffs raise the same arguments again in this case, the only difference being that they have now entered into a legal relationship recognized by the State of California as a marriage. But that fact alone does not remedy the standing deficiencies identified by the Ninth Circuit in Plaintiffs' previous lawsuit. Plaintiffs still have not alleged that another state has refused to recognize their relationship, nor that they have actually sought or been denied any federal benefit given to married couples-the two ways in which DOMA can be triggered. Thus, Plaintiffs do not have standing to challenge DOMA.

Plaintiffs' challenge to DOMA also fails on the merits. Many of their allegations lack the factual support required to plead a cognizable claim under the Federal Rules of Civil Procedure. But even if Plaintiffs have provided sufficient factual support for their claims, DOMA is subject only to rational-basis review, which is satisfied as a matter of law. Accordingly, Intervenors join in the United States of America's motion and respectfully request that Plaintiffs' challenge to DOMA be dismissed.

ARGUMENT

In recent years, the Supreme Court has raised the bar for pleading standards under Federal Rule of Civil Procedure 8. Gone are the days when a complaint could be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *See Conley v. Gibson,* 355 U.S. 41, 45 (1957). A sheer possibility of success is no longer enough-now a complaint must include "sufficient factual matter" to make a claim "plausible on its face." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quotation marks and citation omitted). And while courts should generally accept factual allegations as true when considering a motion to dismiss, legal conclusions and "naked assertions" do not receive this same presumption of truth. *Id.* at 1949-50.

As a result, complaints that rely entirely on "labels and conclusions" or on a "formulaic recitation of the elements of a cause of action" should be dismissed. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Legal conclusions can frame a complaint, but they must be enhanced by "well-pleaded factual allegations." *Ashcroft,* 129 S. Ct. at 1950.

Plaintiffs fall short of this standard. Their complaint rests on legal conclusions and lacks the requisite factual enhancements needed for this case to move forward. Thus, the motion to dismiss should be granted.

I. In their DOMA challenge, Plaintiffs have not pled sufficient facts to meet the constitutional standing requirements.

In every federal suit, the plaintiff bears the burden to show standing for each of his claims. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006). The "irreducible constitutional minimum of standing" includes three elements: injury in fact, causation, and redressability. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102-03 (1998) (citations omitted). "Injury in fact" is a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Id.* at 103. "Causation" is a traceable connection between the plaintiff's injury and the defendant's conduct. *Id.* "Redressability" is the likelihood that the requested relief will redress the alleged injury. *Id.* Just as with their previously dismissed challenge to DOMA, Plaintiffs have failed to allege an injury in fact, and thus they do not have standing to bring this case.

A. The Ninth Circuit's decision dismissing Plaintiffs' previous challenge to DOMA for lack of standing still controls, as Plaintiffs have failed to cure all the deficiencies raised in that decision.

Just as in their previous lawsuit, Plaintiffs are challenging Sections 2 and 3 of DOMA. Section 2 provides that no state is required to give full faith and credit to another state's determination that "a relationship between persons of the same sex ... is treated as marriage." 28 U.S.C. § 1738C. In the previous suit, this Court concluded, and the Ninth Circuit affirmed, that Plaintiffs lacked standing because they did not claim "to have plans to seek recognition of their eventual California marriage in another state." *Smelt v. County of Orange,* 374 F. Supp. 2d 861, 871 (C.D. Cal. 2005), *aff'd,* 447 F.3d at 683.

Plaintiffs now allege that they have entered into a legal union recognized by California as a marriage. *See* Complaint ¶ 2. But they still have not alleged any plans to seek recognition of that union in another state. Without this sort of factual allegation, Section 2 is not implicated, and Plaintiffs cannot claim to have suffered any concrete, particularized injury. So the Ninth Circuit's holding still controls here.

Plaintiffs' renewed challenge to Section 3 is equally lacking. Section 3 defines the words "marriage" and "spouse" for the

purposes of federal statutes, rules, and regulations. While it defines marriage as "a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7, Section 3 "does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition." *Smelt,* 447 F.3d at 683.

Against this backdrop, the Ninth Circuit held that Plaintiffs lacked standing in their first challenge to Section 3 because they did not allege "that they have applied for any federal benefits, much less been denied any at this point." *Id.* at 684. "That they might someday ... ask for some federal benefit which they are denied is not enough" to establish an injury in fact. *Id.*

This Complaint is no different. Plaintiffs again do not allege that they have applied for or been denied any federal benefits. So the Ninth Circuit's previous decision controls, and Plaintiffs again lack standing to challenge Section 3.

B. Prudential-standing considerations further show that Plaintiffs lack standing to challenge Section 3 of DOMA.

The Ninth Circuit also found that Plaintiffs' initial challenge to Section 3 "stumbles on at least one of the prudential standing hurdles." *Smelt,* 447 F.3d at 684. That same roadblock exists here. When considering prudential standing, the Supreme Court has instructed courts to exercise caution and only decide significant constitutional questions when it is necessary to do so:

> The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by a series of rules under which we have avoided passing upon a large part of all the constitutional questions pressed upon us for decision. Always we must balance the heavy obligation to exercise jurisdiction against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (quotation marks, alterations, and citations omitted). The Ninth Circuit appropriately exercised this restraint in *Smelt* because the Section 3 challenge was "excessively generalized," 447 F.3d at 686, implicating the definition of terms that are used in well over one thousand federal statutory enactments. *Id.* at 684-85. Due to the generality of Plaintiffs' challenge-which remains essentially unchanged here-a court could not possibly know "whether in the context of some particular statute as applied to some particular person in some particular situation Congress's use of the word 'marriage' will amount to an unconstitutional classification." *Id.* at 685.

Finding that Plaintiffs lack standing here does not close the courthouse doors to all DOMA challenges. A plaintiff who has actually applied for and been denied a federal benefit because of the DOMA definitions, or whose union has been denied recognition in another state, will be better suited to allege a concrete and particularized harm. And plaintiffs in other circumstances may also be able to satisfy the requirements for standing.1 But here, the facts alleged in the Complaint are plainly insufficient to establish standing.

* Admitted pro hac vice

II. Plaintiffs have failed to state a valid due-process claim.

Plaintiffs claim that DOMA violates their due-process rights because it impermissibly impairs their right to marry each other. Laws challenged on substantive-due-process grounds need only satisfy the "unexacting" standard of rationally advancing some legitimate state purpose, unless the plaintiff shows that the law infringes a "fundamental" right, in which case strict scrutiny applies. *Reno v. Flores,* 507 U.S. 292, 302-06 (1993). Here, Plaintiffs cannot show that DOMA infringes on a fundamental right, and DOMA easily satisfies rational-basis review. Thus, the due-process claim should be dismissed.

A. Plaintiffs' interest in marrying a person of the same sex is not a fundamental right under the Due Process Clause.

The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights,* 503 U.S.

115, 125 (1992). Any judicially imposed expansion carries with it significant consequences because it places the issue "outside the arena of public debate and legislative action." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). Courts should thus "exercise the utmost care whenever ... asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [court]." *Id.* (quotation marks and citations omitted).

To avoid such improper expansion, courts begin substantive-due-process analysis by carefully describing the asserted right. *Id.* at 721. This Court has already defined the asserted right at issue in this case. *Smelt,* 374 F. Supp. 2d at 879. Plaintiffs are not asserting the longstanding right to marry recognized by the Supreme Court. Instead, they are asserting a newly fashioned "right to same-sex marriage." *Id.*

After carefully identifying the asserted right, a court must then determine if that right is fundamental. Fundamental rights are those that are so rooted in our history and tradition that they are considered "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg,* 521 U.S. at 721 (quotation marks and citations omitted).

As this Court has already held, the right to same-sex marriage is not deeply rooted in our Nation's history and tradition. *Smelt,* 374 F. Supp. 2d at 879. The Supreme Court has always understood marriage as "the union ... of one man and one woman." *See Murphy v. Ramsey,* 114 U.S. 15, 45 (1885). For over two hundred years prior to 2003, there was never a time in our Nation's history that marriage meant anything else. *See Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941 (Mass. 2003) (judicially creating same-sex marriage in Massachusetts). And recently, large majority of voters and legislators have strongly reaffirmed marriage as the union of one man and one woman. The law in 44 States now defines marriage as such, and 30 of those States have enshrined that definition in their constitutions.2 Federal law also defines "marriage" as "a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

1 For example, the Commonwealth of Massachusetts recently filed a federal lawsuit challenging DOMA's constitutionality. *See Commonwealth v. U.S. Dep't of Health and Human Servs.,* No. 1:09-cv-11156-JLT (D. Mass. filed July 8, 2009). Intervenors take no position here on whether the Commonwealth has standing to bring such a challenge.

In light of this background, it is not surprising that every other federal court and a majority of state appellate courts that have addressed this issue have refused to find a fundamental right to same-sex marriage. *See, e.g., Wilson v. Ake,* 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu,* 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Conaway v. Deane,* 932 A.2d 571, 627 (Md. 2007); *Hernandez v. Robles,* 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King County,* 138 P.3d 963, 978 (Wash. 2006) (plurality); *Morrison v. Sadler,* 821 N.E.2d 15, 32-33 (Ind. Ct. App. 2005).

Moreover, all of the Supreme Court's cases "infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species." *Conaway,* 932 A.2d at 619; *see also Andersen,* 138 P.3d at 978. For the High Court, protecting the right to marry is about ensuring "our very existence and survival," *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942); maintaining our "civilization," *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978); and "rais[ing] ... child[ren] in a traditional family setting," *id.* at 386. This inherently procreative nature of marriage is unique to opposite-sex couples, and thus the fundamental right to marry is confined to those relationships. Accordingly, Plaintiffs' asserted right is not the Court-recognized fundamental right to marry, but a novel legal theory-the alleged "right" to same-sex marriage. This is not a fundamental right, and thus heightened scrutiny does not apply.

B. DOMA satisfies rational-basis review.

With Plaintiffs' theory of fundamental rights foreclosed, DOMA need only be "rationally related to legitimate government interests." *Glucksberg,* 521 U.S. at 728. Rational-basis review is "a paradigm of judicial restraint," and not "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313-14 (1993). A law analyzed under rational-basis review has "a strong presumption of validity." *Id.* at 314. And the burden is on the challenging party to "negat[e] every conceivable basis which might support it." *Id.* at 315 (quotation marks and citation

omitted).

Here, the United States has at least two closely related interests for defining marriage as the union of one man and one woman, both of which derive from the government's legitimate-indeed compelling-interest in promoting the welfare o children, our most precious and vulnerable citizens. *See Maryland v. Craig,* 497 U.S. 836, 852-53 (1990) ("[I]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of [children] is compelling") (quotation marks and citation omitted). First, the government has a compelling interest in creating a legal structure that promotes the raising of children by both of their biological parents. Only marriage as defined by DOMA unites the biological, legal, and social dimensions of parenthood. Second, the government has a compelling interest in "responsible procreation"-that is, directing the inherently procreative capacity of sexual intercourse between men and women into stable, legally bound relationships.

Only a relationship between a man and a woman "is capable of producing biological offspring of both members." *Conaway,* 932 A.2d at 630-31; *see also Andersen,* 138 P.3d at 982-83. Thus, recognizing those relationships as marriages directly and rationally furthers the government's interest in encouraging the raising of children by their biological mother and father. By contrast, no matter what measures are taken by same-sex couples, they cannot both be a biological parent of the same child. In fact, the only way for same-sex couples to produce children is to involve a third party, a process that risks commoditizing children and intentionally deprives them of having both biological parents in their family. So recognizing same-sex relationships as marriages does not further the government's interest in encouraging children to be raised by both biological parents. Not surprisingly, then, many courts-including this one-have found that this government interest satisfies rational-basis review. *See, e.g., Smelt,* 374 F. Supp. 2d at 880 (finding that the government has legitimate interests in encouraging the optimal union for procreation and for rearing children by both biological parents); *Kandu,* 315 B.R. at 146 (listing cases and holding that "encourag[ing] the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern").

The government also has an interest in promoting "responsible procreation" among its citizens. This interest is rooted in a concern for children, *i.e.,* the natural result of sexual intercourse between men and women. Relationships between men and women are unique in that they may unintentionally result in the birth of children. *See Morrison,* 821 N.E.2d at 24 (" 'Natural' procreation ... may occur only between opposite-sex couples and with no foresight or planning"). The government has an interest in directing these unintended children into committed, legally bound relationships between both of their parents. *See Hernandez,* 855 N.E.2d at 3-4 (stating that a legislature could rationally conclude that marriage "create[s] more stability and permanence in the relationships that cause children to be born" and that "it is better, other things being equal, for children to grow up with both a mother and a father").

Same-sex relationships, however, do not naturally or unintentionally result in pregnancy and child birth. Hence, recognizing those relationships as marriages "would not further [the government's] interest in ... 'responsible procreation.' " *Morrison,* 821 N.E.2d at 24-26, 29-31; *Standhardt v. Superior Court,* 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003).

Similarly, it would not further the federal government's interests to force states that define marriage as the union of one man and one woman to recognize same-sex marriages from other states. Section 2 of DOMA reasonably allows each state to establish its own public policy on this important issue of domestic relations-an issue "that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa,* 419 U.S. 393, 404 (1975); *see also Pennoyer v. Neff,* 95 U.S. 714, 734-35 (1877) ("The State ... has [the] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created"), *overruled on other grounds by Shaffer v. Heitner,* 433 U.S. 186 (1977).

In sum, DOMA furthers compelling government interests and is properly tailored to promote those interests. Thus, Plaintiffs cannot offer a cognizable legal theory that their due-process rights have been violated, and as a result, the motion to dismiss should be granted.

III. Plaintiffs have not alleged facts sufficient to maintain their equal-protection claim.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). It prohibits the government from "invidiously classif[ying]

similarly situated people on the basis of the immutable characteristics with which they were born." *Michael M. v. Superior Court,* 450 U.S. 464, 477-78 (1981). But it "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Skinner,* 316 U.S. at 540 (quotation marks and citation omitted).

Plaintiffs have not alleged a cognizable equal-protection claim because (1) they cannot show that DOMA invidiously discriminates against any class of persons; (2) they cannot show that they, as a same-sex couple, are similarly situated to opposite-sex couples; (3) they cannot show that DOMA impermissibly discriminates based on sex; and (4) they cannot show that DOMA impermissibly discriminates based on sexual orientation. This claim should be dismissed.

A. Plaintiffs have not alleged that DOMA invidiously discriminates against a class of persons-a required element of equal-protection claims.

A threshold requirement for any equal-protection claim is a showing of invidious discrimination. *See Michael M.,* 450 U.S. at 477-78. This requires proof that the government acted with discriminatory intent or purpose. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 194 (2003); *Washington v. Davis,* 426 U.S. 229, 239 (1976). The Complaint fails to allege that the United States acted with discriminatory intent or purpose in passing DOMA, and it provides no factual allegations to support such a claim. Thus, the equal- protection claim should be dismissed.

B. Same-sex couples are not similarly situated to opposite-sex couples for the purpose of DOMA.

Another threshold requirement for an equal-protection claim is showing that a similarly situated class has been treated disparately. *Christian Gospel Church, Inc. v. City and County of San Francisco,* 896 F.2d 1221, 1225-26 (9th Cir. 1990), *superseded on other grounds,* 42 U.S.C. § 2000cc. The Supreme Court has repeatedly recognized that biological differences between men and women may preclude a plaintiff from satisfying the similarly situated requirement. *See, e.g., Miller v. Albright,* 523 U.S. 420, 445 (1998) ("The biological differences between... men and ... women provide a relevant basis for differing rules ..."); *Michael M.,* 450 U.S. at 477-78 (finding that men and women are not "similarly situated with respect to ... intercourse and pregnancy"); *Rostker v. Goldberg,* 453 U.S. 57, 78 (1981). In short, the Equal Protection Clause "surely does not require [the government] to pretend that demonstrable differences between men and women do not really exist." *Michael M.,* 450 U.S. at 481.

Marriage is an inherently relational construct; thus, challenges to marriage laws necessarily involve different treatment between two classes of couples-same-sex and opposite-sex couples-rather than two classes of individuals. These two classes of couples exhibit biological, sociological, and emotional differences, most notable of which pertain to procreation. Put simply, an opposite-sex couple is a procreative unit, while a same-sex couple is not. *Cf id.* at 478 (noting that the "most basic" differences between males and females relate to pregnancy and intercourse). Intercourse between opposite-sex couples naturally produces children, but the sexual acts of same-sex couples cannot. Opposite-sex couples provide children with both of their biological parents, but same-sex couples cannot. These undisputed biological differences demonstrate that same-sex and opposite-sex couples are not similarly situated for the purpose of marriage-a relationship that the Supreme Court has always linked to procreation. *See Zablocki,* 434 U.S. at 384. Thus, Plaintiffs' equal-protection claim cannot satisfy this threshold requirement and should be dismissed.

C. DOMA does not impermissibly discriminate on the basis of sex.

As this Court has already found, "Supreme Court precedent has only found [impermissible] sex-based classifications in laws that have a disparate impact on one sex or the other." *Smelt,* 374 F. Supp. 2d at 876-77 (listing cases). Yet, as many courts have recognized, laws (like DOMA) that define marriage as the union of a man and a woman treat men and women equally-neither may marry a person of the same sex. *See, e.g., id.* at 877; *Kandu,* 315 B.R. at 143 (concluding that "the marriage definition contained in DOMA does not classify according to gender"); *Baker v. State,* 744 A.2d 864, 880 n.13 (Vt. 1999); *In re Marriage Cases,* 183 P.3d 384, 440 (Cal. 2008); *Andersen,* 138 P.3d at 988; *Conaway,* 932 A.2d at 598; *Hernandez,* 855 N.E.2d at 10-11. DOMA does not separate men and women into classes and grant benefits to only one class.

Nor does it place men or women in an unequal position in relation to the other. Consequently, Plaintiffs' equal-protection claim based on sex discrimination should be dismissed.

D. DOMA does not impermissibly discriminate based on sexual orientation.

DOMA does not discriminate on the basis of sexual orientation. It neither mentions nor makes any distinction based on sexual orientation. A man and a woman can marry regardless of their sexual orientation. And a same-sex couple cannot marry, regardless of whether they are "oriented" to persons of the same sex, the opposite sex, or both sexes. Thus, DOMA treats persons who identify as heterosexual in precisely the same manner it treats persons who identify as homosexual.

Plaintiffs will likely argue that DOMA results in sexual-orientation discrimination because it has a disparate impact on persons who identify as homosexual. But disparate impact is insufficient to establish an equal-protection violation without proof of a discriminatory intent or purpose. *See City of Cuyahoga Falls,* 538 U.S. at 194; *Davis,* 426 U.S. at 239. And, as discussed above, Plaintiffs have not alleged that the United States acted with discriminatory intent or purpose when it enacted DOMA. Thus, this claim fails as a matter of law.

Even if this Court were to find that DOMA discriminates based on sexual orientation, controlling precedent requires rational-basis scrutiny. Sexual orientation is not one of the few classifications-race, alienage, national origin, sex, and illegitimacy-that trigger heightened scrutiny under federal law. *See Ball v. Massanari,* 254 F.3d 817, 823-24 (9th Cir. 2001). Ninth Circuit precedent on this point is unmistakably clear. That court expressly held that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny." *High Tech Gays v. Def Indus. Sec. Clearance Office,* 895 F.2d 563, 574 (9th Cir. 1990). And it has reaffirmed this holding in at least two decisions since. *See Flores v. Morgan Hill Unified Sch. Dist.,* 324 F.3d 1130, 1137 (9th Cir. 2003); *Witt v. Dep't of Air Force,* 527 F.3d 806, 821 (9th Cir. 2008) (noting that its precedent requiring rational-basis review to an equal-protection claim alleging sexual-orientation discrimination "was not disturbed by *Lawrence,* which declined to address equal protection").

Additionally, Plaintiffs have not alleged any facts that would support creating a new suspect class. The Supreme Court has identified four distinguishing characteristics of suspect classes: (1) a history of discrimination; (2) a trait that "bears no relation to ability to perform or contribute to society;" (3) an immutable trait; and (4) political powerlessness. *See City of Cleburne,* 473 U.S. at 440-41. Here, Plaintiffs are unable to establish the latter two characteristics as a matter of law.

"Immutability" defines a human characteristic determined "solely by the accident of birth." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). The Ninth Circuit has already held that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage." *High Tech Gays,* 895 F.3d at 573.

Plaintiffs likewise cannot establish the political-powerlessness factor. Suspect classes are created, *inter alia,* because discrimination against that class "is unlikely to be soon rectified by legislative means." *City of Cleburne,* 473 U.S. at 440. But legislatures across the country routinely address perceived sexual-orientation discrimination.3 Thus, "homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation." *High Tech Gays,* 895 F.2d at 574 (citing *City of Cleburne,* 473 U.S. at 445).

2 *See* Ala. Const. art. I, § 36.03; Alaska Const. art. 1, § 25; Ariz. Const. art. XXX, § 1; Ark. Const. amend. 83, § 1-3; Cal. Const. art. I, § 7.5; Col. Const. art. II, § 31; 13 Del. Code § 101; Fla. Const. art. I § 27; Ga. Const. art. I, § IV; Haw. Rev. Stat. §§ 572-1, 572-3; Idaho Const. art. III, § 28; Kan. Const. art. XV, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. XIV, § 263A; Mo. Const. art. I, §33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.D. Const. art. IX, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, § 35; Or. Const. art. XV, § 5a; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const. art. I, § 29; Va. Const. art. I, § 15-A; Wis. Const. art. XIII, § 13; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-11-1-1; Md. Code, Fam. Law § 2-201; Minn. Stat. § 517.01; N.J. Stat. § 37:1-1; N.M. Stat. § 40-1-1; N.Y. Dom. Rel. Law § 5-7; N.C. Gen. Stat. § 51-1.2; 23 Pa. Cons. Stat. § 1704; R.I. Gen. Laws § 15-1-1 - 15-1-5; Wash. Rev. Code § 26.04.010-20; W. Va. Code § 48-2-603; Wyo. Stat. § 20-28

Additionally, the Supreme Court has sternly cautioned against creating new suspect classifications because heightened scrutiny requires an exacting investigation into legislative decisionmaking, and "respect for the separation of powers" weighs

against expanding this area of constitutional jurisprudence. *Id.* at 441; *see also Lyng v. Castillo,* 477 U.S. 635, 638 (1986) (declining to extend strict scrutiny to close relatives); *Mass. Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (per curiam) (declining to extend strict scrutiny to a class of older persons).

For all the foregoing reasons, Plaintiffs' equal-protection claim based on sexual orientation should be dismissed.

IV. DOMA is a valid exercise of the federal government's power under the Full Faith and Credit Clause.

DOMA codifies the well-established legal principle that states are not required, under the Full Faith and Credit Clause, to recognize foreign marriages contrary to their own public policy. While the Full Faith and Credit Clause does not compel states to recognize foreign marriages that conflict with their own public policy, Congress has taken the additional step of enacting DOMA to further protect states' rights in this regard.

Article IV, section 1 of the U.S. Constitution provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved and *the Effect thereof.*

(emphasis added).

The plain language of this clause authorizes Congress to determine the *effect* of one state's law in another state. Indeed, the Supreme Court has long recognized that Congress retains the power to regulate the extraterritorial effects of state laws. *See, e.g., M'Elmoyle v. Cohen,* 38 U.S. (13 Pet.) 312, 324-25 (1839) (holding that "the authenticity of a judgment and its effect, depend upon the *law made in pursuance of the Constitution"*) (emphasis added); *Bank of Alabama v. Dalton,* 50 U.S. (9 How.) 522, 528 (1849) ("the legislation of Congress, *so far as it has gone,* does not prevent a State from passing acts of limitation ...") (emphasis added). DOMA is precisely the type of legislation that the Effect Clause gives Congress the power to enact. It simply declares that a state law will not have mandatory effect in another state.

But states have never been legally required under the Full Faith and Credit Clause to recognize marriages of sister states. Marriage recognition has always been an issue of comity (rather than full faith and credit). Comity is a common-law doctrine used to determine "the recognition which one [state] allows within its territory to the legislative, executive or judicial acts of another [sovereign]." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). That comity controls marriage-recognition questions is a principle that has been universally accepted in courts around the country. *See, e.g., Gaines v. Poindexter,* 155 F. Supp. 638, 643 (W.D. La. 1957) ("The rule that the lex loci contractus is controlling as to the validity of a marriage rests on comity alone, and an exception thereto exists where the marriage is repugnant to the public policy of the domicile of the parties or is contrary to its positive laws") (quoting 55 C.J.S. Marriage § 4(2)); *Mason v. Mason,* 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (holding that "Indiana's recognition of the existence of a foreign marriage is a matter of comity," and rejecting the argument that the Full Faith and Credit Clause required Indiana to recognize an out-of-state marriage); *Kelderhaus v. Kelderhaus,* 467 S.E.2d 303, 304 (Va. Ct. App. 1996) (referring to comity as the basis for recognizing common-law marriages from other states); *Hesington v. Estate of Hesington,* 640 S.W.2d 824, 826 (Mo. Ct. App. 1982) ("[A]s a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state"); *Metro. Life Ins. Co. v. Chase,* 189 F. Supp. 326, 333 (D. N.J. 1960) (stating that comity does not require recognition of a common-law marriage that may have been valid in the District of Columbia "if contrary to the policy of [New Jersey]"); *Brinson v. Brinson,* 96 So. 2d 653, 659 (La. 1957) ("[T]he spirit of comity between states does not require a state to recognize a marriage which is contrary to its own public policy"); *Henderson v. Henderson,* 87 A.2d 403, 409 (Md. 1952) (noting that out-of-state marriages are recognized "merely because of comity"); *Milliken v. Pratt,* 125 Mass. 374, 380 (1878) (similar).

DOMA merely codifies the general principle that states may follow their own public policies concerning marriage, rather than the policies of other states. The Supreme Court "has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to which the laws and policy of one state may be subordinates to those of another." *Pink v. A.A.A. Highway Express, Inc.,* 314 U.S. 201, 210 (1941) (listing cases); *see also Pacific Employers Ins. Co.*

v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939).

By enacting DOMA, Congress made clear that if a state redefines marriage to include same-sex couples, it may not impose that policy choice on other states. Other states are free to recognize or ignore such marriages according to their own public policy. Thus, DOMA does not run afoul of the Full Faith and Credit Clause, and Plaintiffs' claim to the contrary should be dismissed.

V. Plaintiffs' remaining claims should be summarily dismissed.

Plaintiffs also claim that DOMA violates their rights to privacy, travel, and speech. But these claims are stated as legal conclusions, with no factual allegations supporting them. They make no factual claims whatsoever alleging that DOMA restricts their private conduct, efforts to travel, or ability to communicate with others. These are precisely the type of "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" that the Supreme Court has said are insufficient to satisfy the pleading requirements of Federal Rule of Civil Procedure 8. *Ashcroft,* 129 S.Ct. at 1949 (holding that the plaintiff's complaint was deficient under Rule 8).

Likewise, Plaintiffs' Ninth Amendment claim should also be dismissed. It is well established that the Ninth Amendment does not "independently secur[e] any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States,* 944 F.2d 483, 490 (9th Cir. 1991).

CONCLUSION

In Plaintiffs' initial challenge to DOMA, the Ninth Circuit clearly explained why Plaintiffs had not alleged a concrete, particularized injury resulting from DOMA. Yet in filing this suit, Plaintiffs still have not offered any such allegation; thus their renewed challenge should be dismissed on the same grounds. Nevertheless, if this Court reaches the merits of Plaintiffs' claims, DOMA clearly satisfies the applicable standard of rational-basis review.

Respectfully submitted this 27th day of July, 2009.

/s/Brian W. Raum

Brian W. Raum (NY Bar No. 2856102)*

3 In California alone, examples abound. *See, e.g.,* Cal. Fam. Code § 297 (creating domestic partnerships for same-sex couples); Cal. Civ. Code § 51 (prohibiting sexual-orientation discrimination by business establishments); Cal. Civ. Code § 51.7 (protecting against "intimidation by threat of violence" based on sexual orientation); Cal. Educ. Code § 220 (prohibiting sexual-orientation discrimination by educational institutions); Cal. Educ. Code § 51500 (prohibiting schools from teaching anything that could "promote a discriminatory bias" based on sexual orientation); Cal. Penal Code § 422.55 (prohibiting so-called "hate crimes" motivated by sexual orientation).

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* Admitted *pro hac vice*