UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as executor of the estate of THEA CLARA SPYER, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 10-CV-8435 (BSJ)(JCF)

MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

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INTRODUCTION

This Court should deny, as meritless, Plaintiff's motion to strike documents referenced by Intervernor-Defendant the Bipartisan Legal Advisory Group (the "House") in its opposition to Plaintiff's motion for summary judgment and in its Rule 56.1 statement. By failing to account for the distinction between adjudicative and legislative facts, and by asking the Court to apply formal rules of evidence to legislative facts, the motion reflects a fundamental misunderstanding of the nature of constitutional litigation.

Plaintiff seeks to strike the House's references to twelve separate social-science studies, articles, and treatises. Five of these are cited by the House to demonstrate the methodological limitations, flaws, and incompleteness of the social science research used to support Plaintiff's allegations that parenting by same-sex couples is indistinguishable from parenting by opposite-sex couples or a child's biological mother and father.[1] Three items are cited in support of the common-sense conclusion that, other factors being equal, children are better off if raised by a mother and a father.[2] And four articles are cited by the House to illustrate that sexual orientation

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[1] Susan Golombok & Fiona Tasker, *Gay Fathers*, in *The Role of the Father in Child Development* Ch. 11 (Michael E. Lamb ed. 2010); Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. Family Psych. 526 (2006); Lawrence A. Kurdek, "*What Do We Know About Gay and Lesbian Couples?,*" 14 Current Directions in Psych. Sci. no. 5 (Oct. 2005); Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate.com, Mar. 12, 2004, www.slate.com/id/2097048; George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting*, ___ Ave Maria L. Rev. ____ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184. As Plaintiff recognizes, three of these appeared in the report of one of Plaintiff's own experts and were discussed at the expert's deposition, namely: Golombok & Tasker, Wainright & Patterson, and Kurdek. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66).

[2] Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (2000); David Popenoe, *Life Without Father:*

(Continued)

is more mutable than the characteristics that define other suspect classifications under equal protection.[3]

Plaintiff essentially offers two related grievances regarding the House's citations to these materials. Both operate on the mistaken assumption that the materials cited by the House must be treated as expert "evidence" for purposes of evidentiary and procedural rules. First, Plaintiff objects that the materials cited are hearsay and otherwise not formally admissible in evidence because the House's attorneys are not qualified as experts on the relevant topics. Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66) at 1-2, 9-14. Second, Plaintiff requests that these same materials be stricken because they are "intended expert or opinion testimony" that was not "disclosed in writing, with notice to the other side, and subject to cross-examination." *Id.* at 2; *see also id.* at 2-3, 14-20.

Plaintiff is tilting at windmills. Plaintiff seems to assume that the federal courts must decide rules of constitutional law, that will be binding on the entire country for the indefinite future, on a record limited to the statements of whatever individuals the parties happen to be able and willing to discover, persuade, and pay to provide expert testimony in cases that often touch on matters of considerable public controversy. That is not how constitutional litigation, at any

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Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999).

[3] Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. Clinical Child and Adolescent Psych. 490 (2003); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 297 (2000); Nigel Dickson et al., *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612-13 (2003); Greogory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 Sex. Res. Soc. Pol'y 176 (2010). Plaintiff again recognizes that the Herek study appeared in one of her expert reports and was discussed at that expert's deposition. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66).

level, works. Every document that Plaintiff seeks to strike—and those that Plaintiff does not seek to strike, but also claims are inadmissible, *see* First Windsor Ltr. to Ct., Aug. 12, 2011, at 3 n.1—is rightly considered by this Court as a legislative fact. In this light, Plaintiff's allegation that the House has attempted to put expert evidence before the Court without naming experts is meritless. The House has done nothing of the sort, but instead has done what any litigant does in constitutional cases: Marshal books, studies, scholarly articles, and other sources in support of *the rule of law* for which the litigant is advocating. Thus, contrary to Plaintiff's claims, the House's attorneys are not holding themselves out to be experts, but rather are citing to material of which this Court may and should take note.[4]

ARGUMENT

I. Plaintiff's Contentions Are Thoroughly Incompatible With the Courts' Consistent Practice in Constitutional Cases.

If Plaintiff's assumption had been the law, many of our nation's most prominent constitutional decisions could not have been decided the way they were. For instance, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court cited directly to "modern authority" consisting of several works of social science. *Id*. at 494 n.11. And in *United States v. Virginia*, 518 U.S. 515 (1996), while the Court discussed the trial below, it proceeded to reject the trial court's conclusion, relying instead on several works of historical scholarship to render its decision. *See id*. at 523-24, 535-40. Such cases are by no means unique. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion) (extensive collection

[4] Indeed, the plaintiffs in *Pedersen v. Office of Personnel Management*, a related DOMA challenge in the District of Connecticut for which the same experts and depositions are being used, recognized this difference by submitting a Rule 56 statement along with a separate statement of "non-adjudicative facts." *See* Separate Statement of Non-Adjudicative Facts, No. 3:10-cv-01750 (D. Conn.) (July 15, 2011) (ECF No. 62), attached as Ex. A.

of Supreme Court precedents involving consideration of "[t]he writings and studies of social science experts on legislative facts" even "without introduction into the record," on matters including, to give just two examples, "the deterrent effect of capital punishment" and "the relation between obscenity and socially deleterious behavior").

Further examples can be had simply by paging through the United States Reports in search of constitutional decisions involving far-reaching social issues. Indeed, just a few weeks ago, the Supreme Court decided a case in which all four opinions—the majority, concurrence, and two dissents—relied heavily on analyses of such topics as literary history, video-game technology, and historical American attitudes toward parental authority, all without the slightest indication that any of the materials considered by the court (including numerous expert articles and books) ever were introduced into evidence below. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. ___, No. 08-1448 (2011), Slip. Op. at 8-11, http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf (Court's analysis of literary and entertainment history); *id.* at 11 ("Justice Alito has done considerable independent research" regarding the level of violence in video games); *id.* at 16 n.9 (relying on "a 2005 study" identified in an *amicus* brief indicating "that about 18% of retailers still sell alcohol to those under the drinking age"); *id.*, Alito, J, concurring in the judgment, at 12-15 (independent research regarding current and likely future state of video-game technology); *id.*, Thomas, J., dissenting, at 3-13 (comprehensive discussion of historical attitudes of parental authority); *id.*, Breyer, J., dissenting, at 11 (citing Census Bureau study for proposition that "5.3 million grade-school age children . . . are routinely home alone"); *id.* at 12-14 (citing numerous studies for proposition that video games cause aggressive behavior, and do so more than violence in other

media); *id.* at 20-35 (appendices describing and documenting Justice Breyer's comprehensive and independent survey of the relevant social-science publications).

These and many other cases are flatly inconsistent with Plaintiff's contention that, in considering rules of constitutional law, courts and parties are subject to formal rules of evidence and procedure, and confined to the formally-produced record, in identifying relevant scholarly works and data.[5] This is particularly true where, as here, one of the main issues being litigated is whether a particular piece of legislation passes rational-basis review. As a matter of law, in such cases the court's inquiry is whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). It would be anomalous indeed, not to mention virtually impossible to perform this inquiry in a meaningful way, if the courts' ability to investigate the universe of "reasonably conceivable state[s] of facts," *id.*, were confined to a consideration of the views of whatever experts the parties have hired. The practice in federal courts in constitutional cases is overwhelmingly against such a rule, and Plaintiff offers no explanation of why this case is so unusual as to require different treatment.

II. Legislative Facts are Not Subject to Formal Rules of Evidence.

Plaintiff's misguided motion stems from her failure to acknowledge the elementary difference between adjudicative and legislative facts. Adjudicative facts "are simply the facts of

[5] Plaintiff may attempt to argue that, although the courts themselves may refer to such materials and data, parties may not do so without formally adducing them as evidence. There is no sensible rationale for such an arrangement, which apparently would have no purpose other than preventing the courts from hearing the views of the parties on materials relevant to legislative fact-finding. Furthermore, the House is aware of no authority in support of such a rule, and it obviously is inconsistent with the Supreme Court's frequent reliance on legislative facts identified in briefs, including those of *amici curiae*, who by definition had no opportunity to introduce evidence in the trial court. *E.g.*, *Brown*, majority opinion, Slip Op. at 9-11.

the particular case." Fed. R. Evid. 201, advisory committee's note. "'Adjudicative facts are facts about parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case . . . .'" *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966) (quoting Kenneth Culp Davis, *The Requirement of a Trial–Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956)); *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (same); *see also Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005) ("Adjudicatory facts are those relevant only to the particular parties involved in the case."), *rev'd on other grounds*, 550 U.S. 124 (2007).

On the other hand, legislative facts are simply "those which have relevance to legal reasoning and the lawmaking process." Fed. R. Evid. 201, advisory committee's note. The relevant "distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which . . . more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires." *Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990). As Judge Boudin has explained for the First Circuit, "so-called 'legislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts." *Daggett v. Comm'n on Gov'tal Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999).

For purposes of the application of formal rules of evidence, the difference between adjudicative and legislative facts is simple and stark. As stated by Judge Posner for the Seventh Circuit, "besides facts in that sense—the kind of facts that a trier of fact determines—there are

background facts (sometimes called 'legislative' facts) that *lie outside the domain of rules of evidence* yet are often essential to the decision of a case." *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (emphasis added). In *Wiesmueller*, Judge Posner noted without disapproval that the legislative facts did not appear "in the record compiled in summary judgment or trial proceedings," and that they "could be incorporated in the argument section of the brief." *Id.* Consistent with that analysis, the advisory committee's notes to Federal Rule of Evidence 201 make clear that, in examining legislative facts:

> [T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.

Fed. R. Evid. 201, advisory committee's note (quotation marks omitted). "This . . . view . . . renders inappropriate . . . *any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs*, and any requirement of formal findings at any level." *Id.* (emphasis added). As one district court has noted:

> In constitutional litigation . . . , appellate courts and courts of first instance have the ability to go beyond the formal rules of evidence and examine what may be described as "legislative facts." In seeking to determine the rationality of a given measure in meeting permissible goals, the court may examine scholarly articles not formally submitted or may guide its conclusions by reasonable exercise of its deductive powers.

Democratic Party of the U.S. v. Nat'l Conservative Political Action Comm., 578 F. Supp. 797, 830 (E.D. Pa. 1983), *aff'd in part and rev'd in part sub nom. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); *see also United States v. Hernandez-Fundora*, 58 F.3d 802, 811 (2d Cir. 1995) ("The omission of any treatment of legislative facts [in Fed. R. Evid. 201] results from fundamental differences between adjudicative facts and legislative facts.") (citing Fed. R. Evid. 201, advisory committee's note); *Charlton Mem'l Hosp.*

v. Sullivan, 816 F. Supp. 50, 53 (D. Mass. 1993) ("Rules of evidence and procedure, including Federal Rule of Civil Procedure 56, may thus be inapplicable because they are designed for determining 'adjudicative' rather than 'premise' facts.") (citing Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 Minn. L. Rev. 1, 29-34 (1988)).

And the rule could not sensibly be otherwise. As the Fifth Circuit has explained, specifically in the context of holding that a trial court determination of "legislative fact" is not entitled to deferential review:

> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence?

Dunagin, 718 F.2d at 748 n.8 (answering these rhetorical questions by rejecting trial court determination of legislative fact, notwithstanding its adoption based on trial court's consideration of expert testimony); *see also id.* ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.").

III. The House's Citations in Question Go To Classic Issues of Legislative Fact.

Apparently unaware of this distinction, Plaintiff makes no mention of it in her memorandum in support of her motion to strike.[6] Even if she had, it is beyond reasonable dispute that the citations and references Plaintiff seeks to strike go to issues of legislative fact, and thus are not subject to the evidentiary and procedural rules she attempts to invoke. Plainly the adjudicative facts in this case are matters such as who Plaintiff is, whether she in fact purported to marry another woman in Canada and remained in that relationship until the decedent's death, whether Plaintiff is in fact the executor of the estate of her late state-law

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[6] In her second letter to this Court dated August 12, 2011, Plaintiff states that the Second Circuit has rejected the sort of argument raised by the House. Second Windsor Ltr. to Ct., Aug. 12, 2011 at 1-2 (quoting *Landell v. Sorrell*, 382 F.3d 91, 136 n.24 (2d Cir. 2004), *rev'd and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006)). To the contrary, the issue in *Landell* was not remotely similar to the one here. The footnote relied upon by Plaintiff merely reflects the Second Circuit's decision to remand to give the district court a first chance at finding and considering legislative facts that the district court had not reached in its previous decision. *Landell*, 382 F.3d at 136 n.24. Most importantly, although the *Landell* court decided to remand rather than attempt to "resolve disputed legislative facts . . . on an insufficiently developed record," preferring to engage in first-instance legislative fact finding on appeal only in simpler matters, *id.*, it did absolutely nothing to suggest that on remand either the parties or the district court were required to adduce evidence through cross-examined testimony, rather than by simply identifying sources of data in their briefing as the House has done here. *See id.* at 135 & 136 n.24, 148.

Indeed, the *Landell* majority said nothing to contradict the dissenting judge's "assum[ption]" that on remand the majority did *not* contemplate "that the district court will take testimony on the state of mind of the then-legislators, resolve credibility issues, and find facts on these issues." *Id.* at 205 (Winter, J., dissenting). If the *Landell* court had intended to create such a sharp break from the long-standing and uniform practice of other Courts of Appeals and of the Supreme Court, as described above, it surely would not have done so *sub silentio* and by implication in the manner that Plaintiff seems to contend it did.

Moreover, and perhaps most tellingly, the *Landell* majority itself relied on at least one law review article not for a conclusion of law but for an assessment of the effects of campaign-fundraising pressures on "the quality of democratic representation," despite the absence of any indication that the article had been adduced in evidence below or its author formally identified as an expert witness or subjected to cross-examination. *See id.* at 123 (majority opinion) (quoting Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1282-83 (1994)).

spouse, and whether the estate in fact paid federal estate tax.[7] None of the materials that Plaintiff claims are inadmissible go to any of these questions. Instead, they relate to paradigmatic issues of pure legislative fact—issues such as the degree of homosexual persons' political power, the nature of discrimination that homosexual persons have faced, the relative merits of parenting by same-sex and opposite-sex couples, and the relative mutability of sexual orientation. Plaintiff's own descriptions of the materials she seeks to have stricken, and the purposes for which the House cites them, illustrate this fact clearly. *See* App. to Pl.'s Mem. in Supp. of Mot. to Strike (Aug. 10, 2011) (ECF No. 66), column titled "Proposition BLAG Attempts to Support."

Legislative facts are so commonly relied on by courts in constitutional litigation, and the propriety of this is so generally acknowledged, that the issue is not among those more frequently litigated. However, an example of the rules regarding legislative facts is supplied by *Central Soya Co., Inc. v. United States*, 15 C.I.T. 35 (Ct. Int'l Trade 1991). There the court addressed an objection similar to that raised by Plaintiff in the instant matter. The court considered the admissibility of a particular affidavit, where that affidavit allegedly was not submitted in compliance with local rule 56 (because the affiant allegedly could not have testified "as to the facts contained in his affidavit"). *Id.* at 36, 39. The court concluded that, because the "affidavit presents legislative facts of which the court may take judicial notice,[8] the affidavit is admissible

[7] These are precisely the types of facts that the plaintiffs in the parallel *Pedersen* case included in their Rule 56 statement, to the exclusion of legislative facts that do not deal directly with the plaintiffs and the relevant events in their lives. *See* Pls.' Local Rule 56(a)1 Statement in Supp. of Pls.' Mot. for Summ. J., No. 3:10-cv-01750 (D. Conn.) (July 15, 2011) (ECF No. 61), attached hereto as Ex. B.

[8] In light of Federal Rule of Evidence 201's limitation of its rule to "Judicial Notice of Adjudicative Facts," and the rule reflected in the advisory committee's note that legislative facts are not "appropriate subjects for any formalized treatment of judicial notice of facts," the *Soya*

(Continued)

and the defendant's motion to strike is denied." *Id*. This Court should take the same approach as to the materials challenged here.

CONCLUSION

In sum, Plaintiff's motion to strike must fail because it does not acknowledge or reflect an appreciation of the distinction between adjudicative and legislative facts, and improperly seeks to hold materials obviously directed to legislative facts to the same formal evidentiary and procedural standards as those directed to adjudicative ones. Plaintiff approaches this case as one would approach a dispute concerning a contract or an automobile accident. But, as explained thoroughly above, this is constitutional litigation subject to legislative fact-finding on the part of the district court, and Plaintiff's arguments therefore are entirely beside the point. Accordingly, this Court should deny her motion to strike.

Co. court must be understood as using the phrase "judicial notice" in a broad, but not incorrect, sense.

Respectfully submitted,

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August 19, 2011

CERTIFICATE OF SERVICE

I certify that on August 19, 2011, I served one copy of the Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Opposition to Plaintiff's Motion to Strike by CM/ECF and by electronic mail (.pdf format) on the following:

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

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

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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 also* 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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Gerald V. Passaro, II
Raquel Ardin & Lynda Deforge
Janet Geller & Joanne Marquis
Suzanne & Geraldine Artis
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By their attorneys,

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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
Gary D. Buseck

EXHIBIT B

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.	)

PLAINTIFFS' LOCAL RULE 56(a)1 STATEMENT
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby submit the following Statement of Undisputed Facts with references to supporting evidence.

1. Connecticut, New Hampshire, and Vermont have one class of marriages; they do not distinguish between marriages between couples of different sexes and between couples of the same sex. Conn. Gen. Stat. § 46b-20 (codifying *Kerrigan v. Commissioner of Public Health*, 289 Conn. 235 (2008) (holding that any statute, regulation, or common law rule that prevented otherwise qualified individuals of the same sex from marrying violated the Connecticut constitution)). N.H. Rev. Stat. Ann. § 457:1-a (2011) ("Any person who otherwise meets the eligibility requirements . . . may marry any other eligible person regardless of gender."); Vt. Stat. Ann. tit. 15 § 8 ("Marriage is the legally recognized union of two people.").

2. Plaintiffs have a right to be married and are or were until the deaths of their spouses validly married pursuant to Connecticut, New Hampshire, or Vermont law to a person of the same sex. Pedersen & Meitzen Aff. ¶ 1; Passaro Aff. ¶ 11; Ardin & DeForge Aff. ¶ 2; Geller & Marquis Aff. ¶ 3; Artis Aff. ¶¶ 3-4;Kleinerman & Gehre Aff. ¶ 2; Savoy & Weiss Aff. ¶ 1.

3. Plaintiffs have all applied for and been denied federal marital benefits, or sought to file federal income tax returns based on their married status, which have been denied or are deemed denied because of DOMA, 1 U.S.C. § 7. Pedersen & Meitzen Aff. ¶ 6; Passaro Aff. ¶¶ 15-17, 28-31; Ardin & DeForge Aff. ¶¶ 19, 21, 33-36; Geller & Marquis Aff. ¶ 9; Artis Aff. ¶ 20; Kleinerman & Gehre Aff. ¶¶ 11-15; Savoy & Weiss Aff. ¶ 13-17.

A. Joanne Pedersen & Ann Meitzen

4. Plaintiffs Joanne Pedersen ("Joanne) and Ann Meitzen ("Ann") have been validly married under Connecticut law since December 22, 2008 and a committed couple for over twelve years. Pedersen & Meitzen Aff. ¶ 1.

5. Joanne is a retired civilian employee of the Department of the Navy, Office of Naval Intelligence, and is enrolled in the Federal Employees Health Benefits Program ("FEHB"). Pedersen & Meitzen Aff. ¶¶ 4, 6.

6. Within 60 days of their marriage, Joanne contacted her insurer to find out how to add Ann to her insurance plan and was informed that Ann could not be added to Joanne's insurance. Pedersen & Meitzen Aff. ¶ 7; *see also id*. at ¶ 8.

7. On November 8, 2010, during the open enrollment period, when Joanne used the online option to change her health insurance from "Self-Only" to "Self and Family," a screen appeared stating that the computer was "unable to process [the] request" and to "call us" "[i]f you think the family member you wish to enroll is eligible." Pedersen & Meitzen Aff. ¶ 9.

8. Joanne called the number provided, was told that her spouse, Ann, was eligible, was then placed on hold, and was finally told that Ann was *not* eligible as her spouse because she is of the same sex. Pedersen & Meitzen Aff. ¶ 10.

9. Joanne was and is denied the opportunity to enroll herself and her spouse in a "Self and Family" plan because of DOMA, 1 U.S.C. § 7.

10. Ann struggles with chronic lung conditions affecting her ability to work and would therefore prefer to retire from full-time employment. Pedersen & Meitzen Aff. ¶ 13.

11. Because Ann was not added to Joanne's "Self and Family" plan, Ann is unable to retire from full-time employment without facing increased health insurance costs totaling between $300 and $500 more per month, or more, than what she and Joanne would pay if Joanne could add Ann to her FEHB health insurance. Pedersen & Meitzen Aff. ¶ 12.

12. Plaintiffs Pedersen and Meitzen believe they have been injured by DOMA, both with respect to the decreased quality of life Ann faces in managing a full-time job with chronic health issues, and because Joanne worked for the federal government for thirty years but is being treated differently from other retirees. Pedersen & Meitzen Aff. ¶¶ 14-16.

B. Gerald V. Passaro II

13. Plaintiff Gerald V. Passaro II ("Jerry") and Thomas Buckholz ("Tom") were validly married under Connecticut law from November 26, 2008 until Tom's death on January 7, 2009, at which point they had been a committed couple for over 13 years. Passaro Aff. ¶¶ 11-12.

14. Thomas Buckholz was a chemist at the Bayer Corporation ("Bayer") for more than 20 years and was fully vested in Bayer's defined benefit pension plan under which he named Jerry as his beneficiary. Passaro Aff. ¶¶ 3, 6, 13, 15.

15. As the designated beneficiary of Tom's pension, after Tom's death, Jerry requested that Bayer provide him with benefits. Passaro Aff. ¶¶ 15-16.

16. Bayer denied Jerry's request to receive benefits under Tom's pension because of DOMA, 1 U.S.C. § 7. Passaro Aff. ¶¶ 16-17; *see also* ¶¶ 18-24.

17. Jerry believes that his late spouse Tom would be upset to know that DOMA has interfered with his wish to provide for Jerry in any way that he could after his premature death. Passaro Aff. ¶¶ 25-26.

18. After Tom's death, Jerry applied for the Social Security lump-sum death benefit available to surviving spouses. Passaro Aff. ¶ 28; http://www.ssa.gov/pubs/deathbenefits.htm (stating, "A one-time payment of $255 is payable to the surviving spouse if he or she was living with the beneficiary at the time of death, OR if living apart, was eligible for Social Security benefits on the beneficiary's earnings record for the month of death.").

19. The Social Security Administration ("SSA") denied Jerry's claim for the Social Security lump-sum death benefit available to surviving spouses "because [Jerry's] marriage does not meet the requirements under Federal law for payment of Social Security Lump Sum Death benefits." Passaro Aff. ¶ 31.

C. Raquel Ardin & Lynda DeForge

20. Plaintiffs Raquel Ardin and Lynda DeForge have been married under Vermont law since September 7, 2009, and have been a committed couple for over 30 years. Ardin & DeForge Aff. ¶¶ 1, 2.

21. Lynda has been an employee of the U.S. Postal Service for 26 years and is an eligible employee under the terms of Title I of the Family Medical Leave Act ("FMLA"). Ardin & DeForge Aff. ¶¶ 3, 11, 17.

22. Raquel worked for the U.S. Postal Service for 25 years before taking disability retirement in 2005. Ardin & DeForge Aff. ¶¶ 4, 14.

23. Raquel's disability is a result of a serious injury during service abroad in the U.S. Navy, which injury required two neck fusion surgeries and left her with degenerative arthritis in her neck. Ardin & DeForge Aff. ¶¶ 5, 14.

24. Since 2005, Raquel has had to travel to a Veterans Administration facility in Connecticut for quarterly treatments consisting of multiple injections into her neck to address immobility, spasms, and pain caused by the degenerative arthritis and scar tissue from her surgeries. Ardin & DeForge Aff. ¶¶ 14-16.

25. Because of Raquel's serious medical condition, and her inability to move her neck before or after her injections, Lynda is required to be with her one day every three months for those injection treatments. Ardin & DeForge Aff. ¶¶ 15-16.

26. After Plaintiffs married, Lynda applied for FMLA leave "one day every three months" to transport Raquel to and from her injection appointments in Connecticut. Ardin & DeForge Aff. ¶ 19.

27. The U.S. Postal Service denied Lynda's request for FMLA leave to care for Raquel because of DOMA, 1 U.S.C. § 7. Ardin & DeForge Aff. ¶ 21.

28. Because Lynda was denied FMLA leave, she has had to take vacation time to care for Raquel rather than having the choice of using unpaid leave, accrued sick leave, or annual leave/vacation days. Ardin & DeForge Aff. ¶¶ 23, 25.

29. Beyond the injection appointments, and after the denial of FMLA leave, Lynda has also taken an additional 64 hours of vacation time to care for Raquel in the aftermath of two surgeries, whereas she would have preferred to take some days unpaid as authorized under FMLA. Ardin & DeForge Aff. ¶¶ 22-25.

30. Denial of FMLA leave to care for Raquel has caused Lynda a great deal of stress and worry about how to do what is best for their family. Ardin & DeForge Aff. ¶¶ 26-27.

31. The denial of FMLA leave and the necessary use of vacation time in order for Lynda to care for Raquel has caused Lynda to postpone her own knee surgery until she has accrued enough paid vacation time to enable her to be paid for the bulk of the several weeks she will be out of work convalescing from knee surgery. Ardin & DeForge Aff. ¶¶ 26.

32. As an employee of the U.S. Postal Service, Lynda is enrolled in the FEHB Program under a "Self-Only" plan. Ardin & DeForge Aff. ¶¶ 29, 31.

33. Raquel is an annuitant enrolled in the FEHB Program under a "Self-Only" plan. Ardin & DeForge Aff. ¶¶ 4, 30-31.

34. After Plaintiffs DeForge and Ardin married, and during the open enrollment in 2010, Lynda applied to have Raquel added to her "Self and Family" health plan under the FEHB Program. Ardin & DeForge Aff. ¶¶ 33.

35. When Lynda applied to have Raquel added to her "Self and Family" health plan under the FEHB Program using the PostalEASE system for open

enrollment, Lynda was informed that "[s]ame sex spouses are not considered eligible family members under FEHB." Ardin & DeForge Aff. ¶ 34.

36. Raquel and Lynda would prefer to have one "Self and Family" plan that would cover both of them together, and they would also enjoy the cost savings of a single plan. Ardin & DeForge Aff. ¶32.

37. Raquel and Lynda believe DOMA labels them as "not married" and "not a family," and it makes them scared for their future since DOMA would preclude Lynda from obtaining a survivor annuity on Raquel's federal pension, and could prevent them from being buried together in a veterans cemetery. Ardin & DeForge Aff. ¶¶39-40.

D. Janet Geller & Joanna Marquis

38. Plaintiffs Janet Geller ("Jan") and Joanna Marquis ("Jo") have been validly married under New Hampshire law since May 3, 2010 and a committed couple for over 30 years. Geller & Marquis Aff. ¶¶ 1, 3.

39. Jo, age 71, is a retired New Hampshire employee, having worked as a school teacher in public schools for over 30 years. Geller & Marquis Aff. ¶ 5.

40. Jan, age 64, is a retired New Hampshire employee, having worked as a school teacher in public and private schools for over 25 years. Geller & Marquis Aff. ¶ 4.

41. As qualified state retirees, Plaintiffs Geller and Marquis both receive a pension through the New Hampshire Retirement System ("NHRS"). Geller & Marquis Aff. ¶ 6.

42. Because Jo had over 30 years of service (which Jan does not), her NHRS benefits include a medical cost supplement that helps pay for her Medicare Part B supplemental insurance and which also provides a supplement for her spouse. Geller & Marquis Aff. ¶¶ 7-8.

43. After Plaintiffs Geller and Marquis married, Jo applied for the medical cost supplement spousal benefit for Jan. Geller & Marquis Aff. ¶ 9.

44. NHRS denied Jo's application for the medical cost supplement spousal benefit for Jan because of DOMA, 1 U.S.C. § 7. Geller & Marquis Aff. ¶¶ 9-10.

45. NHRS's denial of the spousal benefit requires Plaintiffs Geller and Marquis to incur an additional $375.56 per month ($4,506.72 per year) in healthcare costs for Jan. Geller & Marquis Aff. ¶¶ 9, 11.

46. Plaintiffs Geller and Marquis believe DOMA is taking away the recognition of their family that marriage brought to them after 30 years as a committed couple, depriving them of an important part of their monthly retirement income, and treating them as second class citizens. Geller & Marquis Aff. ¶¶ 12-14.

E. Suzanne & Geraldine Artis

47. Plaintiffs Suzanne and Geraldine Artis ("Suzanne" or "Geraldine") have been validly married under Connecticut law since July 11, 2009, and have been a committed couple for 17 years. Artis Aff. ¶¶ 3-4.

48. Suzanne and Geraldine are parents to three children, ages 13, 11, and 11. Artis Aff. ¶ 8.

49. For the year 2009, Suzanne filed a federal income tax return as Head of Household and Geraldine filed a federal income tax return as Single. Artis Aff. ¶ 13.

50. Suzanne and Geraldine each submitted a first amended federal income tax return for the year 2009 on IRS Form 1040X. Artis Aff. ¶ 15.

51. Suzanne and Geraldine submitted a second amended federal income tax return for the year 2009 on IRS Form 1040X requesting a refund of the difference between what they each paid as a Head of Household filer and as a Single filer, respectively, and what they would have paid if they had been permitted to file with the status of Married Filing Jointly. Artis Aff. ¶¶ 16-17.

52. The IRS denied the Artis's 2009 refund request because "for federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife." Artis Aff. ¶ 20.

53. Because DOMA bars Suzanne and Geraldine from filing federal income tax returns as Married Filing Jointly, they have paid $1,465 more in federal income taxes than they would have paid had they not been barred by DOMA from filing as Married Filing Jointly. Artis Aff. ¶ 17.

54. Suzanne and Geraldine believe DOMA hurts them by requiring them to disregard their own marital status on their federal income tax forms, and by artificially dividing their family rather than recognizing that they are one entire and complete family. Artis Aff. ¶¶ 23-24.

F. Bradley Kleinerman & James Gehre

55. Plaintiffs Bradley Kleinerman ("Brad") and James Gehre ("Flint") have been validly married under Connecticut law since March 6, 2009. Kleinerman & Gehre Aff. ¶ 2.

56. Brad and Flint have three children they jointly adopted, now ages 20, 19, and 10. Kleinerman & Gehre Aff. ¶¶ 1, 5.

57. For the year 2009, Brad filed a federal income tax return and paid federal income taxes as Head of Household. Flint, a stay-at-home parent, does not work outside the home and did not have sufficient income to have to file a federal income tax return. Kleinerman & Gehre Aff. ¶¶ 9-10.

58. For the 2009 tax year, Brad subsequently submitted a first amended return. Kleinerman & Gehre Aff. ¶ 9.

59. For the year 2009, Brad and Flint submitted a second amended federal income tax return on IRS Form 1040X requesting a refund of the difference between what Brad paid as a Head of Household filer and what he and Flint would have paid if they had been allowed to file under the status of Married Filing Jointly. Kleinerman & Gehre Aff. ¶¶ 11-12.

60. The IRS received the second amended return on December 1, 2010. Given the IRS's failure to act in 6 months, the request is deemed denied. Kleinerman & Gehre Aff. ¶¶13, 15; *see also* 26 U.S.C. § 7422.

61. Because DOMA bars Brad and Flint from filing their federal income tax return as Married Filing Jointly, they have paid $2,085 more in federal income

taxes than they would have paid had they not been barred by DOMA from filing under the status of Married Filing Jointly. Kleinerman & Gehre Aff. ¶¶ 11-12.

62. When Brad and Flint were returning from a family trip to Canada in 2002, a U.S. Customs agent told them in front of their children that they should have filled out two customs forms rather than one because the United States does not recognize them as a family. Kleinerman & Gehre Aff. ¶ 17.

63. Brad and Flint believe DOMA is hurtful to their family because it forces them to lie on federal income tax returns and claim that they are not married, stands in the way of having their family fully recognized, and diminishes the meaning of their marriage. Kleinerman & Gehre Aff. ¶¶ 8, 18.

G. Damon Savoy & John Weiss

64. Plaintiffs Damon Savoy ("Jerry") and John Weiss ("John") have been validly married under Connecticut law since October 9, 2010, and have been in a committed relationship for 12 years. Savoy & Weiss Aff. ¶ 1.

65. Jerry has been a government attorney for the Office of the Comptroller of the Currency ("OCC") since 1992 and is enrolled in the FEHB Program. Savoy & Weiss Aff. ¶¶ 3, 9.

66. John gave up his career to focus full-time on raising his and Jerry's three children adopted through the State of Connecticut, now ages 12, 10, and 2. Savoy & Weiss Aff. ¶¶ 2, 4.

67. After John's COBRA coverage terminated, he had to apply for and purchase health care coverage on the private insurance market. Savoy & Weiss Aff. ¶¶ 6, 8.

68. John suffers from Type II Diabetes so health insurance is very important for him and his children's well being and security. Savoy & Weiss Aff. ¶¶ 5, 7.

69. After Plaintiffs Savoy and Weiss married, Jerry applied to have John added to Jerry's existing "Self and Family" health plan under the FEHB Program that covers Jerry and the three children. Savoy & Weiss Aff. ¶¶ 13-14.

70. The OCC denied Jerry's application to add John to his "Self and Family" plan under the FEHB Program because of DOMA, 1 U.S.C. § 7. Savoy & Weiss Aff. ¶ 15.

71. Because John was not added to Jerry's "Self and Family" plan, John has been forced to maintain private health insurance at an additional cost of $217 per month. Savoy & Weiss Aff. ¶¶ 8, 19-20.

72. Plaintiffs Savoy and Weiss believe DOMA singles out their family for disrespect by not even allowing John to join in the "Self and Family" plan that already covers the rest of their family. Savoy & Weiss Aff. ¶ 18.

Respectfully submitted,

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Raquel Ardin & Lynda Deforge
Janet Geller & Joanne Marquis
Suzanne & Geraldine Artis
Bradley Kleinerman & James Gehre And
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DATED: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, a copy of the foregoing Plaintiffs' Local Rule 56(a)1 Statement in Support of Plaintiffs' Motion for Summary Judgment 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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