UNITED STATES DISTRICT COURT
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.

10 Civ. 8435 (BSJ) (JCF)
ECF Case

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Roberta A. Kaplan, Esq.
Andrew J. Ehrlich, Esq.
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
rkaplan@paulweiss.com
aehrlich@paulweiss.com

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
James D. Esseks, Esq.
Rose A. Saxe, Esq.
125 Broad Street
New York, NY 10004
(212) 549-2500
jesseks@aclu.org
rsaxe@aclu.org

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
Melissa Goodman, Esq.
Alexis Karteron, Esq.
Arthur Eisenberg, Esq.
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
akarteron@nyclu.org
aeisenberg@nyclu.org
mgoodman@nyclu.org

Attorneys for Plaintiff Edith Schlain Windsor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiff Edith ("Edie") Schlain Windsor respectfully submits this reply memorandum of law in support of her motion for summary judgment.

PRELIMINARY STATEMENT

As is so often true when a case is exposed to the bright light of the adversarial process, what is most telling about BLAG's opposition to Plaintiff's motion for summary judgment are the arguments that BLAG does not make, instead of the ones that it does. Most significantly, apart from an incomprehensible footnote (BLAG Opp. Br. at 20 n.34), BLAG does not even argue that Section 3 of the so-called Defense of Marriage Act, or DOMA, 1 U.S.C. § 7, survives the demanding review required under the heightened scrutiny standard. BLAG does not argue that the statutory discrimination against gay men and lesbians at issue in this case is either narrowly tailored to serve a compelling governmental interest or that it is substantially related to an important governmental objective.[1]

BLAG, similarly does not (because it cannot) dispute the history of discrimination endured by lesbians and gay men in this country, often at the hands of the federal government itself. BLAG does not (again, because it cannot) dispute that gay men and lesbians are as able as straight people to contribute to our society. Because the courts have long held that these are the two most important factors in deciding whether heightened scrutiny should apply, BLAG has no persuasive argument as to why laws like

[1] If the language in footnote 3 in BLAG's most recent reply brief on its motion to dismiss (BLAG MTD Reply Br. at 4 n.3) means that BLAG rests on the same justifications under heightened scrutiny as it does for rational basis, that cannot substitute for an argument as to how DOMA would be tailored to meet those interests. As discussed below, the government bears the burden of proof under heightened scrutiny, and BLAG, represented by distinguished counsel, has chosen what arguments to make in its briefing in this case.

DOMA that discriminate on the basis of sexual orientation should not be subject to heightened judicial scrutiny.

Rather than address these essential constitutional issues, BLAG instead relies on outdated and non-binding cases from other jurisdictions, and a series of irrelevant arguments, in order to justify the obviously unconstitutional treatment received by Edie Windsor, who was forced to pay a $363,053 federal estate tax bill that a straight widow would not have had to pay. None of BLAG's arguments justify DOMA's blatant discrimination against lesbians and gay men. Indeed, at least three of the propositions advanced by BLAG in its opposition brief so obviously lack merit legally, factually, and as a matter of common sense, that they deserve discussion up front.

First, and perhaps most surprising, is BLAG's assertion, as part of its attempt to avoid equal protection analysis altogether, that there is no such thing as a "class" of gay men and lesbians. (*See* BLAG Opp. Br. at 11 ("These differing definitions [of 'gay,' 'lesbian,' and 'homosexual'] show that these terms are amorphous and do not adequately describe a particular class.").) While at first blush this statement, we respectfully submit, is fairly shocking, what BLAG appears to be saying is that because academics in the field do not uniformly agree upon the precise definition of terms like "gay" or "lesbian," what constitutes a homosexual sexual orientation is too amorphous for lesbians and gay men to constitute an identifiable class of persons for purposes of the United States Constitution.[2]

---

[2] Almost as surprising is BLAG's contention that Plaintiff had a "choice" about being a lesbian based on the fact that she was briefly married to a man in the early 1950s. (BLAG Opp. Br. at 12 n.4.) This argument, like many of BLAG's other assertions, reflects a serious misconception about the life experiences of lesbians and gay men. As Plaintiff recounts in her supplemental affidavit, shortly after marrying her brother's best friend as a result of the overwhelming social pressure not to be "queer," Edie told him that it was simply not fair to him for them to remain married. (Suppl.

We respectfully would ask the Court to take a minute or two to pause on this statement given the reality of life today in the United States. When a relative, friend, or colleague says that he is gay, is it really credible (or even intellectually honest) for BLAG to argue that it is impossible to know what that person is talking about? Indeed, Congress *itself* has passed legislation using the terms "lesbian" and "gay." *See* Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654(f)(1) (repealed 2010) ("[T]he term 'homosexual' . . . includes the terms 'gay' and 'lesbian[.]'"). And when DOMA was passed in 1996, the legislative record was replete with references to lesbians and gay men. *See, e.g.*, 142 Cong. Rec. H7485 (daily ed. July 12, 1996) ("I think Congress should decide whether the domestic spouses of *gays* and *lesbians* should get Social Security survivor benefits.") (emphasis added); 142 Cong. Rec. H7495 (daily ed. July 12, 1996) ("*Homosexual* marriages are not necessary; *gays* can legally achieve the same legal ends as marriage through draft wills, medical powers of attorney, and contractual agreements . . . . [A]sking the rest of the country to recognize such marriages . . . is simply asking for special privileges."); 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) ("*Homosexuals* and *lesbians* boast that they are close to realizing their goal—legitimizing their behavior."). Presumably, the members of Congress who made these statements knew the class of people they were talking about.[3]

Windsor Aff. ¶¶ 3–14.) Thus, Plaintiff herself makes it clear that she did not really have any "choice" about her sexual orientation.

[3] Similarly, the Supreme Court's decisions in both *Lawrence* and *Romer* reflect the common-sense understanding that there is an identifiable class of gay people who are harmed by discrimination. *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject *homosexual persons* to discrimination both in the public and in the private spheres.") (emphasis added); *Romer* v. *Evans*, 517 U.S. 620, 624 (1996) ("Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state

In fact, BLAG's claim that there is no identifiable class of lesbians or gay men is inconsistent with BLAG's own position in this case. To illustrate, at the very same time that it questions the existence of a "class" of lesbians and gay men, BLAG also argues that "[g]ays and lesbians have wielded considerable power in corporate America." (BLAG Opp. Br. at 14.) It goes without saying that it would be strange for a group without any identifiable or clear identity to have the kind of political power and influence that BLAG attributes to gay men and lesbians.

More fundamentally, however, it is important to remember who and what this case is really about—Edie Windsor and her marriage to Thea Spyer. Given the sacrifices that she and her late spouse, Thea Spyer, made and the life they built together while facing social pressures and prejudices that few who grew up in recent generations can imagine, to tell Edie Windsor that there is no such thing as being gay or lesbian is, in a word, absurd.

Second, BLAG argues in its opposition papers that the discrimination faced by lesbians and gay men lasted for only a relatively short period of time, that things are getting better, and therefore, this discrimination really isn't very significant for constitutional purposes. (BLAG Opp. Br. at 8–9.) Again, as discussed in greater detail below, it simply defies common sense, not to mention the extensive evidentiary record put forth by Plaintiff's experts, to suggest that the record of discrimination against lesbians and gay men in this country is anything other than historical fact.

Plaintiff's own life experience again provides stark corroboration. While working as a graduate student at NYU in the 1950's, Edie Windsor was terrified when she was called in by the FBI for an interview to get the security clearance required for her

---

or local government designed to protect the named class, a class we shall refer to as *homosexual persons or gays and lesbians*.") (emphasis added).

job working on NYU's Univac computer. Why? Because she was worried that the FBI was "on to" the fact that she was a lesbian and that she would lose her job as a result. (Suppl. Windsor Aff. ¶¶ 17–23.) Later, when Edie went to work as one of the first software programmers at IBM after receiving her Master's Degree in mathematics, lesbians were prohibited by federal law from working at IBM because it had contracts with the federal government. (*See* Chauncey Dep. 39:23–41:9, Kaplan Decl. Ex. A.) So at the very time that Edie was building a distinguished career at IBM, she was technically forbidden by federal law from working there in the first place.

As for the contention that discrimination is not as bad today as it was back then, that argument is simply not relevant for purposes of heightened scrutiny. If it were, then laws discriminating against African-Americans and women would receive only rational basis review, since discrimination against these groups has abated (though not disappeared) over time. Moreover, even BLAG does not dispute that discrimination against gay men and lesbians continues today. (BLAG Opp. Br. at 8–9.) The very law at issue in this case (DOMA) is in fact a concrete manifestation of such discrimination; BLAG has conceded in its written discovery responses that if Plaintiff had been married to a man, Thea Spyer's estate would not have been liable for federal estate tax at all. (Am. Response to Plaintiff's First Request for Admission, dated Aug. 2, 2011.)

Third and finally, BLAG's argument that Edie and Thea were not validly married for purposes of New York law can and should be dismissed at the outset since BLAG misrepresents the relevant case law. (BLAG Opp. Br. at 24–25.) The New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1 (N.Y. 2006), did not, as BLAG contends, stand for the proposition that out-of-state marriage between same sex couples are not recognized in New York. It held that New York's prior law, limiting marriages performed under New York law to one man and one woman, did not violate

the New York State constitution. *Id.* at 8. In New York, however, the longstanding rule is that an out-of-state marriage is valid in New York unless the marriage is "abhorrent" to New York public policy; and marriages between same-sex couples clearly did not fall within this narrowly circumscribed exception. *See In re Estate of Ranftle*, 917 N.Y.S.2d 195, 196–97 (1st Dep't 2011); *Martinez* v. *Cnty. of Monroe*, 850 N.Y.S.2d 740, 743 (4th Dep't 2008); *see also In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953).

As a result, every appellate court in New York to address the issue has held that valid out-of-state marriages between same-sex couples are recognized in New York. *See Ranftle*, 917 N.Y.S.2d at 196–97; *Lewis* v. *N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578, 581–85 (3d Dep't 2009), *aff'd on other grounds sub nom Godfrey* v. *Spano*, 920 N.E.2d 328 (N.Y. 2009); *Martinez*, 850 N.Y.S.2d at 743. Thus, as the State of New York itself has explained in its *amicus* brief in this case: "New York has long recognized as valid same-sex marriages that were solemnized under the laws of other States or nations, such as Plaintiff Edith Windsor's Canadian marriage to Thea Spyer." (Br. of State of New York as *Amicus Curaie*, dated July 27, 2011, at 1–3.)

ARGUMENT

I.

BLAG'S OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION IS PROCEDURALLY UNSOUND

As its central position, BLAG asserts that Plaintiff's motion for summary judgment should be denied because, in its view, there is a rational basis for the discrimination at the heart of DOMA, and a rational basis is supposedly all that the law requires. Plaintiff has responded to those arguments in her opposition to BLAG's motion to dismiss, and does so below as well.

But, as noted in Plaintiff's opposition to BLAG's motion to dismiss (Opp. to MTD Br. at 6), whether or not heightened scrutiny or rational basis review applies depends in part on a series of factual, not merely legal, questions. BLAG opposes Plaintiff's motion for summary judgment by pointing to untested, hearsay documents in an effort to disprove factual contentions relating both to some of the heightened scrutiny factors (history of discrimination, immutability) as well to as the purported justifications for the discrimination effected by DOMA (the science on parenting by gay people).

As the Court is aware, summary judgment is appropriate where, as here, the moving party can establish "that there is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); s*ee also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322–23 (1986). Once that showing is made, the burden shifts to the other party (here, BLAG) to demonstrate the existence of "any genuine issues of material fact" thereby justifying the need for a trial. *Celotex Corp.*, 477 U.S. at 322. Typically, the type of information that would "support" such a showing that a statement of fact "is genuinely disputed" includes citations to materials in the record such as "depositions, documents[,] affidavits[,] admissions, [or] interrogatory answers . . . ." Fed. R. Civ. P. 56(c)(1)(A).

That is exactly what Plaintiff has done here. As set forth in Plaintiff's moving brief, and as discussed below, Plaintiff has submitted two affidavits from herself, as well as affidavits from five renowned experts in fields ranging from American history to child psychology to political science. Certainly, on the question of whether some form of heightened scrutiny should apply, BLAG cannot possibly meet its burden of demonstrating an actual factual dispute about whether there is a history of discrimination against gay men and lesbians, whether being gay or lesbian has anything to do with an individual's ability to contribute to society, or whether one "chooses" to be gay. And

while BLAG argues that sexual orientation is not immutable, Plaintiff has submitted a sworn declaration from the author of two of the four articles cited by BLAG in support of that contention, Professor Lisa Diamond, condemning their misuse of her research and stating unequivocally that "[i]f the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes." (Suppl. Diamond Decl. ¶ 10.) Indeed, along with the instant reply memorandum, Plaintiff has submitted supplemental affidavits from Professors Lamb and Peplau responding to BLAG's distortions of the science on gay parenting and immutability.

BLAG, by contrast, has offered nothing other than selective citations to materials whose relevance and reliability are questionable at best. Perhaps most significantly, it has not offered a single affidavit from a single witness—whether a member of the House of Representatives or the author of one of the articles it seeks to rely upon—in order to make the required showing that there is a genuine issue of disputed fact in this case. Thus, given the absence of admissible documents or any witnesses on its side of the case, BLAG would have no evidence to introduce at trial even if summary judgment were denied.

Once the Court concludes that heightened scrutiny does apply, BLAG's purported "dispute" about the consensus on parenting by gay people cannot raise a genuine issue of material fact because BLAG does not even attempt to argue that DOMA is narrowly tailored to serve a compelling state interest or substantially related to an important government objective. Moreover, as discussed in Plaintiff's opening brief and her opposition to BLAG's motion to dismiss, DOMA is not even rationally related to any legitimate interest the federal government may allegedly have in "responsible procreation" by straight couples, in ensuring that children have straight role models, or in

encouraging straight couples to get married. In other words, no one could reasonably conclude that excluding married same-sex couples from federal protections will do anything to advance these supposed interests. (Pl. Br. at 26–28, 35–36; Opp. to MTD Br. at 26–30.) Indeed, even if BLAG's citations to hearsay articles are acceptable under the "constitutional facts" doctrine, the actual evidentiary responses from Plaintiff's experts to BLAG's mis-cited and mischaracterized hearsay articles demonstrate that those articles fail to create any genuine issue of material fact. *See Jeffreys* v. *City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) ("At the summary judgment stage, a nonmoving party must offer some hard evidence showing that its version of the events is not wholly fanciful.") (internal quotations omitted). Thus, even under the "constitutional facts" doctrine and rational basis review, BLAG has failed to demonstrate that there is any genuine issue of disputed material fact, as required by Rule 56.

II.

THERE IS NO BINDING PRECEDENT IN THE SECOND CIRCUIT AS TO WHETHER HEIGHTENED SCRUTINY SHOULD APPLY

The Supreme Court and the Second Circuit have not yet confronted the issue of what level of scrutiny—heightened or rational basis—applies to laws like DOMA that discriminate on the basis of sexual orientation. BLAG argues that this Court should not apply any form of heightened scrutiny because other courts in other circuits have applied the rational basis test to laws discriminating against gay men and lesbians. (BLAG Opp. Br. at 5–7.) BLAG's argument, however, relies entirely on overruled precedent or decisions that do not address the constitutional question presented.

First, contrary to BLAG's suggestion, the level of scrutiny that courts should apply to classifications based on sexual orientation is an open question. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the Supreme Court held that a state constitutional amendment categorically denying lesbians and gay men antidiscrimination protection

violated the Equal Protection Clause of the Fourteenth Amendment by "classif[ying] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635. In holding that the measure at issue "fail[ed], indeed defie[d]," even the rational basis inquiry, the Court avoided the question of what level of scrutiny applied. *Id.* at 632. Similarly, in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), the Supreme Court declared unconstitutional a law that restricted the liberty of lesbians and gay men by criminalizing their sexual relationships under the Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause, because the statute at issue "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578. *Lawrence* expressly left open any question of equal protection under the Constitution, and certainly did not decide what level of scrutiny applies when the government discriminates against people because of their sexual orientation. *Id.* at 574–75.

The Second Circuit has not decided this issue either. In *Able* v. *United States*, 155 F.3d 628 (2d Cir. 1998), the court expressly reserved the question of whether heightened scrutiny applies to sexual orientation classifications. *Id.* at 632 ("[T]he district court strongly suggested that in reviewing statutes that discriminate on the basis of homosexuality heightened scrutiny would be appropriate. We need not decide this question because at oral argument plaintiffs asserted that they were not seeking any more onerous standard than the rational basis test.") (internal citation omitted).

Second, while BLAG points out that several federal courts of appeal have concluded that sexual orientation classifications trigger only rational basis review (BLAG Opp. Br. at 5–6), it fails to mention that none of those decisions actually addresses the suspect classification factors laid out by the Supreme Court. Instead, almost every single one of those cases relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in which the

Court held that state laws criminalizing sexual intimacy between gay people did not violate the Due Process Clause of the Fourteenth Amendment. Of course, *Bowers* was overruled in *Lawrence*, 539 U.S. at 578, and that simple fact undermines the reasoning and authority of each of BLAG's cases.

As explained in Plaintiff's moving brief (Pl. Br. at 11–13), the Supreme Court has laid out two primary factors and two supplemental factors that guide its decisions about whether courts should subject government classifications to heightened scrutiny. When courts and commentators first started to apply these suspect classification factors to laws that classify based on sexual orientation back in the early 1980s, they recognized that heightened scrutiny should apply.[4] But after *Bowers*, the courts stopped examining the suspect classification factors and instead interpreted *Bowers* as categorically foreclosing gay people from being treated as a suspect or quasi-suspect class even if they would have received such protections under the traditional equal protection analysis. For example, in a sexual orientation equal protection decision after *Bowers*, the D.C. Circuit reasoned:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

---

[4] *See, e.g.*, *Rowland* v. *Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari; joined by Marshall, J.) (concluding that sexual orientation classifications should be "subjected to strict, or at least heightened, scrutiny"); John Hart Ely, *Democracy & Distrust* 162–64 (1980); Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed.) (1988); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985).

Padula v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). Other courts quickly followed suit, relying on *Bowers*.[5]

Since *Bowers* "was not correct when it was decided," *Lawrence*, 539 U.S. at 578, the pre-*Lawrence* cases cited by BLAG that relied on *Bowers* should not be considered persuasive by this Court. As the Attorney General has concluded, many pre-*Lawrence* decisions rely "on a line of reasoning that does not survive the overruling of *Bowers*." Letter of Att'y Gen. Holder to Speaker Boehner of the U.S. House of Rep. at 3 (Feb. 23, 2011) [hereinafter Holder Letter]; *see also* Br. of Defendant United States, dated Aug. 19, 2011, at 6–7.

With *Bowers* out of the way, federal courts are now free to undertake the Supreme Court's equal protection analysis and apply the suspect classification test to sexual orientation classifications. Since *Lawrence*, however, no federal court of appeals has "engage[d] in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny." Holder Letter at 3–4. Instead, when faced with the issue, most courts of appeal have simply adhered to the pre-*Lawrence* case law and continued to cite cases that relied on *Bowers*.[6] Moreover, several

---

[5] *See, e.g.*, *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 54 F.3d 261, 266–68 (6th Cir. 1995); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *Richenberg* v. *Perry*, 97 F.3d. 256, 260 (8th Cir. 1996). Many of those circuit court decisions reversed district court rulings that applied the suspect classification test and concluded that heightened scrutiny should apply. *See, e.g.*, *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368–70 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563; *Ben-Shalom* v. *Marsh*, 703 F. Supp. 1372, 1379–80 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989); *Equality Found. of Greater Cincinnati* v. *City of Cincinnati*, 860 F. Supp. 417, 434–39 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

[6] *See, e.g.*, *Lofton* v. *Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004);

of these erroneous court of appeals decisions are of dubious precedential value because the parties had not submitted briefs on the appropriate standard of scrutiny or otherwise presented the issue to the court.[7] A few have improperly concluded that the Supreme Court's decision in *Romer* decided that rational basis review applies.[8] In short, none of the court of appeals decisions on the level of scrutiny relied on by BLAG is binding upon or should be persuasive to this Court.

III.

DOMA IS SUBJECT TO HEIGHTENED SCRUTINY

Laws like DOMA, which treat gay people differently based on their sexual orientation, cannot be presumed to be constitutional, as would occur if rational basis applied,[9] but must instead be subject to some form of heightened judicial scrutiny.[10] This

---

Scarbrough v. *Morgan Cnty Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Witt* v. *Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *see generally* Arthur S. Leonard, *Exorcizing the Ghosts of* Bowers *v.* Hardwick*: Uprooting Invalid Precedents*, 84 Chi.-Kent L. Rev. 519 (2009).

7 *See, e.g.*, *Price-Cornelison*, 524 F.3d at 1113 n.9 (noting that plaintiff argued in the district court that "lesbians comprise a suspect class, warranting strict scrutiny . . . [but] does not reassert that claim now on appeal"); *Witt*, 527 F.3d at 823 (Canby, J., dissenting in part) (noting that plaintiff had not argued on appeal that sexual orientation classifications should receive heightened scrutiny).

8 *See, e.g., Lofton*, 358 F.3d at 818 & n.16 (relying on *Holmes* v. *Cal. Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997)), and *Richenberg*, 97 F.3d at 260 n.5, both of which in turn rely on misinterpretations of *Romer*); *Veney* v. *Wyche*, 293 F.3d 726, 732 (4th Cir. 2002) (erroneously relying on *Romer*). In *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008), also relied upon by BLAG, the First Circuit ended its analysis by finding that *Romer* and *Lawrence* did not compel the court to apply heightened scrutiny, but never analyzed what level of scrutiny was appropriate.

9 *See Nordlinger* v. *Hahn*, 505 U.S. 1, 17–18 (1992).

10 Although BLAG complains that Plaintiff doesn't specify which level of scrutiny applies (BLAG Opp. Br. at 5 n.2), it is Plaintiff's position that strict scrutiny must apply (Pl. Br. at 13, 24 n.10). Nevertheless, whether strict or intermediate scrutiny

is so because such laws clearly meet all of the relevant criteria that the Supreme Court has set forth for a statute to receive heightened scrutiny by the courts: (1) there is a history of discrimination against the group, (2) on the basis of a characteristic that does not affect the group's "ability to perform or contribute to society," (3) and that is a central part of the group members' identity or is immutable, and (4) the group is a minority with relatively limited political power. *See Bowen* v. *Gilliard*, 483 U.S. 587, 602–03 (1987); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985). As explained in Plaintiff's moving brief, the first two factors (history of discrimination and ability to contribute to society) are the most significant. *See Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008).

A. History of Discrimination

BLAG does not contest, nor could it contest, that there is a historical record of discrimination against lesbians and gay men in the United States. BLAG, however, attempts to minimize this history by asserting that it was "relatively short." (BLAG Opp. Br. at 8.) As discussed below, this is neither true nor relevant.

As Plaintiff's expert, Yale historian George Chauncey, has explained, the first American laws against sexual relations between persons of the same sex were enacted in the early colonial period. (*See* Chauncey Aff. ¶¶ 17–19.) At various times in the United States, discriminatory laws barred lesbians and gay men, for example, from working in civilian or military positions for the federal government, from entering the country, or from securing citizenship. (*Id.* ¶¶ 43-47; *see also* Br. of Defendant United States, dated Aug. 19, 2011, at 8–11.) Indeed, in her supplemental affidavit, Edie Windsor recalls that she was terrified in 1955 that the FBI would inquire into her sexual

---

applies is of relatively little import here because whatever the level of scrutiny, BLAG's purported justifications for DOMA clearly fail.

orientation and deny her the government security clearance she needed for her job at NYU. (*See* Suppl. Windsor Aff. ¶¶ 17–23.) Lesbian and gay parents who were open about their sexual orientation risked losing their children. (*See* Chauncey Aff. ¶¶ 81–86.) Sadly, many aspects of this history of discrimination continue today. As BLAG admits, lesbians and gay men in the United States have been and continue to be subjected to violence because of their sexual orientation. (BLAG Response to Windsor's Request for Admission #6; *see also* Chauncey Aff. ¶ 96.)

BLAG tries to muddy the waters by taking statements from Professor Chauncey out of context. (BLAG Opp. Br. at 8.) For example, BLAG misleadingly asserts that according "to Dr. Chauncey, 'all of the [discrimination] was put in place between the 1920s and 1950s, and most were dismantled between the 1960s and the 1990s.'" (*Id.*) BLAG, however, fails to disclose that when Professor Chauncey was asked about this point during his deposition, he explained quite clearly that this period was not the first time that the government began to discriminate, but the first time it began to do so against gay men and lesbians based *on their status* as gay men and lesbians:

> [A]s I have tried to say, the category of homosexual or heterosexual, gay . . . or straight . . . didn't exist in the same way before, so there was certainly a long history of hostility to the behavior that would come to be identified with and seen as characteristic of the people that would come to be known as homosexuals or gay people. . . . But . . . it was in the 20th century that the government began to classify and discriminate against certain of its citizens on the basis of their status as homosexuals. Again, that drew on a longer history of vilification but it took a distinctive form in the 20th century.

(Chauncey Dep. 53:11–25, Kaplan Decl. Ex. A.)

BLAG also fails to mention that contrary to BLAG's assertion, at other points during his deposition in this case, Professor Chauncey was quite clear that

discrimination against gay people continued well past the 1950s. For example, in addition to mentioning the passage of Amendment 2 in Colorado in 1992 (which of course led to the Supreme Court's *Romer* decision) (Chauncey Dep. 25:8–26:6, Kaplan Decl. Ex. A), Professor Chauncey observed:

> I think that in the case of gay and lesbian Americans, we have seen in the last decade really just an extraordinary degree to which their basic rights have been subject to the vicissitudes of public opinion, with — since the seventies, a large number of cases in which their civil rights have been put to the vote in popular referenda and, something like in three quarters of the cases have been taken away . . . It is hard to think of many other groups that have been subject to the vicissitudes of public opinion in quite that way.

(*Id.* at 29:14–30:5, Kaplan Decl. Ex. A.)

In any event, it makes no sense to assert, as BLAG does, that the discrimination that even BLAG concedes occurred is insufficient to warrant heightened scrutiny. The history of discrimination prong of the suspect classification test requires only that the characteristic has been used to discriminate invidiously in the past, not that it has been used to discriminate since the beginning of recorded time. The undisputed record of discrimination against lesbians and gay men here is clearly more than enough.[11]

B. Sexual Orientation Has No Impact on an Individual's Ability to Contribute to Society

BLAG does not contend that a person's sexual orientation affects his or her ability to contribute to society and thus concedes the second of the two essential factors of the heightened scrutiny analysis. Instead, it argues that "[t]he Congress that

---

[11] BLAG suggests that recent repeal of some government policies discriminating against lesbians and gay men indicates that sexual orientation classifications should not be considered suspect. (BLAG Opp. Br. at 8–9.) This argument proves too much, since racial minorities and women had achieved far greater legislative victories by the time that courts began considering racial and sex classifications suspect. (Pl. Br. at 21–22.)

enacted DOMA and the President who signed it obviously thought that the classifications drawn by DOMA were relevant and rationally related to several legitimate legislative goals." (BLAG Opp. Br. at 9.)

For purposes of the second prong of the heightened scrutiny test, this statement is simply a non-sequitur; it does not address whether being gay or straight affects a person's ability to contribute to society. In other words, if a congressional belief that a classification was "relevant" or "rational" were enough to preclude heightened scrutiny, then the supportive opinions of the Congresses that passed (and the Presidents that signed) racial segregation laws would instantly and forever have immunized such laws from constitutional review.

The undisputed evidence in this case demonstrates that "[b]eing gay or lesbian has no inherent association with a person's ability to participate in or contribute to society" (Peplau Aff. ¶ 29), and BLAG has offered nothing whatsoever to rebut this obvious fact.

C. Sexual Orientation Is Immutable and Is a Core Part of Individual Identity

Because the two factors discussed above are satisfied, a law like DOMA that singles people out based on their sexual orientation should be subject to heightened scrutiny. *See, e.g.*, *Mass Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976); *United States* v. *Virginia*, 518 U.S. 515, 532–33 (1996). The immutability of sexual orientation and its centrality to a person's identity, however, reinforce the need for heightened scrutiny here, and BLAG's arguments to the contrary lack merit. (*See* Br. of Defendant United States, dated Aug. 19, 2011, at 16–17.)

First, as noted above, BLAG argues that the concept of immutable sexual orientation "runs headlong into the differing definitions of the terms 'sexual orientation,' 'homosexual,' 'gay,' and 'lesbian,'" as if citing to various definitions of these words

somehow contradicts the fact that the underlying characteristics those terms describe are immutable or constitute a core part of an individual's identity. (*See* BLAG Opp. Br. at 10.) As discussed above, whatever variations there may be in the precise definitions of these terms, BLAG's argument that they "do not adequately describe a particular class" is disingenuous (*see id.* at 11)—Congress itself has passed legislation specifically targeting lesbians and gay men; it cannot claim now that this class of people does not exist.

BLAG also selectively cites excerpts from four articles establishing, according to BLAG, that many people experience changes in their sexual orientation or "choose" to be gay or lesbian. These articles do not support the proposition BLAG advances. First and foremost, two of the four articles cited by BLAG simply cannot be relied upon at all for the propositions advanced. This is so because the author of these articles has now submitted an affidavit in this case stating in no uncertain terms that "BLAG misconstrues my research findings, which do not support the propositions for which BLAG cites them." (Diamond Suppl. Decl. ¶ 5.)[12]

Moreover, the third article BLAG cites, for the proposition that about 12% of gay men and 32% of lesbians reported experiencing at least a small amount of choice in their sexuality, was discussed at the deposition of one of Plaintiff's experts, Professor Letitia Anne Peplau of UCLA.[13] When asked about this article on re-direct examination at her deposition, Professor Peplau explained that while it is unclear what participants in

---

[12] *See* Lisa M. Diamond, *New Paradigms for Research on Heterosexual & Sexual-Minority Development*, 32 J. of Clinical Child & Adolescent Psychol. 492 (2003); Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. of Soc. Issues 301 (2000).

[13] Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sex. Res. Soc. Pol'y 176 (2010).

the study who reported having some "choice" about their sexual orientation meant, rather than saying that they "chose" to be gay, it was more likely they meant "that they recognize that they had same sex romantic sexual attractions and then they chose rather than denying or suppressing those attractions [. . .] to act upon them by, for example, forming a same sex relationship." (Peplau Dep. 101:2–18, Kaplan Decl. Ex. B.)

Moreover, Professor Peplau has now submitted her own supplemental affidavit in which she testifies that having reviewed all four of the articles BLAG cites in its attempt to argue that sexual orientation is not immutable, none of the articles in any way change her opinions that "sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes; that sexual orientation is a multi-faceted phenomenon involving attractions, related behaviors, and identity; that most adults are attracted to and form relationships with members of only one sex; and that the significant majority of adults exhibit a consistent and enduring sexual orientation." (Suppl. Peplau Aff. ¶ 5) (internal quotations omitted).

In her supplemental affidavit, Professor Peplau also opines specifically about the fourth article cited by BLAG[14] and states that, contrary to BLAG's assertions, it actually "provides further evidence in support of [her] opinions." (*Id.* ¶ 6.) As Professor Peplau explains, "[a]mong the participants in the Dickson study, the overwhelming majority of individuals who reported only opposite sex attraction at age 21 also reported only opposite sex attraction at age 26. Similarly, the vast majority of those who reported major attraction to the same sex at age 21 reported this at age 26 as well. The data show that only 1/2 of 1% of the male participants and 1.3% of the female participants shifted from only opposite sex attraction to major attraction to the same sex or vice versa." (*Id.*)

---

[14] Nigel Dickson et al., *Same-Sex Attraction in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607 (2003).

As for BLAG's assertion that it is somehow relevant that one (obviously) cannot determine the sexual orientation of a newborn baby (BLAG Opp. Br. at 11), this argument not only sounds like eugenics, but, as Professor Peplau explained at her deposition, the fact that most persons typically come to understand their sexual orientation during adolescence does not mean that they can change their orientation at will. (*See* Peplau Dep. at 25:18–20, Kaplan Decl. Ex. B.)

Finally, the weakness of BLAG's position on immutability is perhaps best demonstrated by its remarkable argument that the fact that Plaintiff was once briefly married to a man demonstrates that sexual orientation is a choice. (BLAG Opp. Br. at 11–12.) It certainly was not a choice for Edie Windsor, who felt strong pressure as a young woman to marry a man in the 1950s, but soon realized, as she explained to her husband, that it was not fair either to herself or to him for them to stay married. (*See* Suppl. Windsor Aff. ¶¶ 3–16.) BLAG's suggestion that there is no such thing as lesbians and gay men as a group is absurd enough; to go further and suggest that Plaintiff had a "choice" about being a lesbian because she was once married to a man is insulting.[15]

[15] BLAG's contention that a small portion of people who experience same-sex attractions at one point may not experience them later misses the reason why the immutability of a trait may matter when determining if heightened scrutiny should apply. Age, for example, is not a suspect classification "because all persons, if they live out their normal life spans, will experience it." *Kimel* v. *Fla. Bd. of Regents,* 528 U.S. 62, 83 (2000). By contrast, no one would seriously suggest that all (or even most) people will one day experience being gay or lesbian. In any event, a trait need not be an unchangeable biological characteristic to warrant imposition of heightened scrutiny. As explained in Plaintiff's moving brief, people can convert to a different religion, aliens can become naturalized, individuals can change their sex, and some people can "pass" or even modify outward signs of their race or national origin, and yet each of these classifications warrants heightened constitutional scrutiny. (*See* Pl. Br. at 18.)

D. Lesbians and Gay Men Lack Political Power

Although BLAG does not dispute that lesbians and gay men continue to suffer from discrimination at the hands of the federal, state, and local governments, BLAG nevertheless argues that lesbians and gay men are politically powerful. As support for this argument, BLAG points to discrete successes in certain jurisdictions where lesbians and gay men and their allies have been able to repeal some of the many discriminatory laws or practices targeting gay men and lesbians. (BLAG Opp. Br. at 12–20.) While these recent events certainly demonstrate that some people are beginning to understand that discrimination against lesbians and gay men is not acceptable, what they do not demonstrate—contrary to BLAG's contentions—is that lesbians and gay men are so strong politically that they do not require the constitutional protections against a political majority that is often hostile towards them, as DOMA, forty-one state constitutional marriage amendments or statutes, and even the current Republican presidential campaign make overwhelmingly apparent.

As a conceptual matter, BLAG's arguments misconstrue the nature of political power, which Plaintiff's expert Professor Segura has explained refers to "a person's or group's demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system." (Segura Aff. ¶ 13.) In other words, determining whether a group has political power involves looking beyond the existence of particular policy outcomes that a group supports; it also requires an examination of "whether or not the group [itself is] in the position to make that policy outcome happen or if the policy outcome was simply the happenstance of political conditions or a meeting of the minds or an agreement of others who agree with their position." (Segura Dep. 28:25–29:17, Kaplan Decl. Ex. C.) As applied here, the fact that like-minded allies have been able to repeal some of the legislative measures that specifically target lesbians and gay

men for unequal treatment does not indicate that gays and lesbians have meaningful political power. In fact, one of the nation's two political parties is firmly committed in most respects to opposing any and all measures extending civil rights to gay men and lesbians, and even the most hard-fought gains for gay men and lesbians are repeatedly subject to contention, through ballot initiatives, threat of repeal, or other means. (*Id.* at 57:23–60:6, 143:2–14, Kaplan Decl. Ex. C; Segura Aff. ¶¶ 35–44, 75–77.)

Indeed, BLAG's own brief illustrates the extent to which lesbians and gay men lack political power. For example, while BLAG argues that legislation in four states and the District of Columbia permitting marriage for same-sex couples shows that lesbians and gay men have political power (BLAG Opp. Br. at 18), even BLAG acknowledges that "[u]ndeniably, [. . .] same-sex marriage jurisdictions remain even today a relatively small minority in this country. Forty-one states have constitutional amendments or statutes" affirmatively banning such marriages. (BLAG MTD Br. at 17 and Ex. B.) And although BLAG claims that "pro-homosexual forces" spent more than their opponents did in the campaign over Proposition 8 in California, the end result of course was that voters used the political process to deny gay and lesbian residents a right to which they had previously been entitled. (*See* BLAG Opp. Br. at 18.)

Similarly, BLAG cites a letter from a gay rights group to President Obama asking him to cease defending the constitutionality of DOMA as evidence of the significant political power of lesbians and gay men. (*See id.* at 13.) But, as Professor Segura explained at his deposition, that letter was written nearly two years *prior* to the administration's change in policy regarding DOMA, and the President receives thousands of letters a day, including many from large organizations. (Segura Dep. at 166:16–167:13, Kaplan Decl. Ex. C.) BLAG's position also requires one to assume (cynically)

that the President's decision was purely political, and not based on the unconstitutionality of DOMA and the President's recognition of his obligations under the Constitution.[16]

Likewise, although BLAG emphasizes the recent repeal of "Don't Ask, Don't Tell" as evidence of the significant political power of gay men and lesbians (BLAG Opp. Br. at 14), what BLAG doesn't mention is that the vote only occurred during a "lame-duck" session of Congress, that 191 of the 214 Republicans voting on the measure voted against the repeal (*see* Segura Aff. ¶ 32), and that, among other party leaders, the Republican presidential candidate who won the Iowa straw poll has called for the reinstitution of the ban on gay men and lesbians in the military if she is elected President. Sheryl Gay Stolberg, *For Bachmann, Gay Rights Stand Reflects Mix of Issues and Faith*, N.Y. Times at A1 (July 17, 2011). In fact, both of the two currently leading Republican presidential candidates have signed a pledge committing them to support a ban on equal marriage rights for same-sex couples. *See* Will Weissert, *Perry Signs Pledge on Anti-Gay Marriage Amendment*, Associated Press (Aug. 26, 2011). These are hardly the indicia of a group that has any significant degree of political power.

The fact that government-sanctioned discrimination against lesbians and gay men may be less extensive today than it was in the past in no way undermines the need for heightened scrutiny to apply to such discrimination. As Plaintiff established in her opening brief, when the courts recognized that racial and gender classifications require heightened scrutiny, African-Americans and women had achieved substantially greater legal protections through the political system than lesbians and gay men have today. BLAG has no response to this other than to note differences in the numerical size

---

[16] Indeed, given the role of BLAG, a subdivision of the United States House of Representatives, in this case, it is hard for Plaintiff, now 82 years old, to credit its prediction (if that's what it is) that DOMA will be repealed "soon" as a result of the political process. (BLAG Opp. Br. at 9.)

between African-Americans and women on the one hand, and the total population of lesbians and gay men in the United States, on the other. (*See* BLAG Opp. Br. at 20.) But if anything, this argument cuts the other way—that lesbians and gay men are less numerous than African-Americans and women can speak only to their relative *lack* of political power and illustrates why lesbians and gay men require greater constitutional protection against discrimination from a political majority that vastly outnumbers them.[17]

IV.

BLAG MISSTATES THE SCIENTIFIC CONSENSUS CONCERNING GAY PARENTS

BLAG does not explain anywhere in its briefing how DOMA would satisfy the standards required by heightened scrutiny—i.e., that DOMA is narrowly tailored to serve a compelling state interest (applying strict scrutiny) or is substantially related to an important government objective (applying intermediate scrutiny).[18] *See Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 75 (2001) ("[U]nder heightened scrutiny, 'the burden of justification is demanding and it rests entirely on the party defending the

---

[17] Again, BLAG has no response to Plaintiff's argument that a complete lack of political power is not a prerequisite to a group receiving heightened scrutiny. *See, e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 235 (1995) (holding that all racial classifications are subject to strict scrutiny, although some racial groups hold substantial political power).

[18] In a footnote, BLAG argues that DOMA's discrimination against Plaintiff and other married same-sex couples can be justified under heightened scrutiny "because it reflects and reinforces the Supreme Court's own definition of a fundamental right." BLAG Opp. Br. at 20 n.34. While it is not entirely clear what BLAG means by this, if the reference is to the Supreme Court's summary affirmance in *Baker* v. *Nelson*, 409 U.S. 810 (1972), BLAG is incorrect to suggest that the substantive due process inquiry controls the outcome under equal protection. *See, e.g.*, *Lawrence*, 539 U.S. at 574–75 (noting difference between equal protection and due process inquiries). Unlike due process analysis, which focuses in part on whether a particular right is part of history and tradition, equal protection analysis looks to history, if at all, only when that history suggests that courts should apply a higher level of scrutiny and be *less* deferential to the state's decision to discriminate.

classification.'") (quoting *Virginia*, 518 U.S. at 533); *see also* Br. of Defendant United States, dated Aug. 19, 2011, at 22–27.

BLAG does, however, include in its opposition brief a two-page section arguing that "the studies comparing gay or lesbian parents to heterosexual parents have serious flaws." (BLAG Opp. Br. at 23.) Once again, BLAG's argument is both irrelevant and wrong.

As an initial matter, while claiming that the science on same-sex parents has "serious flaws" (*id.*), BLAG does not challenge, on *Daubert* or any other grounds, the expert opinion of Professor Lamb that "children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents." (Lamb Aff. ¶ 12.) *See Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Nor has BLAG offered the testimony of any expert or even lay witness to call into doubt Professor Lamb's opinion. BLAG simply has not offered any evidence, much less competent evidence, that would contradict Professor Lamb's opinion.

More fundamentally, BLAG nowhere connects its bald claim that the gay parenting research is flawed—or even its "between-the-lines" insinuation that gays and lesbians are not as capable as heterosexual parents—to its burden on this motion to demonstrate that DOMA's discrimination is substantially or narrowly tailored to meet a compelling or important interest. As set forth in Plaintiff's opening brief, as a matter of logic, DOMA's exclusion of married same-sex couples from the benefits and burdens afforded to straight couples does not encourage straight couples either to marry or "responsibly procreate"—two of the stated rationales for DOMA (and again, when heightened scrutiny is applied, it is only Congress' stated rationales that matter). All that DOMA does is harm children's interests by "prevent[ing] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurances of a stable

family structure when afforded equal recognition under federal law." *Gill* v. *Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (internal quotation marks omitted). This justification, therefore, cannot satisfy heightened (or, indeed, even rational basis) scrutiny.

In any event, BLAG's suggestion (made on the basis of non-scientific articles and a few excerpts from studies taken out of context) that the scientific research does not support Dr. Lamb's expert opinion is obviously misguided. Dr. Lamb is a highly-regarded expert in child development and is the Head of the Division of Social and Developmental Psychology at the University of Cambridge in England. He has studied children's development and adjustment for thirty-five years and is the author of more than five hundred academic publications. His expert report is based not only on his vast experience and individual research, but on an analysis of the decades of scientific research and literature in the area of children's adjustment, including the over one hundred publications cited in his expert report, which confirm that children raised by lesbian or gay parents are just as well adjusted as those of heterosexual parents. (*See* Lamb Dep. at 31:25–32:4, Kaplan Decl. Ex. D ("The studies show . . . that there is no difference in children's adjustment depending upon the sexual orientation of their parents.").) BLAG's assertions to the contrary fall apart upon even minimal inspection.

As Professor Lamb explained at his deposition and reiterates in his supplemental affidavit, the sentences from three academic articles that BLAG read to him at his deposition and quotes in its brief as showing that the scientific research is flawed have been taken out of context and mischaracterized. Specifically, with respect to the statement that there is less research on gay male parents than lesbian parents (BLAG Br. at 23), Professor Lamb explained that "there is sufficient, indeed overwhelming, evidence that the adjustment of children is not affected by their parents' sexual orientation, and the

fact that more studies have focused on children raised by lesbians, rather than by gay men, does nothing to undercut that conclusion." (Supp. Lamb Aff. ¶ 8.) Similarly, with respect to the statement that there are relatively few studies on outcomes for adolescents, Professor Lamb explained that "although there is less research on adolescents than on younger children, there have been several studies involving adolescents and they have uniformly reported positive outcomes on the part of adolescents raised by gay parents. Further, the correlates of positive adolescent adjustment are the same regardless of the parents' sexual orientation." (*Id.* at ¶ 10.) The third reference cited by BLAG as suggesting a need for further research on same sex couples—an article by Lawrence Kurdek—did not even relate to gay parents at all. Moreover, as Professor Lamb explains, the fact that an academic identifies areas for future research certainly does not suggest that the existing science is somehow unreliable. (*Id.* at ¶¶ 11–12.)

Apart from these three articles, the meaning of which BLAG patently misconstrues, BLAG cites only a decision by the United States Court of Appeals for the Eleventh Circuit and two articles, one by Anne Hulbert, a former book editor at Slate.com, and one by George Dent, a law professor, as support for its claim that "[n]umerous studies have pointed to methodological flaws in those studies comparing heterosexual and homosexual parents." (BLAG Br. at 24.) Plainly, these references lack any scientific merit. Neither Hulbert nor Dent has any professional expertise in child development; their articles were not published in peer-reviewed scientific journals; and any views expressed in their articles are non-scientific and fundamentally unreliable. (Supp. Lamb Aff. ¶ 15.)[19] As for the Eleventh Circuit's opinion, as Professor Lamb

[19] Aside from the fact that its assertions are baseless, unfortunately, Dent's article is so laden with inflammatory statements of stereotype that it is probably not an exaggeration to say that it reads as if it could have been written about Jews in France or Germany in the late nineteenth century. He asserts, for example, that homosexuals

explains, "[c]ontrary to the conclusion of the *Lofton* court, the research on gay parent families is a robust body of research that meets the rigorous methodological standards demanded for publication in the leading academic journals. There is simply no basis on which to dismiss this body of research as invalid or unreliable due to methodological deficiencies." (*Id.* at ¶ 17.)[20]

Put simply, "the scientific research on gay parent families is robust, meets accepted rigorous standards for research in the field, and supports the central conclusion provided in [Professor Lamb's] affidavit . . . that children with gay and lesbian parents are just as likely to be well-adjusted as those with heterosexual parents." (*Id.* at ¶ 6.) In short, merely taking unsupported potshots at Plaintiff's expert's testimony, as BLAG has done, is not sufficient to show that there is a *genuine* issue of disputed fact with respect to the scientific consensus on gay and lesbian parenting. *See Jeffreys*, 426 F.3d at 554 ("To defeat summary judgment [...] nonmoving parties must do more than simply show that there is some metaphysical doubt as to the material facts, and they may not rely on

---

have "high rates of disease," that their relationships "are often abusive," and that "artificial reproduction should be permitted only to traditional married couples." George W. Dent, *No Difference?: An Analysis of Same-Sex Parenting,* 10 Ave Maria L. Rev. __ at **11, 12–13, 24 (forthcoming 2011). In the other article written by Dent and relied upon by BLAG (*see, e.g.*, BLAG 56.1 Statement ¶ 47), Dent argues that marriage for same-sex couples is analogous to "baby-selling," bestiality, and "child-marriage." George W. Dent, *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 628, 633, 637 (1999). *Cf. Romer*, 512 U.S. at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

[20] As a matter of fact, there was no scientific evidence about gay parents and their children in the record in *Lofton*, which was decided on summary judgment. *See Lofton* v. *Kearney*, 157 F. Supp. 2d 1372, 1383–84 (S.D. Fla. 2001). Without the benefit of any expert testimony explaining the science, the Eleventh Circuit offered its own interpretation of this body of literature. As Dr. Lamb explains in his supplemental affidavit, however, these judges' characterization of the scientific research does not comport with reality, as recognized by the scientific consensus. (Suppl. Lamb Aff. ¶¶ 16–17.)

conclusory allegations or unsubstantiated speculation.") (internal quotations omitted); *Trans Sport, Inc.* v. *Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2d Cir. 1992) (summary judgment cannot be defeated on the basis of "conjecture or surmise") (internal quotations omitted).

V.

SECTION THREE OF DOMA IS A UNIQUE DEPARTURE FROM A TRADITION OF FEDERAL DEFERENCE TO STATE DECISIONS ABOUT WHETHER A PERSON IS MARRIED

As explained in Plaintiff's moving brief, DOMA is a blatantly discriminatory law that departs from the well-settled federal practice of deferring to the states' determination of whether a person is married. (Pl. Br. at 38–39.) *See also Elk Grove United Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004). Indeed, prior to DOMA's enactment in 1996, it was clear that "whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile." *See, e.g.*, *Dunn* v. *Comm'r*, 70 T.C. 361, 366 (1978).[21]

BLAG attempts to deny this unassailable proposition by pointing to three unique circumstances in which the federal government exercised its plenary powers relating to marriage. As Plaintiff's expert, Harvard Professor Nancy Cott has explained, however, these all involved federal involvement in marriage precisely because there was *no state* able to exercise its jurisdiction under the circumstances: (1) following the Civil War, the Freedman's Bureau regulated marriage in the South for a short period of time during Reconstruction, particularly given the fact that until that time, the just-freed slaves had had no right to marry (Cott Aff. ¶¶ 75–77; Cott Dep. at 18:2–10, 31:20–25, Kaplan

[21] While in certain narrow instances, Congress has limited the sub-set of married individuals who are eligible to receive certain types of federal benefits, *see, e.g.*, 42 U.S.C. § 416; 26 U.S.C. § 7703, it has never before redefined marriage comprehensively, as it does through DOMA.

Decl. Ex. E); (2) the federal government outlawed bigamy in the Utah Territory prior to the time that Utah became a state (Cott Aff. ¶¶ 78–80; Cott Dep. 32:1–33:7, Kaplan Decl. Ex. E); and (3) similar to exercising its plenary power over the Territories, the federal government regulated marriage in connection with certain Native American populations. (Cott Dep. at 17:19–18:1, Kaplan Decl. Ex. E) Apart from these situations, where the federal government stepped in for absent states, the federal government has always deferred to state decisions about who is married. What BLAG has not explained is what constitutionally permissible purpose is furthered by DOMA's stark exception to that longstanding federal practice here.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Plaintiff's opening brief, Plaintiff respectfully requests that the Court grant her motion for summary judgment.

Dated: New York, New York
September 15, 2011

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

/s/ Roberta A. Kaplan

Roberta A. Kaplan, Esq.
Andrew J. Ehrlich, Esq.
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
rkaplan@paulweiss.com
aehrlich@paulweiss.com

– and –

James D. Esseks, Esq.
Rose A. Saxe, Esq.
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004-2400
(212) 549-2500
jesseks@aclu.org
rsaxe@aclu.org

– and –

Melissa Goodman, Esq.
Alexis Karteron, Esq.
Arthur Eisenberg, Esq.
NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
akarteron@nyclu.org
mgoodman@nyclu.org
aeisenberg@nyclu.org

Attorneys for Plaintiff Edith Schlain Windsor