A Response to the Administration's Decision Not to Defend
Section 3 of the Defense of Marriage Act

by Paul Benjamin Linton, Special Counsel
The Thomas More Society (Chicago, Illinois)

Introduction

On February 23, 2011, Attorney General Eric Holder sent letters to the Speaker of the House of Representatives and other leaders of Congress informing them that, "[a]fter careful consideration, including a review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ('DOMA'), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment." Letter of Attorney General Eric Holder, February 23, 2011, to Hon. John A. Boehner, Speaker, United States House of Representatives 1 (Holder Letter).

As a consequence of the President's determination that Section 3 of DOMA is unconstitutional, the Attorney General, at the President's direction, expressed his intention to instruct the Department of Justice attorneys representing the Government in two recently filed challenges to Section 3 of DOMA in New York and Connecticut[2] "to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive

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[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

[2] *Windsor v. United States*, No. 1:10-CV-8435 (S.D.N.Y.); *Pedersen v. Office of Personnel Management*, No. 3:10-CV-1750 (D. Conn).

Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law." Holder Letter at 5-6. "Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct the Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id*. at 6. That "other pending DOMA litigation" includes three appeals now under review in the First Circuit Court of Appeals challenging Section 3 as applied to lawfully married same-sex couples residing in Massachusetts.[3] This paper is a response to the Attorney General's letter and his (and the President's) explanation for not defending the Defense of Marriage Act.

The President's Authority Not To Defend Acts Of Congress

Whether the President has the authority to refuse to defend an Act of Congress (and, if so, when it is appropriate to use such authority) is a controversial matter. In his letter of February 23, 2011, Attorney General Holder referenced both a law review essay by a former Solicitor General, *see* Seth P. Waxman, *Defending Congress*, 79 N.C.L.REV. 1073 (2001), and a March 22, 1996, letter from Assistant Attorney General Andrew Fois

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[3] *Commonwealth of Massachusetts v. United States Dep't of Health & Human Services*, *Gill v. Office of Personnel Management*, *Hara v. Office of Personnel Management*, Consolidated Nos. 10-2204, 10-2207 and 10-2214.

to Senator Orrin Hatch, providing numerous examples in which the Department of Justice has refused to defend an Act of Congress.[4] Holder Letter at 5. Mr. Fois acknowledged in his letter that the Department of Justice has not developed formal guidelines for determining when an Act of Congress should not be defended.

In his essay, Mr. Waxman noted that, "[i]n the unique context of a constitutional challenge to legislation, the interests of the Congress and the Executive are generally pretty clear: they have spoken. And, as a result, at least when those interests do not conflict with the Solicitor General's duty to the courts, the Department of Justice defends Acts of Congress in all but the rarest of cases." *Defending Congress*, 79 N.C.L.REV. at 1078. He elaborated on the reasons for such deference:

> Vigorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. It ensures that proper respect is given to Congress's policy choices. It preserves for the courts their historic function of judicial review. And it reflects an important premise in our constitutional system–that when Congress passes a law and the President signs it, their actions reflect a shared judgment about the constitutionality of the statute. In the mine run of cases, it is fair to presume that the Congress that passed the legislation and the President who signed it were of the view that the law conformed to the Constitution as construed by the Supreme Court.

Id.

In light of the foregoing considerations, "[e]xcept in two well-recognized

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[4] In addition, the letter enclosed a list provided by the Senate Legal Counsel indexing virtually all instances from 1975 to 1993 in which the Department of Justice represented that it would decline to defend the constitutionality of a statute, or where the Executive Branch determined that it would not enforce or implement a statute that it believed to be unconstitutional.

circumstances, . . . the Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality." *Defending Congress*, 79 N.C.L.REV. at 1078. "The first exception applies when an Act of Congress raises separation of powers concerns." *Id*. at 1084. "The second exception . . . arises when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents." *Id*. at 1085. Neither exception applies to the Defense of Marriage Act, and the Attorney General does not suggest otherwise.

In his essay, Mr. Waxman pointed out that, "even when neither exception applies, the Department of Justice has occasionally declined to make professionally respectable arguments, even when available to defend a statute– typically, in cases in which it is manifest that the President has concluded that the statute is unconstitutional." *Defending Congress*, 79 N.C.L.REV. at 1083. In his February 23, 2011, letter, Attorney General Holder quotes this passage from Waxman's essay and notes that the President *has* concluded that Section 3 of DOMA is unconstitutional. Holder Letter at 5. Nevertheless, that conclusion is rooted in the President's belief, which is shared by the Attorney General, that classifications based upon sexual orientation should be subject to heightened scrutiny, and that arguments to the contrary are not "reasonable." *Id*. Are there "reasonable" arguments that can be made in defense of DOMA? Or, in the words of the Attorney General (Holder Letter at 5) is this "the rare case where the proper course is to forgo the defense of this statute"?

The Attorney General's Letter Overlooks A Binding Precedent Of The Supreme Court

In deciding to abandon the defense of § 3 of the Defense of Marriage Act, the Attorney General has overlooked a binding precedent of the Supreme Court. In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), a same-sex couple challenged on federal constitutional grounds a state law which, as interpreted by the state supreme court, reserved marriage to opposite-sex couples. *Baker*, 191 N.W.2d at 185-86. The plaintiffs claimed, among other things, that the law, so interpreted, violated their rights under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 186. The Minnesota Supreme Court rejected plaintiffs' claims in a brief opinion, including their argument that the Supreme Court's recent decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down state anti-miscegenation laws on both due process (right to marry) and equal protection (racial discrimination) grounds compelled recognition of same-sex marriages. *Id*. at 186-87. With respect to the *Loving* argument, the state supreme court remarked that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction merely based upon race and one based upon the fundamental difference in sex." *Id.* at 187.

The plaintiffs in *Baker* appealed to the Supreme Court, reiterating their due process and equal protection claims. *See Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). The Supreme Court dismissed their appeal for want of a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972). Under well-

established precedent, the dismissal of the appeal in *Baker* for want of a substantial federal question constitutes a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). *Baker's* precedential value "extends beyond the facts of the particular case to all similar cases," *Wright v. Lane County District Court*, 647 F.2d 940, 941 (9th Cir. 1981), and lower courts are bound by that decision "until such time as the [Supreme] Court informs them [that] they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). The Supreme Court has never overruled *Baker*, modified its holding or revisited the issues decided therein. If, *pace Baker*, the reservation of *marriage* to opposite-sex couples does not violate either the Due Process Clause or the Equal Protection Clause,[5] then it necessarily follows that the reservation of the *benefits* of marriage to such couples, as provided for in Section 3 of the Defense of Marriage Act, does not violate due process or equal protection principles, either.

In *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005), the court rejected a challenge to DOMA on the authority of *Baker*. Noting that the Supreme Court "has not

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[5] Several state and federal courts have found *Baker* dispositive in challenges to statutes reserving marriages to opposite-sex couples. *See Morrison v. Sadler*, 821 N.E.2d 15, 19, 33 (Ind. Ct. App. 2005); *McConnell v.Nooner*, 547 F.2d 54 (8th Cir. 1976); *McConnell v. United States*, 188 Fed.App. 540 (8th Cir. 2006); *Adams v. Howerton*, 486 F.Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982). *See also Lockyer v. City and County of San Francisco*, 95 P.3d 459, 503-04 (Cal. 2004) (Kennard, J., concurring in part and dissenting in part) (dismissal of the appeal in Baker constitutes a determination on the merits of all the issues raised which continues to bind lower courts); *Andersen v. King County*, 138 P.3d 963, 999 (Wash. 2006) (Johnson, J.M., J., concurring in judgment only) (same). *But see Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (plurality) (*contra*).

explicitly or implicitly overturned its holding in *Baker* or provided the lower courts . . . with any reason to believe that the holding is invalid today," the court concluded that *Baker* is "binding precedent upon this Court . . . ." 354 F.Supp.2d at 1305. Although two other district courts have held otherwise in rejecting challenges to DOMA, *see In re Kandu*, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004), *Smelt v. County of Orange*, 374 F.Supp.2d 861, 872-73 (C.D. Cal. 2005), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006), it would certainly be "reasonable" to argue that *Baker* should control the disposition of any challenges to Section 3 of DOMA on due process and equal protection grounds.

Are Classifications Based Upon Sexual Orientation Subject To Heightened Scrutiny?

Assuming that the summary disposition in *Baker v. Nelson* is not controlling in the various pending challenges to DOMA, the question then becomes whether classifications based upon sexual orientation are subject to heightened scrutiny, and whether reasonable arguments may be made that they should be subject only to rational basis review. The Supreme Court has identified four factors that it considers in determining whether heightened scrutiny applies to the members of a class: first, whether, "[a]s a historical matter, they have . . . been subjected to discrimination[;]" second, whether their common characteristic "bears [any] relation to [their] ability to perform or contribute to society[;]" third, whether they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[;]" and, fourth, whether they are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *City of*

Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 441, 445 (1985); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Contrary to the suggestion of the Attorney General (Holder Letter at 2-3), gays and lesbians satisfy only the first factor–they have been subjected to a history of discrimination–but not the other three.

The sexual orientation of gays and lesbians clearly does not bear any relation to their "ability to perform or contribute to society" in most respects, but, in two critical respects, it does. Precisely because of their sexual orientation, gays and lesbians are generally unwilling to enter into a sexual relationship and/or a marriage with a member of the opposite sex. As a consequence, their sexual activity, by definition, cannot result in the birth of a child–intended or unintended. By the same token, a same-sex couple–whether married or unmarried–cannot give any children they may adopt (or have through assisted reproduction) the benefits having both a mother and a father in the home to nurture and raise them. But both state and federal courts have recognized that two of the legitimate interests for which the institution of marriage (and its benefits) exists and is protected by law are providing a stable social and familial environment in which procreation–intended or unintended–may take place,[6] and providing the benefits of dual-

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[6] *Standhardt v. Superior Court*, 77 P.3d 451, 462-63 (Ariz. Ct. App. 2003); *Conaway v. Deane*, 932 A.2d 571, 630-31, 635 (Md. 2007); *Morrison v. Sadler*, 821 N.E.2d at 22-27; *Hernandez v. Robles*, 855 N.E.2d at 7 (plurality), *id*. at 21-22 (Graffeo, J., concurring); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 359-60 (N.Y. App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006), *id*. at 374-76 (Catterson, J., concurring); *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 145-46 (N.Y. App. Div. 2006), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d at 982-83, 985 (plurality), *id.* at 1002-03 (Johnson, J.M., J., concurring in judgment only); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Dean*

gender parenting for the children so procreated,[7] interests expressly identified in the House Report accompanying the Defense of Marriage Act.[8] Same-sex unions promote neither interest.

The Supreme Court has cautioned that, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id*. at 442. The "distinguishing characteristic" of gays and lesbians–their sexual orientation–is obviously relevant to the State's (and the government's) legitimate interests in promoting responsible procreation and dual-gender parenting. Because same-sex unions do not promote either state interest, they are not

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v. District of Columbia, 653 A.2d 307, 363 (D.C. App. 1995) (Op. of Steadman, J.); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *Smelt v. County of Orange*, 374 F.Supp.2d 861, 880 (C.D. Cal. 2005).

[7] *Standhardt*, 77 P.3d at 462-63; *Morrison*, 821 N.E.2d at 23, 25, 27; *Hernandez*, 855 N.E.2d at 7; *Andersen*, 138 P.3d at 985; *Singer*, 522 P.2d at 1197; *Dean*, 653 A.2d at 363; *Citizens for Equal Protection*, 455 F.3d at 867; *Wilson v. Ake*, 354 F.Supp.2d at 1309 (citing *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 819-20 (11th Cir. 2004)); *In re Kandu*, 315 B.R. at 146; *Smelt*, 374 F.Supp.2d at 880.

[8] "[C]ivil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing." H.R. Report No. 104-664 at 13 (1996), *reprinted in* 1966 U.S.C.C.A.N. 2905, 2916.

similar to opposite-sex unions, which do. Accordingly, the sexual orientation of gays and lesbians *does* “bear [a] relation to [their] ability [or at least their willingness] to perform or contribute to society” with respect to two of the principal interests which traditional marriage is designed to serve, as several courts have recognized.[9]

With respect to the third factor, unlike a person’s gender or race, a person’s sexual orientation is neither an obvious nor an immutable characteristic. Indeed, the Attorney General acknowledges that “sexual orientation carries no visible badge . . . .” Holder Letter at 3. As the Sixth Circuit Court of Appeals has noted:

> Those persons have a homosexual “orientation” simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable “on sight” unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual

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[9] *See*, *e.g.*, *Citizens for Equal Protection*, 455 F.3d at 866-68; *Hernandez v. Robles*, 855 N.E.2d at 11 (plurality) (“[a] person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State’s interest in fostering relationships that will serve children best”). In his letter, the Attorney General states that “many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.” Holder Letter at 4 n.6. Those conclusions, however, simply represent policy positions adopted by those organizations. As a number of courts and judges have recognized, the studies themselves are controversial and have been disputed by other studies indicating precisely the opposite. *See*, *e.g.*, *Andersen*, 138 P.3d at 983-84 (plurality), *id*. at 1005-07 & nn. 42-48 (Johnson, J.M., J., concurring in judgment only); *Hernandez*, 855 N.E.2d at 7-8 (plurality); *Morrison*, 821 N.E.2d at 26. And the methodologies of the studies purporting to show that there is no difference between opposite-sex parenting and same-sex parenting have been criticized because “the sampling populations are not representative,” “the observation periods are too limited in time,” “the empirical date are unreliable,” and “the hypotheses are too infused with political or agenda driven bias.” *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 999 (Mass. 2003) (Cordy, J., dissenting). Similar concerns have been raised in more recent cases. *See Lofton*, 358 F.3d at 825; *Morrison*, 821 N.E.2d at 26; *Hernandez*, 855 N.E.2d at 8 (plurality).

> tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a group[.]"

Equality Foundation of Greater Cincinnati, *Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)). *See also Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same, noting that "[t]he conduct or behavior of the members of a class has no relevance to the identification of those groups"). Nor has any scientific or medical consensus formed that sexual orientation is biologically or genetically determined *at birth*. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"). *See High Tech Gays v. Defense Industries Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes").

With respect to the fourth factor, gays and lesbians cannot be said to be "politically powerless in the sense that they have *no* ability to attract the attention of the lawmakers." *City of Cleburne*, 473 U.S. at 445 (emphasis added). To take but two examples, despite the fact that homosexuals account for no more than one to two percent of the population and have experienced a long history of discrimination, they have succeeded in persuading Congress to repeal the "Don't Ask, Don't Tell" policy in the military, *see* DON'T ASK,

DON'T TELL REPEAL ACT OF 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010), and to enact the Matthew Shepard Act, amending the federal hate crimes statute to include offenses based on a person's actual or perceived sexual orientation. 18 U.S.C. § 249(a)(2). More than twenty years ago, the Ninth Circuit Court of Appeals concluded that "homosexuals are not without political power, they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by [this] legislation [barring discrimination on the basis of sexual orientation and extending the scope of hate crimes to offenses based on a person's sexual orientation]." *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (quoting *City of Cleburne*, 473 U.S. at 445). Given the tremendous advances gays and lesbians have made in influencing the political branches to enact major provisions of their legislative agenda across a wide range of issues since *High Tech Gays* was decided, the notion that they are "politically powerless" or otherwise unable to "attract the attention of the lawmakers" is risible.[10]

In light of the foregoing analysis of the factors that determine whether a standard of judicial review more rigorous than rational basis should be applied to members of a class (either strict scrutiny for suspect classes, or intermediate scrutiny for quasi-suspect classes), it is not surprising that the United States Courts of Appeals have uniformly

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[10] Of course, the mere fact that a class of persons is unable to enact its entire legislative agenda (*e.g.*, a federal statute prohibiting discrimination on account of sexual orientation) does not reflect "political powerlessness," otherwise *every* class could be said to be "politically powerless." *See City of Cleburne*, 473 U.S. at 445 ("[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect").

rejected the view expressed in Attorney General's letter that classifications based upon sexual orientation must satisfy a heightened standard of review. Eleven of the thirteen federal circuits have held that homosexuals do not constitute a suspect or quasi-suspect class requiring greater than rational basis review under either the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment,[11] and a twelfth circuit has applied rational basis review without deciding

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[11] *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 261 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997); *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002), *id*. at 957 (Posner, J., concurring); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997); *Meinhold v. United States Department of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Price-Cornelison*, 524 F.3d 1103, 1113-14 & n. 9 (10th Cir. 2008); *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, 523 F.3d 1219, 1232-34 (10th Cir. 2008); *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854-55 (10th Cir. 1995); *Jantz v. Muci*, 976 F.2d 623, 627-30 & n.3 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 817-18 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C. Cir. 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989). A panel decision of the Ninth Circuit holding otherwise, *see Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), was later withdrawn on rehearing. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*).

whether a higher standard would be warranted.[12]

The Attorney General dismisses the significance of these decisions in a single paragraph. Holder Letter at 3-4. First, he notes that "[m]any" of the decisions relied upon the Supreme Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), later overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that there is no right to engage in homosexual sodomy. Because those decisions relied upon a subsequently overruled Supreme Court opinion, they are entitled to no precedential weight. Holder Letter at 3. It must be noted, however, that of the twenty-nine decisions cited in note 11, five (*Baker*, *McConnell*, *Rich*, *National Gay Task Force* and *Dronenburg*) were decided *before Bowers* and, therefore, could not have been based on the Court's opinion in *Bowers*; and fifteen others (*Cook*, *Veney*, *Johnson*, *Scarborough*, *Equality Foundation*, *Schroeder*, *Citizens for Equal Protection*, *Richenberg*, *Witt*, *Flores*, *Holmes*, *Philips*, *Price-Cornelison*, *Milligan-Hitt* and *Lofton*) were decided *after* the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which clearly, if only by implication, cast a long shadow on the continuing vitality of *Bowers*. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (Court's "holding that homosexuality cannot be singled out for disfavorable treatment . . . contradicts a decision, unchallenged here, pronounced only 10 years ago") (citing *Bowers*). And eight of these cases (*Cook*, *Johnson*, *Scarborough*, *Citizens for Equal Protection*, *Witt*, *Price-Cornelison*, *Milligan-Hitt* and *Lofton*) were

[12] *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998). The Third Circuit has not addressed the issue.

decided *after* the Supreme Court overruled *Bowers* and, therefore, could not possibly have been based on *Bowers*. In sum, thirteen of the twenty-nine court of appeals decisions holding that classifications based on sexual orientation are subject to rational basis review were handed down either before *Bowers* was decided in 1986 or after it was overruled in *Lawrence* in 2003.

Moreover, even with respect to the sixteen court of appeals decisions rendered after *Bowers* and before *Lawrence*, the Attorney General's suggestion that these decisions are not entitled to any precedential weight overlooks the fact that *Lawrence* itself used the rational basis standard of review, not heightened scrutiny, to strike down the Texas sodomy statute, the very same standard that was used in these sixteen decisions. Those authorities remain relevant precedents in determining the appropriate standard of review that should be applied to DOMA. *See Loomis v. United States*, 68 Fed. Cl. 503, 522 (2005) (noting continuing validity of pre-*Lawrence* cases holding that classifications based on homosexuality are not subject to heightened judicial review).

Furthermore, unlike *Lawrence*, which concerned a *due process* challenge to a criminal statute directed at *private* sexual conduct, DOMA merely reserves the *public* (federal) benefits of marriage to opposite-sex couples, an *equal protection* issue expressly not decided by the Supreme Court in *Lawrence*. "The present case . . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578.

Second, the Attorney General states that some of the circuit court decisions "rely on claims regarding 'procreational responsibility' that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings." Holder Letter at 3. Neither in his letter, however, nor in any court submissions in cases challenging DOMA has the Attorney General explained *why* "procreational responsibility" is an unreasonable basis for distinguishing between opposite-sex couples who, as a class, *are* capable of procreating children, and same-sex couples who, as a class, are *not* capable of procreation through same-sex sexual conduct. That distinction has been found to be of constitutional relevance in numerous cases rejecting challenges to state statutes and constitutional provisions reserving marriage to opposite-sex couples,[13] as well as in several federal district court cases upholding the constitutionality of DOMA,[14] not one of which is mentioned in the Attorney General's letter. Nor does he cite the "more recent social science understandings" on the basis of which he concludes that sexual orientation is immutable.[15] Significantly, in the most recent and extensively litigated case on the issue–the federal constitutional challenge to

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[13] *See* the cases cited in n. 11.

[14] *Wilson v. Ake*, 354 F.Supp.2d at 1308-09; *In re Kandu*, 315 B.R. at 145-46; *Smelt v. County of Orange*, 374 F.Supp.2d at 880.

[15] The only authority the Attorney General cites is an almost twenty-year old book authored by Judge Richard A. Posner. Holder Letter at 3, citing Richard A. Posner, SEX AND REASON 101 (1992).

California's Proposition 8 (which reserves marriage to opposite-sex couples)–the plaintiffs did not prove and the district court did not find that a person's sexual orientation is immutable. *See Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010). The Attorney General passes over this in silence, as he does recent state court decisions concluding that one's sexual orientation is *not* an immutable characteristic or, at minimum, that its immutability has not been established medically and scientifically.[16]

Third, the Attorney General notes that none of the circuit court decisions holding that classifications based on sexual orientation are subject to rational basis review "engages in an examination of *all* of the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny." Holder Letter at 4 (emphasis added). The unstated implication of the Attorney General's phrasing–"*all* of the factors"–is that if the members of a class satisfy any one of the factors the Supreme Court has identified for determining "suspect" (or "quasi-suspect") status, then a classification based on their class characteristic should be subject to heightened scrutiny. Accordingly, any decision that determines that sexual orientation is not subject to heightened scrutiny, without examining all four factors, is entitled to no weight. But that misstates the law. The Supreme Court has never held that the existence of a single "suspect class" factor (*e.g.*, a history of discrimination) requires heightened scrutiny. Rather, it is the combination of those factors that determines whether members of a class

[16] *Conaway v. Deane*, 932 A.2d at 614-16 & n. 57; *Andersen v. King County*, 138 P.3d at 974 (Wash. 2006) (plurality). *See also Singer v. Hara*, 522 P.2d at 1196 n. 12.

are entitled to the protection afforded by a more demanding standard of judicial review. All of these factors, however, *have* been mentioned in one or more of the circuit court decisions cited in note 11. *See High Tech Gays*, 895 F.2d at 573 (referring to the factors of discrimination, immutability and political powerlessness and determining that homosexuals do not meet the requirements of having an immutable personal characteristic or lacking political power); *Padula*, 822 F.2d at 101-04 (identifying factors and implying that homosexuality is behavorial); *Woodward*, 871 F.2d at 1076 (determining that homosexuality is not an immutable characteristic); *Citizens for Equal Protection*, 455 F.3d at 866-68 (determining that the State's interest in providing a stable relationship for children who are procreated unintentionally applies only to opposite-sex, not same-sex, couples and, therefore, same-sex couples are not similarly situated with respect to that interest). In any event, the unanimity of opinion of the circuit courts on the question of the "appropriate level of scrutiny" supports the argument that only rational basis review is required. Such an argument is certainly "reasonable" and "professionally responsible," Holder Letter at 5, regardless of whatever views the Attorney General and the President may have on the public policy promoted by DOMA.

The Attorney General also ignores several recent state court marriage decisions that have examined the criteria the Supreme Court has identified as relevant in determining "the appropriate level of scrutiny," and have concluded, for purposes of *state* equal protection analysis (which, in some instances, mirrors federal equal protection

analysis), that gays and lesbians do not satisfy one or more of those criteria and, therefore, that they do not qualify for "suspect" (or even "quasi-suspect") status.[17]

Finally, the Attorney General observes that "many of the more recent decisions [from the circuit courts] have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*." Holder Letter at 4.[18] However, "neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard." *Id*. It is not entirely clear what the Attorney General's point here is. None of the circuit court decisions following *Romer* and *Lawrence* has suggested that the Supreme Court has definitively resolved the standard of review question. They merely noted that the Court applied rational basis review. That the Court did not decide in either *Romer* or *Lawrence* whether classifications based upon sexual orientation are subject to a higher

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[17] *Conaway v. Deane*, 932 A.2d 606-16; *Hernandez v. Robles*, 855 N.E.2d at 11 (plurality); *Andersen v. King County*, 138 P.3d at 974-76 (plurality), *id*. at 996-98 (Johnson, J.M., J., concurring in judgment only). *See also Singer v. Hara*, 522 P.2d at 1196 & n. 12. Although three state supreme courts have held, *on state constitutional grounds*, that classifications based on sexual orientation warrant intermediate (or strict) scrutiny, they were able to reach that conclusion only by eliminating (in California) or diluting to the point of irrelevancy (in Connecticut and Iowa) the requirement that the class in question be politically powerless. *See In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 440-61 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 893-95 (Iowa 2009).

[18] *Lawrence*, it must be reiterated, was decided under the Due Process Clause. The Court expressly declined to rest its decision on the Equal Protection Clause. 539 U.S. at 574-75. Accordingly, *Lawrence* did not involve equal protection analysis of a legislative classification.

standard of review than rational basis does not affect the fact that every circuit court decision citing *Romer* (or both *Romer* and *Lawrence*) on this issue has held that heightened scrutiny is *not* constitutionally required. It is that body of consistent, uniform opinion that supports the reasonableness of the argument defending DOMA.

Conclusion

In light of the strength of the arguments that may be advanced in support of the Defense of Marriage Act–arguments based upon the Supreme Court's summary disposition in *Baker v. Nelson*, the unanimous opinions of the courts of appeals that classifications based upon sexual orientation are subject only to rational basis review, the three district court opinions upholding DOMA, the state reviewing court opinions upholding statutes reserving marriage to opposite-sex couples and the interests identified by Congress in enacting DOMA–it may be asked whether the decision of the President and the Attorney General not to defend DOMA represents a considered judgment as to the statute's constitutionality or, rather, whether they have invoked the Constitution "as a pretext for what are, in fact, policy disagreements with the statute." Waxman, *Defending Congress*, 79 N.C.L.REV. at 1079 fn. 14. "[T]he decision not to defend a statute, and indeed to advocate against it, should be a rare and solemn act." *Id*. at 1087. Contrary to the views of the President and the Attorney General, this is *not* "the rare case where the proper course is to forgo the defense of [the] statute." Holder Letter at 5.