

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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ARTHUR BRUNO SMELT, *et al.*

*Plaintiffs-Appellants*

v.

COUNTY OF ORANGE, *et al.*

*Defendants-Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION  
In support of *Defendants-Appellees*  
Urging affirmance

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## **INTEREST OF *AMICUS CURIAE***

*Amicus Curiae* The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs in important cases pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, in arguing to protect the sanctity of marriage. This brief is filed pursuant to the consent of counsel of record for all parties and intervenors.

## **ARGUMENT**

The District Court correctly upheld the constitutionality of section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (2000) (hereinafter DOMA), finding that it does not violate the Due Process or Equal Protection guarantees of the Fifth Amendment. However, the District Court's discussion of these matters was somewhat brief. Therefore, this brief will reinforce the Court's findings with a more in-depth analysis of the relevant case law and established legal doctrine. Section I-A discusses why homosexuals are not a suspect or quasi-suspect class based on sexual orientation. Section I-B discusses why DOMA does not create a class based on sex. Section II discusses why same-sex "marriage" is not a fundamental



right. Section III discusses why a right to privacy claim falls under, and is not independent of, a Due Process claim.

**I. THE DISTRICT COURT CORRECTLY HELD THAT DOMA DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT BECAUSE HOMOSEXUALS DO NOT CONSTITUTE A SUSPECT OR QUASI-SUSPECT CLASS, NOR DOES DOMA ESTABLISH A CLASS BASED ON SEX.**

A. Homosexuals Do Not Constitute a Suspect or Quasi-Suspect Class Based on Sexual Orientation Because They Fail to Meet the Supreme Court's Requirements for Designation as a Suspect or Quasi-Suspect Class.

The District Court properly held that homosexuals are not a suspect or quasi-suspect class. *Smelt v. County of Orange*, No. SA CV 04-1042-GLT (MLGx), 2005 U.S. Dist. LEXIS 12195, at \*35 (C.D. Cal. Jun. 16, 2005).

The United States Supreme Court has “identified only three suspect classes”: race, ancestry/ethnicity, and alienage. *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880). The Court has found only two additional classifications quasi-suspect: sex and illegitimacy. *Woodward*, 871 F.2d at 1076. *See United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women*

*v. Hogan*, 458 U.S. 718, 723-24 (1982); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). See also *Able v. United States*, 155 F.3d 628, 632 (2nd Cir. 1998).

Suspect or quasi-suspect status is reserved for groups who “1) have suffered a history of discrimination; 2) exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.” *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)).

The Supreme Court has used the degree of discrimination suffered by groups due to race, national origin, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976), alienage, sex, or illegitimacy, see *Woodward*, 871 F.2d at 1076, as the measurement to determine whether a group is a suspect or quasi-suspect class. While several courts have declared that homosexuals have suffered the requisite history of discrimination, see, e.g., *High Tech Gays*, 895 F.2d at 573, these same courts have found that homosexuals do not meet the other two criteria.

Thus, courts have found that homosexuality is not obvious, immutable, or distinguishing and “differs fundamentally from those [traits] defining any of the recognized suspect or quasi-suspect classes.”

*Woodward*, 871 F.2d at 1076. *See also High Tech Gays*, 895 F.2d at 573 (finding “[h]omosexuality is not an immutable characteristic . . . .”); *Hrynda v. United States*, 933 F. Supp. 1047, 1053 (M.D. Fla. 1996). Further, homosexuality is “behavioral in nature,” *Woodward*, 871 F.2d at 1076; *see also High Tech Gays*, 895 F.2d at 573, and the “behavior or conduct” of a recognized class “is irrelevant to [its] identification[]” as suspect or quasi-suspect. *High Tech Gays*, 895 F.2d at 573-74 (*citing Woodward*, 871 F.2d at 1076).

Furthermore, with the work and support of organizations such as Lambda Legal Defense and Education Fund (*see* <http://www.lambdalegal.org/cgi-bin/iowa/index.html>), Gay & Lesbian Advocates & Defenders (GLAD) (*see* <http://www.glad.org/>), National Organization for Women (NOW) (*see, e.g.,* <http://www.now.org/lists/news-releases/msg00033.html>), Human Rights Campaign (HRC) (*see* <http://www.hrc.org/>), The Log Cabin Republicans (*see* <http://online.logcabin.org/about/>), National Gay and Lesbian Task Force (NGLTF) (*see* <http://www.thetaskforce.org/>), and the American Civil Liberties Union (ACLU) (*see* <http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm>), homosexuals do not lack political influence, nor do they exhibit the political powerlessness of a minority. As a group,

they “attract the attention” of lawmakers and are the subject of anti-discrimination legislation. *High Tech Gays*, 895 F.2d at 574. *See also Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (finding that homosexuals have “growing political power” and the “ability to attract the attention of the lawmakers.”).

Additional case law confirms the absence of legal grounds upon which to classify homosexuals as a suspect or quasi-suspect group. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (applying rational basis test to the proscription of homosexual activity); *Romer v. Evans*, 517 U.S. 620, 631 (1996) (applying rational basis review to evaluate legislation alleged to unconstitutionally discriminate against homosexuals); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997) (finding “homosexuals do not constitute a suspect or quasi-suspect class”); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997) (finding homosexuals are not a suspect or quasi-suspect class); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (finding homosexuals are not a suspect class); *Rich v. Sec’y of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (finding “[a] classification based on one's choice of sexual

partners is not suspect.”); *Lofton v. Sec’y of the Dep’t of Children & Family Services*, 358 F.3d 804, 817-18 (11th Cir. 2004) (finding homosexuals are not a suspect class); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005) (finding homosexuality is not a suspect class); *id.* at 1308 (“DOMA does not create a suspect classification[.]”); *In re Kandou*, 315 B.R. 123, 143-44 (Bankr. D. Wash. 2004) (finding homosexuals are not a suspect or quasi-suspect class).

In light of the foregoing, the District Court correctly reached the only possible legal conclusion: homosexuals are not a suspect or quasi-suspect class.

B. DOMA Does Not Create a Class Based on Sex Because It Treats Men and Women Equally.

The District Court properly found that DOMA does not create a sex-based classification. *Smelt*, at \*39-40. Other courts have found that “DOMA does not discriminate on the basis of sex because it treats women and men equally.” *Wilson*, 354 F. Supp. 2d at 1307-08 (citing *Kandou*, 315 B.R. at 143 (“DOMA does not classify according to gender . . . .”). See also *Shields v. Madigan*, 783 N.Y.S.2d 270, 276 (N.Y. Sup. Ct. 2004) (finding that a statute that restricted marriage to opposite sex couples did not create a gender classification because “males and females are similarly situated” under it). Neither men nor women are singled out for any superior

or inferior treatment under DOMA. “Women, as members of one class, are not being treated differently from men, as members of a different class.” *Kandu*, 315 B.R. at 143. Men may marry the opposite sex, and not members of their own sex. Likewise, women may marry the opposite sex, and not members of their own sex. DOMA’s prescriptions and proscriptions, therefore, apply equally to both sexes. *See Kandu*, 315 B.R. at 143 (*quoting Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999)) (finding DOMA equally proscriptive on men and women).

Since DOMA “is plainly focused upon the impact of the marriage statute upon homosexuals, not upon men and women in general,” it seems “unrealistic to use gender discrimination as the basis for the analysis.” *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. Cir. 1995) (Steadman, J., concurring)<sup>1</sup>. However, relying on *Loving v. Virginia*, 388 U.S. 1 (1967), Appellants assert that DOMA creates a sex-based classification not between men and women, but between opposite-sex couples and same-sex couples. *Smelt*, at \*36-37. Courts, however, have rejected the *Loving* analogy. *Kandu*, 315 B.R. at 142-43. *See Baker*, 744 A.2d at 880 n.13 (finding that a statute that restricted marriage to opposite-sex couples created no “discrete

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<sup>1</sup> The opinion of the court was rendered *per curiam*, comprised of “Parts I., II., III., and V. of Judge Ferren’s [dissent in part] and the concurring opinions of Judges Terry and Steadman.” *Dean*, 653 A.2d at 308.

class subject to differential treatment solely on the basis of sex . . . .”); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974) (finding no analogy to *Loving* because same-sex couples were not denied entry into marriage due to their sex, but due to the “recognized definition” of marriage); *Baker v. Nelson*, 191 N.W.2d 185, 187 (finding a “clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”). The District Court, as well, found Appellants’ *Loving* analogy inapposite to the present case, as DOMA does not “have a disparate impact on one sex or the other.” *Smelt*, at \*39-40 (finding that DOMA “does not treat men and women differently.”) It is, at best, a “stretch [of] the concept of gender discrimination to assert that it applies to treatment of same-sex couples differently from opposite-sex couples.” *Dean*, 653 A.2d at 363 n.2 (Steadman, J., concurring).<sup>2</sup>

The Supreme Court has, however, established a “twofold” test to determine whether a facially gender-neutral statute such as DOMA discriminates on the basis of sex. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). The first determination is whether the statute is “indeed neutral” and not “covert[ly] or overt[ly]” sex-based. *Id.* If it is established that the statute is not sex-based, the second determination is whether the

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<sup>2</sup> The opinion of the court was rendered *per curiam*, and included Judge

statute “can be traced to a discriminatory purpose[,]” *id.* at 272, or likewise “reflects invidious gender-based discrimination.” *Id.* at 274. *See also Kandu*, 315 B.R. at 143 (*quoting Baker*, 744 A.2d at 880 n.13) (finding “[t]he test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law ‘can be traced to a discriminatory purpose.’”).

DOMA passes both parts of this test. It is not sex-based, as it “does not single out men or women as a discrete class . . . .” *Kandu*, 315 B.R. at 143. As noted, any prohibitions that may be found or implied in DOMA are applied equally to both genders. *Id.* Likewise, with “no evidence, from the voluminous legislative history or otherwise, that DOMA’s purpose is to discriminate against men or women as a class,” DOMA cannot constitute sex-based discrimination *Id.* *See, generally*, H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905. While the legislature certainly knew that DOMA might prevent some people from “marrying,” “‘discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences.” *Feeney*, 442 U.S. at 279. Discriminatory purpose requires that the legislature have acted “at least in part ‘because of,’ not merely ‘in spite of,’” DOMA’s effect(s) upon those whose “marriages” it prevents. *Id.*

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Steadman’s concurring opinion. *See* note 1, *supra*.



There is no indication that DOMA was enacted to promote invidious sex discrimination. DOMA's simple purpose is to "restrict marriage to one man and one woman." *Kandu*, 315 B.R. at 143. *See, generally*, H.R. Rep. No. 104-664 (1996). Thus, no sex-based classification can be found in DOMA.

Accordingly, courts "have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex." *Baker*, 744 A.2d at 880 n.13 (finding a statute that limited marriage to one man and one woman did not discriminate on the basis of sex). *See Smelt*, at \*36 (listing cases that have found no sex discrimination in defining marriage as the union of one man and one woman). *See also Dean*, 653 A.2d at 362-63 & n.2 (Steadman, J. concurring)<sup>3</sup>; *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974); *Nelson*, 191 N.W.2d at 186-87.

It is one thing to show unconstitutional discrimination in a statute that specifically concerns homosexuals. *See, generally, Romer*, 517 U.S. 620. It is quite another to show "purposeful" or "invidious," *Feeney*, 442 U.S. at 274, sex discrimination in a facially gender-neutral marriage statute that treats both sexes equally. Because DOMA passes the Supreme Court's test for sex discrimination, the District Court properly concluded that DOMA does not create a classification based on sex.

**II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE FUNDAMENTAL RIGHT TO MARRY DOES NOT INCLUDE SAME-SEX “MARRIAGE” BECAUSE ONLY OPPOSITE-SEX MARRIAGE HAS BEEN GRANTED FUNDAMENTAL RIGHT STATUS.**

The District Court properly found that same-sex “marriage” is not a fundamental right. *Smelt*, at \*46-47. “Marriage” to a person of the same sex has never been recognized as a fundamental right by any federal court.

*Wilson*, 354 F. Supp. 2d at 1306. *See also Kandu*, 315 B.R. at 139. This is implicit in the teaching of the *Lawrence* Court: if there is no fundamental right to a homosexual act, then official government recognition of the union formed by the act cannot be a fundamental right. *See Lawrence*, 539 U.S. at 578 (applying rational basis test to the proscription of homosexual sex acts, and finding no requirement that the “government” recognize “any relationship that homosexual persons seek to enter.”). *See also Kandu*, 315 B.R. at 139-40; *Standhardt v. Superior Crt. of Ariz.*, 77 P.3d 451, 282 (2003) (“If the [*Lawrence*] Court did not view such an intimate expression of the bond securing a homosexual relationship to be a fundamental right, we must reject any notion that the Court intended to confer such status on the right to secure state-sanctioned recognition of such a union.”).

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<sup>3</sup> The opinion of the court was rendered *per curiam*, and included Judge Steadman’s concurring opinion. See note 1, *supra*.

While marriage itself is an established fundamental right, *see Smelt*, at \*41 (citing the leading cases recognizing marriage as a fundamental right), the right to marry whomever one may choose is not. The Supreme Court has not “conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship.” *Kandu*, 315 B.R. at 140. *See also Dean*, 653 A.2d at 333 (“same-sex marriage cannot be called a fundamental right protected by the due process clause.”) (Ferren, J., dissenting in part)<sup>4</sup>; *Standhardt*, 77 P.3d 451, 460 (Ariz. 2003) (“same-sex marriage is not a fundamental [right] protected by due process.”); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (finding no fundamental right to same-sex marriage).

People are, in general, free to enter any relationship they please. However, the simple right to enter a relationship does not make that relationship a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (“That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .”); *Wilson*, 354 F. Supp. 2d at 1306-07 (“not all important decisions are protected fundamental rights.”); *Standhardt*, 77 P.3d at 459-60 (“not all important decisions sounding in personal autonomy are protected

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<sup>4</sup> The opinion of the court was rendered *pur curiam*, and included Judge

fundamental rights.”). Nor does the right to enter a relationship inherently require any particular status be given to that relationship. “[T]here is a distinct difference between protecting the right to engage in private conduct . . . . and the ‘affirmative right to receive official and public recognition[.]’” of that conduct. *Wilson*, 354 F. Supp. 2d at 1307 n.10 (quoting *Lofton*, 358 F.3d at 817).

Furthermore, by definition, “‘marriage’ is the legal union of one man and one woman as husband and wife.” *Baker*, 744 A.2d at 868. See also *The American Heritage Dictionary of the English Language* 1102 (3rd ed. 1996) (marriage is the “union of a man and woman as husband and wife.”); *Webster’s New International Dictionary* 1506 (2nd ed. 1955) (marriage is “being united to a person . . . of the opposite sex as husband or wife”); *Black’s Law Dictionary* 758 & 992 & 1628 (8th ed. 2004) (marriage is the “union of a couple as husband and wife[.]” a husband is “[a] married man;” a wife is “[a] married woman;”); *Black’s Law Dictionary* 986 (7th ed. 1999) (marriage is the “union of a man and woman as husband and wife.”); *Black’s Law Dictionary* 756 (1st ed. 1891) (marriage is “one man and one woman united in law for life”). “[A]s it has been recognized and defined for centuries—indeed, millennia—[marriage] necessarily excludes two persons

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Ferren’s dissent in part. See note 1, *supra*.

of the same sex from entering into that relationship.” *Dean*, 653 A.2d at 362 n.2 (Terry, J., concurring).<sup>5</sup>

Some would dismiss this and similar observations as tautological, a “definitional or semantic substitute for meaningful analysis.” Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. Rev. 1, 38. *But see id.*; Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. Pub. L. 309 (1988). If the sole argument was that marriage must remain the union of one man and one woman for no other reason than it has always been that way, such a dismissal might well be in order. The “definition” of marriage, however, is much more than a relatively meaningless “semantic.” A cogent analogy is found at the molecular level.

As he has for millennia, the layman knows sodium chloride (NaCl) as common table salt, or simply salt. The study of chemistry has established that a molecule of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine (Cl). Two atoms of chlorine may, nonetheless, join together and form Cl<sub>2</sub>. Two atoms of sodium may also join together, forming Na<sub>2</sub>. However, neither Cl<sub>2</sub> nor Na<sub>2</sub> are NaCl, nor can they ever be.

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<sup>5</sup> The opinion of the court was rendered *per curiam*, and included Judge

At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly call  $\text{Na}_2$  or  $\text{Cl}_2$  “salt,” but neither will ever be, nor have the same features, dynamics, and effects as, NaCl.

Likewise, one can call the union of two men or two women “marriage,” but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman.

And just as the term “salt” is given to the specific molecular union NaCl, the term “marriage” is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that  $\text{Na}_2$  or  $\text{Cl}_2$  is not salt. That is not circular reasoning—it is simply a recognition that the union of two men or two women is not the union of one man and one woman. The reservation of the term “marriage”

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Terry’s concurring opinion. See note 1, *supra*.

for the specific union of one man and one woman is therefore not tautological, but only employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.

While it may be arguable that there is more similarity between same-sex unions and opposite-sex unions than either Na<sub>2</sub> or Cl<sub>2</sub> and NaCl, it has been recognized through the ages, and more recently by the United States Congress, that a man and a woman each contribute and produce something unique in that particular union that cannot be duplicated by another union. *See, generally*, H.R. Rep. No. 104-664 (1996). Congress has determined that the protection and promotion of this union is in the best interest of the state. *See id.* *See also* DOMA. Such a determination is well within the authority of the legislature to make, and well outside the authority of the judiciary to refute absent specific criteria. *See Smelt*, at \*47-49 (citing the relevant cases and describing the interaction of the legislature and judiciary for rational basis review).

“[T]he word ‘marriage,’ when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex ‘marriages’ are legally and factually—*i.e.*,

definitionally—impossible.” *Dean*, 653 A.2d at 361 (Terry, J., concurring).<sup>6</sup> Thus, recognizing homosexual “marriage” as inclusive of the fundamental right to marry “would not expand the established [fundamental] right to marry, but would redefine the legal meaning of ‘marriage.’” *Standhardt*, 77 P.3d at 458. A court does not have the authority to “alter or expand the definition of marriage . . . .” *Dean*, 653 A.2d at 362 (Terry, J., concurring).<sup>7</sup> Should doing so ever become necessary, that responsibility lies with the legislature. *Maynard v. Hill*, 125 U.S. 190 (1888); *Dean*, 653 A.2d at 362 (Terry, J., concurring)<sup>8</sup>; *Shields*, 783 N.Y.S.2d at 277.

There is no legal justification for conferring fundamental right status on a relationship whose very name is a contradiction in terms and whose status is otherwise confirmed by relevant case law. “The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.” *Standhardt*, 77 P.3d

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<sup>6</sup> The opinion of the court was rendered *per curiam*, and included Judge Terry’s concurring opinion. See note 1, *supra*.

<sup>7</sup> The opinion of the court was rendered *per curiam*, and included Judge Terry’s concurring opinion. See note 1, *supra*.

<sup>8</sup> The opinion of the court was rendered *per curiam*, and included Judge Terry’s concurring opinion. See note 1, *supra*.



at 460. The District Court properly concluded that the fundamental right to marry does not include same-sex “marriage.”

**III. THE DISTRICT COURT PROPERLY CONCLUDED THAT APPELLANTS’ PRIVACY CLAIM FELL UNDER THEIR DUE PROCESS CLAIM BECAUSE CASE LAW DEMONSTRATES THAT PRIVACY CLAIMS ARE CURRENTLY SO TREATED.**

The District Court properly found that Appellants’ privacy claim fell within their Due Process claim. *Smelt*, at \*47 n.23. Appellants relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), apparently to establish a separate claim to privacy. However, the *Griswold* court’s analysis of the merits of the case began with the assertion that the merits “implicate the Due Process Clause . . . .” *Id.* at 481. Nowhere in the discussion that followed did the Court suggest that it had abandoned the Due Process context. *See, generally, id.* at 480-85. The concurrence, as well, demonstrates that the privacy claim was part of the *Griswold* Court’s Due Process analysis. *See, generally, id.* at 486-87 (Goldberg, J., concurring). Additionally, subsequent case law affirms that while the origin of the right to privacy—while initially debatable—is currently understood to be derived from Due Process protections. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Glucksberg*, 521 U.S. at 719-20; *Albright v. Oliver*, 510 U.S. 266, 310 n.28 (1994); *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (2002); *Israel v. Immigration & Naturalization Serv.*, 785 F.2d 738, 742 (9th Cir. 1986); *Cooksey v. Boyer*,

289 F.3d 513, 515-16 (8th Cir. 2002); *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005).

The District Court was correct in its decision to deny Appellants' separate privacy claim. There is no basis under *Griswold* or relevant case law to analyze a privacy claim independent of a Due Process claim.

#### **IV. CONCLUSION**

Homosexuality fails the test of a suspect or quasi-suspect class. DOMA is free of sex discrimination under the Supreme Court's sex discrimination test for a facially gender-neutral statute. There is no fundamental right to same-sex "marriage." Acknowledging that the term marriage is reserved for the specific union of one man and one woman, and none other, is not tautological or semantic, but the simple recognition that a same-sex union is not identical in feature or effect as an opposite-sex union. Ultimately, as "the unvarying legal concept and definition" of marriage "requires persons of different sexes, there can be no equal protection or due process violation" when marriage is limited to one man and one woman. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980).

Furthermore, there is no separate privacy claim in this case. Wherefore, in light of the foregoing, this Court should affirm the District

Court's findings that section 3 of DOMA does not violate the Equal Protection or Due Process guarantees of the Fifth Amendment.

Respectfully submitted,  
This 21 day of October, 2005

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## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief Amicus Curiae has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 4,346 words.

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Smelt v. County of Orange*, No. 05-56040, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on October 21, 2005, addressed as listed below. The required number of paper copies were field in the same manner on the same date.

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