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August 17, 2004

MARK L. HATCHER  
CLERK U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA  
DEPUTY

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON**

In re:  
LEE KANDU and ANN C. KANDU,  
Debtors.

No. 03-51312

**MEMORANDUM DECISION**

This matter came before the Court pursuant to an Order to Show Cause for Improper Joint Filing under 11 U.S.C. § 302. Based on the arguments presented and considering the pleadings submitted, the Court's findings of fact and conclusions of law are as follows:

**FINDINGS OF FACT**

Lee Kandu and Ann C. Kandu (Debtors), two women, who are United States citizens, were married in British Columbia, Canada, on August 11, 2003. On October 31, 2003, Lee Kandu (Debtor) filed pro se a voluntary petition for relief under Title 11, Chapter 7. Ann C. Kandu was listed on the petition as a joint debtor pursuant to 11 U.S.C. § 302. On December 5, 2003, the Court filed an Order to Show Cause for Improper Joint Filing of unmarried individuals. The Court was advised that on March 25, 2004, Ann C. Kandu died.<sup>1</sup>

<sup>1</sup>Pursuant to Fed. R. Bankr. P. 1016, the death of Ann C. Kandu did not abate the Debtors' case under Chapter 7, nor did her death render the issues moot. Rather, in accordance with Fed. R. Bankr. P. 1016, the estate "shall be administered and the case concluded" in the same manner as though the death did not occur.

**ORIGINAL**

1 The Debtor filed a Memorandum in Support of Debtors' Joint Filing on April 20,  
2 2004, challenging the constitutionality of the Defense of Marriage Act (DOMA), 1 U.S.C.  
3 § 7. On April 30, 2004, the United States Trustee (UST) filed a motion for order shortening  
4 time and a Motion for Additional Time to file Response Brief and for Certification of Issues  
5 to the Attorney General for the State of Washington. On May 7, 2004, the Court granted  
6 the motions and certified to the Attorney General of the State of Washington the issue of  
7 the constitutionality of RCW 26.04.010 that limits marriage to a husband and wife of the  
8 opposite sex. On May 17, 2004, the UST advised an Assistant Attorney General by letter  
9 that the Court would address only issues regarding the constitutional challenges to DOMA.  
10 For issues concerning the constitutionality of RCW 26.04.010, the Court would at a later  
11 date, if necessary, afford the State an opportunity to be heard.

12 On May 21, 2004, the UST filed its response to the show cause order, and on  
13 June 4, 2004, the Debtor filed a reply thereto. On June 10, 2004, the Court heard oral  
14 arguments and subsequently took the matter under advisement.

### 15 **CONCLUSIONS OF LAW AND DISCUSSION**

16 The Defense of Marriage Act, provides that "[i]n determining the meaning of any Act  
17 of Congress, or of any ruling, regulation, or interpretation of the various administrative  
18 bureaus and agencies of the United States, . . . the word 'spouse' refers only to a person  
19 of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. The controlling statute, or  
20 Act of Congress, in this case is 11 U.S.C. § 302 that governs joint cases for bankruptcy  
21 filings. This statute provides that, "[a] joint case under a chapter of this title is commenced  
22 by the filing with the bankruptcy court of a single petition under such chapter by an  
23 individual that may be a debtor under such chapter and such individual's spouse."  
24 11 U.S.C. § 302(a) (emphasis added).

25 The Debtor contends that DOMA, as applied to 11 U.S.C. § 302, is unconstitutional.  
26 The Debtor specifically argues that excluding same-sex couples from recognition under  
27 11 U.S.C. § 302 violates the Tenth Amendment, the principles of comity, and the Fourth

1 and Fifth Amendments to the U.S. Constitution. The Debtor has not challenged DOMA  
2 under the Full Faith and Credit Clause, Article IV, Section I of the U.S. Constitution.

3 DOMA was signed by President Clinton in 1996. This Court is unaware of any  
4 published opinion by a federal court addressing its constitutionality. Thus, the arguments  
5 presented by the Debtor as to DOMA's constitutionality are matters of first impression. The  
6 issues concerning same-sex marriage, however, are not novel. The constitutional issues,  
7 as well as arguments set forth by the parties, have been the subject of recent state court  
8 decisions, as well as debate in Congress, state legislatures, and in the academic world.

9 I

10 TENTH AMENDMENT

11 The Debtor first argues that DOMA is unconstitutional because it violates the Tenth  
12 Amendment to the U.S. Constitution. She maintains that DOMA is unenforceable because  
13 it regulates domestic relations, specifically marriage that is a power not granted to  
14 Congress in Article I of the U.S. Constitution and, therefore, reserved to the States by the  
15 Tenth Amendment.

16 The Constitution "establishes a system of dual sovereignty between the States and  
17 the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399  
18 (1991). The federal government's power, however, is expressly limited by the Constitution.  
19 Gregory, 501 U.S. at 457, 111 S. Ct. at 2399. Those limits are articulated by the Tenth  
20 Amendment that provides "[t]he powers not delegated to the United States by the  
21 Constitution, nor prohibited by it to the States, are reserved to the States respectively, or  
22 to the people." U.S. Const. amend. X. The basic concern of the Tenth Amendment is the  
23 "proper division of authority between the federal government and the States." New York  
24 v. United States, 505 U.S. 144, 149, 112 S. Ct. 2408, 2414 (1992). The text of the Tenth  
25 Amendment itself does not limit the power of the federal government. New York, 505 U.S.  
26 at 156-57, 112 S. Ct. at 2418. Rather, the Tenth Amendment requires a court to look at  
27 "whether particular sovereign powers have been granted by the Constitution to the Federal

1 Government or have been retained by the States.” New York, 505 U.S. at 155, 112 S. Ct.  
2 at 2417. The Tenth Amendment is implicated when a particular Act of Congress is outside  
3 its enumerated powers, infringing on the powers reserved to the States. See New York,  
4 505 U.S. at 156, 112 S. Ct. at 2417-18.

5 In this case, the Debtor argues that the Tenth Amendment is implicated because  
6 through DOMA Congress is regulating marriage, a power that has traditionally been  
7 reserved to the States. DOMA defines the term “marriage” and “spouse” for federal  
8 purposes as follows:

9 In determining the meaning of any Act of Congress, or of any ruling,  
10 regulation, or interpretation of the various administrative bureaus and  
11 agencies of the United States, the word “marriage” means only a legal union  
12 between one man and one woman as husband and wife, and the word  
13 “spouse” refers only to a person of the opposite sex who is a husband or a  
14 wife.

15 1 U.S.C. § 7. DOMA was enacted in response to Baehr v. Lewin, 852 P.2d 44 (Haw.  
16 1993). H.R. Rep. No. 104-664, at 6-7 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2911.  
17 Congress recognized that the Hawaii Supreme Court appeared to be on the verge of  
18 requiring the State of Hawaii to issue marriage licenses to same-sex couples. H.R. Rep.  
19 No. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. at 2906. Congressional history indicates  
20 a profound concern over the consequences such a decision could have on both federal law  
21 and the impact it would have on other states. H.R. Rep. No. 104-664, at 2, 6-7, reprinted  
22 in 1996 U.S.C.C.A.N. at 2906, 2910-11. Particularly, with regard to federal law, “a decision  
23 by one State to authorize same-sex marriage would raise the issue of whether such  
24 couples are entitled to federal benefits that depend on marital status.” H.R. Rep.  
25 No. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. at 2906. According to the House  
26 Report, “[t]he word ‘marriage’ appears in more than 800 sections of federal statutes  
27 and regulations, and the word ‘spouse’ appears more than 3,100 times.” H.R. Rep.  
28 No. 104-664, at 10, reprinted in 1996 U.S.C.C.A.N. at 2914. Until recently, Congress did  
not define the term marriage or spouse in those sections, because it was believed that

1 state and federal definitions of those terms were consistent, namely, that marriage is the  
2 union of one man and one woman. See H.R. Rep. No. 104-664, at 10, reprinted in 1996  
3 U.S.C.C.A.N. at 2914. In light of Baehr, Congress recognized the potential for confusion,  
4 adopting DOMA to preserve the traditional definition of marriage intended by Congress for  
5 application of federal law. See H.R. Rep. No. 104-664, at 10, reprinted in 1996  
6 U.S.C.C.A.N. at 2914.

7 DOMA explicitly applies only to federal law. H.R. Rep. No. 104-664, at 29, reprinted  
8 in 1996 U.S.C.C.A.N. at 2934. Its definitions of marriage and spouse are applicable only  
9 to the determination of the meaning of “any Act of Congress, or of any ruling, regulation,  
10 or interpretation of the various administrative bureaus and agencies of the United States.”  
11 1 U.S.C. § 7. The determination of who may marry, however, continues to be exclusively  
12 a function of state law. H.R. Rep. No. 104-664, at 3, reprinted in 1996 U.S.C.C.A.N.  
13 at 2907.

14 The primary question raised by the Debtor as it concerns the Tenth Amendment is  
15 whether DOMA oversteps the boundary between federal and state authority. The Court  
16 concludes that the answer in this instance is that it does not. The Tenth Amendment is not  
17 implicated because the definition of marriage in DOMA is not binding on states and,  
18 therefore, there is no federal infringement on state sovereignty. States retain the power  
19 to decide for themselves the proper definition of the term marriage.

20 The Debtor also argues that Congress may preempt state family law, in favor of a  
21 federal standard, only when specific conditions are met. In support, she relies on  
22 Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802 (1979) and United States v. Yazell,  
23 382 U.S. 341, 86 S. Ct. 500 (1966). In both Hisquierdo and Yazell, the Court considered  
24 whether state law was preempted by federal law because there was a direct conflict  
25 between the state and federal policy. Hisquierdo, 439 U.S. at 582, 99 S. Ct. at 809; Yazell,  
26 382 U.S. at 349, 86 S. Ct. at 505. In this case, unlike the cases cited above, there is no  
27 conflict between state and federal policy. Washington State has adopted its own definition

1 of marriage identical to DOMA, defining marriage for state purposes as the legal union of  
2 one man and one woman. Preemption is not at issue since federal and Washington state  
3 standards remain identical, notwithstanding recent developments.<sup>2</sup> The state and federal  
4 definitions of marriage are independent of one another. The states remain free to regulate  
5 marriage at a state level, without federal interference. This Court concludes, therefore, that  
6 DOMA is consistent with the principles articulated by the Tenth Amendment.

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II

**COMITY**

The Debtor next requests this Court to apply the doctrine of comity to validate her marriage for purposes of 11 U.S.C. § 302. She contends that since all of the requirements for a valid marriage in British Columbia, Canada, were met, this Court should recognize the marriage and allow the Debtors to file a joint petition under 11 U.S.C. § 302.

As a general matter, the laws of one nation do not have force or effect beyond its borders. Hilton v. Guyot, 159 U.S. 113, 163, 16 S. Ct. 139, 143 (1895). The extent to which the legislative, executive, or judicial acts of one nation will be recognized and enforced within another nation, depends on what has been termed the "comity of nations." Hilton, 159 U.S. at 163, 16 S. Ct. at 144.

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience . . .

Hilton, 159 U.S. at 163-64, 16 S. Ct. at 143. Comity is voluntary. Hilton, 159 U.S. at 165, 16 S. Ct. at 144. The Debtor's assertion that comity is mandatory is simply not supported by case law. Although there may be a preference for comity when the laws of nations are in alignment, no such preference exists when the laws of a foreign nation are contrary to the sovereign's policy or prejudicial to its interests. Hilton, 159 U.S. at 164-65, 16 S. Ct.

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<sup>2</sup>See Superior Court for King County, Washington in Andersen v. King County, No. 04-2-04964-4-SEA (Aug. 4, 2004).

1 at 144. The Supreme Court has concluded, in the event of a conflict of laws between  
2 nations, a court must prefer the laws of its own nation. Hilton, 159 U.S. at 165, 1 S. Ct.  
3 at 144.

4 The Debtors were legally married according to the laws of British Columbia, Canada.  
5 However, unlike British Columbia, the United States does not recognize same-sex  
6 marriages. DOMA states that, for federal purposes, marriage is solely the union between  
7 one man and one woman. Particularly relevant, the Supreme Court has stated that, “[a]  
8 judgment affecting the status of persons, such as a decree confirming or dissolving a  
9 marriage, is recognized as valid in every country, unless contrary to the policy of its own  
10 law.” Hilton, 159 U.S. at 167, 16 S. Ct. at 145. Because the British Columbia policy and  
11 the United States policy concerning marriage directly conflict, this Court must prefer its own  
12 laws finding DOMA controlling in this case.<sup>3</sup>

13 The Debtor also argues that the rules of statutory construction require this Court to  
14 recognize the Debtors’ same-sex marriage. She maintains that courts must construe  
15 statutes to avoid unreasonable interference with the authority of other nations. This Court  
16 disagrees. In determining the scope of a statute, a court must first look to the language  
17 of the statute. United States v. Turkette, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981).  
18 When the statute’s language is clear, it is the court’s function to enforce the statute  
19 according to its terms. E.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,  
20 530 U.S. 1, 6, 120 S. Ct. 1942, 1947 (2000) (citing United States v. Ron Pair Enters., Inc.,  
21 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989)). The language of DOMA is clear and  
22 unambiguous. It states that, in all acts of Congress, the term “marriage” means only the  
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24 <sup>3</sup>The Debtor argues that the fact that the United States definition of marriage is different than the British  
25 Columbia definition of marriage is not enough to justify disregarding the principles of comity. She asserts that  
26 in order to withhold recognition of foreign laws, there must be a strong and clear countervailing public policy.  
27 According to the House Report, the purpose of DOMA was to defend the institution of traditional, heterosexual  
28 marriage. H.R. Rep. No. 104-664, at 12, reprinted in 1996 U.S.C.C.A.N. at 2916. This Court concludes, in  
reviewing the legislative history, that the federal government has announced a strong and clear countervailing  
policy concerning marriage that justifies disregarding comity.

1 legal union between one man and one woman, and the word "spouse" refers only to a  
2 person of the opposite sex that is a husband or wife.

3 III

4 **FOURTH AMENDMENT**

5 The Debtor next alleges that DOMA violates the Fourth Amendment to the U.S.  
6 Constitution because it takes federal rights and responsibilities from married same-sex  
7 couples. Although the Debtor used the word "take" that suggests an argument under the  
8 Takings Clause of the Fifth Amendment to the U.S. Constitution, the Debtor made clear  
9 in her memorandum, as well as at oral argument, that she intended her argument to fall  
10 within the search and seizure provisions of the Fourth Amendment.

11 The Fourth Amendment provides that "[t]he right of the people to be secure in their  
12 persons, houses, papers, and effects, against unreasonable searches and seizures, shall  
13 not be violated." U.S. Const. amend. IV. Historically, the applicability of the Fourth  
14 Amendment was limited to the criminal context. Gerstein v. Pugh, 420 U.S. 103, 125 n.27,  
15 95 S. Ct. 854, 869 (1975). It was designed to "safeguard the rights of those accused of  
16 criminal conduct." Gerstein, 420 U.S. at 125 n.27, 95 S. Ct. at 869. More recently, the  
17 Fourth Amendment has been applied in the civil context as well. United States v. James  
18 Daniel Good Real Prop., 510 U.S. 43, 51, 114 S. Ct. 492, 500 (1993). In its expansion,  
19 however, the Supreme Court indicated that the Fourth Amendment properly applies in the  
20 civil context only when the purpose of the governmental action is within the traditional  
21 meaning of search and seizure. James Daniel Good Real Prop., 510 U.S. at 52, 114 S. Ct.  
22 at 500.

23 It appears the only issue raised by the Debtor is whether the government's failure  
24 to recognize her same-sex marriage, for federal purposes, constitutes an unlawful seizure  
25 of the Debtors' property interests in federal benefits. According to its traditional definition,  
26 a seizure under the Fourth Amendment occurs when the government interferes with an  
27 individual's possessory interest in property in some meaningful way. United States v.

1 Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984). In order for the Debtor's  
2 Fourth Amendment unlawful seizure argument to succeed, she must first establish an  
3 ownership interest in the property seized. See Jacobsen, 466 U.S. at 113, 104 S. Ct.  
4 at 1656. A property interest requires more than an abstract need or desire for the benefits  
5 claimed. Greene v. Babbitt, 64 F.3d 1266, 1271 (9th Cir. 1995). Rather, the Debtor must  
6 have "a legitimate claim of entitlement" to the benefits. Greene, 64 F.3d at 1271 (quoting  
7 Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972)).

8 In this case, Congress enacted a statute which defines marriage, for federal  
9 purposes, as one man and one woman. 1 U.S.C. § 7. Although the Debtor claims that  
10 DOMA deprives same-sex couples of the federal benefits currently enjoyed by married  
11 opposite-sex couples, she has failed to demonstrate a possessory interest in such benefits,  
12 such that would be entitled to protection under the Fourth Amendment. The Debtor has  
13 cited no authority to support her view as to the application of the Fourth Amendment. She  
14 conceded at oral argument that her reasoning has no legal basis. In absence of case law  
15 to the contrary, this Court concludes that there is no violation of the Fourth Amendment.

#### 16 IV

#### 17 DUE PROCESS AND EQUAL PROTECTION

18 The Debtor asserts that DOMA violates both the due process and equal protection  
19 guarantees of the Fifth Amendment to the U.S. Constitution. Specifically, she argues that  
20 the fundamental right to marry includes the right to marry someone of the same sex and  
21 that the classification created by DOMA is entitled to heightened scrutiny by the courts.  
22 The UST asserts that there is no controlling authority to support either of the Debtor's  
23 contentions, and that moreover, there is controlling authority by the Supreme Court to the  
24 contrary, articulated in Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37 (1972).

#### 25 A. Baker v. Nelson

26 The UST contends that in Baker, the Supreme Court considered the Debtor's  
27 constitutional challenges to legislation restricting marriage to a man and a woman, and

1 held that this restriction violates neither due process nor equal protection. The UST argues  
2 that, because no Supreme Court or Ninth Circuit decision has reached a different  
3 conclusion since Baker, that case is binding precedent and dispositive of the issues before  
4 this Court. See Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980)  
5 (recognizing that Baker is binding precedent regarding the constitutionality of a state court  
6 judgment prohibiting two people of the same sex from marrying each other), aff'd, 673 F.2d  
7 1036 (1982).

8 In the underlying case, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal  
9 dismissed, 409 U.S. 810 (1972), the Minnesota Supreme Court considered a constitutional  
10 challenge under the First, Eighth, Ninth, and Fourteenth Amendments to the U.S.  
11 Constitution limiting marriage to one man and one woman. The couple at issue had been  
12 denied a marriage license on the basis that the couple was of the same sex. Baker,  
13 191 N.W.2d at 185. The court rejected the argument that the right to marry without regard  
14 to the sex of the parties is a fundamental right. Baker, 191 N.W.2d at 186. In so holding,  
15 the court concluded that the statute did not violate the Due Process Clause. Likewise, the  
16 court rejected the argument that the state statute violated the Equal Protection Clause.

17 Invoking the Supreme Court's mandatory appellate jurisdiction (since repealed), the  
18 same-sex couple sought review of the state court ruling, arguing that denial of the marriage  
19 license violated the Due Process and Equal Protection Clauses of the Fourteenth  
20 Amendment. The Supreme Court, which had no discretion to refuse adjudication of the  
21 case on its merits,<sup>4</sup> see Hicks v. Miranda, 422 U.S. 332, 344, 95 S. Ct. 2281, 2289 (1975),  
22 summarily decided the case and dismissed the appeal "for want of a substantial federal  
23 question." Baker, 409 U.S. 810, 93 S. Ct. 37.

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27 <sup>4</sup>Contrary to the Debtor's assertion, the Supreme Court did not "decline to review Baker" in 1971.

1 With respect to the effect of the Supreme Court's summary decision in Baker, the  
2 Supreme Court has explained that lower courts are bound by summary actions on the  
3 merits by the Court. Hicks, 422 U.S. at 344-45, 95 S. Ct. at 2289.

4 Summary affirmances and dismissals for want of a substantial federal  
5 question without doubt reject the specific challenges presented in the  
6 statement of jurisdiction and do leave undisturbed the judgment appealed  
7 from. They do prevent lower courts from coming to opposite conclusions on  
8 the precise issues presented and necessarily decided by those actions. . . .  
9 Summary actions, however, . . . should not be understood as breaking new  
10 ground but as applying principles established by prior decisions to the  
11 particular facts involved.

12 Mandel v. Bradley, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240-41 (1977). When the  
13 Supreme Court summarily affirms, it "affirm[s] the judgment but not necessarily the  
14 reasoning by which it was reached." Mandel, 432 U.S. at 176, 97 S. Ct. at 2240 (quoting  
15 Fusari v. Steinberg, 419 U.S. 379, 391, 95 S. Ct. 533, 541 (1975) (Burger, J. concurring)  
16 (footnote omitted)).

17 Nonetheless, the Supreme Court has limited the scope of the precedential value of  
18 such summary decisions. "[T]he precedential effect of a summary affirmance can extend  
19 no farther than 'the precise issues presented and necessarily decided by those actions.'  
20 Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182, 99 S. Ct. 983,  
21 989 (1979) (quoting Mandel, 432 U.S. at 176, 97 S. Ct. at 2240). Furthermore, "[q]uestions  
22 which 'merely lurk in the record,' . . . are not resolved, and no resolution of them may be  
23 inferred." Illinois State Bd. of Elections, 440 U.S. at 183, 99 S. Ct. at 989, (quoting  
24 Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 149 (1925)). One court has explained  
25 that "the precedential value of a summary disposition by the Supreme Court is to be  
26 confined to the exact facts of the case and to the precise question posed in the  
27 jurisdictional statement." Lecates v. Justice of the Peace Court No. 4 of Del., 637 F.2d  
28 898, 904 (3rd Cir. 1980). Thus, before deciding a case on the authority of a summary  
disposition by the Supreme Court, a judge must,

(a) examine the jurisdictional statement in the earlier case to be certain that  
the constitutional questions presented were the same and, if they were,

1 (b) determine that the judgment in fact rests upon decision of those  
2 questions and not even arguably upon some alternative nonconstitutional  
3 ground. . . . “[A]ppropriate, but not necessarily conclusive, weight” is to be  
4 given this Court’s summary dispositions.

5 Mandel, 432 U.S. at 180, 97 S. Ct. at 2242 (Brennan, J., concurring). When “a summary  
6 disposition is applicable, it is a binding precedent.” Lecates, 637 F.2d at 904.

7 The UST argues that this Court is bound by Baker on both the Debtor’s due process  
8 and equal protection arguments. Before this Court can apply Baker as binding precedent,  
9 it must examine the jurisdictional statements presented to the Supreme Court that are as  
10 follows:

- 11 1. Whether appellee’s refusal to sanctify appellants’ marriage deprives  
12 appellants of their liberty to marry and of their property without due process  
13 of law under the Fourteenth Amendment.
- 14 2. Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to  
15 sanctify appellants’ marriage because both are of the male sex violates their  
16 rights under the equal protection clause of the Fourteenth Amendment.
- 17 3. Whether appellee’s refusal to sanctify appellants’ marriage deprives  
18 appellants of their right to privacy under the Ninth and Fourteen  
19 Amendments.

20 Juris. Statement in Baker v. Nelson, October Term, 1972, p. 3.

21 Determining whether a summary disposition by the Supreme Court is binding  
22 precedent is anything but a clear and certain task. The issue in Baker was whether a state  
23 licensing statute limiting marriage to opposite-sex couples, and thereby excluding  
24 same-sex marriage, violated the due process and equal protection provisions of the  
25 Constitution. At first impression, this appears to be the same issue the Debtor brings  
26 before this Court now: whether DOMA that limits the term “marriage” to two individuals of  
27 the opposite sex, and thereby excludes couples of the same sex, violates the due process  
28 and equal protection provisions of the Constitution. Yet there are differences that could  
sufficiently distinguish Baker from the current case. For instance, the appellants in Baker  
sought review of the constitutionality of a state marriage licensing statute, while the Debtor  
here seeks review of subsequently-enacted federal legislation with its own Congressional  
history that concerns exclusively federal benefits. Additionally, the appellants in Baker

1 challenged the statute under the Equal Protection and Due Process Clauses of the  
2 Fourteenth Amendment; the Fifth Amendment is at issue here.

3 The Debtor also argues that even if Baker is applicable, intervening Supreme Court  
4 decisions have altered the legal landscape so drastically that the case now has little, if any,  
5 precedential value regarding the constitutionality of excluding all same-sex couples from  
6 the federal rights and benefits<sup>5</sup> associated with marriage. See Hicks, 422 U.S. at 344,  
7 95 S. Ct. at 2289 (holding that federal courts must rely on cases summarily decided by the  
8 Supreme Court until “doctrinal developments indicate otherwise”). The Debtor relies on  
9 Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003), Romer v. Evans, 517 U.S. 620,  
10 116 S. Ct. 1620 (1996), and Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978) as  
11 support for her supposition that the legal landscape has been drastically altered.

12 Since Baker, there has been no decision by the Supreme Court or the Ninth Circuit  
13 addressing the constitutionality of a statute limiting marriage to opposite-sex couples. It  
14 is recognized, as discussed below, that there has been no binding federal case law holding  
15 that same-sex marriage is a fundamental right, that same-sex couples are a suspect or  
16 quasi-suspect class, or that marriage laws distinguishing between same-sex and  
17 opposite-sex couples cannot pass rational basis review. The Supreme Court’s approach  
18 to the constitutional analysis of same-sex conduct, however, at least arguably appears to  
19 have shifted. This is particularly apparent in light of the Supreme Court’s decision in  
20 Lawrence. See Lawrence, 539 U.S. at –, 123 S. Ct. at 2488-98 (Scalia, J., dissenting).

21 The Supreme Court decision in Illinois State Bd. of Elections clarifies that “summary  
22 dispositions are to be narrowly interpreted and are of limited precedential value.” William  
23 J. Schneier, The Do’s and Don’ts of Determining the Precedential Value of Supreme Court  
24 Summary Dispositions, League of Women Voters v. Nassau County Board of Supervisors,  
25 51 Brook. L. Rev. 945, 959 (1985). Given the enumerated statutory differences between

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26  
27 <sup>5</sup>The Court would note that the only federal benefits and rights at issue in this case are those associated with  
28 federal bankruptcy law.

1 Baker and DOMA, subsequent Congressional history related to DOMA, the limited scope  
2 of precedential value of summary affirmations and dismissals, and the possible impact of  
3 recent Supreme Court decisions, particularly as articulated in Lawrence, this Court  
4 concludes that Baker is not binding precedent on the issues presented by the Debtors.

### 5 **B. Due Process**

6 The Debtor argues that DOMA's exclusion of federal benefits for same-sex  
7 marriages infringes on her right to marry someone of the same sex. She contends that this  
8 right is guaranteed as a fundamental liberty interest by the Due Process Clause of the Fifth  
9 Amendment. Conversely, the UST asserts that there is no controlling authority that  
10 recognizes a fundamental right to enter into a same-sex marriage.

11 The Fifth Amendment provides, "[n]o person shall be . . . deprived of life, liberty, or  
12 property, without due process of law." U.S. Const. amend. V. The Due Process Clause  
13 "provides heightened protection against government interference with certain fundamental  
14 rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct.  
15 2258, 2267 (1997). If there is a fundamental right to same-sex marriage, this Court must  
16 apply a "strict scrutiny" analysis that forbids government infringement on a fundamental  
17 liberty interest "unless the infringement is narrowly tailored to serve a compelling state  
18 interest." Glucksberg, 521 U.S. at 721, 117 S. Ct. at 2268 (quoting Reno v. Flores,  
19 507 U.S. 292, 302, 113 S. Ct. 1439, 1447 (1993)). If participation in a same-sex marriage  
20 is not a fundamental right, the Court must address the constitutionality of DOMA with a  
21 more liberal "rational basis" analysis that requires upholding the legislation if it is rationally  
22 related to a legitimate government interest. Glucksberg, 521 U.S. at 728, 117 S. Ct. at  
23 2271.

24 Whether same-sex marriage is a constitutionally mandated "fundamental right" is  
25 then the first critical inquiry under the Due Process Clause. The Supreme Court has  
26 identified the nature of rights that qualify for heightened judicial protection. This includes  
27 those fundamental liberties that are "implicit in the concept of ordered liberty," such that

1 “neither liberty nor justice would exist if they were sacrificed.” Glucksberg, 521 U.S. at  
2 721, 117 S. Ct. at 2268 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149,  
3 152 (1937)). The Court has also characterized those liberties as ones that are “objectively,  
4 ‘deeply rooted in this Nation’s history and tradition.’” Glucksberg, 521 U.S. at 720-21,  
5 117 S. Ct. at 2268 (emphasis added) (quoting Moore v. City of East Cleveland, 431 U.S.  
6 494, 503, 97 S. Ct. 1932, 1938 (1977) (plurality opinion)). It is not in dispute that the  
7 Supreme Court has held that in addition to the freedoms protected by the Bill of Rights, the  
8 “liberty” protected by the Due Process Clause has conferred fundamental right status on  
9 marriage. Glucksberg, 521 U.S. at 720, 117 S. Ct. at 2267 (citing Loving v. Virginia,  
10 388 U.S. 1, 87 S. Ct. 1817 (1967)).

11 No federal court, however, has explicitly recognized that this fundamental right to  
12 marry extends to a person of the same sex. Accordingly, this Court must determine  
13 whether the Debtor has a fundamental right to enter into a same-sex marriage, viewed in  
14 light of past Supreme Court decisions holding that there is a fundamental right to marry  
15 persons of the opposite sex. The Debtor urges this Court to conclude that there is a  
16 fundamental right of same-sex couples to marry, as such a right was implicitly recognized  
17 by the Supreme Court in its recent opinion of Lawrence, and explicitly by the Supreme  
18 Judicial Court of Massachusetts in Goodridge v. Department of Pub. Health, 798 N.E.2d  
19 941 (Mass. 2003), and by the Superior Court for King County, Washington in Andersen v.  
20 King County, No. 04-2-04964-4-SEA (Aug. 4, 2004).

21 The Massachusetts court decision, however, was decided under the Massachusetts  
22 Constitution that the Supreme Judicial Court of Massachusetts characterized as being  
23 more “protective of individual liberty and equality than the Federal Constitution.”  
24 Goodridge, 798 N.E.2d at 948. The Massachusetts Constitution was also stated as being  
25 more protective of “spheres of private life” and less tolerant of government intrusion.  
26 Goodridge, 798 N.E.2d at 949. Since the Goodridge decision granting same-sex marriage  
27

1 licenses was based upon rights stemming from the more protective Massachusetts  
2 Constitution, the precedential value of its decision is significantly reduced.

3 In Lawrence, the Supreme Court held that the Due Process Clause of the  
4 Constitution protects the right of two individuals of the same sex to engage in mutually  
5 consensual private sexual conduct. Lawrence, 539 U.S. at –, 123 S. Ct. at 2484. The  
6 Debtor argues that the Court’s language in this opinion is so broad as to implicitly  
7 recognize same-sex marriages. The Debtor points to language in Lawrence stating that  
8 the Constitution protects “personal decisions relating to marriage, procreation,  
9 contraception, family relationship, child rearing, and education,” and that a gay person  
10 “may seek autonomy for these purposes, just as heterosexual persons do.” Lawrence,  
11 539 U.S. at –, 123 S. Ct. at 2474, 2482 (emphasis added).

12 Contrary to the Debtor’s arguments, however, the Supreme Court in Lawrence also  
13 explicitly stated that the case did “not involve whether the government must give formal  
14 recognition to any relationship that homosexual persons seek to enter.” Lawrence,  
15 539 U.S. at –, 123 S. Ct. at 2484. It would appear, then, that the Supreme Court did not  
16 intend to extend its holding to include same-sex marriage. Moreover, the Court applied  
17 without explanation a rational basis test, rather than strict scrutiny review required when  
18 fundamental rights are at issue. Lawrence, 539 U.S. at –, 123 S. Ct. at 2484. Although  
19 Lawrence could be a preview of the Supreme Court’s course in its constitutional analysis  
20 of marriage, see Lawrence, 539 U.S. at –, 123 S. Ct. at 2498 (Scalia, J., dissenting) (noting  
21 that, contrary to the majority’s explicit statement that the case does not address the issue  
22 of same-sex marriage, the majority opinion actually “dismantles the structure of  
23 constitutional law that has permitted a distinction to be made between heterosexual and  
24 homosexual unions” with respect to marriage), neither the majority nor concurring opinions  
25 in Lawrence conclude that the fundamental right to marry includes the right to marry  
26 someone of the same sex, see Standhardt v. Superior Court of Arizona, 77 P.3d 451, 457  
27 (Ariz. 2003) (holding that if the Supreme Court did not view same-gender sexual relations

1 to be a fundamental right, the Court could not have intended to confer such status on  
2 same-gender marriage), review denied (2004) . This Court views the Supreme Court's  
3 decision in Lawrence as appropriately acknowledging that all people, no matter what their  
4 sexual preferences, are entitled to respect for their private lives. The Lawrence holding  
5 does not require a change in the federal statutory approach to marriage.

6       Employing the analysis set forth by the Supreme Court for purposes of identifying  
7 fundamental liberties, there is no basis for this Court to unilaterally determine at this time  
8 that there is a fundamental right to marry someone of the same sex. The Supreme Court  
9 has cautioned courts to "exercise the utmost care" in conferring fundamental-right status  
10 on a newly asserted interest. Glucksberg, 521 U.S. at 720, 117 S. Ct. at 2268 (quoting  
11 Collins v. City of Harken Heights, 503 U.S. 115, 125, 112 S. Ct 1061, 1068 (1992)). Even  
12 if this Court believes there should be a fundamental right to marry someone of the same  
13 sex, it would be incorrect to suggest that the Supreme Court, in its long line of cases on the  
14 subject, conferred the fundamental right to marry on anything other than a traditional,  
15 opposite-sex relationship. See Dean v. District of Columbia, 653 A.2d 307, 333 (1995).  
16 It is in this respect that this Court disagrees with the contrary conclusion recently reached  
17 by the Superior Court for King County, Washington in Andersen, where it was determined  
18 that there is a fundamental right to marry someone of the same sex.

19       Furthermore, as previously stated, the Supreme Court has defined fundamental  
20 liberties as those that are "objectively, 'deeply rooted in this Nation's history and tradition.'" Glucksberg, 521 U.S. at 720-21, 117 S. Ct. at 2268 (emphasis added) (quoting Moore,  
21 431 U.S. at 503, 97 S. Ct. at 1938 (plurality opinion)). "This approach tends to rein in the  
22 subjective elements that are necessarily present in due-process judicial review."  
23 Glucksberg, 521 U.S. at 722, 117 S. Ct. at 2268. Contrary to the Andersen opinion, there  
24 are no grounds to conclude objectively that same-sex marriages are deeply rooted in this  
25 Nation's history and tradition. See Standhardt, 77 P.3d at 459 (holding that because  
26  
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1 same-sex marriages are not deeply rooted in the legal and social history of our Nation, they  
2 cannot be a fundamental right).

3 Based on the specific directives provided by the Supreme Court for fundamental  
4 rights analysis, and in the absence of binding precedent holding same-sex marriages to  
5 be a fundamental right, this Court declines to hold that there is a fundamental right to marry  
6 someone of the same sex, as urged by the Debtor. Accordingly, rational basis review is  
7 the appropriate review to apply in this case.<sup>6</sup>

8 A bankruptcy court is a trial court of limited jurisdiction and must be extremely  
9 cautious before creating on its own a new fundamental right based on what the Supreme  
10 Court might in the future decide. As the Arizona Court of Appeals stated in Standhardt,  
11 “[w]e are mindful of the Supreme Court’s admonition to ‘exercise the utmost care’ in  
12 conferring fundamental-right status on a newly asserted interest lest we transform the  
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14 <sup>6</sup>The UST argues that in the alternative, even if there is a fundamental right to marry someone of the same  
15 sex, DOMA does not directly or substantially interfere with the ability of anyone, including same-sex couples,  
16 to marry the individual of his or her choice. The only issue before this Court concerns joint filing status.  
17 DOMA simply addresses how couples who are married will be treated for federal purposes, calling only for  
18 rational basis review. It is not disputed that DOMA, unlike similar state statutes, does not preclude the right  
19 to marry any person, same sex or not. The Debtor, however, argues that since DOMA excludes same-sex  
20 couples from all of the rights, benefits and obligations of marriage under federal law, it thereby renders all  
21 same-sex couples “unmarried” for all purposes.

22 The Supreme Court has held that not every state regulation that relates in any way to the incidents  
23 of or prerequisites for marriage must be subjected to rigorous scrutiny. “To the contrary, reasonable  
24 regulations that do not significantly interfere with decisions to enter into the marital relationship may  
25 legitimately be imposed.” Zablocki, 434 U.S. at 386, 98 S. Ct. at 681. See, e.g., Califano v. Jobst, 434 U.S.  
26 47, 54, 98 S. Ct. 95, 99-100 (1977) (holding that loss of federal social security benefits upon marriage does  
27 not “interfere with the individual’s freedom to make a decision as important as marriage”). This Court  
28 concludes that the restrictions as applied to the Debtor in the instant case are reasonable. First, the sole  
federal benefit at issue in this case is the ability to file a joint petition as permitted by the Bankruptcy Code in  
11 U.S.C. § 302. Although DOMA has the effect of excluding same-sex couples from petitioning for joint filing  
status in bankruptcy, same-sex couples are nonetheless entitled to all of the protections afforded by the  
Bankruptcy Code. They need only seek those benefits by filing individual cases and paying separate filing  
fees. The Debtor does not assert that DOMA interferes with a fundamental right to bankruptcy. As the  
Supreme Court has made clear, there is no fundamental right, or constitutional right, to a discharge in  
bankruptcy. United State v. Kras, 409 U.S. 434, 446, 93 S. Ct. 631, 638 (1973); In re Statham, 483 F.2d 436,  
437 (9th Cir. 1973). Second, as discussed above, DOMA does not forbid a same-sex couple from being  
married under the laws of a state or a foreign jurisdiction. In consideration of DOMA, Congress explicitly  
pointed out that the determination of who may marry in the United States is uniquely a function of state law,  
and that DOMA in no way alters that situation. H.R. Rep. No. 104-664, at 3, reprinted in 1996 U.S.C.C.A.N.  
at 2907.

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1 liberty protected by due process into judicial policy preferences rather than principles born  
2 of public debate and legislative action.” Standhardt, 77 P.3d at 459 (quoting Glucksberg,  
3 521 U.S. at 720, 117 S. Ct. at 2268). See also, In re Cole, 13 F. Supp. 283, 285 (S.D.  
4 Ohio, 1936) (noting that trial courts should carefully limit exercise of their power to declare  
5 acts of Congress unconstitutional).

6 Consequently, this Court concludes that same-sex marriage is not a fundamental  
7 right, DOMA does not directly or substantially interfere with the ability of same-sex couples  
8 to marry, and rational basis review is the appropriate level of scrutiny to apply for purposes  
9 of a due process analysis. The Court’s rational basis analysis follows the discussion of  
10 equal protection provision below.

### 11 **C. Equal Protection**

12 The Debtor also argues that DOMA violates the equal protection provision of the  
13 Fifth Amendment. The only equal protection clause in the Constitution appears in the  
14 Fourteenth Amendment<sup>7</sup> and applies only to the states. 2 Ronald D. Rotunda & John E.  
15 Nowak, Treatise On Constitutional Law-Substance & Procedure § 14.7 (3d ed. 1999). It  
16 is clear, however, “that there is an equal protection component of the Due Process Clause  
17 of the Fifth Amendment that applies to the federal government.” High Tech Gays v.  
18 Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570 (9th Cir. 1990). The Supreme  
19 Court’s approach to “Fifth Amendment equal protection claims has always been precisely  
20 the same as to equal protection claims under the Fourteenth Amendment.” High Tech  
21 Gays, 895 F.2d at 571 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S. Ct.  
22 1225, 1228 n.2 (1975)).

23 In resolving the Debtor’s equal protection challenge, the Court “must first determine  
24 what classification has been created” by DOMA. Aleman v. Glickman, 217 F.3d 1191,  
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26  
27 <sup>7</sup>The Fourteenth Amendment, Equal Protection Clause, provides, “[n]or shall any State . . . deny to any person  
28 within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

1 1195 (9th Cir. 2000). The Court must then ascertain the appropriate level of scrutiny to  
2 employ.

3 The Debtor first argues that DOMA creates a classification based on gender, and  
4 is thus entitled to heightened scrutiny. See United States v. Virginia, 518 U.S. 515, 533,  
5 116 S. Ct. 2264, 2275 (1996). In so arguing, she equates DOMA's classification to the  
6 race-based classification struck down in Loving, 388 U.S. at 8, 87 S. Ct. at 1822 (rejecting  
7 the contention that the equal application of a statute prohibiting interracial marriages  
8 immunized the statute from strict equal protection scrutiny).

9 The UST counters that unlike the patent racial classification in Loving, DOMA does  
10 not discriminate on the basis of sex because (1) on its face, it makes no detrimental  
11 classification that disadvantages either men or women; (2) it cannot be traced to a purpose  
12 to discriminate against either men or women; and (3) it does not reflect either the baggage  
13 of sexual stereotypes or stigmatization of women. Several courts have also rejected the  
14 Loving analog. See Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999) (noting that all of  
15 the seminal United States Supreme Court sex-discrimination decision have invalidated  
16 statutes that single out men or women as a discrete class for unequal treatment; under a  
17 marriage statute, there is no discrete class subject to differential treatment solely on the  
18 basis of sex); Dean, 653 A.2d at 362-63 & n.2 (Steadman, J. concurring); Singer v. Hara,  
19 522 P.2d 1187, 1191-92 (Wn. App. 1974) (holding that there "is no analogous sexual  
20 classification involved in the instant case because appellants are not being denied entry  
21 into the marriage relationship because of their sex; rather, they are being denied entry into  
22 the marriage relationship because of the recognized definition of that relationship as one  
23 which may be entered into only by two persons who are members of the opposite sex."),  
24 review denied, 84 Wn.2d 1008 (1974); Baker, 191 N.W.2d at 187.

25 In Loving, the State of Virginia argued that its anti-miscegenation statutes did not  
26 violate constitutional prohibitions against racial classifications because the statutes  
27 affected both racial groups equally. Loving, 388 U.S. at 8, 87 S. Ct. at 1821. The

1 Supreme Court disagreed, noting that the fact of equal application does not immunize the  
2 state from the “very heavy burden of justification” that the Equal Protection Clause  
3 “traditionally required of state statutes drawn according to race.” Loving, 388 U.S. at 9,  
4 87 S. Ct. at 1822. The Court held that the laws at issue were founded on an impermissible  
5 racial classification and therefore could not be used to deny interracial couples the  
6 fundamental right to marry. Loving, 388 U.S. at 11, 87 S. Ct. 1823.

7 DOMA defines “marriage” as “only a legal union between one man and one woman  
8 as husband and wife.” 1 U.S.C. § 7. The legislative history clearly reveals that the primary  
9 purpose of DOMA is to restrict marriage to one man and one woman. The Debtor argues  
10 that because DOMA does not allow one woman to marry another woman, the legislation  
11 is a sex-based classification warranting strict scrutiny.<sup>8</sup> DOMA, however, does not single  
12 out men or women as a discrete class for unequal treatment. Rather, as the court in  
13 Baker, observed, a marriage law such as DOMA “prohibit[s] men and women equally from  
14 marrying a person of the same sex.” Baker, 744 A.2d at 880 n.13. Women, as members  
15 of one class, are not being treated differently from men, as members of a different class.  
16 “The test to evaluate whether a facially gender-neutral statute discriminates on the basis  
17 of sex is whether the law ‘can be traced to a discriminatory purpose.’” Baker v. Vermont,  
18 744 A.2d at 880 n.13 (quoting Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 272,  
19 99 S. Ct. 2282, 2293 (1979)). There is no evidence, from the voluminous legislative history  
20 or otherwise, that DOMA’s purpose is to discriminate against men or women as a class.  
21 Accordingly, the marriage definition contained in DOMA does not classify according to  
22 gender, and the Debtor is not entitled to heightened scrutiny under this theory.

23 \_\_\_\_\_  
24 <sup>8</sup>It is the Court’s understanding, and contrary to the Debtor’s assertion, that the Supreme Court has used an  
25 intermediate standard of review for gender-based classifications in equal protection analysis. Virginia,  
26 518 U.S. at 533, 116 S. Ct. at 2275 (holding that the government must show “at least that the [challenged]  
27 classification serves ‘important governmental objectives and that the discriminatory means employed’ are  
28 ‘substantially related to those objectives.’”) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150,  
100 S. Ct. 1540, 1545 (1980)); 3 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional  
Law—Substance & Procedure § 18.20 (3d ed. 1999). Thus, Loving is distinguishable on this basis as well.

1 The Debtor next argues that DOMA classifies based on homosexuality that also is  
2 entitled to strict scrutiny. In High Tech Gays, however, the Ninth Circuit held that  
3 “homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than  
4 rational basis scrutiny under the equal protection component of the Due Process Clause  
5 of the Fifth Amendment.” High Tech Gays, 895 F.2d at 574; see Flores v. Morgan Hill  
6 Unified Sch. Dist., 324 F.3d 1130, 1137 (9th Cir. 2003) (referencing High Tech Gays for  
7 the holding that “homosexuals are not a suspect or quasi-suspect class, but are a definable  
8 group entitled to rational basis scrutiny for equal protection purposes”). The Supreme  
9 Court’s decision in Lawrence, does not eviscerate this holding. See State v. Limon,  
10 83 P.3d 229, 241 (Kan. App. 2004) (Malone, J., concurring) (noting that “Lawrence did not  
11 confer suspect class status on homosexuals, and in fact specifically declined to do so”).  
12 Although the majority opinion did not employ an equal protection analysis in striking down  
13 a statute criminalizing sodomy, Justice O’Connor did apply such an analysis, but  
14 determined that rational basis review was appropriate where, as in Lawrence, “the  
15 challenged legislation inhibits personal relationships.” Lawrence, 529 U.S. at –, 123 S. Ct.  
16 at 2485 (O’Connor, J., concurring). As noted in this Court’s analysis of the due process  
17 guarantee, although the majority opinion in Lawrence may indicate a shift in the Supreme  
18 Court’s treatment of same-sex couples, the Supreme Court did not hold that same-sex  
19 couples constitute a suspect or semi-suspect class under an equal protection analysis.  
20 Absent such a holding, this Court is bound by the Ninth Circuit decision in High Tech Gays,  
21 and must apply rational basis review, similar to that employed under the Due Process  
22 Clause.

#### 23 **D. Rational Basis Review**

24 If a law neither burdens a fundamental right, nor targets a suspect class, the  
25 Supreme Court “will uphold the legislative classification so long as it bears a rational  
26 relation to some legitimate” governmental end. Romer, 517 U.S. at 631, 116 S. Ct.  
27 at 1627. This Court has determined that DOMA does not burden a fundamental right nor

1 target a suspect class. The Supreme Court has provided thorough guidance to the courts  
2 for purposes of applying rational basis review. See Heller v. Doe, 509 U.S. 312, 113 S. Ct.  
3 2637 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096 (1993);  
4 Aleman, 217 F.3d 1191.

5 “In areas of social and economic policy, a statutory classification that neither  
6 proceeds along suspect lines nor infringes fundamental constitutional rights must be  
7 upheld against equal protection challenge if there is any reasonably conceivable state of  
8 facts that could provide a rational basis for the classification.” Beach Communications,  
9 508 U.S. at 313, 113 S. Ct. at 2101 (emphasis added). Rational basis review is “a  
10 paradigm of judicial restraint” and “is not a license for courts to judge the wisdom, fairness,  
11 or logic of legislative choices.” Beach Communications, 508 U.S. at 313-14, 113 S. Ct.  
12 at 2101. “Nor does it authorize ‘the judiciary [to] sit as a superlegislature to judge the  
13 wisdom or desirability of legislative policy determinations made in areas that neither affect  
14 fundamental rights nor proceed along suspect lines.’” Heller, 509 U.S. at 319, 113 S. Ct.  
15 at 2642 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517  
16 (1976) (per curiam)).

17 A statute is presumed constitutional. Heller, 509 U.S. at 320, 113 S. Ct. at 2643.  
18 “[T]he burden of establishing the unconstitutionality of a statute rests on him who assails  
19 it.” Baker v. Carr, 369 U.S. 186, 266, 82 S. Ct. 691, 737 (1962) (quoting Metropolitan Cas.  
20 Ins. Co. v. Brownell, 294 U.S. 580, 584, 55 S. Ct. 538, 540 (1935)). The burden is to  
21 “‘negative every conceivable basis which might support it,’ whether or not the basis has a  
22 foundation in the record.” Heller, 509 U.S. at 320-21, 113 S. Ct. at 2643 (quoting  
23 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 1006  
24 (1973)). The government “has no obligation to produce evidence to sustain the rationality  
25 of a statutory classification.” Heller, 509 U.S. at 320, 113 S. Ct. at 2643. “[C]ourts are  
26 compelled under rational-basis review to accept a legislature’s generalizations even when  
27 there is an imperfect fit between means and ends. A classification does not fail

1 rational-basis review because it 'is not made with mathematical nicety or because in  
2 practice it results in some inequality.'" Heller, 509 U.S. at 321, 113 S. Ct. at 2643 (quoting  
3 Dandridge v. Williams, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1970)). "A statutory  
4 classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to  
5 the achievement of the State's objective.'" Heller, 509 U.S. at 324, 113 S. Ct. at 2645  
6 (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71, 99 S. Ct. 383, 390 (1978)).

7 As previously stated, since the Debtor does not have a fundamental right to enter  
8 into a same-sex marriage and is not within a quasi-suspect or suspect class, the  
9 constitutionality of DOMA is tested under a rational basis analysis. The UST argues that  
10 DOMA meets this test primarily because it furthers the legitimate government interest in  
11 encouraging the development of relationships optimal for procreating and raising children.  
12 Additionally, the legislative history of DOMA identifies four governmental interests  
13 advanced by this legislation: "(1) defending and nurturing the institution of traditional,  
14 heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state  
15 sovereignty and democratic self-governance; and (4) preserving scarce government  
16 resources." H.R. Rep. No. 104-664, at 12, reprinted in 1996 U.S.C.C.A.N. at 2916.

17 The burden of proof is on the Debtor to establish that the rational basis test is not  
18 met. The Debtor contends that the interests advanced by the UST do not provide any  
19 rational justifications for excluding same-sex married couples from the rights extended to  
20 other married couples under federal law. The Debtor argues, (1) as to procreation, federal  
21 recognition of marriage has never been limited to couples willing or able to conceive and  
22 raise children; (2) the exclusion of all same-sex married couples from federal recognition  
23 undermines the state's goal to encourage responsible procreation, because same-sex  
24 couples can reproduce with outside assistance; (3) as to the raising of children by both  
25 biological parents, the Debtor alleges that because same-sex couples can now both be  
26 biological parents of a child, DOMA in reality undermines the state's goal; and (4) the  
27 Supreme Court has held that procreation is not a necessary or definitive aspect of marriage

1 and has specifically rejected the notion that the purpose of marriage is to encourage the  
2 rearing of children by both of their biological parents.

3 To uphold the constitutionality of DOMA, the test is not whether Congress' rationale  
4 for enacting DOMA is persuasive, but whether it satisfies a minimal threshold of rationality.  
5 The review afforded under this rational basis standard is very deferential to the legislature,  
6 and does not permit this Court to interject or substitute its own personal views of DOMA  
7 or same-sex marriage. While courts have the authority to recognize rights supported by  
8 the Constitution, the creation of new and unique rights is more properly reserved for the  
9 people through the legislative process. As articulated by Justice Spina's in his dissent in  
10 Goodridge, 798 N.E.2d at 978, when courts extend a constitutional protection to a new  
11 right or liberty interest, they are to a great extent placing the matter outside the arena of  
12 public debate and legislative action.

13 The UST asserts that encouraging the development of relationships optimal for  
14 procreation is a primary government interest advanced by DOMA. Because a heterosexual  
15 union is the only one that can naturally produce a child, the UST states that government  
16 has an interest in encouraging the stability and legitimacy of this union for the benefit of the  
17 offspring. "Simply defined, marriage is a relationship within which the community socially  
18 approves and encourages sexual intercourse and the birth of children. It is society's way  
19 of signaling to would-be parents that their long-term relationship is socially important—a  
20 public concern, not simply a private affair." H.R. Rep. No. 104-664, at 14, reprinted in  
21 1996 U.S.C.C.A.N. at 2918. "Marriage and procreation are fundamental to the very  
22 existence and survival of the race." Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535,  
23 541, 62 S. Ct. 1110, 1113 (1942). Washington State, too, has recognized this interest:  
24 "[m]arriage exists as a protected legal institution primarily because of societal values  
25 associated with the propagation of the human race." Singer, 522 P.2d at 1195.

1 Authority exists that the promotion of marriage to encourage the maintenance of  
2 stable relationships that facilitate to the maximum extent possible the rearing of children  
3 by both of their biological parents is a legitimate congressional concern. See, e.g., Bowen  
4 v. Gilliard, 483 U.S. 587, 614, 107 S. Ct. 3008, 3024 (1987) (Brennan J., dissenting)  
5 (noting that “[t]he optimal situation for the child is to have both an involved mother and an  
6 involved father”) (quoting H. Biller, Paternal Deprivation 10 (1974)); Lofton v. Secretary of  
7 the Dep’t of Children and Family Servs., 358 F.3d 804, 819 (11th Cir. 2004) (considering  
8 the state’s argument that the presence of both male and female authority figures in the  
9 home is critical to optimal childhood development, the court held that “[i]t is hard to  
10 conceive an interest more legitimate and more paramount for the state than promoting an  
11 optimal social structure for educating, socializing, and preparing its future citizens to  
12 become productive participants in civil society”); Adams, 486 F. Supp. at 1124 (holding  
13 that it is beyond dispute that the state has a compelling interest in providing “status and  
14 stability to the environment in which children are raise”); Standhardt, 77 P.3d at 462-63  
15 (holding that the state has an interest in promoting child-rearing by opposite-sex couples);  
16 Singer, 522 P.2d at 1197 (holding that “marriage is so clearly related to the public interest  
17 in affording a favorable environment for the growth of children that we are unable to say  
18 that there is not a rational basis upon which the state may limit the protection of its  
19 marriage laws to the legal union of one man and one woman”). This Court’s personal view  
20 that children raised by same-sex couples enjoy benefits possibly different, but equal, to  
21 those raised by opposite-sex couples, is not relevant to the Court’s ultimate decision. It is  
22 within the province of Congress, not the courts, to weigh the evidence and legislate on  
23 such issues, unless it can be established that the legislation is not rationally related to a  
24  
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27

1 legitimate governmental end.<sup>9</sup> Thus, although this Court may not personally agree with the  
2 positions asserted by the UST in support of DOMA, applying the rational basis test as set  
3 forth by the Supreme Court, this Court cannot say that DOMA's limitation of marriage to  
4 one man and one woman is not wholly irrelevant to the achievement of the government's  
5 interest.

6 The Debtor and other critics however, argue that DOMA's definition of marriage  
7 permits heterosexual couples to marry regardless of whether they intend or are even able  
8 to have children. While this may be, the Supreme Court has made clear that, "[e]ven if the  
9 classification involved here is to some extent both underinclusive and overinclusive, and  
10 hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like  
11 this 'perfection is by no means required.'" Vance v. Bradley, 440 U.S. 93, 108, 99 S. Ct.  
12 939, 948 (1979) (quoting Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376,  
13 385, 80 S. Ct. 474, 480 (1960)). Congress is not required to provide identical forms of  
14 encouragement or endorsement to same-sex couples as to those in more traditional  
15 relationships. It need only to have a rational basis for its legislation. Moreover, if the  
16 government attempted to limit marriage solely to those able or desiring to produce children,  
17 the government would be required to make such inquires of couples prior to marriage. This  
18 would implicate constitutionally-rooted privacy concerns. See Eisenstadt v. Baird, 405 U.S.  
19 438, 453-54, 92 S. Ct. 1029, 1038 (1972); Adams, 486 F. Supp. at 1124-25 (recognizing  
20 government inquiry about couples' procreation plans or requiring sterility test before issuing  
21 marriage licenses would "raise serious constitutional questions."); Standhardt, 77 P.3d  
22 at 462 (citing Griswold v. Connecticut, 381 U.S. 479, 485-86, 85 S. Ct. 1678, 1682 (1965)).

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23  
24 <sup>9</sup>Although this Court may agree with the ultimate result reached in Andersen, as previously stated, the UST  
25 need not produce any "evidence to sustain the rationality of a statutory classification." Heller, 509 U.S. at 320,  
26 113 S. Ct. at 2643. Moreover, "a legislative choice is not subject to courtroom fact-finding and may be based  
27 on rational speculation unsupported by evidence or empirical data." Beach Communications, 508 U.S. at 315,  
28 113 S. Ct. at 2102. Thus, the state court's reliance on the lack of "scientifically valid studies tending to  
establish a negative impact on the adjustment of children raised by an intact same-sex couple" is misplaced  
as it is not incumbent on the government to produce any evidence for the record. Andersen, at 21.

1 Additionally, it would interfere with the fundamental right of opposite-sex couples to marry.

2 See Loving, 388 U.S. at 12, 87 S. Ct. at 1824.

3 Furthermore, that same-sex couples also raise children does not negate the  
4 reasonableness of the link between opposite-sex marriage and child-rearing. That children  
5 in same-sex families could also benefit from the stability offered by marriage, as previously  
6 stated, rational classifications cannot be struck down merely because they are to some  
7 degree over- or underinclusive. See Vance, 440 U.S. at 108, 99 S. Ct. at 948. Moreover,  
8 classifying governmental beneficiaries “inevitably requires that some persons who have an  
9 almost equally strong claim to favored treatment be placed on different sides of the line,  
10 and the fact [that] the line might have been drawn differently at some points is a matter for  
11 legislative, rather than judicial, consideration.” Beach Communications, 508 U.S. at  
12 315-16, 113 S. Ct. at 2102 (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179,  
13 101 S. Ct. 453, 461 (1980)). “[A]s long as plausible reasons exist for placement of the  
14 current line,” the reasonableness of a classification cannot be set aside. Standhardt,  
15 77 P.3d at 463.

16 The Debtor also argues that DOMA is like Colorado’s Amendment 2 that was struck  
17 down in Romer v. Evans for failure to meet the rational basis test. Romer v. Evans,  
18 517 U.S. 620, 116 S. Ct. 1620 (1996). In Romer, the Supreme Court considered an equal  
19 protection challenge to Amendment 2 to Colorado’s constitution that “prohibited all  
20 legislative, executive, or judicial action at any level of state or local government designed  
21 to protect homosexual persons from discrimination.” Romer, 517 U.S. at 624, 116 S. Ct.  
22 at 1623. Applying rational basis review, the Supreme Court held that Amendment 2 did  
23 not bear a rational relationship to a legitimate government purpose. The primary rationale  
24 offered by the State for Amendment 2 was “respect for other citizens’ freedom of  
25 association, and in particular the liberties of landlords or employers who have personal or  
26 religious objections to homosexuality.” Romer, 517 U.S. at 635, 116 S. Ct. at 1629. The

1 Supreme Court held that the amendment had the “peculiar property of imposing a broad  
2 and undifferentiated disability on a single named group,” and “its sheer breadth is so  
3 discontinuous with the reasons offered for it that the amendment seems inexplicable by  
4 anything but animus toward the class it affects.” Romer, 517 U.S. at 632, 116 S. Ct.  
5 at 1627.

6 In contrast, DOMA is not so exceptional and unduly broad as to render the UST’s  
7 reasons for its enactment “inexplicable by anything but animus” towards same-sex couples.  
8 See Standardt, 77 P.3d at 465 (rejecting Romer analogy on grounds that statute limiting  
9 marriage to opposite-sex couples furthers a proper legislative end and was not enacted  
10 simply to make same-sex couples unequal). Rather, DOMA simply codified that definition  
11 of marriage historically understood by society. See Adams, 486 F. Supp. at 1123  
12 (observing that marriage historically has been defined as the union between persons of  
13 different sex).

14 The House Report indicates that Congress considered as interests in enacting  
15 DOMA, protecting state sovereignty and democratic self-governance, morality, and  
16 preserving scarce government resources. The UST, however, neither raises nor relies on  
17 these asserted interests as grounds to uphold the constitutionality of DOMA. Basing  
18 legislation on moral disapproval of same-sex couples may be questionable in light of  
19 Lawrence. The Debtor makes no mention or attack of these interests, but as the Court  
20 concludes that the government has a “conceivable” legitimate interest in enacting DOMA  
21 that is rationally related to promote an optimal social structure, the Court need not consider  
22 these additional interests advanced by Congress in its legislative history.

23 This Court concludes that DOMA does not violate either the Due Process or Equal  
24 Protection Clause of the Fifth Amendment.

25 Finally, the Debtor argues that the joint petition should be allowed because Ann C.  
26 Kandu, one of the Debtors, died since the initial filing of their joint bankruptcy petition.

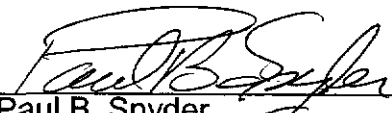
1 Accordingly, the joint petition would not offend the purpose of DOMA. The Debtor asserts  
2 she is not seeking recognition of an ongoing relationship with a same-sex spouse. She is  
3 simply seeking to resolve the disposition of assets and property.

4 The Court recognizes that the Debtors' situation has changed since the filing of the  
5 joint petition; however, this Court must ascertain the Debtors' status at the time the  
6 bankruptcy petition was filed. Although one of the Debtors is now deceased, the posture  
7 of this legal proceeding is unchanged. Further, despite the Debtor's assertion to the  
8 contrary, the Debtor is in fact seeking recognition of her same-sex marriage as of the  
9 petition date that would necessarily require this Court to recognize the relationship as a  
10 "marriage" under the Bankruptcy Code.

11 **CONCLUSION**

12 The Court concludes that DOMA does not violate the principles of comity, or the  
13 Fourth, Fifth, or Tenth Amendments to the U.S. Constitution. The Debtors' petition in  
14 bankruptcy shall be dismissed on September 3, 2004, unless the Debtors have filed a  
15 motion to bifurcate prior to said date.

16 DATED: August 17, 2004

17   
18 Paul B. Snyder  
U.S. Bankruptcy Judge

19 CERTIFICATE OF MAILING: I CERTIFY I MAILED COPIES OF  
20 THE FOREGOING TO Lee Kandu; Gregory Katsas; Marjorie Raleigh

21 DATED: August 17, 2004

22 BY: Deborah Vincent