No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON THE MERITS FOR RESPONDENT EDITH SCHLAIN WINDSOR

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

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STATEMENT OF THE CASE

This case raises the question whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which excludes legally married couples who are gay from the federal rights, benefits, and burdens that govern all other married couples, is constitutional. Both the district court and the court of appeals held that the equal protection component of the Fifth Amendment's due process clause was violated when the federal government imposed $363,053 in estate taxes on the estate of Thea Spyer simply because she was married to a woman (respondent Edith S. Windsor), instead of to a man.

A. Factual Background

1. In the early 1960s, at a time when lesbians and gay men risked losing their families, friends, and livelihoods if their sexual orientation became known, respondent Edith Windsor and her late spouse Thea Spyer fell in love and embarked upon a relationship that would last until Dr. Spyer's death forty-four years later.

The depth, commitment, and longevity of their relationship and eventual marriage are all the more remarkable given the times they lived through. Dr. Spyer was expelled from college when a campus security guard observed her kissing another woman. J.A.153. Ms. Windsor entered into a brief, and unsuccessful, marriage to a man in the early 1950s

because she did not believe that it was possible for her to live openly as a lesbian. J.A.494-96.

Shortly after her first marriage ended, Ms. Windsor moved to New York City, where she received a graduate degree in mathematics. She eventually became a highly successful computer programmer at IBM, achieving the highest technical rank at the company, notable for a woman at the time. J.A.231. Sadly, discriminatory federal laws threatened her ability to pursue her career. Ms. Windsor supported herself during graduate school by working as a programmer on the UNIVAC computer for the Atomic Energy Commission. But an Executive Order prohibited companies that had contracts with the Government from employing gay men or lesbians. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953). Thus, when the FBI requested an interview in connection with her security clearance, Ms. Windsor rightly feared that she would lose her job if she were asked about her sexual orientation. J.A.497-98. (Fortunately for Ms. Windsor, the FBI never raised the subject. *Id.*) Similarly, by hiring Ms. Windsor (who never disclosed her sexual orientation), IBM later unknowingly ran afoul of that same Executive Order.

Threats of disclosure and harassment also forced gay people like Ms. Windsor and Dr. Spyer to lead important parts of their lives in secrecy. Ms. Windsor and Dr. Spyer met at one of the few restaurants in New York City where lesbians were welcomed in 1963. Four years later, they moved in

together and became engaged, although there was then no prospect of their being able to marry legally. To avoid unwelcome questions about the identity of Ms. Windsor's "fiancé" from co-workers, Dr. Spyer proposed with a diamond brooch, instead of a diamond ring. J.A.231-33.

Ms. Windsor and Dr. Spyer's life together was full of all the joys and sorrows that any couple faces. They worked, paid their taxes, traveled, entertained friends, and participated in their community. J.A.233. Ms. Windsor spent her career at IBM. Dr. Spyer, who earned a doctorate in clinical psychology, maintained an active private practice.

In 1977, Dr. Spyer was diagnosed with progressive multiple sclerosis, a disease of the central nervous system that causes irreversible neurological damage and often, as in Dr. Spyer's case, paralysis. Ms. Windsor supported Dr. Spyer as her disability worsened, requiring first a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Dr. Spyer could operate with her one usable finger. J.A.234. Their life together became the subject of an award-winning documentary film, *Edie and Thea: A Very Long Engagement* (2009).

Eventually, Dr. Spyer's health had so deteriorated that it became clear she would not live long enough to hold their wedding ceremony in New York, as the couple had long hoped. Therefore, joined by a physician and several close friends, Dr. Spyer, then seventy-five, and Ms. Windsor, then seventy-

seven, flew to Toronto, Canada, where they were wed on May 22, 2007. J.A.236.

They spent their last two years together as a married couple. Dr. Spyer died of a heart condition on February 5, 2009. Grief-stricken, Ms. Windsor suffered a severe heart attack and received a diagnosis of stress cardiomyopathy, or "broken heart syndrome." J.A.236-37.

2. Dr. Spyer left her entire estate to Ms. Windsor, who was appointed executor. J.A.237. Federal law imposes a tax on estates the value of which exceeds a specified threshold. Under 26 U.S.C. § 2056(a), however, there is an unlimited deduction for property that passes from the decedent to the surviving spouse. Congress enacted this deduction to eliminate the "widow's tax" on surviving spouses who were "subject to estate taxes even though the property remains within the marital unit." H.R. Rep. No. 97-201, at 159 (1981); *see also* S. Rep. No. 97-144, at 127 (1981).

But for DOMA, the applicability of the estate tax's marital deduction depends solely on whether the couple was validly married under the law of their state of domicile at the time of death. *See, e.g.*, *Estate of Goldwater v. Comm'r*, 539 F.2d 878 (2d Cir. 1976). All parties to this litigation agree that if Dr. Spyer had been married to a man, the marital deduction would have applied and her estate's federal tax bill would have been $0. J.A.464-65 (admission of the Bipartisan Legal Advisory Group of House of

Representatives); J.A.486 (acknowledgment of United States).

Although New York, where the couple lived together for more than four decades and where Dr. Spyer died, recognized the validity of the couple's marriage, J.A.467, the Internal Revenue Service ("IRS"), citing DOMA, did not. J.A.251-52. Consequently, Dr. Spyer's estate owed $363,053 in federal estate tax, which Ms. Windsor paid as executor. J.A.238-39.

B. The Defense of Marriage Act

1. Until 1996, federal law contained no comprehensive definition of the words "marriage" or "spouse." While some statutes or regulations contained program-specific provisions qualifying the scope of these words, *see, e.g.*, 26 U.S.C. § 2(b)(2) (imposing additional tax-related requirements in order to be considered "married" without defining term); 8 U.S.C. § 1186a(b)(1) (imposing additional requirement that qualifying marriage not be fraudulently entered), federal law generally treated an individual as married or not based on the laws of the relevant state (usually the state of domicile).

DOMA altered this status quo by imposing a new rule applicable to all federal laws. 1 U.S.C. § 7. That definition restricts "marriages" to "only a legal union between one man and one woman as husband and wife." *Id.* And it limits the word "spouse" to only "a person of the opposite sex." *Id.* Thus, under

DOMA, the federal government regards gay couples as not married even if they are married under state law.

DOMA excludes married couples who are gay from all of the rights, privileges, and obligations that the federal government otherwise affords married couples. Ms. Windsor's situation is representative. In addition to being denied the ability to claim the estate tax deduction on behalf of her deceased spouse's estate, she has also been denied the Social Security death benefit to which surviving spouses are normally entitled. *See* Windsor Jurisdiction Br. at 1a-9a; J.A.470.

Because DOMA affects more than 1,100 provisions of federal law, it denies married gay couples and surviving spouses access to protections in many other contexts as well. DOMA, for example, prevents married couples who are gay from filing joint federal income tax returns. *See* 26 U.S.C. § 6013. It denies federal employees the ability to share their health insurance and other medical benefits with their spouses. *See* U.S. Office of Pers. Mgmt., Federal Employees Health Benefits Program Handbook, *available at* http://tinyurl.com/FedBenefitsHandbook. It impairs the rights of same-sex spouses to obtain benefits relating to intellectual property. *See* 17 U.S.C. §§ 101, 203, 304. It denies gay couples the protections of the Family and Medical Leave Act ("FMLA"). *See* 5 U.S.C. § 6382(a)(1)(C); 29 U.S.C. § 2612(a)(1)(C). It deprives the surviving member of a military couple formal notification of his

or her spouse's death in the line of duty, and blocks surviving spouses from accessing veterans benefits. *See* Br. of *Amici Curiae* Lawrence J. Korb et al.

At the same time, DOMA exempts married gay couples from federal restrictions and duties, such as the financial disclosure requirements that apply to the spouses of federal officials. *See* 5 U.S.C. App. 4 §§ 102, 103, 109; *see also* Br. of *Amici Curiae* Former Federal Election Commission Officials. DOMA also prevents the federal government from enforcing laws against third parties where those laws depend on marital status. For example, it is a federal crime to retaliate against a federal law enforcement official by threatening or injuring his or her spouse. *See* 18 U.S.C. § 115(a), (c)(2). Under DOMA, however, the federal government cannot use this law to prosecute the murderer of a gay FBI agent's spouse. *See* Br. of *Amicus Curiae* Citizens for Responsibility & Ethics in Washington.

2. In 1996, when DOMA was passed, twenty states criminalized consensual sodomy, and only 44% of Americans thought that gay and lesbian relations between consenting adults should be legal. Gay and Lesbian Rights, Gallup 2008, *available at* http://tinyurl.com/GLRightsGallup. This Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld the constitutionality of those laws, provided "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Congress accepted that invitation by

passing DOMA. As the House Report noted, "[i]f (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals . . . protect[ions] . . . under antidiscrimination laws." H.R. Rep. No. 104-664, at 31 (1996) ("House Report").

DOMA was enacted after a decision by the Hawaii Supreme Court that raised the possibility that Hawaii might permit gay couples to marry. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); House Report at 2. The House Report acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law." House Report at 3. Nonetheless, and without any congressional testimony "concern[ing] DOMA's effects on the numerous federal programs at issue," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012), the bill raced from introduction to enactment in under four months on a fast track. *See* House Report at 36 (dissenting views).[1] As one Representative noted, "[t]here is no

[1] Although Congress did not invite testimony concerning the programmatic or other implications of DOMA, it did schedule witnesses who predicted that the failure to pass DOMA would lead to marriages "between parents and their grown children" and claimed that supporting DOMA was "no more 'homophobic' than it is 'siblingphobic' to oppose incest, or 'animalphobic' to want humans to make love only to their own species." *See* Defense of Marriage Act: Hearing on H.R. 3396 before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 102, 132 (1996).

likelihood that Hawaii will complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis." *Id.* During the markup session in the House, one Representative commented with regard to Section 3 that Congress was "saying all sorts of things about this whole area of federal pensions and benefits without . . . really understanding what we're doing." Markup Session on H.R. 3396, The Defense of Marriage Act, Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 30-31 (1996).

The fiscal effects of DOMA were unknown at the time. The House rejected a proposal that would have required the General Accounting Office to analyze DOMA's budgetary effects on the federal government. 142 Cong. Rec. 17,092-93 (1996). Similarly, Senator Robert Byrd, one of the bill's sponsors and an expert on federal appropriations, asked: "How much is it going to cost . . . if the definition of 'spouse' is changed? . . . I know I do not have any reliable estimate of what such a change would mean, but then, I do not know of anyone who does." 142 Cong. Rec. 22,448 (1996).

DOMA sped through Congress in large part because of the strong views many members of Congress expressed at the time about the morality of being gay. The House Report explained that refusing federal recognition to marriages of gay couples reflects "moral disapproval of homosexuality." House Report at 16. During one day's debate, a Representative declared that homosexuality "is based

on perversion, that it is based on lust." 142 Cong. Rec. 16,972 (1996). Another Representative charged that homosexuality was "inherently destructive." Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 237 (1996). At one point, the tenor of the debate led one Representative to observe: "Words have been thrown around . . . . Today, I wrote down . . . 'promiscuity, perversion, hedonism, narcissism, . . . depravity and sin.'" 142 Cong. Rec. 17,079 (1996).

The congressional debate was also filled with predictions of dire consequences if same-sex relationships received legal recognition. One Representative cautioned that marriages between gay couples would "destroy thousands of years of tradition which has upheld our society." 142 Cong. Rec. 17,084 (1996). Another Representative exclaimed that "[w]e as legislators . . . are in the midst of [ ] chaos." 142 Cong. Rec. 17,074 (1996). Yet another Representative stated that marriages of gay couples legitimized "unnatural" behavior. 142 Cong. Rec. 17,082 (1996). Two Representatives predicted that failure to pass DOMA would lead to "discussing pedophilia," 142 Cong. Rec. 17,077 (1996), and allowing marriage between "two men and one woman, or three men, four men, or an adult and a child," 142 Cong. Rec. 16,799 (1996). And another Representative warned that "no culture that has ever embraced homosexuality has ever survived." 142 Cong. Rec. 16,802 (1996).

C. Procedural Background

1. In 2010, as executor of Dr. Spyer's estate, Ms. Windsor filed this lawsuit against the United States in the United States District Court for the Southern District of New York. She sought a refund of the $363,053 paid by the estate and a declaratory judgment that DOMA violates the equal protection guarantee of the Fifth Amendment. J.A.172-73.

After the Attorney General notified Congress and the district court that the United States would not defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") was permitted to intervene to defend DOMA.

Following full discovery, the district court granted Ms. Windsor's motion for summary judgment. Applying rational basis review, Judge Barbara S. Jones concluded that "DOMA's section 3 does not pass constitutional muster." Pet. App. 14a.

In particular, the district court could not "discern a logical relationship between DOMA" and the goal of promoting responsible procreation or child-rearing by straight couples. *Id.* at 30a. DOMA "has no direct impact on heterosexual couples at all," *id.*; nor, because marriage remains largely a creature of state law, does DOMA affect "the types of family structures in which children in this country are raised," *id.* at 19a. Citing the Court's decision in *Romer v. Evans*, 517 U.S. 620, 635 (1996), the district

court found that "here, Congress's goal is 'so far removed' from the classification, it is impossible to credit its justification." Pet. App. 19a.

As for BLAG's claim that DOMA serves a federal interest in uniformity, the district court found any "link between the means and the end" to be constitutionally "problematic" because DOMA "intrude[d] upon the states' business of regulating domestic relations." *Id.* at 20a. Historically, "states have enjoyed the latitude to 'experiment[ ] and exercis[e] their own judgment in an area to which [they] lay claim by right of history and expertise.'" *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (alteration in original)). The district court concluded that DOMA is not a legitimate means for serving any "newfound interest in promoting or maintaining consistency in the marital benefits that the federal government provides," *id.*, because by "reexamin[ing] the states' decisions concerning same-sex marriage" and "sanction[ing] some of those decisions and reject[ing] others," DOMA "does not square with our federalist system of government." *Id.*

Accordingly, the district court declared DOMA "unconstitutional as applied to Plaintiff" and "awarded judgment in the amount of $363,053.00 plus interest and costs allowed by law." *Id.* at 23a.

2. The Second Circuit affirmed. The opinion, written by Chief Judge Dennis Jacobs, held that "review of Section 3 of DOMA requires heightened

scrutiny." U.S. Supp. Br. at 15a. Considering the factors this Court has used to decide whether to treat a particular classification as suspect or quasi-suspect, the Second Circuit found that "all four factors justify heightened scrutiny" of discrimination on the basis of sexual orientation: "A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority." *Id.* at 15a-16a.

Applying heightened scrutiny, the court of appeals found that DOMA is not "substantially related to an important government interest." *Id.* at 18a. The court observed that, "[a]t argument, BLAG's counsel all but conceded" that its proffered justifications for Congress's having "enact[ed] DOMA may not withstand intermediate scrutiny." *Id.* at 24a. With respect to an ostensible federal interest in uniformity, the court of appeals observed that any "emphasis on uniformity is suspicious," because federal law has "historically deferred to state domestic relations laws, irrespective of their variations," *id.*; because DOMA arguably created "more discord and anomaly," *id.* at 25a; and because DOMA also created "inefficiencies" in determining eligibility for federal benefits, *id.* at 26a.

Moreover, the court of appeals found that given that "DOMA is so broad, touching more than a

thousand federal laws," the statute was "not substantially related to fiscal matters," and therefore could not be justified as preserving the federal fisc. *Id.* at 27a-28a.

Responding to BLAG's argument that DOMA serves a federal interest in responsible parenting by heterosexual couples, the court of appeals echoed the district court's analysis and concluded that "[i]ncentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." *Id.* at 30a. Given that other courts had been "unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and child-rearing," the court of appeals held that DOMA is not "substantially related" to that goal. *Id.*

Finally, the court of appeals recognized that some people object to marriage between same-sex couples or to homosexuality in general, often based on their religious beliefs. But secular "law (federal *or* state) is not concerned with holy matrimony." *Id.* at 31a. As the court of appeals explained, while a "state may enforce and dissolve a couple's marriage, . . . it cannot sanctify or bless it. For that, the pair must go next door." *Id.*

SUMMARY OF ARGUMENT

DOMA's discriminatory treatment of married gay couples violates Ms. Windsor's right to the equal

protection of the laws as guaranteed by the Fifth Amendment.

This Court should apply heightened scrutiny to DOMA because it discriminates on the basis of sexual orientation. Classifications based on sexual orientation implicate all of the factors to which the Court has pointed in concluding that classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry demand special scrutiny. First, lesbians and gay men have been subjected to a long history of discrimination. Second, a person's sexual orientation does not affect his or her ability to contribute to society. Third, sexual orientation is an immutable and distinguishing characteristic that is a core attribute of personhood. Fourth, lesbians and gay men lack the political power to protect themselves from invidious discrimination. BLAG hardly contests the first and second of these criteria, which are the most significant to the analysis.

Under heightened scrutiny, the federal government must at the very least show that the classification is "substantially related to the achievement of [important government objectives]." *United States v. Virginia*, 518 U.S. 515, 533 (1996). It cannot do so here.

Even under rationality review, DOMA is unconstitutional because it is not rationally related to any legitimate government interest. Although rational basis review necessarily depends on the facts of each case, the Court is particularly likely to find a

law irrational where it targets an unpopular or disfavored group for disparate treatment, imposes sweeping disabilities divorced from any specific factual context, or is so novel that it lies outside our "constitutional tradition." *Romer*, 517 U.S. at 633-34. DOMA suffers from all of these infirmities.

None of the interests that have been proffered, either at the time of enactment or as post hoc rationalizations by BLAG, are plausibly advanced by DOMA. DOMA's exclusion of married gay couples from federal marital benefits does not rationally induce straight couples to marry or have children within marriage. DOMA does not encourage uniformity in the administration of federal benefits. To the contrary, it creates disuniformity by treating legally married couples differently even within the same state of domicile. DOMA does not save the federal government money and, even if it did, that would not be a permissible rationale absent some non-arbitrary or nondiscriminatory reason for choosing to exclude married gay couples.

Finally, BLAG offers a variety of circular arguments based on dual sovereignty, tradition, and caution, each of which simply asserts an interest in treating gay couples who have married differently because, according to BLAG, gay couples have always been treated differently. Thus, even subjected only to rationality review, DOMA cannot stand.

ARGUMENT

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). This Court has long held that the Fifth Amendment imposes the same obligation on the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). All couples who are validly married under state law are similarly situated, regardless of whether those couples are straight or gay. The federal government's decision to treat them differently, based solely on their sexual orientation, triggers, and fails, heightened scrutiny. But even under rationality review, DOMA is unconstitutional.

I. BECAUSE DOMA DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION, IT TRIGGERS — AND FAILS — HEIGHTENED SCRUTINY

The Court has held that some classifications are so much "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler*, 457 U.S. at 216 n.14, that their use triggers especially searching judicial review. Over the years, the Court has applied heightened judicial scrutiny to classifications based on race, sex, illegitimacy, alienage, and national origin or ancestry. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

In reaching the conclusion that these classifications are presumptively unconstitutional, the Court has relied on a constellation of factors: (1) whether the group has suffered a history of discrimination; (2) whether the group's members differ from other individuals in a way that bears on their ability to perform or to contribute to society; (3) whether individuals cannot, or should not be expected to, change the characteristic that defines membership in the class; and (4) whether the group lacks political power because "prejudice" against the group "curtail[s] the operation of those political processes ordinarily to be relied upon." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973). No one of these factors is dispositive, but the Court's decisions demonstrate that the first two are at the core of the concept. Thus, for example, classifications based on alienage receive heightened scrutiny, despite the fact that noncitizens can be naturalized, and classifications based on sex receive heightened scrutiny even though women constitute a majority of the electorate. *See Graham*, 403 U.S. at 371-72; *Frontiero*, 411 U.S. at 686-88.

In this case, the court of appeals correctly held that discrimination on the basis of sexual orientation — which DOMA surely constitutes[2] — requires

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[2] BLAG floats the curious suggestion that DOMA "does not classify based on a married couple's sexual orientation," because it is theoretically possible that a man and a woman, each of whom is gay, would marry each other and be treated as

heightened scrutiny. U.S. Supp. Br. at 15a-16a. This Court should hold the same. As this Court has already recognized, laws burdening lesbians and gay men that were "once thought necessary and proper" may in fact "serve only to oppress," *Lawrence*, 539 U.S. at 579, and overly broad laws discriminating on the basis of sexual orientation are impermissible, *Romer*, 517 U.S. 620. Experience has shown that government discrimination against lesbians and gay men is not entitled to a presumption of constitutionality, just as this Court concluded over time that classifications based on gender and illegitimacy, which were initially subject to rational basis review, require heightened scrutiny because they are prone to abuse. *See Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

Applying heightened scrutiny, which requires that the classification be "substantially related to the achievement of [important governmental] objectives," *Virginia*, 518 U.S. at 533, DOMA cannot be sustained.

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married, while two straight men who married each other would be treated as unmarried. BLAG Br. 25 n.7. If the Court were to accept that reading of DOMA — based, though it is, on a highly implausible, unrealistic view of who marries whom — then DOMA would constitute sex discrimination, which since the time of *Frontiero*, 411 U.S. 677, has triggered heightened scrutiny. *See* Br. of *Amicus Curiae* National Women's Law Center et al.

1. Gay men and lesbians have experienced a pervasive history of discrimination. As this Court recognized in *Lawrence*, "for centuries there have been powerful voices to condemn homosexual conduct as immoral." 539 U.S. at 571. As a result, lesbians and gay men have confronted discrimination at the hands of both governmental and private actors.

Government discrimination has taken many forms. Until this Court's decision only a decade ago in *Lawrence*, states used their criminal laws to discriminate against gay men and lesbians, often making their private, consensual sexual intimacy a felony punishable by imprisonment. *See Bowers*, 478 U.S. 186. For many years, the federal government refused to employ gay people and engaged in surveillance to purge supposed "homosexuals" from the federal civil service. J.A.358-62. (For Ms. Windsor, the threat of these official government policies was quite real. *See supra* pp.2-3.) Congress defined gay people as having a "psychopathic personality" that disqualified them from admission into the country. *Boutilier v. INS*, 387 U.S. 118, 120 (1967). Schoolteachers were fired from their jobs simply for revealing their sexual orientation. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985).

BLAG points out that "homosexuals as a class have never been politically disenfranchised." BLAG Br. 57. True enough, but irrelevant. Formal disenfranchisement has never been used as a litmus test for applying heightened scrutiny. Classifications

based on illegitimacy, for example, are suspect, *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982), but citizens born to unmarried parents have never been disenfranchised. For nearly a century, women have had the right to vote, and yet this Court applies heightened scrutiny to statutes adopted long after their enfranchisement.

Private discrimination against gay people also has been and remains pervasive. Campaigns have spread false stereotypes of lesbians and gay men as child molesters and unfit parents, stereotypes that linger to this day. J.A.370-76. Lesbians and gay men continue to face the ever-present threat of anti-gay violence. J.A.385-86; BLAG Objections and Resp. to Pls.' First Req. for Admiss. at 4-5, *Windsor v. United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011), ECF No. 51 (admitting that lesbians and gay men have been and continue to be subjected to violence).[3]

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[3] The continued antipathy to gay people is reflected in the tone and content of many of the *amicus* briefs submitted in this case in support of BLAG. *Amici* refer to gay men and lesbians as "immoral," Br. of *Amici Curiae* Chaplain Alliance for Religious Liberty et al. 18; Br. of *Amicus Curiae* Westboro Baptist Church 26, "sinful," Br. of *Amici Curiae* Catholic Answers et al. 13, "radically disrupt[ive] to society," Br. of *Amicus Curiae* Manhattan Declaration 14, "abhorred and opposed," Br. of *Amicus Curiae* Foundation for Moral Law 3, and a "vector of injury and disease," Br. of *Amicus Curiae* David Boyle 3. One set of *amici* argues that overturning DOMA will "make it more socially acceptable for fathers to leave their families." Br. of *Amici Curiae* Robert P. George et al. 22. Another compares the

BLAG suggests that discrimination against lesbians and gay men is a relatively short-lived phenomenon that began in the twentieth century. BLAG Br. 57. Not so. Disapproval, stigma, and sanctions against homosexual conduct have existed in America since its founding, and discrimination against gay people has existed since people started to identify as gay in the late 1800s. J.A.345-48. Besides, "ninety years of discrimination" is enough; "whether such discrimination existed in Babylon is neither here nor there." U.S. Supp. Br. at 17a.

2. In deciding that heightened scrutiny should apply to a particular classification, a second factor on which this Court has relied is whether the classification is based on a characteristic that "frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686; *accord Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). This makes sense: if a characteristic does not predict ability to participate in civil society, the courts should be skeptical of governmental reliance on it as a basis to categorize people.

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recognition of Ms. Windsor's marriage by New York to the "Fugitive Slave Act . . . that forced residents of New York . . . to . . . assist their slave-state neighbors to return slaves who had escaped back to slavery." Br. of *Amicus Curiae* Dovid Z. Schwartz 20. Still another analogizes "same-sex marriage advocates" to the "pro-slavery advocates of the 1850's." Br. of *Amicus Curiae* Eagle Forum 13.

Sexual orientation has nothing to do with "impairment in judgment, stability, reliability, or general social or vocational capabilities." J.A.267-68 (quoting Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights*, 131 Am. J. Psychiatry No. 4, 497 (1974)). Despite pervasive discrimination, lesbians and gay men have served with great distinction in virtually every facet of American society, as artists, athletes, academics, soldiers, scientists, lawyers, judges, psychologists like Dr. Spyer, and computer programmers like Ms. Windsor.

A person's sexual orientation is unlike "such nonsuspect statuses as intelligence or physical disability," *Frontiero*, 411 U.S. at 686, which the Court has noted may affect a person's capabilities, or a person's age, which is generally associated with a "decline[ ]" in "physical ability," *Mass. Bd. of. Ret. v. Murgia*, 427 U.S. 307, 315 (1976). In other words, sexual orientation has no bearing on a person's ability to "cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442.

BLAG does not contest the equal ability of gay people to function in society. Rather, BLAG improperly fastens instead on the fact that gay couples "engage in relationships that do not produce unplanned and unintended offspring." BLAG Br. 54.

But this "distinguishing characteristic," *id.*, has no bearing on a gay person's "ability to perform or contribute to society." As this Court explained in

Cleburne, in deciding whether heightened scrutiny should apply, courts "should look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics of the case before us." 473 U.S. at 446 (emphasis added). BLAG fails to explain how gay people's immunity from unintended pregnancies bears on their ability, for example, to "cope with" the death of a loved one, "function in" a surgical residency program, "perform" in the armed forces, "participate" on a board of directors, or "contribute to" the financial success of a company. *Cleburne*, 473 U.S at 442; *Frontiero*, 411 U.S. at 686; *Lucas*, 427 U.S. at 505. Differences in forms of sexual intimacy, whatever their procreative implications, are simply not "characteristic[s] that the government may legitimately take into account *in a wide range of decisions*." *Cleburne*, 473 U.S. at 446 (emphasis added). At most, BLAG's argument amounts to an (unsuccessful) attempt at a defense of DOMA on the merits; it is irrelevant to whether sexual orientation classifications get heightened scrutiny.

Indeed, under BLAG's misformulation, discrimination against women would never have received heightened scrutiny either. This Court has repeatedly recognized that certain "[p]hysical differences between men and women" remain "enduring," and in some respects "'[t]he two sexes are not fungible.'" *Virginia*, 518 U.S. at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). Those differences may arguably justify some differences in treatment. But the irrelevance of those

differences to a wide range of government decisions explains why sex classifications trigger heightened scrutiny.

To the extent that BLAG or its *amici* are arguing that gay people are distinctively impaired in their ability to contribute to society generally because they are not always biologically related to their children, that is wrong. Thousands of straight couples are not parents at all; still other thousands of straight couples are not the biological parents of their children because they adopted their children, because they are stepparents, or because they used assisted reproductive technologies that rely on donor eggs or sperm. Yet BLAG does not dare suggest that those individuals are less able to contribute to society.[4]

3. Another factor this Court sometimes considers when determining whether a classification merits heightened review is whether there are "obvious, immutable, or distinguishing characteristics that define" the group at issue, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and that members of the group should not be required to change.[5]

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[4] If gay people's general immunity from unintended pregnancies could ever be relevant to government decision-making, it could, at most, only be with respect to a statute intended to address unintended pregnancies.

[5] The Court's cases establish that a defining characteristic need not be absolutely unchangeable to form the basis of a suspect

Sexual orientation is such a trait. BLAG's argument that sexual orientation is not a defining characteristic because it is somehow "fluid" fails as a matter of fact and law.[6] Mainstream scientific opinion establishes that most gay people cannot change their orientation at will. *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), *available at* http://tinyurl.com/APAReportTherapy. "Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation."

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classification. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (aliens may apply for citizenship); *Lucas*, 427 U.S. at 506 n.12 (illegitimate children may be legitimated); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (suggesting that discrimination against a particular religion may be subjected to heightened scrutiny under the Equal Protection Clause as well as the First Amendment even though people can change religion).

[6] In its opposition to Ms. Windsor's motion for summary judgment below, BLAG cited the work of Professor Lisa Diamond, a leading expert on women's sexuality. BLAG Opp'n to Windsor Mot. for Summ. J. at 10, 11, *Windsor v. United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011), ECF No. 50. In a subsequent affidavit, Professor Diamond responded definitively to BLAG's contentions as to the "fluidity" of sexual orientation: "If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes." J.A.520.

Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring). But even if sexual orientation were "fluid" for some people, it is fixed for most. It is for Ms. Windsor. Contrary to suggesting the "fluidity" of her sexual orientation, her brief, unsuccessful marriage to Saul Windsor demonstrates that being gay was not a matter of "choice," but is a fundamental aspect of her identity. J.A.494-96.

Moreover, as lower courts to consider the issue since *Lawrence* have recognized, "[w]here there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity . . . an individual should not be required to abandon it. To hold otherwise would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity." *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 329 (D. Conn. 2012); *see also Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

BLAG's argument ignores a central reason why this factor matters. As the Second Circuit observed, the Court examines this factor in part to determine whether the characteristic may serve as "an obvious badge" that makes a group particularly vulnerable to discrimination. *See Lucas*, 427 U.S. at 506; *see also Frontiero*, 411 U.S. at 686 (heightened scrutiny appropriate because of "the high visibility of the sex characteristic"). Sexual orientation "is necessarily disclosed when two persons of the same sex apply for a marriage license . . . or when a surviving spouse of a same-sex marriage seeks the

benefit of the spousal deduction (as Windsor does here)." U.S. Supp. Br. at 20a.

BLAG argues that discrimination against gay people should not receive heightened review because homosexuality is, in BLAG's view, defined solely by "a propensity to engage in certain conduct." BLAG Br. 55. That argument is demeaning to people like Ms. Windsor, for whom a lesbian or gay sexual orientation is a fundamental aspect of their identity, and in any event has already been rejected by this Court. In *Lawrence* and again in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), the Court rejected the false distinction between proscribing conduct and targeting gay people for disparate treatment. Just as a "tax on wearing yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), so too, an estate tax levied on married gay couples, but not on married straight couples, is a tax on gay people.

4. Although gay people have made significant strides in pursuing equal treatment under the law, it remains true that lesbians and gay men are clearly a numerical minority and frequently lack the political power to defend themselves against the majority. J.A.397-435. The fact that gay couples are the *only* legally married couples in the entire nation who cannot benefit from the wide range of federal benefits provided to all other legally married couples is itself powerful evidence of gay people's ongoing political vulnerability.

The political power of gay men and lesbians today stands in sharp contrast to the political efficacy of women in 1973, when the Court concluded in *Frontiero v. Richardson* that sex-based classifications required heightened scrutiny. 411 U.S. at 688. Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero*, 411 U.S. at 687-88. There is still no federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and 29 states have no such protections either. J.A.405, 408-09. As political power has been defined by the Court for purposes of heightened scrutiny analysis, lesbians and gay men do not have it.

Indeed, the democratic process has been used to thwart protections for lesbians and gay men more frequently and with more success than against any other group in recent history. Gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997). Political scientist Gary Segura provided expert testimony below that "[e]vidence from the past two decades . . . has demonstrated that gay men and lesbians are especially vulnerable in the context of direct democracy." J.A.409; *see also* J.A.410-12 (expert testimony detailing initiatives); *Romer*, 517 U.S. at 623-24; *Perry v. Brown*, 671 F.3d 1052, 1063-64 (9th Cir. 2012) (describing Proposition 8); *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.); Br. of *Amici Curiae* Political Science Professors. This repeated use of

majoritarian "direct democracy" to disadvantage a single minority group is extraordinary in our nation's history.

Not only do gay people continue to face repeated attempts to deprive them of civil rights, but their efforts to obtain "protections taken for granted by most people," *Romer*, 517 U.S. at 631, have been largely unsuccessful. As noted above, there is no federal civil rights protection for sexual orientation. Starting in 1977, legislation banning sexual orientation discrimination in employment and housing was introduced in every Congress over two decades but never made any progress toward enactment. More recently, advocates have attempted to achieve more modest protections by introducing an employment-only version in nine of the last ten Congresses. Yet, despite the fact that nearly 90% of Americans express support for such protections for lesbians and gay men, even that legislation has passed only once in the House and never in the Senate. *See Gay and Lesbian Rights*, Gallup 2008, *available at* http://tinyurl.com/GLRightsGallup; Br. of *Amici Curiae* Members of the U.S. House of Representatives and U.S. Senators.

That there surely have been political gains for lesbians and gay men in recent years does not alter this analysis. J.A.399-400, 407-08. "The question is not whether homosexuals have achieved political successes over the years . . . . The question is whether they have the strength to politically protect themselves from wrongful discrimination." U.S.

Supp. Br. at 21a. BLAG's contention that "gays and lesbians are one of the most influential, best-connected, best-funded" groups, BLAG Br. 53, contains unfortunate echoes of stereotypes about other minority groups.[7]

5. If this Court applies heightened scrutiny, DOMA must fail. As the Second Circuit concluded, DOMA is not substantially related to an important government purpose.

At oral argument before the court of appeals, "BLAG's counsel all but conceded" that its proffered justifications for DOMA could "not withstand intermediate scrutiny." U.S. Supp. Br. at 24a. Before this Court, BLAG relegates its entire argument on whether DOMA can survive heightened scrutiny to a single eight-line footnote. BLAG Br. 57-58 n.10. But when heightened scrutiny applies, the government must proffer "a tenable justification" describing "*actual* state purposes, not rationalizations for actions in fact differently grounded." *Virginia*, 518 U.S. at 535-36 (emphasis added). As Ms. Windsor explains in Part II of this brief, none of the ostensible federal interests Congress articulated in 1996 that BLAG identifies here satisfies even rationality review. *A fortiori*, they cannot withstand heightened scrutiny. As for the post hoc rationalizations for DOMA BLAG asserts in

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[7] Under BLAG's articulation of this factor, it is not clear whether even laws classifying on the basis of race or gender would still be entitled to receive heightened scrutiny today.

this case, they not only fail rationality review, but cannot properly be taken into account in the heightened scrutiny analysis at all. *Virginia*, 518 U.S. at 535-36.

II. DOMA FAILS RATIONAL BASIS REVIEW

DOMA is also unconstitutional under rational basis review as the Court has applied that test. Particularly when viewed in the context of who is disadvantaged by the law, its tremendous breadth, and its impact on the relationship between federal and state law, DOMA serves no legitimate federal interest.

A. DOMA HAS CHARACTERISTICS THAT THIS COURT HAS IDENTIFIED IN PRIOR CASES AS EVIDENCE OF IRRATIONALITY

Equal protection principles demand that a statutory classification "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. This requirement protects "the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough Twp. v. Cromwell*, 326 U.S. 620, 623 (1946); *see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2084-85 (2012) (Roberts, C.J., dissenting). Thus "even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the

classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Because this challenge is brought to a federal statute, the government interest must be a federal one.

1. Although rational basis review is generally deferential and necessarily depends on the facts and circumstances of each case, it is not "toothless." *Lucas*, 427 U.S. at 510. This Court's decisions show that laws fail rationality review in a variety of contexts relevant here. *See, e.g.*, Br. of *Amici Curiae* Gay & Lesbian Advocates & Defenders et al.; Br. of *Amicus Curiae* The Institute for Justice.

First, laws fail rationality review where the actual purpose of the law is illegitimate. A statute cannot be drawn simply "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). When a classification has been chosen "'because of,' [and] not merely 'in spite of,' its adverse effects upon an identifiable group," a reviewing court must ask whether the statute serves some purpose beyond a mere desire to harm the targeted group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Otherwise, as this Court has warned, "*any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). While sometimes using the term "animus," *see, e.g.*, *Romer*, 517 U.S. at 632, the Court's

disapproval extends to laws based on irrational prejudice, unease, "negative attitudes," "fear," "bias," or the "bare . . . desire to harm a politically unpopular group," as well as laws reflecting stereotypical thinking about people who appear to be different or who have been historically disfavored. *See Cleburne*, 473 U.S. at 448, 450; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Moreno*, 413 U.S. at 534.

Second, a law can fail rationality review when it "targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest." Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 94 (1997); *Cf. City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (while Congress must have "wide latitude," there "must [still] be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635.

Third, laws that do not fit "within our constitutional tradition" require "careful consideration to determine whether they are obnoxious to the constitution[ ]." *Romer*, 517 U.S at 633. For example, statutes provoke suspicion when they upset the relationship between the federal government and the states in novel or unusual ways. *See, e.g., United States v. Morrison*, 529 U.S. 598,

615-16 (2000) (expressing concern for a federal law's intrusion into "family law" including "marriage, divorce, and childrearing"); *United States v. Lopez*, 514 U.S. 549, 564 (1995). Sometimes "the most telling indication of [a] severe constitutional problem" will be "the lack of historical precedent" for Congress's intervention. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (internal citation omitted).

2. DOMA raises all three of these red flags. First, DOMA was enacted out of "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). The Act was rushed through Congress at a time when there was no realistic prospect of gay couples getting married in the near future anywhere, even in Hawaii. The legislative history is replete with language of panic and fear, as well as stereotypical thinking about the purported dangers of gay people or their relationships. Congress gave no consideration to the ways DOMA would impact the thousands of federal programs implicated. It made no attempt to assess DOMA's impact on the federal budget. It expended no effort to address the obvious irrational consequences of DOMA's sweeping applicability, such as DOMA's exclusion of married gay couples from federal financial disclosure requirements or conflict of interest rules. The very language of its title indicates that DOMA was

enacted to *defend* or "guard against" people who appear to be different.

Second, DOMA's scope is uniquely broad. By amending the Dictionary Act, rather than any specific federal program, DOMA categorically disqualifies gay people who are married from all federal rights, privileges, and obligations of marriage, creating a sweeping exclusion that is disconnected from any specific rational justification. DOMA is arguably broader in scope even than Colorado's Amendment 2 in *Romer*, since, in contrast to an antidiscrimination statute, it affects more than a thousand federal laws and countless regulations and administrative decisions governing nearly every aspect of individuals' interactions with the federal government. U.S. Supp. Br. at 27a-28a.

Third, DOMA represents an abrupt departure from the traditional relationship between the federal government and the states. Prior to DOMA, "Congress ha[d] never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Massachusetts*, 682 F.3d at 1, 12. "DOMA was therefore an unprecedented intrusion 'into an area of traditional state regulation.'" U.S. Supp. Br. at 25a (quoting *Massachusetts*, 682 F.3d at 13). State marriage laws have long varied on issues such as recognition of common law marriage, the age of consent to marry, the degree of consanguinity permitted, and divorce. J.A.291-304. Despite these differences, the federal government "fully embraced these variations and

inconsistencies in state marriage laws," even though many involved "similarly politically-charged, protracted, and fluid debates at the state level." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391-92 (D. Mass. 2010), *aff'd sub nom Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

BLAG's assertion that Congress has "a long history . . . [of] supplying its own definitions of marriage for various federal purposes" is misleading. BLAG Br. 4. To be sure, Congress has adopted some narrow statutes distinguishing among marriages, but none purported to disregard an entire category of state-sanctioned marriages. Rather, as the First Circuit has explained, those statutes were all tailored "to the particular [federal] program or personnel involved." *Massachusetts*, 682 F.3d at 12; *see also* Br. of *Amici Curiae* Family Law Professors. DOMA's categorical exclusion of the marriages of gay couples is thus entirely different.

3. The characterization of DOMA as a typical "line-drawing" statute is equally misguided. BLAG Br. 29 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 316 (1993)). At the time Congress acted, there was already a line in place: the federal government generally recognized all marriages that were valid under state law. More specifically, when it came to the federal estate tax — the program at issue in this case — the preexisting line was whether the decedent was validly married under the law of the state of domicile at the time of death. DOMA therefore filled

no gap in the existing legal regime. Moreover, none of the line-drawing cases that BLAG cites involve anything like DOMA's distinction on the basis of sexual orientation between two classes of couples who are legally married under state law. Indeed, even in the "line-drawing" cases relied upon by BLAG, the Court insisted on a constitutionally permissible rationale for the line drawn.[8]

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[8] *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 317-20 (statutory distinction between cable television facilities that served separately owned and managed buildings and those that served buildings under common ownership was justified by regulatory efficiency, avoiding monopoly, and differences in cable subscriber influence); *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (federal disability benefits scheme that paid stipends to Medicaid recipients in public mental health facilities, but not to residents who did not receive Medicaid, was based on a permissible belief that Medicaid recipients were needier); *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (provision that permitted elderly resident citizens and some legal aliens to enroll in Medicare, but denied eligibility to aliens who had not resided in the United States for five years, was rationally based on differences in individuals' connection to the United States); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (zoning ordinance limiting occupancy of one-family residences could reasonably distinguish between families and groups of college students because of the different likelihood of occupants' increasing the amount of traffic and noise).

B. DOMA IS NOT RATIONALLY RELATED TO THE ACHIEVEMENT OF ANY LEGITIMATE FEDERAL INTEREST

The interests that BLAG offers or that can be gleaned from the legislative history fall into three general categories: (1) procreation-related interests, (2) uniformity/conservation of resources interests, and (3) interests in dual sovereignty, tradition, and caution. None provides a rational basis for DOMA.

1. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Procreation

BLAG's most developed (and its only particularized) justification for DOMA's exclusion of married gay couples is that DOMA somehow channels straight couples who may have unplanned pregnancies into marriage, encourages biological parents to raise children together, and provides children with a male and female role model. Denying federal marital obligations and protections to married gay couples is rational, BLAG asserts, because gay couples and straight couples, "whatever their other similarities, are not similarly situated with regard to their propensity to result in unplanned pregnancies." BLAG Br. 47.

That BLAG advances only this distinction between gay and straight married couples speaks volumes about the lack of any rational basis for

DOMA's comprehensive discrimination against married gay couples. This one difference cannot explain the federal government's decision to impose a sweeping disability on married gay couples that excludes them from countless federal programs and protections, and that only harms their children. Because this distinction is based on the one feature that distinguishes married gay couples from married straight couples, what BLAG is really arguing is that it is acceptable to discriminate against married gay couples simply because they are gay.[9]

1. DOMA cannot be justified simply by pointing out that Congress has a legitimate interest in the well-being of children. Rather, excluding married gay couples from all federal benefits and responsibilities must bear some logical connection to the well-being of children. It does not.

First, as nearly every court to have considered the question has noted — and as even BLAG concedes, BLAG Br. 32, 43 — DOMA does not prevent gay couples from marrying under state law or change state adoption or parenting laws. *See, e.g.*, *Massachusetts*, 682 F.3d at 14-15; *Pedersen*, 881 F. Supp. 2d at 340-41; *Dragovich v. U.S. Dep't of*

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[9] In addition, BLAG cannot justify a classification by pointing to biological differences between gay and straight couples — which ultimately come down to biological differences between men and women — unless those differences are sufficiently material that they satisfy heightened scrutiny. *See, e.g.*, *Virginia*, 518 U.S. at 532-34.

Treasury, 872 F. Supp. 2d 944, 959 (N.D. Cal. 2012). There is no reason to think that DOMA has the effect of preventing gay couples from deciding to raise children, and any such purpose would be illegitimate because all individuals possess a fundamental right to decide "whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Even less does DOMA influence the procreative behavior of *heterosexuals*. Denying federal protections to married gay couples will not affect whether straight couples marry or have children who are biologically related to both parents. Whatever benefits or protections straight couples receive from the federal government do not come from DOMA. Those benefits or protections come from various independent programmatic statutes (like the Internal Revenue Code, the Social Security Act, or the FMLA). All DOMA does is bar married gay couples from also gaining access to those programs. As the First Circuit recognized, "[t]his is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citations omitted); *see also* U.S. Supp. Br. at 29a ("All [of BLAG's procreation-related] rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way."). A total lack of connection violates equal protection at any level of

review. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 621-22 (1985).

BLAG acknowledges this essential disconnect, but claims nevertheless that federal recognition "can still [a]ffect such institutions at the margin." BLAG Br. 43. Significantly, BLAG does not, and cannot, suggest that fewer straight couples would get married without DOMA. The best that BLAG and its *amici* can come up with is an argument that recognizing the marriages of couples who cannot "inherently" procreate might suggest to straight couples that marriage is about things like love and commitment between two adults and not simply and solely about having children. BLAG Br. 10, 45. Under this argument, federal recognition of gay couples' marriages would somehow make straight couples less likely to marry before having children. *See, e.g.*, Br. of *Amicus Curiae* Helen M. Alvaré 34; Br. of *Amici Curiae* Robert P. George et al. 15-20.

This far-fetched theory has nothing to do with DOMA. It is irrational, fantastical thinking to believe that the federal government's decision to treat married gay couples as unmarried under federal law will encourage straight couples to marry before having children. *Cleburne*, 473 U.S. at 446 (government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Put more concretely, no straight couple would decide to marry or have children simply because Ms. Windsor had to pay $363,053 in federal estate taxes.

Conversely, no straight couple would call off their wedding if Ms. Windsor receives a tax refund.[10] *Cf. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) (pointing out the illogic of thinking that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation").

2. Further, DOMA cannot logically be explained by the fact that gay couples do not have unplanned pregnancies. It is not enough for BLAG simply to identify some difference between gay and

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[10] Relying on *Johnson v. Robison*, 415 U.S. 361 (1974), BLAG argues that DOMA is rational "because the institution of marriage arose in large measure in response to a unique social difficulty that opposite-sex couples, but not same-sex couples, posed." BLAG Br. 49. *Johnson* involved a statute that created a benefit for veterans who had served in the military, but denied the benefit to those who were conscientious objectors. *Johnson*, 415 U.S. at 362-63. This Court upheld the statute because granting benefits only to those who served in the military could help compensate for the special hardships and risks of active military service. In so holding, the Court explained that, if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Id.* at 383. But DOMA does not "include" married straight couples or grant a single benefit to them; rather, it excludes married gay couples from all federal programs. *See* U.S. Supp. Br. at 27a (DOMA "functionally *eliminated* longstanding federal recognition of all marriages that are properly ratified under state law — and the federal benefits (and detriments) that come with that recognition." (emphasis added)).

straight couples; it must articulate how that difference "rationally explains the different treatment." *Eisenstadt*, 405 U.S. at 447; *see also Romer*, 517 U.S. at 631-33. Any procreative rationale for DOMA is both too narrow and too broad. It is too narrow in the sense that federal law grants recognition to many marriages that cannot result in children. Older married couples, infertile married couples, and married couples who choose not to have children are all given federal recognition. *Cf. Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("[T]he sterile and the elderly are allowed to marry.").

And any procreative rationale for DOMA is too broad in that DOMA touches upon a vast array of programs that have nothing to do with children. While Congress can and does rationally choose to give some benefits and protections to people who have children rather than those who do not (e.g., the child tax credit, adoption tax credit), a huge number of the benefits and responsibilities affected by DOMA — for example, federal employee pensions, criminalization of retaliation against a federal official's spouse, and conflict of interest statutes — have no relationship to whether a married person or couple have children. Congress cannot justify treating married gay couples as unmarried for all federal purposes on the ground that their unions cannot result in inadvertent pregnancies. *Cleburne*, 473 U.S. at 446.

Similarly, it is impossible to credit BLAG's suggestion that the purpose of DOMA was to "offer[ ]

special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children." BLAG Br. 48. Federal policy does not favor biological over non-biological (including adopted) children. *See, e.g.*, 2 Am. Jur. 2d *Adoption* § 172 (2013) ("[N]o legal distinction is drawn between adopted children and natural born children . . . the rights and status of an adopted child are the same as those of a natural child."); *see also* Br. of *Amici Curiae* Professors of Family and Child Welfare Law. The overwhelming majority of families in which one or both parents are not biologically related to the child involve heterosexual couples. This is true because of adoption (stepparent and otherwise), as well as the increasing use of assisted reproductive technologies that rely on donor sperm or eggs. If federal policies designed to support children do not distinguish between biological and non-biological children, a desire to encourage biological parenthood cannot explain DOMA even as to the federal laws related to children, let alone the vast majority of DOMA-affected laws that are unrelated to children. *Cf. Eisenstadt*, 405 U.S. at 447-50 (holding that a justification cannot be a rational basis where it "has at best a marginal relation to the proffered objective"). Moreover, a federal statute intended to favor biological over non-biological children would itself raise significant equal protection issues. *See, e.g.*, *Jimenez*, 417 U.S. at 631-32.[11]

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[11] This Court has held that "[p]enalizing" children "is an ineffectual — as well as unjust — way of deterring the parent."

3. Because there is no logical connection between what DOMA does and whether any couples, straight or gay, married or unmarried, have children, there is no need for this Court to engage with the discredited assertions of BLAG and its *amici* that the children of married gay parents do not fare as well as the children of married straight parents. A few points are nevertheless worthy of mention.

DOMA deprives children with married gay parents of tangible protections and stigmatizes their families by branding them unequal. *See* Br. of *Amici Curiae* Scholars of the Constitutional Rights of Children. Thus, DOMA itself harms children.

Moreover, when it passed DOMA, Congress had before it no evidence on the suitability of gay or straight couples as parents, and it made no factual findings that gay couples are inferior parents. To the contrary, the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows that children raised by gay parents are just as well adjusted as those raised by straight parents. J.A.327-34. It is also well established that men and women both have the capacity to be good parents, and that having one parent of each gender does not improve a child's development. J.A.324-26; *see also* Br. of *Amici Curiae* the American Psychological

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Weber, 406 U.S. at 175. Denying protections to married gay parents with children in order to encourage either straight couples to marry before having children, or gay couples not to have children, is "illogical" and "unjust." *Id.*

Association et al.[12] BLAG does not dispute this scientific consensus, although its *amici* argue that one recent study has now created a scientific debate about the outcomes for children raised by gay and lesbian couples. That study, however, does nothing to disturb the longstanding consensus that children raised by committed gay couples are as well adjusted as children raised by committed straight couples.[13]

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[12] In multiple cases where evidence about parenting by same-sex couples was put to trial, the lower courts have agreed. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (Mem.); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *5-6, 8 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).

[13] That study, Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same Sex Relationships?*, 41 Social Sci. Res. 752-70 (2012), did not compare children raised in stable gay households with children raised in stable straight households. Br. of *Amicus Curiae* the American Sociological Association. The author himself recognized that "[c]hild outcomes in stable, 'planned' [gay] families and those that are the product of previous heterosexual unions [like most of those in his study] are quite likely distinctive, as previous studies' conclusions would suggest." *Id.* at 765. BLAG cites one other report for the proposition that biological parents are better for their children than other parents. *See* Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child

2. DOMA Is Not Rationally Related To Any Legitimate Federal Interest In Uniformity Or Conserving Federal Resources

Another set of purported justifications for DOMA focuses on the administration of federal programs that turn on marital status. BLAG argues that DOMA serves a federal interest in the uniform treatment of federal benefits and avoids the "fiscal impact of expanding the class of federal beneficiaries." BLAG Br. 21; *see also id.* at 33. On closer inspection, neither of these justifications can sustain DOMA. First, DOMA does not actually accomplish them. Second, as justifications, "uniformity" and "cost savings" are similar in that, while beneficial in the abstract, they both fail to explain the classification chosen — that is, why Congress was justified in promoting either "cost savings" or "uniformity" by sacrificing the interests of married gay couples. *See Armour*, 132 S. Ct. at 2084-85 (Roberts, C.J., dissenting).

1. DOMA was not, of course, necessary to achieve uniformity. Absent DOMA, all *married* couples (whether gay or straight) would uniformly

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Trends Research Brief 1-2 (2002), http://tinyurl.com/ChildTrendsFamily. The authors of that report have stated "no conclusions can be drawn from this research about the well-being of children raised by same-sex parents or adoptive parents." *Id.* at 1.

have been eligible for the benefits and responsible for the obligations imposed by federal law. Ms. Windsor would have been treated the same as any other widow in New York.

What DOMA does is to impose a disuniformity between married straight couples and married gay couples, while imposing a uniformity between married gay couples and unmarried gay couples. To argue, as BLAG does, that this ensures "that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside," BLAG Br. 33, is really to say that married gay couples aren't genuinely married at all but instead are "similarly situated" to unmarried people. That ignores reality. There are over 130,000 legally married same-sex couples in the United States, each subject to all of the legal obligations that come with marriage within each state. *See Census Releases Data on Same-Sex Couples*, The Williams Institute (Sept. 27, 2011), *available at* http://tinyurl.com/WilliamsCensus. DOMA's choice can therefore only be explained by an illegitimate desire to treat married gay couples differently simply because they are gay. *Moreno*, 413 U.S. at 534.

BLAG's subsidiary arguments fare no better. BLAG suggests that the differential treatment of married gay couples for all federal programs and statutes is justified because Congress has "a distinct interest in making a federal employee indifferent between working [or perhaps more accurately, living] in Maryland or Virginia." BLAG Br. 43. But state

law, not DOMA, will be the driving force in that situation. A federal employee who is asked to move from a state that recognizes his or her marriage to one that does not faces a significant disincentive in any event. Piling a federal disability on top of a state-law inequality advances no independent or legitimate federal interest. In any case, it is implausible to think that DOMA — which sweeps across all federal statutes and programs, not just those related to federal employees — was enacted for that purpose or serves that goal.

Furthermore, the problem that BLAG posits Congress was trying to fix — married couples losing or gaining federal benefits simply by moving to a different state — existed before gay couples began to marry and continues to exist today for married straight couples whose status is recognized in one state, but not in another. This problem confronts, among others, couples in common law marriages and couples who are first cousins. *See* Social Security Ruling ("SSR") 63-20, 1963 WL 3518 (1963) (first cousins); *see also* 42 U.S.C. § 416(h)(1)(A)(i) (marriage for Social Security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122 (2009) (same for FMLA); 38 C.F.R. § 3.1(j) (marriage for veterans benefits based on place of residence at time of marriage or when benefits accrued). *See* Br. of *Amici Curiae* Former Cabinet Secretaries et al.

The most striking example of disuniformity in modern times involves divorces. After some states

adopted no-fault divorce regimes, the federal government repeatedly confronted the question of whether a remarriage following an out-of-state divorce was valid. *See, e.g.*, *Estate of Goldwater*, 539 F.2d 878 (2d Cir. 1976) (marital estate tax); *Estate of Spalding*, 537 F.2d 666 (2d Cir. 1976) (same). When confronted with differing state and foreign rules for divorce, Congress declined to adopt a uniform federal definition of divorce because, as the Ninth Circuit observed, "[t]o provide a federal tax law of marriage would create greater confusion," given that marriage "is peculiarly a creature of state law." *Lee v. Comm'r*, 550 F.2d 1201 (9th Cir. 1977). Instead, the Government adopted choice-of-law rules that advanced the goals of particular federal programs; those rules typically deferred to the law of the state of domicile. And it did so despite profound disagreement among the states over whether and when couples should be allowed to terminate their marriages, litigation as to the validity of those divorces, and social disapproval of some of the more lenient standards for divorce. *See, e.g.*, *Estate of Spalding*, 537 F.2d at 667 (describing Nevada in 1968 as a "then-regarded renegade state whose procedural practices, re divorce, caused lifted eyebrows in more Victorian jurisdictions"). Even if Congress can regulate "one step at a time," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), any claim that Congress was really pursuing uniformity, rather than discriminating against married gay couples, is undermined by its acceptance of far greater variation in marriage recognition, particularly with respect to

divorce. *Cleburne*, 473 U.S. at 448; *Reed*, 404 U.S. at 76-77.

BLAG's suggestion that a uniform federal rule for treatment of married gay couples was needed to "eas[e] administrative burdens," BLAG Br. 34, is also impossible to reconcile with the straightforward state law about who is married and who is not. The federal government can determine whether gay couples are married the same way it determines whether straight couples are married: by relying on state law. This is a far simpler question than many others dealt with by federal agencies every day.[14] While BLAG asserts that Ms. Windsor's claim for an estate tax refund "illustrates" the "complicated" issue that DOMA was intended to solve, BLAG Br. 34, only BLAG appears to harbor any confusion about whether Ms. Windsor and Dr. Spyer were married.[15] As the courts below observed, DOMA creates complexity; it does not combat it. *See, e.g.*, U.S. Supp. Br. at 26a ("The

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[14] In addition to variations in marriage eligibility from state to state, the federal government routinely incorporates state-law definitions of other family law terms such as "child" into federal law, *cf. Astrue v. Caputo*, 132 S. Ct. 2021, 2031 (2012), and deals with far greater complexities in administering benefits programs that use a functional definition of family or "household" (many of which actually recognize same-sex couples for purposes of determining income eligibility). *See* Br. of *Amici Curiae* Former Cabinet Secretaries et al.

[15] As discussed in footnote 1 of the jurisdiction brief filed on behalf of Ms. Windsor, New York unquestionably recognized Ms. Windsor's marriage. Windsor Jurisdiction Br. at 2 n.1.

uniformity rationale is further undermined by inefficiencies that [DOMA] creates."); Pet. App. at 19a-20a. And in any event, this Court has repeatedly declared that "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *see also Frontiero*, 411 U.S. at 690.

2. Nor can DOMA be justified by a congressional desire to avoid the "fiscal impact of expanding the class of federal beneficiaries." BLAG Br. 21. An interest in conserving resources, standing alone, "can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. Congress cannot "pursue the objective of saving money by discriminating against individuals or groups." *Lyng v. Int'l Union*, 485 U.S. 360, 373 (1988).

To the contrary, like uniformity, saving money provides a legitimate, independent justification for a classification only where there is some reason to believe that the group being excluded is different in some relevant way from the group receiving the benefit. *See Graham*, 403 U.S. at 375 ("The saving of welfare costs cannot justify an otherwise invidious classification." (citation omitted)). If BLAG's view were correct, the government could also decide to save money by denying benefits to couples who married on odd days of the month because doing so would save money. But that law would clearly be struck down as irrational. Here too, it is irrational to save money by denying benefits to married gay

couples that the government confers on married straight couples. It is thus not surprising that numerous lower courts have rejected this justification as failing to explain why Congress sought to save money by discriminating against gay people. *See, e.g.*, *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009); *Dragovich*, 872 F. Supp. 2d at 957; *Golinski*, 824 F. Supp. 2d at 994-95; *Gill*, 699 F. Supp. 2d at 390.

In any event, experience has disproved BLAG's suggestion that DOMA conserves federal resources. BLAG Br. 37-41. When Congress enacted DOMA, it lacked any information about the fiscal consequences of this sweeping change in federal law. *See supra* p. 9. Nor, as the co-sponsor of the bill in the Senate admitted at the time, did Congress even attempt to arrive at a "reliable estimate." *See id.* Thus, any attempt to justify DOMA as a cost-saving measure cannot survive constitutional scrutiny. *See Heller v. Doe*, 509 U.S. 312, 321 (1993); *Carolene Prods. Co.*, 304 U.S. at 153 (a showing that presumed facts do not exist is relevant to the constitutionality of a statute).

More recently, the Congressional Budget Office has concluded that federal recognition of married gay couples would actually result in a net benefit to the federal treasury. *See* Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (June 21, 2004), *available at* http://tinyurl.com/CBO2004. BLAG's response is to say that unlike straight couples, gay couples might

decide whether or not to marry solely on the basis of financial considerations. BLAG Br. 40 n.8. But gay couples like Ms. Windsor and Dr. Spyer marry for the same reasons straight couples do — to express their love and commitment to each other. To suggest otherwise, without a shred of empirical support, insults gay people and rests on impermissible stereotypes that render a classification unconstitutional. *See Cleburne*, 473 U.S. at 453 n.6.

3. DOMA Fails To Further Any Legitimate Federal Interest In Dual Sovereignty, Tradition, Or Caution

The remaining interests put forward by BLAG today and by Congress in 1996 focus on values related to federalism, tradition, and caution. None of these interests is furthered in a rational way by DOMA.

1. BLAG asserts that federal discrimination against married gay couples is warranted because DOMA preserves dual sovereignty. BLAG Br. 20. According to BLAG, DOMA allows "each sovereign in our federal system" to decide the "important issue" of civil marriage for gay people "for itself." BLAG Br. 32. Similarly, the House Report identifies one of DOMA's aims as protecting "democratic self-governance." *See* House Report at 16.

Section 3 of DOMA, however, is not rationally related to achieving this goal. As the district court

found in this case, the purported interest in protecting "democratic self-governance," *id.*, applies only to Section 2.[16] Pet. App. at 3a n.1; *see also Massachusetts*, 682 F.3d at 14. In fact, by discriminating between gay and straight married couples, DOMA actually undermines the sovereignty of states, like Ms. Windsor's home state of New York, that allow gay couples to marry. *See* Br. of *Amici Curiae* States of New York, Massachusetts et al.

As for the alleged interest in "preserv[ing] each sovereign's ability to define marriage for itself," BLAG Br. 31, DOMA is not a statute that gives each sovereign the ability to define marriage. Rather, it is a statute through which the federal government adopted a particular definition of marriage that nullifies the marriages of gay couples for all purposes under federal law. The relevant constitutional question is whether *that choice* — to treat for federal purposes the marriages of straight people one way and the marriages of gay people another way — is consistent with the equal protection principles of our Constitution. In other words, no one disputes that Congress has sovereign power to decide eligibility with respect to federal programs and benefits. The question here is whether it exercised that power

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[16] Section 2 of DOMA provides that "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C.

constitutionally. For the reasons already described, it did not.

2. Nor can DOMA be justified by a desire for "caution," BLAG Br. 41-42 — or perhaps more accurately, and in the words of the House Report, a desire to "nurtur[e] the institution of traditional, heterosexual marriage," or to "promot[e] heterosexuality." House Report at 12-15. In context, this appeal not to change or to "go slow" simply "reflect[s] some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Unless that difference is both real and rationally related to the decision to exclude the group at issue, it cannot justify the government's decision. *Romer*, 517 U.S. at 633. And it is hard to conceive of how Congress could "promote" heterosexuality in a way that does not denigrate gay people based on their status as gay. *See Lawrence*, 539 U.S. at 575; *Christian Legal Soc'y*, 130 S. Ct. at 2990. It is also worth remembering that the very same "go slow" argument was made against extending rights to African-Americans, among others. *See, e.g.*, *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963).

As discussed above, DOMA was anything but a cautious legislative step. Instead, in a rush to respond to a perceived problem of gay couples marrying in Hawaii, DOMA abandoned the uniform historic federal practice of deferring to the states in terms of marital status. J.A.311-12. Indeed, DOMA

today operates not to defend marriage for straight people, but only to undermine the institution of marriage as it now exists where gay couples are allowed to marry: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Pet. App. 16a-17a.

3. BLAG similarly argues that because gay couples were not allowed to marry before 1996, it was rational for Congress "to preserve . . . past legislative judgments." BLAG Br. 38.

The "past legislative judgments," however, had always been to respect the determination of each state and to treat people as married if they were married under state law. By adopting a different rule, DOMA dramatically departed from the consistent legislative judgment of previous Congresses solely to single out gay people as different from straight people. As BLAG has acknowledged, when gay couples could not legally marry under state law, the federal government had no reason to grant federal marital protections to such couples. *See* BLAG Br. 30. BLAG argues that it is this status quo that Congress sought to maintain when it enacted DOMA. However, a bare desire to "preserve" legislative judgments made when there were no married gay couples cannot explain why, when such couples *can* legally marry, they should be treated as unmarried by the federal government for all federal purposes. This interest, like BLAG's "sovereignty" and "caution" arguments, simply restates what

DOMA does. It provides no independent justification for treating married gay couples as legal strangers.

C. THE FACTS OF THIS CASE REINFORCE THE CONCLUSION THAT DOMA IS UNCONSTITUTIONAL

1. In her complaint, Ms. Windsor challenged the way DOMA operated to deny her spouse's estate the marital deduction generally available to married couples. J.A.173. If Congress had passed a discrete statute simply excluding married couples who are gay from the benefits of the estate tax's spousal exemption, it would be impossible to discern a rational connection between that exclusion and any of the interests that have been advanced on behalf of DOMA.

For example, even if the federal government has a legitimate interest in encouraging responsible procreation by straight couples, it would be irrational to think that denying gay couples the benefits of the estate tax deduction would do anything to further that interest. Hardly any straight couples — especially straight couples of an age where their relationship still runs a risk of "produc[ing] unplanned and unintended offspring," BLAG Br. 11 — would make decisions about "responsible procreation" based on their eligibility for a deduction from an estate tax likely to be levied only decades

later and only on a small fraction of the population.[17] And none are likely to be influenced in their immediate procreative or childbearing choices by how that tax is or is not levied on gay people.

2. Nor could the exclusion of gay couples from the marital estate-tax deduction be justified as rationally related to any other legitimate government interest. To be sure, excluding married gay couples from the marital deduction would raise revenue. But so would excluding couples where one of the spouses was born on February 29. Both would be unacceptably arbitrary. Any rationale for excluding the estates of married gay decedents from the deduction requires explaining not just that uniformity is a legitimate federal interest, but why treating the estates of married gay decedents *differently* than the estates of married straight decedents rationally promotes an interest in *uniformity*. Even under rationality review, such a distinction would fail.

3. The fact that DOMA is *not* a discrete or tailored statute, but instead sweeps across over 1,100 federal statutes that confer benefits or impose responsibilities on married people, strengthens the

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[17] Male decedents with estates sufficiently large to trigger the estate tax live to an average age of 77.2 years, while female decedents live to 82.0 years. See Brian G. Raub, *Federal Estate Tax Returns Filed for 2004 Decedents*, Stat. of Income Bull., Spring 2008, at 115, 117, *available at* http://tinyurl.com/estatestats.

conclusion that it fails rationality review. The indiscriminate nature of DOMA's definition reinforces the inference that DOMA reflects impermissible animus, or "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

This same lack of explanation for DOMA's discrimination between married gay and straight couples pervades every context that DOMA touches. DOMA is not a collection of discrete laws; it is "a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635. This sweeping classification of married gay couples thus "confounds th[e] normal process of judicial review," *id.* at 633, and makes it clear that DOMA was not intended "to further a proper legislative end" but rather to make married gay couples "unequal to everyone else," *id.* at 635.

Finally, while BLAG repeatedly argues that the Court should not "constitutionalize" the issue because "the democratic process is at work," BLAG Br. 22; *see also id.* at 20, 54, 58, the question presented here is a narrow one: is there a sufficient federal interest in treating married gay couples differently from all other married couples for all purposes under federal law? There is not. By suggesting that the Court cannot or should not

answer this question, BLAG fails to recognize that the protections of the Fifth Amendment are abiding. DOMA is impossible to reconcile with the promise of impartial governance that the Constitution's guarantee of equal protection extends to all of our Nation's citizens.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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