Case Nos. 10-2204, 10-2207 and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

DEAN HARA
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, et al.,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants-Appellants/Cross-Appellees,
HILLARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

BRIEF OF *AMICI CURIAE* FAMILY AND CHILD WELFARE LAW PROFESSORS IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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STATEMENT OF INTEREST OF AMICI

Amici, professors of family and child welfare law, submit this brief to address the justifications for the Defense of Marriage Act, ("DOMA") section 3 asserted by the Bipartisan Legal Advisory Group ("BLAG") and their amici that pertain to procreation and child-rearing. Amici's scholarship in family and child welfare law explicates both the multiple purposes of marriage reflected in law and the range of mechanisms under state and federal law for extending legal and social support to children. Amici support Appellees' position that the purported child-welfare purposes of the Defense of Marriage Act DOMA lack a footing in law, policy, history, or logic. Amici will show how DOMA operates at cross-purposes to other federal and state laws regarding families and childrearing. [1]

SUMMARY OF THE ARGUMENT

The essence of BLAG's claims is that the federal government should be permitted to exclude married same-sex couples from all federal marital protections because same-sex couples are unable to fulfill the central purposes of marriage.

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[1] All parties and the intervener in case numbers 10-2204 and 10-2214 have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), Amici and counsel for Amici authored this Brief in whole. No party or party's counsel contributed money intended to fund preparing or submitting this Brief. No person other than amici curiae or counsel contributed money intended to fund preparing or submitting the Brief.

According to BLAG and its amici,[2] these purposes are i) to promote "responsible procreation and child-rearing" by those whose sexual unions potentially result in the conception of biological children, and ii) to provide the "optimal" environment for child-rearing, which is allegedly a mother and father raising their biological children. Brief of the Bipartisan Legal Advisory Group at 49-58 [hereinafter "BLAG Brief"]; *see also id*. at 7 (conception and rearing of children), 40-42 (addressing parenting). Stated another way, according to BLAG, the federal government's primary interest is in supporting families that consist of, or potentially could consist of, children and their biological married parents.

BLAG's asserted justifications cannot sustain the constitutionality of DOMA and its categorical exclusion of all married same-sex couples from the more than 1,000 federal marital benefits, protections and responsibilities. In this brief, amici explain why BLAG's asserted procreation and child-rearing justifications for DOMA lack any grounding in history, law, policy or logic and

[2] References to BLAG include those amici advancing "responsible procreation" and/or "optimal childrearing" arguments. *See Amicus* Brief of Aguduth Israel at 19-29; *Amicus* Brief of American College of Pediatricians at 5-26; *Amicus* Brief of Catholic Bishops at 15-21; *Amicus* Brief of Family Research Council at 14-22; *Amici* Brief of Robert George at 16-22; *Amicus* Brief of Foundation for Moral Law at 22-24; *Amicus* Brief of George Goverman at 11, 16, 19-21; *Amicus* Brief of Liberty Counsel at 22-27; *Amicus* Brief of National Organization for Marriage at 17-21; *Amicus* Brief of Pacific Justice Institute at 15-18, 26-27; *Amicus* Brief of Lamar Smith at 7-27.

should be dismissed.[3] First, amici show that historically, and to this day, the states' interest in regulating marriage, and the federal government's interest in supporting marital families have never been conditioned on a couple's ability or willingness to have or raise children. Indeed, constitutional doctrine confirms that while procreation often occurs within marriage, the fundamental rights to marry and to procreate are separate and distinct from each other. The claim that Congress excluded married same-sex couples from marriage-based federal protections because those couples must use adoption or assisted reproduction to have children is based on an erroneous characterization of marriage and the multiple purposes it serves.

Second, amici show that there is no legal basis for the assertion that federal law favors biological parentage over the well-considered decisions of many married couples—both same-sex and opposite-sex—to adopt children or conceive children through assisted reproduction. Federal law and policy reflect a deep commitment to the welfare of all children, not just children born to and raised by both of their biological parents.

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[3] Amici agree with Appellees that heightened scrutiny applies because DOMA classifies based on sexual orientation, which is at least a quasi-suspect classification, but amici submit that DOMA is unconstitutional even under rational basis review.

As family and child welfare law professors, amici share the government's commitment to the welfare of children and to encouraging parents to be responsible for their children's well-being. Amici also believe that marriage can benefit children by providing support and stability to their families. As amici show, however, DOMA hinders rather than furthers these purposes. Even if, *arguendo*, federal protections for married couples are intended to promote "responsible procreation" and "optimal" child-rearing by married biological parents, DOMA does not rationally further these goals; it does not change the legal status of heterosexuals in any way. Both before and after DOMA, married opposite-sex couples had and have the same access to federal protections; DOMA does not expand or alter their rights. DOMA's sole effect is to deny these federal marital protections to married same-sex couples. Because DOMA singles out only already-married same-sex couples for adverse treatment, there is no conceivable rational relationship between DOMA and irrational speculation about its effects on the behavior of opposite-sex couples, who are untouched by it. DOMA serves only to undermine children's welfare by denying a subset of families access to the federal marital protections that all other families headed by married couples depend on.

ARGUMENT

I. Biological Procreation is Not an Essential Element of Marriage.

BLAG's central justification in defense of DOMA—that Congress limited federal marital protections to opposite-sex married couples because only they have the capability of engaging in unassisted and sometimes accidental procreation—is not supported by the history or law of marriage.

A. The Relevant History of Marriage Laws.

The states always had an interest in the legal institution of civil marriage because it promotes social and economic stability by acknowledging and protecting the mutual commitment of two individuals who choose to integrate their lives, legally and emotionally. *See* Brief of Historians as Amici Curiae Supporting Appellees § 1(C). Marriage has long been used as a vehicle for ensuring that family members will care for one another personally and financially. In this vein, marriage has been used for determining property rights and inheritance, support obligations to children and other dependents, if any, and the distribution of benefits. *Id*. While procreation certainly occurs within many marriages, neither procreation nor the ability to procreate biologically has ever been the defining feature or an essential element of marriage under state law. *Id*.

No state has ever required prospective spouses to agree to procreate or to remain open to procreation, or even to be able to procreate to be eligible to marry.[4] Sterile persons have never been precluded from marrying even when they have knowledge of their sterility.[5] *See Lawrence v. Texas*, 539 U.S. 558, 604 (2004) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry") (internal citation omitted). States do not require that the couple have the capacity or intent to engage in sexual relations in order to marry. A couple's inability to be sexually intimate does not prevent them from being eligible to marry or from remaining married.[6]

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[4] Infertility among opposite-sex couples is not unusual. Data from 2002 show that approximately 7 million women and 4 million men suffer from infertility. Michael L. Eisenberg, James F. Smith, Susan G. Millstein, Robert D. Nachtigall, Nancy E. Adler, Lauri A. Pasch, Patricia P. Katz & Infertility Outcomes Program Project Group, *Predictors of not pursuing infertility treatment after an infertility diagnosis: examination of a prospective U.S. cohort*, 94 Fertility and Sterility 2369, 2369 (2010).

[5] Some states expressly presume female infertility at certain ages (*e.g.*, N.Y. E.P.T.L. § 9-1.3(e) (women over 55 presumed to be infertile)), but this does not disqualify such women from marrying or enjoying federal marital protections.

[6] Consummation is not necessary for a marriage to be valid. Once the parties fulfill the statutory requirements for solemnization, they are married, regardless of whether they share any form of sexual intimacy at all. *See, e.g., Franklin v. Franklin*, 154 Mass. 515, 516 (1891)("consummation of marriage by coitus is not necessary to its validity"); *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989)("consummation" not necessary to validate a marriage); *Anderson v.*

The distinction between the right to marry and the right to procreate is also embedded in state fault-based divorce and annulment laws. These laws center on the relationship between the spouses, listing as grounds for divorce, for example, willful desertion, cruel and inhuman treatment, non-support, and separation with no reasonable probability of resumption of marital relations.[7] Nothing in those laws suggests that the inability or unwillingness to procreate biologically is grounds for divorce or denying marital protections.

The Supreme Court recently reaffirmed that sexual relations and the potential for procreation are not the core, essential elements of marriage. In *Lawrence*, the Court explained that such an understanding of marriage demeans the depth and significance of the marital relationship. 539 U.S. at 567 ("To say that the issue in *Bowers* [*v. Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a

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Anderson, 219 N.E.2d 317, 329 (Ohio C.P. 1966); *Beck v. Beck*, 246 So.2d 420 (Ala. 1971)(sexual activity not essential for valid common law marriage).

Impotence has been a ground for fault divorce in some states, but only where physical incapacity had been concealed from the spouse. *See, e.g., Jarzem v. Bierhaus*, 415 So.2d 88, 90 (Fla. Dist. Ct. App. 1982)("[I]f the wife's claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such fact before the marriage"). While someone who is deceived about a spouse's ability to have sexual relations may end the marriage, the state does not void a marriage for this reason. *See, e.g., Martin v. Otis*, 233 Mass. 491, 495 (1919) (impotence renders a marriage voidable by the disappointed party, but not void).

[7] *See, e.g.*, Freed and Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 Fam. L. Rptr. 4065, 4075 (1982).

married couple were it to be said marriage is simply about the right to have sexual intercourse").

The absence of procreation-based requirements for marriage renders implausible any contention that Congress categorically excluded married same-sex couples from all federal marital protections because those couples cannot biologically procreate without assistance.

B. The Constitutional Doctrine Related to Marriage and Procreation.

The fundamental right to marry and the fundamental right to procreate are distinct. Marriage is a fundamental right for all individuals regardless of procreative abilities or choices. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (determining that married couples have the right to prevent procreation through the use of contraception); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing and family relationships"). At the same time, the right of an individual to choose whether or not to procreate is not dependent on their being married. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("It is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a

person as a decision whether to bear or beget a child"). This shows that the right to procreate and the right to marry are two constitutionally distinct rights.

Moreover, in its most recent ruling on the right to marry, the Supreme Court held that individuals cannot be excluded from marriage simply because they cannot procreate. *See Turner v. Safley*, 482 U.S. 78, 95 (1987). In *Turner*, the Court recognized that marriage has multiple purposes unrelated to procreation, *e.g.*, "the expression of emotional support and public commitment," "exercise of religious faith", "expression of personal dedication," and "the receipt of government benefits." *Id*. at 95-96. Accordingly, the Court struck a Missouri regulation under which approval of a prison inmate's marriage was generally given only where a pregnancy or the birth of an out-of-wedlock child was involved. *Id*. at 82, 96-97. Even under the more deferential standard applicable to prison regulations, the Court found the non-procreative elements of marriage "sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96.

The Court has also rejected attempts to condition the right to marry on parental responsibility for children. When the State of Wisconsin sought to deny the right to marry to parents who failed to pay child support, the Court held the statute was an unconstitutional infringement of the right to marry, even as it acknowledged the substantial child-welfare rationale for the law. *Zablocki*, 434 U.S. at 388-89.

C. Federal Marital Benefits Have Never Been Contingent on Procreative Capacity.

When marital status is relevant to a federal program, Congress has always deferred to the states' determination of who is married and who is not. *See, e.g.*, *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (federal law looks to state law to give content to family law terms). It was not until the enactment of DOMA in 1996 that Congress supplied its own sweeping definition of "marriage" and "spouse" for the United States Code.

In the more than 1,000 references to marriage in current federal law, Congress recognizes the diverse purposes of marriage, including those that have nothing to do with the ability or willingness to bring children into a family. For example, numerous legal protections assume the mutual loyalty of spouses and their emotional interdependence. Under the Family Medical Leave Act, for instance, a qualified worker in a covered workplace may take a leave to address the serious illness of his or her spouse. 29 U.S.C. § 2612. When a U.S. citizen falls in love with a foreign national, he or she may petition for an "immediate relative" visa for the non-citizen spouse to enable the couple to remain together. 8 U.S.C. § 1154(a)(1)(A)(i), (b), (c). Conflict of interest rules applicable to spouses assume spousal loyalty. *See, e.g.*, 5 U.S.C. § 3110 (public officials prohibited from appointing, employing, promoting or advancing relatives in an agency in which the official serves or over which the official exercises jurisdiction).

Many other federal laws assume and protect the economic interdependence of the couple. These include the ability to file income taxes under the "married" status, 26 U.S.C. § 6013, social security spousal and surviving spouse benefits, 42 U.S.C. § 402 (b), (c) (e), (f), increased veterans' disability payments upon marriage, 38 U.S.C. § 1115, and death benefits for a surviving spouse, 38 U.S.C. § 1311, (dependency and indemnity compensation to a surviving spouse). Married couples can transfer assets to each other during marriage or at divorce without incurring added tax burdens. *See, e.g.*, 26 U.S.C. § 1041 (interspousal asset transfers during marriage and at divorce without tax consequences). At divorce, courts may issue a Qualified Domestic Relations Order to divide otherwise non-divisible retirement assets, 29 U.S.C. § 1056(d)(1); 26 U.S.C. §§ 401(a)(13), 414(p).

These and many other of the 1138 current federal marital rights and obligations do not relate to procreation or children in any way.[8]

In sum, there is no historical or legal justification to support BLAG's claim that the essential purpose of marriage is to link marriage and unassisted procreation. While marriage is a relationship in which unassisted procreation often occurs, many married couples also use assisted procreation and adoption to bring

[8] For a full overview, *see* General Accounting Office Report GAO-04-353R, "Defense of Marriage Act - Update to Prior Report" (Jan. 24, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

children into their families. Others are childless by choice or for other reasons. Amici do not claim that procreation and marriage are never connected, but BLAG's position demeans the institution of marriage and erroneously ignores its myriad other purposes.

II. The Federal Government Does Not Prefer Biological Parenthood Over Other Forms of Parenthood; Instead, the Federal Government Seeks to Enhance the Welfare of All Children Regardless of the Circumstances of Their Birth or the Way They Enter a Family.

In defense of DOMA, BLAG contends that denying protections to married same-sex couples and providing those protections only to married opposite-sex couples is consistent with the federal government's alleged goal of promoting children's welfare by encouraging biological parents to raise their own children. BLAG Br. at 49-52. But federal law and policy do not support this purported preference for biological parent-child relationships. Moreover, the Supreme Court has made clear that laws may not favor or discriminate against children based on the status of their parents.

A. Congressional Child Welfare Policy Encourages Stability for All Children.

While amici agree that security and stability for children are vital interests, BLAG conflates the federal government's interest in supporting marriage as a stable setting for raising children with a purported interest in privileging the families of biologically related parents and children. This emphasis on biological parenting is misplaced.

First, BLAG is incorrect that Congress makes a distinction between children raised by both of their biological parents and other children. Congress defers to

and relies on the states' determinations of parentage.[9] While state determinations of parentage vary greatly, every state has laws facilitating adoption by individuals who are not a child's biological parents. *Adoption Law & Practice*, at ch. 1 (J.H. Hollinger, ed., Matthew Bender 1988 & Supp. 2011). Additionally, most states have procedures for recognizing legal parentage of non-biological parents, including those who use assisted reproduction.[10] The revised Uniform Parentage Act recognizes multiple bases for establishing legal parentage that do not depend on a biological or genetic connection between parent and child, nor on a parent's marital status. Rather, parentage can depend on some combination of an

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[9] *See, e.g.*, 42 U.S.C. § 416(h)(2)(A) (social security act looks to the law of the state of residence to determine whether an individual is a "child" of the insured wage-earner); 8 U.S.C. § 1101(b)(1)(C) ("a child legitimated under the law of the child's residence or domicile" is included within the definition of "child" for purposes of immigration and nationality law); *see also* Memorandum Opinion for the Acting General Counsel, Social Security Administration (Oct. 16, 2007), *available at* http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf (DOMA does not prevent the non-biological child of a partner in a Vermont Civil Union from receiving child's insurance benefits).

[10] Virtually every state has enacted laws that terminate a sperm donor's parental obligations if the sperm is donated according to statutory guidelines. Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families*, 62 Ark. L. Rev. 29, 34-35 (2009). *See generally* Charles P. Kindregan & Maureen McBride, *Assisted Reproductive Technology* (American Bar Assoc. 2d ed. 2011).

individual's intent to parent and his or her actual performance of parental responsibilities. Unif. Parentage Act, §§ 102, cmt., § 201 (amended 2002).[11]

The federal government actively supports adoption through a variety of laws, policies and spending measures. *See* 42 U.S.C. § 670 (Foster Care and Adoption Assistance); The Adoption and Safe Families Act of 2007, P.L. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing time-lines on states for moving children from foster care to adoption); Multiethnic Placement Act of 1994, 42 U.S.C. § 1996(p) (prohibiting states from delaying or denying adoptive placements on the basis of race). In addition to the federal adoption subsidies available to adoptive parents of children with special needs, 26 U.S.C. § 36C(a)(3), there are income tax credits for adoption related expenses, 26 U.S.C. § 36C, exclusions for employer-paid adoption expenses, 26 U.S.C. § 137, and, an adopted child is a dependent for purposes of the dependency exemptions. 26 U.S.C. §§ 151-152.

These laws show that the federal government has long recognized that individuals may become legal parents in a number of ways other than through biological procreation and has used its authority to encourage and support parenting by adoptive and other non-biological parents.

[11] The UPA has "four separate definitions of 'father' . . . to account for the permutations of a man who may be so classified." Unif. Parentage Act, § 102, cmt. (amended 2002)

Second, while the federal government has a powerful interest in promoting children's welfare, it has no legitimate interest in promoting the welfare only of children raised by both of their biological parents. Federal law and policies aim to protect the wellbeing of all children, regardless of how they were conceived, principally by ensuring that their parents are responsible for supporting them. Guidelines setting child support amounts are mandated in all child support cases without any distinction among parents based on the method of conception or on biological connection. *See* Family Support Act of 1988, P.L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.). Federal law also requires the states to adopt a number of specific mechanisms to improve enforcement of child support obligations, including wage garnishment, and license revocation. These enforcement mechanisms apply in all child support cases, regardless of a biological connection between the children and their parents. *See*, *e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42. U.S.C.) (1996); Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (1998).

Another goal of federal policy is to help families care for their children. Numerous federal statutes extend benefits to children through their parents and they do so regardless of whether there is a biological relationship between parent and child. As a preliminary matter, all of these federal statutes incorporate and

rely upon state determinations of parentage which, as stated above, are not limited to biological parent-child relationships. Moreover, in addition to incorporating these state definitions of "child," numerous federal statutes explicitly encourages non-biological children by including adopted children and, often, stepchildren. The Social Security Act provides benefits to children of disabled and deceased parents and provides that a "child" includes an adopted child and a "stepchild who has been such stepchild for not less than one year." 42 U.S.C. § 416(e). *See also* 5 U.S.C. § 8441(4) (for purposes of survivor annuities for federal employees, "child" is defined to include an adopted child and a step-child who lives with the employee in a "regular parent-child relationship"); 5 U.S.C. § 9001(5)(c) (defining "child" for purposes of federal employee insurance benefits to include an adopted child); 26 U.S.C. § 152(f)(1) (defining a dependent "child" for income tax purposes to include an adopted child); 38 U.S.C. § 101 (defining "child" of a veteran entitled to survivor benefits to include an adopted child and a "stepchild who is a member of the veteran's household").

Some federal laws help to ensure stability in custodial and support decisions by mandating interstate recognition and enforcement of state custody and support orders. Like the laws described above, the protections of these statutes are not limited to biologically related parents and children. *See* Parental Kidnapping Protection Act, ("PKPA"), 28 U.S.C. § 1738A ("child" defined as "a person under

the age of eighteen"; "contestant defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child"). "Parent" is not defined in the PKPA because, like most federal statutes, it accepts and incorporates each state's own parentage determinations. The same is true in the Full Faith and Credit for Child Support Orders Act. 28 U.S.C. § 1738B ("'contestant' means-- (A) a person (including a parent) who-- (i) claims a right to receive child support; (ii) is a party to a proceeding that may result in the issuance of a child support order; or (iii) is under a child support order . . . .").

Despite these federal policies that effectively incorporate state determinations of parentage, BLAG erroneously claims that the federal government extends marital rights and responsibilities to promote and assist those families most likely to consist of opposite-sex adults and their children created through unassisted biological procreation. BLAG Br. at 49-53. This is a fictional account of federal laws and policies, and not a description. Other than DOMA itself, BLAG cites no federal statutes to support this claim for the simple reason that there are none. Existing federal family law policy demonstrates a commitment to protect the stability and security of all families, whether or not there is a biological connection between the children and their parents. *See also* III C., *infra*.

In sum, federal law does not support BLAG's claim that DOMA furthers a legitimate government interest in favoring families in which children are conceived

through biological procreation because no such interest exists.[12] In shaping federal family law, Congress has long recognized that all children are equally deserving of stability and support. DOMA is a glaring exception to this time-honored approach.

B. The Supreme Court Has Rejected Differential Treatment Of Children Based On The Circumstances of Their Birth.

BLAG implicitly claims that the government has an interest in treating children differently depending on the circumstances of their birth and, more specifically, treating children born to married biological parents more favorably than other children. This purported interest serves what BLAG characterizes as the government's goal of maintaining a social link between marriage and procreation. Yet, what BLAG suggests is a legitimate interest in favoring the offspring of married biological parents, is directly counter to the principles established by the Supreme Court in the 1960s and 1970s. In a series of cases, the Court held that the equal protection clause does not permit disparate treatment of children based on the circumstances of their birth. *See, e.g.*, *Weber v. Aetna Casualty & Surety*

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[12] Such a policy would implicate fundamental constitutional rights because whether one chooses to have children biologically, through adoption or some other means, or not at all is a matter of individual liberty. *See, e.g.*, *Zablocki*, 434 U.S. at 384-86 (decisions relating to procreation, childbirth and child rearing are among the "personal decisions protected by the right to privacy"). And when children are part of a family, the parents enjoy the liberty interest (and responsibility) to raise their children as they see fit, without government interference based on its conception of best interests. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000).

Company, 406 U.S. 164, 175 (1972); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). As the Court explained:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing… no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent.

Weber, 406 U.S. at 175. For these same reasons, it would be equally impermissible now to privilege some children but deny others access to important federal benefits and protections because, for example, they were born to a mixed-race or an atheist couple, or adopted or born through assisted reproduction, or because their parents are a married same-sex couple. BLAG would have this Court accept that it is constitutional to create a new class of "illegitimate" children who can be denied the federal marital protections that affect children because of the circumstances of their birth to, or adoption by, married same-sex couples. This kind of discrimination cannot survive equal protection review.

III. DOMA Undermines Child Welfare Interests.

A. DOMA Has No Rational Connection to the Asserted Goal Of Encouraging Heterosexuals to Have Children Within Marriage.

BLAG argues that DOMA furthers the government's interest in encouraging opposite-sex couples who accidentally procreate to marry. BLAG Br. at 49-52. Assuming, *arguendo*, that this is a permissible government interest, excluding

married same-sex couples from the array of over 1,000 federal marital protections and responsibilities does nothing to further such an interest. The exclusion does not create any new substantive rights or protections for married couples, nor does it provide any other type of marriage incentive. The myriad federal protections afforded to married opposite-sex couples existed before DOMA was enacted and are unchanged by DOMA. Moreover, DOMA does not preempt or affect state determinations of who is eligible to marry—and, of course, the appellees in this case are validly married.

BLAG claims that recognizing the marriages of same-sex couples undermines the message that children are *the* reason for marriage[13] and, thus, could lead to more heterosexual couples having children outside of marriage and departing from traditional marital norms. BLAG Br. at 53.

This argument is utterly implausible. It is not credible to claim that heterosexuals' decisions to marry or have children are or will be influenced by the denial of federal marital protections to married same-sex couples. Further, the argument founders on the history and law discussed in section I, *supra*: Marriage and procreation may overlap for many people as a practical matter, as it does for

[13] In fact, the message sent by same-sex couples marrying and raising children in their marriages is consistent with the message BLAG says Congress wants to send, *i.e.*, that marriage is about procreation and children.

some of the couples in this case, but legally they are independent individual rights and neither is conditioned on the other.

BLAG's argument may be erroneously assuming that government policies that encourage child rearing by married couples justify its assertion that marriage is essentially defined by biological procreation. The Supreme Court clearly distinguished laws that support child-rearing within marriage from any necessary connection between procreation and marriage in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In *Michael H.*, the court upheld a state statute which denied a biological father standing to assert his parentage when the child's mother was married to another man at the time of birth. The state's solicitude for the integrity of the mother's existing marriage, as well as its preference for parenting by two married parents, was so strong that the state essentially cut off the biological father's parental rights, even though he had actually lived with and helped care for his daughter. In other words, the state's interest in marriage supported the decoupling of biological procreation and childrearing. The Court found that the state's use of the marital presumption to trump the child's relationship with her biological father was not unconstitutional.

In addition, DOMA does not prevent states from permitting same-sex couples to marry, and many such couples are doing so. Thus, even if the mere existence of married same-sex couples could somehow be understood to convey a

message that marriage is unnecessary for heterosexuals and prompt a decrease in their marriage rates as BLAG contends,[14] DOMA would not remedy that purported "problem" in any way. DOMA does not invalidate the existing marriages of same-sex couples or prevent additional same-sex couples from legally marrying. Any asserted connection between DOMA and an increased likelihood that heterosexual couples who have accidentally procreated will marry is illogical and unfounded.

While DOMA does nothing to promote the welfare of opposite-sex couples and their children, it harms the children of married same-sex couples and undermines the vital federal interest in the welfare of *all* children. It makes no difference, as BLAG argues, that only some heterosexual couples are at risk of

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[14] BLAG claims data from other nations with different legal and cultural systems shows that legal recognition of same-sex couples' causes opposite-sex couples not to marry. However, "there is no evidence that giving partnership rights to same-sex couples had any impact on heterosexual marriage in Scandinavia and the Netherlands. Marriage rates, divorce rates, and nonmarital birth rates have been changing in Scandinavia, Europe, and the United States for the past thirty years . . . and these trends were underway well before the passage of laws that gave same-sex couples rights." M.V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, Sexuality Research and Social Policy: Journal of NSRC, Sept. 2004 at 1-10. Rather, the ability of same-sex couples to marry in seven U.S. jurisdictions promotes and does not deter marriages.

In Massachusetts, where same-sex couples began marrying in 2003, marriage rates have remained consistent, starting at 5.8% in 2000, peaking at 6.5% in 2004, and ending at 5.5% in 2009. National Center for Health Statistics, *Marriage rates by State: 1990, 1995, and 1999-2009, available at* http://www.cdc.gov/nchs/data/nvss/marriage_rates_90_95_99-09.pdf. Massachusetts retained the lowest divorce rate among the states. National Center for Health Statistics, *Divorce rates by State: 1990, 1995, and 1999-2009, available at* http://www.cdc.gov/nchs/data/nvss/divorce_rates_90_95_99-09.pdf.

having "accidental" pregnancies. Any couple can be irresponsible about bringing a child into their family, whether conceived through their own sexual activity or acquired through adoption or with the assistance of technology. And all children, whether raised by the most or the least responsible parents, can benefit from federal recognition of their parents' marriages and the supports that come with it. BLAG's arguments simply lack any connection to reality. *Romer v. Evans*, 517 U.S. 620, 632-33, 635 (1996) (classification must be grounded in a "factual context"); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (to satisfy the rational basis test, the government interest must have "footings in the realities of the subject addressed by the legislation").

In sum, DOMA was not aimed at influencing the behavior of heterosexual couples. DOMA was intended to deny same-sex married couples recognition of their marriages and the protections that would follow for them and their families. Accordingly, BLAG's argument that DOMA promotes responsible and optimal procreation by heterosexuals is a charade that must be rejected.

B. DOMA Has No Rational Connection to the Asserted Goal of Promoting the "Optimal" Child-Rearing Environment.

DOMA's connection to the purported objective of promoting the "optimal" child rearing environment is non-existent. *See, e.g.*, BLAG Br. at 55-58. The only remaining argument is that Congress enacted DOMA to deter same-sex couples from having children because the federal government disfavors these families. But

this is not a legitimate government purpose and contravenes the most fundamental principles of our democracy, including respect for individual freedom and dignity, particularly regarding decisions about procreation and family life. *See, e.g.*, *Eisenstadt* 405 U.S. at 453 (individual right to be free from "unwarranted governmental intrusion" into decision to have a child); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (the constitution protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education); *Lawrence*, 539 U.S. at 573 (same). Equally important, such a purpose would contravene the bedrock principle that government may not seek to alter behavior of adults by punishing their children.

Even if deterring gay people from having children were a permissible goal (which it cannot be under constitutional doctrine), DOMA does not effectuate that goal. Same-sex couples, married or not, are having and raising children whether DOMA exists or not. [15]

Further, except for adherence to traditional beliefs, there is no basis for favoring opposite-sex parents over same-sex parents. The Government has disavowed this claim because the scientific consensus resulting from decades of

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[15] The 2010 Census reported that almost a third of married same-sex couples are raising minor children and counted nearly 110,000 same-sex couples raising children. Williams Institute, *2010 Census Snapshot*, *available at* http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-census-snapshot-2010/.

peer-reviewed social science, psychological, and child development research shows that children raised by same-sex couples fare as well as children raised by opposite-sex couples. *See* Superseding Brief of the United States at 50-51; *see also* JA 961-62, 969-70 (Dr. Lamb; research demonstrating comparable parenting methods among same-sex and opposite-sex couples).

Although BLAG asserts that "the optimal environment for child-rearing is both a mother and a father," BLAG Br. at 55, the factors predicting healthy child and adolescent adjustment do not turn on the gender of the parents. It is the relationship of the parents to one another, their mutual commitment to their child's well-being and the social and economic resources available to the family that affect outcomes. JA 969 (Dr. Lamb; quality of child's relationship with parents and relationship between parents are determinative).

BLAG claims children need a male and a female role model and that mothers and fathers perform different roles in children's lives. BLAG Br. at 58. But this is just another way of saying same-sex couples make inferior parents, which has no factual basis. JA 967 (Dr. Lamb; there are no universal differences in the ways mothers and fathers parent). In addition, generalizations about differences between men and women cannot be the basis for making policy based on gender. *U.S. v. Virginia*, 518 U.S. 515, 533, 541-42 (1996).

Furthermore, federal marital benefits do not turn on the predicate of unassisted procreation. Many married opposite-sex couples use adoption and assisted reproduction,[16] and these couples, as well as childless couples, readily access all federal marital protections. Thus, the connection between supporting "optimal" childrearing and excluding married same-sex couples from federal marital protections is so attenuated that it cannot be credited. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). DOMA is so "riddled with exceptions" that this justification "cannot reasonably be regarded as its aim." *Eisenstadt*, 405 U.S. at 449.

C. DOMA Undermines the Well-Being of Children.

In the end, it is both puzzling and sad that BLAG points to the protection of children to support DOMA's constitutionality when DOMA does not provide a single protection for a single child. To the contrary, DOMA serves only to deny a group of children access to the important protections the federal government would otherwise afford their married parents.

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[16] In 2008, 61,426 infants were born with the use of ART. Centers for Disease Control and Prevention, *2008 Assisted Reproductive Technology Report*, 65 (2008), *available at* http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf.

DOMA affects children by limiting resources that would be available to their families if their parents' marriages were recognized, e.g. spousal health insurance benefits, leave from work under the Family Medical Leave Act for a spouse's serious health condition, and pension protections. DOMA may make it more complicated for children of same-sex married couples to receive benefits under federal law. Finally, DOMA hurts children of married same-sex couples by sending the message that there is something inferior about their families. *See* JA 1324-28 (Dr. Herek; discussing the stigmatizing effect of DOMA).[17]

As the Massachusetts Supreme Judicial Court explained, denying marital protections to same-sex couples "will not make children of opposite-sex marriages more secure." *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 964 (Mass. 2003). What is absolutely clear, however, is that denying marital protections to same-sex couples will "prevent children of same-sex couples from enjoying the immeasurable advantages that flow" from marriage. *Id.* This perverse logic of

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[17] An effort to deter same-sex couples from becoming parents would exacerbate the shortage of adoptive parents. *See* U.S. Dep't of Health and Human Services, Administration for Children and Families, *AFCARS Report, Preliminary FY 2010 Estimates as of June 2011*, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm;David Brodzinsky, Ph.D., *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, Evan B. Donaldson Adoption Institute (Oct. 2011), *available at* http://www.adoptioninstitute.org/publications/2011_10_Expanding_Resources_BestPractices.pdf.

BLAG's child welfare argument shows that it cannot serve as a rationale for DOMA.[18]

CONCLUSION

BLAG attempts to justify DOMA by singling out the one intrinsic difference between married same-sex and many opposite-sex couples—the possibility of unassisted biological procreation—and claiming that the essential purpose of marriage – to beget children – rests on that difference. Amici have shown that this argument is contradicted by history, law, policy and logic. Moreover, DOMA does not promote responsible procreation or child-rearing by opposite-sex couples because DOMA changes nothing for them or their children. Instead, DOMA undermines the government's compelling interest in the welfare of all children by categorically excluding a class of married parents and their children from the important protections Congress provides other married couples and their children. Amici ask this Court to affirm the ruling below.

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[18] Since these procreation and child-rearing interests have no "footings in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and are not plausibly furthered by the exclusion of same-sex married couples from existing federal marital protections, DOMA "seems inexplicable by anything other than animus towards the class it affects." *Romer*, 517 U.S. at 632. This Court need not find that Congress acted out of impermissible animus to strike down the law since it lacks even a rational relationship to a legitimate government interest. However, this helps to explain how the law came to pass.

CERTIFICATE OF COMPLIANCE WITH Rule 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5418 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii).

Respectfully submitted,

AMICI CURIAE

By and through their counsel

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF filing system on November 3, 2011.

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