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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

NANCY GILL, et al.,
Plaintiffs-Appellees,

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal from Final Orders of the U.S. District Court
for the District of Massachusetts

REPLY BRIEF FOR INTERVENOR-APPELLANT
THE BIPARTISAN LEGAL ADVISORY GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES

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REPLY BRIEF FOR INTERVENOR-APPELLANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Although Plaintiffs' briefs are riddled with errors large and small, they are dominated by three overarching misunderstandings. First, Plaintiffs erroneously assert the view—completely unsupported in logic or precedent—that the Constitution grants the states sole authority to define the words "marriage" and "spouse," even when Congress uses them in *federal* statutes to apportion *federal* benefits and burdens. That premise is wholly without foundation and would invert the constitutional order, yet it undergirds many of Plaintiffs' critical arguments, such as their effort to render *Baker v. Nelson* no longer controlling. Second, and remarkably in light of Plaintiffs' unsuccessful effort to obtain initial *en banc* hearing, Plaintiffs refuse to accept that this Court meant what it said, in *Cook v. Gates*, when it announced that sexual-orientation classifications are subject to ordinary rational basis review. Third, Plaintiffs repeat the district court's error of assuming that DOMA is invalid unless the denial of benefits to same-sex couples itself benefits opposite-sex married couples. But rational basis review does not work that way. So long as Congress had *any* rational basis for drawing the line where it did—and Congress had several—then DOMA is constitutional, and Plaintiffs' remedy lies in the political process where proponents of same-sex marriage have made remarkable gains.

I. *BAKER V. NELSON* CONTROLS.

A. *Baker* Is Indistinguishable.

Baker v. Nelson, 409 U.S. 810 (1972), establishes DOMA's constitutionality in this Court. *See* Br. for Intervenor-Appellant [House] 22-24 (Sept. 22, 2011) (ECF No. 5582087) ("House Br."). Plaintiffs attempt, without success, to distinguish *Baker* on the grounds that it (1) upheld a state, not federal, statute, and (2) involved a claim of sex discrimination. *See* Br. of Pls.-Appellees & Cross-Appellant 61-63 (Oct. 27, 2011) (ECF No. 5591471) ("Gill Br."); Br. for Pl.-Appellee Commonwealth of Massachusetts 35-36 (Oct. 27, 2011) (ECF No. 5591423) ("Mass. Br.").

Plaintiffs seem to acknowledge that, under *Baker*, states may utilize the traditional definition of marriage without offending the Constitution, and that, if they do, the federal government also may (indeed, must) decline to recognize same-sex relationships as marriages for purposes of federal law. Nonetheless, Plaintiffs argue that Massachusetts's recognition of same-sex marriages somehow changes everything and distinguishes their case from *Baker*. This theory has nothing to recommend it. As the House emphasized in its opening brief, equal protection requirements are "precisely the same" under the Fifth and Fourteenth Amendments, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995), and so DOMA is every bit as constitutional as the Minnesota law in *Baker*. House Br.

18 n.4. To the extent Plaintiffs rely on the misguided notion that Congress has no option but to accept a state's definition of marriage, even when it comes to apportioning federal benefits and burdens, that premise is thoroughly discredited by the Justice Department's superseding brief, *see* Superseding Br. for [HHS] 56-61 (Sept. 22, 2011) (ECF No. 5582082) ("DOJ Br."), and in Part IV, *infra*. Thus, *Baker* is controlling here just as it would be in a challenge to DOMA brought by a plaintiff in the 44 states that continue to employ the traditional definition of marriage. *Baker* makes clear that state action refusing to recognize same-sex marriage does not violate the Equal Protection Clause. The result is not different just because DOMA involves *federal* action. *See Adarand Constructors*, 515 U.S. at 217.[1]

The lower-court opinions declining to follow *Baker*, on which Plaintiffs rely, Gill Br. 62-63, make basic errors this Court should not replicate. *Smelt v. Cnty. of Orange* asked the wrong question—whether "the questions presented in the *Baker* jurisdictional statement would still be viewed by the [modern] Supreme Court as 'unsubstantial.'" 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005); *but see Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). *In re Kandu* erroneously regarded the

[1] Plaintiffs' argument regarding Congress' nonexistent or "attenuated" interest in defining the term "marriage" in the U.S. Code, *see* Gill Br. 62, is predicated entirely on the Tenth Amendment. But even if there were a Tenth Amendment problem with Congress' effort to define marriage—and there is not—it would not mean that federal action also violates equal protection where state action does not.

Fifth Amendment equal protection inquiry as different from the Fourteenth Amendment one. 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004); *but see Adarand Constructors*, 515 U.S. at 217. And *In re Marriage of J.B. and H.B.* distinguished itself from *Baker* on the implausible ground that, unlike *Baker* and this case, it involved a same-sex divorce. 326 S.W.3d 654, 671-72 (Tex. App. 2010).

Plaintiffs also attempt to distinguish *Baker* as involving a claim of discrimination based on sex, rather than sexual orientation. They cite no authority for this view of *Baker*, and for good reason: The plaintiffs in *Baker* clearly complained of both sex and sexual-orientation discrimination. The *Baker* jurisdictional statement argued that "there is no justification in law for the discrimination against homosexuals," and that the plaintiffs had "been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples." House Br. Add. 96a. Moreover, the *Baker* plaintiffs' formulation of the question presented—whether equal protection permits the denial of marriage to a couple "because both are of the [same] sex," *id.* 92a—encompassed both their sex and sexual-orientation discrimination arguments.

B. *Baker* Remains Good Law.

Plaintiffs claim that *Baker* was undermined by *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Gill Br. 63-64; Mass. Br. 35-36. This is flatly inconsistent with *Lawrence* itself: In that opinion, which

came after *Romer*, the Court expressly stated that it was *not* addressing the question of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. In concurrence, Justice O'Connor identified "preserving the traditional institution of marriage" as a legitimate state interest. *Id.* at 586. Short of mentioning *Baker* by name, there was nothing more the *Lawrence* Court could have done to reaffirm that *Baker* remains unaffected by *Lawrence* and prior decisions, including *Romer*.

"[T]he lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs them that they are not," *Hicks*, 422 U.S. at 344-45 (quotation marks and brackets omitted), and the Supreme Court pointedly has refrained from contradicting *Baker*. Accordingly, *Baker* is controlling here.

II. RATIONAL BASIS SCRUTINY APPLIES TO DOMA.

A. *Cook v. Gates* Requires Rational Basis Scrutiny.

Wholly apart from *Baker*, *Cook v. Gates,* 528 F.3d 42 (1st Cir. 2008), mandates rational basis scrutiny for DOMA. House Br. 24-26. Even the Justice Department, which opposes rational basis scrutiny, recognizes that *Cook* is "binding authority of this circuit" requiring it. DOJ Br. 22, 27. The individual Plaintiffs, too, recognized as much when they requested initial *en banc* hearing. Pet. of Pls.-Appellees . . . for Hearing En Banc 12 (June 21, 2011) (ECF No.

5559480). Given the rejection of that petition, Plaintiffs' effort to dismiss *Cook* is particularly inappropriate.

Plaintiffs obviously disagree with *Cook*'s rejection of the "conten[tion] that the district court erred by applying rational basis review" instead of "a more demanding standard," 528 F.3d at 61, and *Cook*'s holding that "the district court was correct to reject the plaintiffs' equal protection claim *because homosexuals are not a suspect class*," *id.* at 62 (emphasis added). But those statements discredit Plaintiffs' contention that the *Cook* court "did not consider whether sexual orientation is a suspect or quasi-suspect classification." Gill Br. 48; *cf.* Mass. Br. 54.

Plaintiffs are also wrong to suggest that *Cook*'s binding force can be ignored based on Plaintiffs' assessment that it was insufficiently litigated. "[A] decision is *stare decisis* despite the contention that . . . the argument was . . . insufficient." *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (citation omitted). In any event, *Cook* featured ample argument concerning the level of scrutiny: Many plaintiffs advocated a sort of "rational-basis-plus" scrutiny, *see* Gill Br. 48, and plaintiff Pietrangelo argued that "the District Court should have . . . f[ou]nd gays a

protected suspect class" and applied "strict scrutiny."[2] Br. of Appellant James E. Pietrangelo, II, Pt. II, *Cook v. Rumsfeld*, Nos. 06-2313, 06-2381, 2006 WL 4015625 (1st Cir. Nov. 6, 2006) (pagination unavailable). In response, the Justice Department argued that sexual orientation classifications are not suspect and are subject only to rational basis review. *See* Br. of the Appellees Pts. II, III(A), *id.*, No. 06-2313, 2006 WL 4015624 (1st Cir. Dec. 22, 2006) (pagination unavailable). Plaintiffs' beliefs that more could have been done to litigate the matter, and that the Court should have discussed it at greater length than eight paragraphs, *see Cook v. Gates*, 528 F.3d at 60-62, or focused on different doctrinal details, do not undermine *Cook*'s precedential force.

Nor can *Cook*'s conclusion that rational basis scrutiny applies to sexual-orientation classifications be dismissed as mere *dictum*. *Contra* Gill Br. 49. The *Cook* court's decision regarding level of scrutiny was an integral part of its adjudication of the plaintiffs' equal protection claim, and therefore is part of the court's holding regardless of whether later plaintiffs would find it more convenient if the court had taken a different approach. Thus, *Cook*'s conclusion that rational basis review rather than strict scrutiny applies to sexual-orientation classifications is a holding of this Court.

[2] Plaintiffs' assertion that Pietrangelo, proceeding *pro se*, "did not argue" this point, Gill Br. 49 n.28, is incorrect. Mr. Pietrangelo, moreover, is an attorney and JAG Corps veteran. *Pietrangelo v. U.S. Army*, 568 F.3d 341, 342 (2d Cir. 2009).

The idea that *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) ("*CLS*"), overruled *Cook*, *see* Gill Br. 49, is simply fanciful. *CLS* involved a First Amendment challenge to a university's decision to deny recognition to a student organization that excluded homosexual and non-Christian students. The Supreme Court rejected the challenge. *CLS* has no bearing here.

B. DOMA Does Not Burden Any Right to "Family Integrity."

Same-sex marriage, as the House has explained, is not a fundamental right. House Br. 28-31. The individual Plaintiffs disavow any argument that "DOMA infringes the fundamental right to marry." Gill Br. 46 n.26. They nevertheless try the next best thing and maintain that DOMA interferes with their "fundamental interest in maintaining the integrity of their existing families and marriages." *Id.* 55. This argument is indistinguishable from the argument they prudently disclaim. Plaintiffs' same-sex marriages *are* the family relationships they claim DOMA burdens, and the right to enter or maintain a same-sex marriage is not fundamental.

Nor, in any event, does DOMA "burden" Plaintiffs' same-sex marriages. The family-integrity cases Plaintiffs cite involved governmental *prohibitions* on relatives living together. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 496-97 (1977); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). In contrast, DOMA does not bar same-sex couples from residing together or getting married, but instead

provides that the federal government will treat them exactly the same either way.[3] Government does not infringe a right by declining to subsidize it while subsidizing a different one. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464 (1977) (states may pay expenses of childbirth but not abortion).[4]

III. THE UNIQUELY FEDERAL INTERESTS IN DOMA CONFIRM ITS CONSTITUTIONALITY.

A. Caution and Preserving Past Legislative Judgments.

Plaintiffs argue that DOMA does not represent a "cautious" approach, because true caution would have led Congress to adopt state-law redefinitions of marriage for purposes of apportioning federal benefits and burdens. Gill Br. 34-35; Mass. Br. 40. But while that approach would have been permissible, it would not have been more cautious in terms of preserving past legislative judgments.

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[3] Plaintiffs' suggestion that DOMA is subject to elevated scrutiny because it "imposes substantial federalism costs," Gill Br. 58-59, fails, first, because DOMA governs only the meaning of *federal* law; DOMA has no effect on state law. Second, the Supreme Court has never held federalism considerations can trigger heightened scrutiny under equal protection. The only majority decision cited by Plaintiffs involved the Voting Rights Act's requirement of federal preclearance of state election procedures. *See Nw. Austin Mun. Util. Dist. No. One v. Holder,* 129 S. Ct. 2504 (2009). DOMA bears no resemblance to that requirement.

[4] For the same reason, the individual Plaintiffs are incorrect that DOMA unconstitutionally discourages the raising of children by same-sex couples, *see* Gill Br. 29: declining to subsidize protected activity is not an impermissible restriction on that activity. Indeed, if withholding marital or marriage-like benefits was an unconstitutional restriction on the right to have children, then government apparently would be unable to deny such benefits to *anyone*, married or not, who legally could maintain custody of a child.

Once it became clear that some states would redefine marriage in ways that differed from the traditional definition, Congress could not fully preserve the status quo ante of adopting state laws that in turn uniformly adopted the traditional definition as the federal standard. Congress could choose either to continue to adopt state definitions or continue to employ the traditional definition for federal law purposes, but it could not have it both ways. If rational basis means anything, the choice as to which aspect of the status quo ante to preserve—the procedural adoption of state law or the substantive traditional definition—was surely one for Congress to make. Indeed, because preserving the substantive definition not only preserved earlier legislative judgments but also advanced the obviously rational goal of uniformity, Congress' choice clearly survives rational basis review.

Plaintiffs also echo the district court in claiming that caution cannot be a rational basis for a statute unless it is known that the alternative would create some identified "problem." Gill Br. 35-36; Mass. Br. 39-40. This is untenable: caution is a virtue, or at least a rational basis, precisely when the consequences of adopting a new substantive rule are unknown. This is especially true when dealing with a fundamental, foundational institution of society, like marriage—and with a proposed change in that institution that (until extremely recently) had never been tried anywhere. Under such circumstances, it was and is wholly rational for Congress to provide an extended time for debate to percolate in society, in the

academy, and potentially in the laboratories of the states and of foreign nations, before determining whether the potential negatives of changing the substantive definition of marriage have been sufficiently identified and weighed.[5]

B. Fiscal Prudence.

As to Congress' undeniable interest in protecting the federal fisc from negative or uncertain consequences and preserving previous legislative bargains by avoiding an expansion in the availability of marital benefits, Plaintiffs maintain that (1) some applications of DOMA do not save money; (2) DOMA as a whole does not save money; and (3) saving money is not a legitimate governmental interest unless there is some further justification for restricting benefits. Gill Br. 37-40; Mass. Br. 42. Each contention fails.

First, the fact that *some* applications of DOMA will not result in savings is beside the point. Indeed, it is precisely because the redefinition of marriage by certain states would cost the federal government money on some programs and save it on others that the federal government was justified in preserving the substantive definition in a way that avoided uncertain effects on the overall federal fisc and the budgets of particular agencies. Nor does the fact that there might be

[5] The cases cited by Massachusetts are not to the contrary, but instead simply establish that popular support alone cannot make a government action constitutional. *See* Mass. Br. 41 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963)).

net savings in some programs mean that the overall effect would not harm the fisc. And to the extent Congress actually wanted to reduce benefits to married couples in certain circumstances, pre-1996 Congresses clearly made that judgment with the traditional definition in mind. Preserving that judgment is hardly irrational. Moreover, DOMA's tendency to financially benefit some individuals in same-sex relationships hardly evidences an equal protection violation.

Second, the CBO report that Plaintiffs cite to argue that DOMA as a whole does not save money is hardly conclusive on the issue, due to its lack of detailed analysis and apparent methodological flaws already pointed out by the House. House Br. 44 n.12.[6] Congress obviously did not have the study before it when it

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[6] Plaintiffs take offense at the House's observation of these deficiencies, suggesting that the report would be inaccurate only if same-sex couples deliberately defrauded the government. Gill Br. 39 n.20; Mass. Br. 42-43. This is untrue: The point is not that individuals in same-sex relationships who choose to marry will fraudulently fail to report it (though the report appears not to account for that possibility either). The point instead is that, absent DOMA, individuals in same-sex relationships who stand to benefit financially from being married would get married at higher rates than individuals in same-sex relationships who would take a substantial financial hit in terms of lost benefits if they obtain a state-law marriage certificate. *See* House Br. 42 n.12. This notion that financial incentives might affect the decision whether and when to marry is not limited to same-sex couples. Plaintiffs' *amicus* concedes that the same incentives affect opposite-sex couples considering whether to marry. *See* Brief *Amicus Curiae* of Citizens for Responsibility and Ethics in Washington in Support of Affirmance . . . 14-15 (Nov. 3, 2011) (ECF No. 5593004) ("CREW Br."). The point is not that this is unique to same-sex couples, but simply that if same-sex couples with a financial incentive to marry get married at a higher rate than same-sex couples with a disincentive, then the conclusions of the simplistic CBO study are undermined.

enacted DOMA, and given the study's cursory nature and questionable assumptions,[7] it remains reasonable for Congress to conclude that on balance federal classifications based on marital status involve a net benefit to married couples. In all events, the fact that simply adopting state redefinitions of marriage as the federal definition would have an undeniably significant impact on the federal fisc, the net effect of which remains disputed, is reason enough for Congress to retain the traditional definition as the federal definition. Doing so guaranteed that changes in state-law definitions would have no impact on the federal fisc and would avoid potentially large and unpredictable fiscal impact. Such prudent fiscal stewardship is an eminently rational basis for maintaining the status quo.

Plaintiffs finally maintain that even if DOMA is reasonably calculated toward saving money, some additional justification is required. Gill Br. 38; Mass.

[7] The individual Plaintiffs' and the district court's contention that Congress "made a deliberate choice" not to assess DOMA's fiscal impact by rejecting a proposed amendment, Gill Br. 39; House Br. Add. 32a n.116, is false. The amendment had nothing to do with DOMA's "financial impact," but instead would have required a GAO study of "the differences in benefits, rights, and privileges available to persons in a marriage and to persons in a domestic partnership . . . ." 142 Cong. Rec. H7503-04 (daily ed. July 12, 1996). The question of the delta between marital benefits and domestic partner benefits is distinct from the question whether the net fiscal impact of DOMA would be positive or negative. There is every reason to believe that Congress assumed federal law provided net benefits to married couples and so DOMA's net fiscal impact would be positive. *See, e.g.*, House Br. 13-14.

Br. 42. But the Supreme Court has long recognized that proceeding "cautiously" and protecting the fisc by not hastily extending previously unavailable benefits is a legitimate government interest, *Bowen v. Owens*, 476 U.S. 340, 347-49 (1986) (upholding Congress' decision not to immediately expand social security surviving spouses' benefit eligibility), to be second-guessed only where it involves "invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). *Cook* has already held that sexual-orientation classifications are not suspect or "invidious," and so Congress' rational decision to preserve the federal fisc from the uncertain and likely negative effects of states abandoning the traditional definition of marriage is sufficient to sustain DOMA. House Br. 43 n.11.

C. Uniformity.

As explained, *see* House Br. 40, with respect to federal marital benefits, the Hawaii Supreme Court's *Baehr* decision presented Congress with three choices: (a) adopt the approach of the overwhelming majority of the States and continue to employ the traditional definition as the federal one; (b) incorporate the state rule as the federal rule and create a patchwork; or (c) adopt Hawaii's new definition as the federal one. Only the first and last choices would promote nationwide uniformity in eligibility criteria. It was perfectly rational for Congress to choose uniformity when it comes to federal benefits (thus rejecting option (b)) and equally rational to

prefer option (a) over option (c), which would have rejected the then-prevailing rule in every state but Hawaii (where the law was in flux).

Plaintiffs' primary response is that Congress has no legitimate interest in nationwide uniformity in substantive eligibility criteria, but instead is constitutionally required to adopt the several states' criteria, no matter how disuniform. Gill Br. 40-41; Mass. Br. 44. This has to be something other than a rational basis/equal protection argument. It is eminently rational for Congress to employ uniform eligibility requirements in apportioning burdens and benefits in federal programs. Thus, unless there is something unique about federal definitions of marriage for Tenth Amendment purposes—and there is not, *see infra* Part IV—then the uniformity rationale disposes of Plaintiffs' attack on DOMA.

Plaintiffs rather weakly suggest that Congress should have preferred a form of uniformity where everyone is treated the same for federal-law purposes as they are for state-law purposes. But that just restates Plaintiffs' mistaken contention that Congress must adopt the state definition as an argument that Congress must prefer uniformity between the state and federal definitions over the uniform treatment of same-sex couples across the nation. The latter form of uniformity is clearly more important in the context of nationwide federal benefit programs. But in all events, if rational basis means anything, it means that Congress may choose a

uniform federal substantive definition over a rule that uniformly adopts the state definition. *See* House Br. 48-49.

Plaintiffs' contention that federal agencies are capable of making the choice-of-law determinations required by their preferred rule has no place in a rational basis argument. Gill Br. 42-43; Mass Br. 45. The question is not whether DOMA is necessary because such determinations are *impossible*, but rather whether Congress rationally could have desired to streamline the process and obviate the need for such determinations. Of course, it could; especially in light of the potential complexity of such determinations, which Plaintiffs' own briefing illustrates. *See id.*

For similar reasons, and contrary to Plaintiffs' suggestions, it was rational for Congress to address the major discrepancies between state laws addressing same-sex marriage, but not more minor differences regarding consanguinity or age requirements. Likewise, the fact that past Congresses did not address major disuniformities that no longer existed when DOMA was enacted, *see* Mass. Br. 20, did not render it irrational for Congress in 1996 to prevent the greatest threat to uniformity of its time. The burden is for Congress to act rationally in enacting

DOMA, not to have proceeded on precisely the same theory across multiple Congresses.[8]

IV. CONGRESS MAY DEFINE THE TERMS USED IN ITS ENACTMENTS.

Ultimately, Plaintiffs' challenge appears to rest on their argument that Congress has no legitimate interest in providing or ability to provide a federal definition of the term "marriage," as it appears in federal statutes, and has no choice but to adopt the state definition. Gill Br. 26-28; *see generally* Mass. Br. Congress had multiple rational bases for preferring a uniform federal definition over a patchwork, so DOMA should survive unless there is something categorically different about marriage. There is not. Congress has ample power to define the terms used in federal statutes to apportion federal benefits and burdens. Any other rule would turn the Supremacy Clause and our entire constitutional structure upside down.

Plaintiffs' argument is profoundly mistaken. Just stating Plaintiffs' proposition—that the Constitution prohibits Congress from defining the words

[8] The district court's reliance on Congress' inaction regarding state anti-miscegenation laws, *see* House Br. Add. 36a, undermines its own conclusion: because such laws violate the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1 (1967), Congress could prohibit them under Section 5 of that Amendment, and surely could have treated inter-racial marriages as valid for purposes of federal law and federal benefits. That Congress did not exercise that power does not mean it does not exist. Similarly, Congress' alleged pre-DOMA inaction as to other disuniformities does not demonstrate an absence of authority.

"marriage" and "spouse" when it uses them in the U.S. Code, and instead permits the fifty states to dictate the meaning of federal statutes using those words—reveals its incompatibility with our federal system. Even DOJ, which openly supports Plaintiffs' goals, cannot bring itself to endorse this far-fetched theory and instead has rebutted it. *See* DOJ Br. 58-61. And despite Plaintiffs' suggestion that this argument rests on foundational notions of state authority, Gill Br. 27; Mass. Br. 17-21, neither Plaintiffs nor the district court have identified even a single case striking down a federal definition on this ground.

That is no surprise. Plaintiffs' theory is wholly inconsistent with our basic constitutional structure. Implicitly conceding as much, Plaintiffs attempt to limit the reach of their theory by claiming it means only that Congress cannot restrict eligibility for federal marital benefits based on "sweeping arguments about family law policy in general," Gill Br. 24, or based on Congress' supposed "belief that the state made a mistake in marrying" certain couples, *id.* 28, or by asserting a federal interest in "regulating marriage," Mass Br. 24. But those theories of what motivated DOMA are both incorrect and inconsistent with basic principles of judicial review of congressional enactments, especially under rational basis review. DOMA by its terms does none of these things but rather simply supplies a federal definition for the apportionment of federal benefits and burdens. That is wholly

unexceptionable from a federalism standpoint.[9] Indeed, the general presumption is that a uniform federal definition applies to terms used in federal statutes: "[T]he principle is well established that, unless Congress plainly manifests an 'intent to incorporate diverse state laws into a federal statute, the meaning of [a] federal statute should *not* be dependent on state law.'" *Spina v. DHS*, 470 F.3d 116, 126 (2d Cir. 2006) (second alteration in original) (quoting *United States v. Turley*, 352 U.S. 407, 411 (1957)). Congress can define "marriage" for purposes of apportioning federally-created benefits and duties for the same reasons that it may prescribe the statute of limitations for a federal cause of action or supply law, including a definition of "marriage," in federal territories or federal enclaves: all are areas of appropriate federal concern, do not directly interfere with state law and

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[9] This also reveals Massachusetts's emphasis on DOMA's "unprecedented" nature, *e.g.*, Mass. Br. 14-15, to be overblown. While Congress rarely has attempted to dictate the meaning of marriage for purposes of *state* law, DOMA does not do that. Nor does DOMA *supplant* state family law, in the way the Supreme Court has assumed Congress cannot. *See id.* 18-19 (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)). And as Plaintiffs recognize, Congress may and does refuse some federal marital benefits to some state-recognized marriages. *See* Gill Br. 27-28; Mass. Br. 23-27. Thus, Massachusetts's claim that "prior to DOMA, Congress had *never* refused to recognize a State determination of marital status" makes little sense, and in any event is supported only by citation of a student Note that deals solely with tax law, makes this sweeping claim only in passing, and cites nothing to support it. Mass. Br. 20 (citing Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996)).

are classic exercises of federal authority.[10] For this reason, Massachusetts's references to preemption law, Mass. Br. 30-31, are simply inapposite.

But without this limiting gloss, Plaintiffs' theory that Congress must respect any state-sanctioned marriage lest it intrude on the states' exclusive sphere sweeps far too broadly and would invalidate not just DOMA but a host of other federal statutes Plaintiffs purport to respect. For instance, Plaintiffs concede that the Constitution permits Congress to refuse favorable immigration status to spouses in state-recognized marriages entered solely to obtain that status, or to refuse federal death benefits to the surviving spouse of a state-recognized "death-bed marriage[]." Gill Br. 42; Mass. Br. 24, 27. But such refusals reflect the bedrock principle that Congress can protect the federal objectives of federal programs and is not somehow bound to take state-sanctioned marriages as a given.

Massachusetts alternatively suggests that congressional restrictions on marital benefits are invalid only if some couples will *never* be able to satisfy them. Mass. Br. 13, 24, 27-28. But that makes no sense as a federalism argument. If Congress wishes to exclude some state-sanctioned marriages from a federal

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[10] Massachusetts's supposed counterexamples drawn from corporate law, Mass. Br. 16-17, are inapposite because corporations, unlike marriages, are legal persons for many purposes, *e.g.*, *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 253 (1906) (Fourteenth Amendment), and dueling federal and state determinations about whether a state-chartered corporation even exists thus would create serious constitutional difficulties with no analog in other contexts.

definition used only for federal law purposes, it may do so. And if states really had some exclusive sphere over marriage, a federal criterion would be problematic whether or not the putative spouses could theoretically have done something different to satisfy the criterion. *Cf.* Mass. Br. 26-27 (approving denial of federal surviving-spouse benefits to widows of death-bed marriages).[11]

Finally, in addition to all its theoretical problems, Plaintiffs' rule would result in intolerably strange practical outcomes. For instance, it would have *prohibited* Congress from recognizing interracial marriages when many states refused to do so, or from currently recognizing same-sex relationships as marriages in most of the country even if Congress desired to. This cannot be the law.

V. PLAINTIFFS' REMAINING ARGUMENTS FAIL.

A. The Governmental Interests Justifying the Majority of States' Marriage Definitions Also Support DOMA.

Plaintiffs unsuccessfully attempt to discredit the government interests underlying both DOMA and state-law traditional marriage statutes. This is particularly ironic in Massachusetts's case, because less than a decade ago the

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[11] Plaintiffs suggest an additional rule that would reduce equal protection principles to formalistic drafting guidelines for federal statutes: that Congress may establish criteria for benefits *in addition to* a state-recognized marriage, but not *define* the term marriage for purposes of federal law. Gill Br. 27-28; Mass Br. 13, 23-24. Any federalism principle worth protecting could not be that easily circumvented, and Congress surely has the latitude to choose between alternative drafting formulations with the identical effect.

Commonwealth advanced virtually identical rationales while defending its own traditional marriage laws in state court. *See* Br. of Defs.-Appellees iv, *Goodridge v. Dept of Pub. Health*, No. SJC 08860 (Mass. Dec. 20, 2002), *available at* http://www.domawatch.org/cases/massachusetts/goodridgevdepartmentofhealth/20021220_state_brief.pdf (table of contents listing rational bases for traditional marriage, including "fostering and protecting the link between marriage and procreation," "fostering a favorable setting for child-rearing," and "conserving limited financial resources"). In any event, this Court can deal with Plaintiffs' contentions in short order: Plaintiffs do not challenge any state marriage statute, and DOMA simply adopted the overwhelming majority rule among the states recognizing only opposite-sex marriages. While the House has identified some of the valid government interests behind that definition, *see* House Br. 38-58, there is no need for an exhaustive analysis of them to uphold DOMA, because Congress surely had an independent rational *federal* basis for deferring to the (unchallenged) determinations of the majority of states in this regard.

Plaintiffs' contentions also fail on their merits. For instance, Plaintiffs maintain that DOMA is not narrowly tailored to any government interest in child welfare, because some federal marital benefits allegedly are not related to children, Gill Br. 28-29; Mass. Br. 49-50, and because DOMA offers benefits to childless opposite-sex couples while excluding parenting same-sex couples, Mass. Br. 48-

49. But the absence of narrow tailoring does not condemn a statute under rational basis review.[12] *See* House Br. 35. It is surely rational to think that children will benefit from a relationship that includes both of their biological parents and excludes an arrangement that, by definition, forecloses that child-rearing relationship.

With little explanation, Plaintiffs declare it "implausible" that changing the definition of marriage might affect people's decisions whether to marry or have children in marriage. Mass. Br. 46-47; *cf.* Gill Br. 31. But while Plaintiffs may not like it, Congress reasonably could have concluded that severing the link between marriage and procreation could have that effect, or at least deferred to the majority of states that did so. *E.g.*, Mass. *Goodridge* Br. 117 (noting "primary purpose of linking marriage and procreation per se"). Plaintiffs cannot establish the irrationality of Congress' actions by accusing respected foreign scholars on whom Congress relied of "invent[ing] facts" and making "patently false claims," Gill Br. 33, nor, under rational basis review, can they demand "evidence on the record" to demonstrate that this conclusion is not "based only on sheer animus." Mass. Br. 46.

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[12] One *amicus* argues that DOMA's exemption of same-sex married couples from federal ethics rules applicable to public officials is irrational. CREW Br. 4-11. But CREW does not explain why Congress could not rationally treat married same-sex couples the same as unmarried same-sex couples and unmarried opposite-sex couples, who also are not subject to such rules.

Like the district court, Plaintiffs rely on the questionable "consensus" among certain social scientists regarding the indistinguishability of parenting by same- and opposite-sex couples. Gill Br. 30; *see also* Mass. Br. 49. Yet whether such a consensus exists and is durable enough to support legislation is a question for Congress, not the courts. House Br. 40-41, 56-58. This is especially true with regard to open-ended inquiries such as what constitutes the best environment for children, or how to determine whether a child has been raised to be a successful adult. Such inquiries inevitably mix questions of public policy with those of science, and the courts should be vigilant in ensuring that scientific opinion is limited to the latter and not permitted to invade the policy realm reserved for the people's representatives.

Finally, Plaintiffs insist that the House must demonstrate that the exclusion of same-sex couples from DOMA's definition of marriage affirmatively benefits opposite-sex couples. *E.g.,* Gill Br. 31. That is wrong on many levels. First, Congress need only have one rational basis for DOMA. A rational belief that it would benefit opposite-sex married couples or reaffirm the traditional definition of marriage to the benefit of such couples would suffice, but so does any one of the multiple alternative rational bases discussed above, *see* pp. 9-17. Second, this argument ignores that opposite-sex couples primarily benefit from being included within the federal definition. Excluding others from a special category of

benefits—be it same-sex couples married under state law, same-sex couples who wish to be married but cannot under state law, unmarried opposite-sex couples in long-term relationships, or others—may incidentally benefit those included in the definition by increasing the likely pool of benefits, but like any beneficiary of a subsidy, the primary benefit is from inclusion, not from exclusion of others. Finally, even if denying benefits to same-sex relationships does not by itself benefit opposite-sex marriages, Congress could rationally decide to benefit only the latter based on the belief that children will benefit from having a legal relationship with both their biological parents, the fact that the overwhelming majority of children are conceived and raised by opposite-sex couples, House Br. 51, that opposite-sex couples raise children in greater proportions than same-sex couples, *id.* 51-52, that opposite-sex couples have children in adverse and unplanned circumstances much more often than same-sex couples, *id.* 52, and that Congress rationally could seek to provide children with parents of both sexes, *id.* 55-58. *See Johnson v. Robison*, 415 U.S. 361, 383 (1974) (classifications are valid where "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not").

B. Defining Marriage Is Related to the Purposes of Federal Marital Benefits Programs.

Massachusetts argues that DOMA violates the Spending Clause because it is not reasonably related to the federal spending programs at issue. Mass. Br. 56-59.

This is wholly untenable. DOMA's definitional provisions are about as "germane" as any spending conditions could be. Surely, when Congress funds state-administered programs providing benefits to individuals, its designation of *which* individuals should receive those benefits will be related to the purpose of the program—indeed, will define that purpose—at least so long as there is a rational basis for the line Congress draws. As there are numerous rational bases for DOMA, *see* House Br. 38-58, the relatedness requirement is satisfied.[13]

VI. THE POLITICAL PROCESS IS THE PROPER VENUE FOR RESOLVING THESE ISSUES.

The individual Plaintiffs claim that "the democratic process" already has decided the issue of whether the federal government should recognize their relationships as marriages. Gill Br. 64-65. That argument ignores the federal

[13] Massachusetts's contrary arguments, Mass. Br. 58-59, are simply second-guessing of congressional judgments regarding the true purposes of federal programs. Such second-guessing is inappropriate under spending power or rational basis review. The Medicaid means-testing rules requiring aggregation of spouses' income reflect Congress' determination that spouses should be financially responsible for each other's medical care. For the reasons articulated in the House's briefing and DOMA's legislative history, Congress decided not to demand the same level of interdependence of same-sex couples. That decision benefitted same-sex couples and is a perfectly rational decision that Massachusetts cannot disturb. With respect to veterans' cemeteries, Congress did not permit veterans to designate any or all "loved ones" to be buried with them, *cf. id.* 59, but limited burial rights to a few enumerated relationships that Congress regarded as particularly close. Congress' determination that same-sex romantic relationships are not equivalent in this respect to traditional marriages or parent-child relationships may be controversial, but it is not irrational.

democratic process, but it does underscore that the cause of same-sex marriage has made remarkable strides at the state level. While the initial gains in Massachusetts were procured in state courts, those decisions have not been overturned by referendum. Moreover, as the House detailed in its opening brief, proponents of same-sex marriage have won impressive battles in the political process in other states. Nor have successes been limited to the state level. The federal executive branch has extended substantial benefits to same-sex couples and declined to defend DOMA, despite conceding that reasonable arguments can be made in its defense. Additionally, in December 2010, Congress repealed Don't Ask Don't Tell, while even more recently the Senate Judiciary Committee voted to repeal DOMA. 157 Cong. Rec. D1212 (daily ed. Nov. 10, 2011); Seung Min Kim, *Senate Dems move to repeal DOMA,* Politico (Nov. 10, 2011), http://www.politico.com/news/stories/1111/68075.html. And, in this very case, 133 Members of Congress and scores of major corporations have filed *amici* briefs supporting the plaintiffs' position. *See* Br. of Members of the U.S. House of Representatives . . . Urging Affirmance (Nov. 3, 2011) (ECF No. 5593009); Br. of *Amici Curiae* 70 . . . Employers . . . in Support of Affirmance . . . (Nov. 3, 2011) (ECF No. 5593067).

That is where things stand now. In some ways, the question for this Court is whether this issue will remain in the political process or whether the courts will

end the debate by declaring DOMA unconstitutional. The latter course is not supported—indeed is foreclosed—by precedent, but it also has little to recommend it as a way for resolving an issue on which people of good faith have strongly opposed views. The political process requires advocates on both sides of the issue to persuade. Litigation requires labeling opponents bigots, attributing "animus" and labeling judgments reached by an overwhelming bipartisan consensus of Congress to be not just wrong, not just antiquated, but downright irrational.

Plaintiffs seem to relish the challenge. Even the Commonwealth has changed its stripes so thoroughly that arguments it espoused before the Commonwealth's highest court only recently are now labeled irrational. Indeed, Plaintiffs acknowledge that one of the major purposes of their briefing here is to demonstrate that DOMA is irrational and therefore must have been motivated by "animus" or "moral disapproval." Gill Br. 44-45; Mass. Br. 50-53. The Gill Plaintiffs concede that DOMA cannot be struck down on this ground unless it lacks any other rational basis, Gill Br. 44,[14] and as the House has demonstrated numerous rational bases, this argument fails. But the unseemliness of litigating in

[14] Massachusetts suggests that "*post hoc* justifications" cannot save a statute under rational basis review if the court concludes it was "enacted out of animus." Mass. Br. 52. This is incorrect. The only case the Commonwealth cites for this proposition, *Romer*, specifically considered *post hoc* justifications for the statute at issue, and invalidated it only after finding those justifications "impossible to credit." 517 U.S. at 635.

appellate briefs whether hundreds of prominent elected officials, many still in office and most still living, acted irrationally or out of bigotry once again demonstrates why this issue should instead be resolved through the political process.[15] Only that route can yield a result that is the product of persuasion, rather than labels.

CONCLUSION

For the foregoing reasons and those stated in the House's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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[15] Plaintiffs superficially disclaim any charge of actual bigotry or irrationality, but nevertheless maintain that DOMA was enacted without "rational reflection" or based on an "instinctive mechanism" that "people who appear to be different are dangerous." Gill Br. 45; Mass. Br. 53 n.18. Rearranging words and inserting euphemisms does not change the accusation.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

On December 1, 2011, I filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit, using the appellate CM/ECF system, the foregoing Reply Brief for Intervenor-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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