

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

JOANNE PEDERSEN, et al.,)	
)	
)	
Plaintiffs,)	
)	
v.)	Case No. 3:10-cv-01750 (VLB)
)	
OFFICE OF PERSONNEL)	
MANAGEMENT, et al.,)	
)	
Defendants.)	

INTERVENOR-DEFENDANT'S MOTION TO DISMISS

Intervenor-Defendant, the Bipartisan Legal Advisory Group of the United States House of Representatives, through its undersigned counsel, hereby moves to dismiss this action pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. To the extent that this Court finds that some plaintiffs have standing, this action should be dismissed for failure to state a claim upon which relief can be granted.

The grounds for this motion are more fully set forth in the accompanying memorandum in support. A proposed order is attached hereto.

Respectfully submitted,

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INTRODUCTION

This action involves a constitutional challenge to Section 3 of the Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7. Plaintiffs’ action should be dismissed with prejudice. DOMA, which as an act of Congress is entitled to a strong presumption of constitutionality, is subject to rational basis review. As explained in the opposition simultaneously filed by the Bipartisan Legal Advisory Group of the United States House of Representatives (the “House”) to Plaintiffs’ motion for summary judgment, DOMA is not subject to heightened scrutiny because it neither implicates a fundamental right nor involves the classification of a suspect class. DOMA easily passes the rational basis test and does not violate the Equal Protection component of the Fifth Amendment.

In enacting DOMA, Congress rationally could have been, and in fact was, concerned with employing proper caution in the face of a proposed redefinition of the centuries-old definition of marriage. Congress’ interest in protecting the public fisc also provided a rational basis for DOMA, as did Congress’ interest in maintaining consistency and uniformity with regard to eligibility for federal benefits. Congress’ judgment also was supported by the rational bases that underlay the traditional definition in the first instance. Congress rationally could have been, and in fact was, concerned about creating a social understanding of bearing, begetting, and rearing children that was separated from marriage. Likewise, Congress rationally could have been, and in fact was, interested in recognizing an institution designed to ensure that children have parents of both

sexes. Accordingly, Congress' decision to employ the traditional definition of marriage for purposes of allocating federal benefits and burdens was eminently rational. A conclusion to the contrary would mean that the 427 members of Congress who voted for DOMA (including then-Senator Joseph Biden), and President Clinton who signed DOMA into law, were not just misguided in Plaintiffs' eyes, but were patently irrational in reaffirming the traditional definition of marriage.

Moreover, any effort to redefine the institution of marriage as something other than the union of one man and one woman is a matter best left to the democratic process, where the issue has been actively debated and where proponents of same-sex marriage have made remarkable strides. As the Ninth Circuit has noted, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 681 (9th Cir. 2006). And there is an alternative: Determining the federal rights of same-sex couples "remains a fit topic for [Congress] rather than the courts." *Id.* at 684 n.34 (citing several bills pending in the 109th Congress). In short, the question at issue in this case is not a question that is "unlikely to be soon [addressed] by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This is a quintessential legislative and democratic question that should be decided by the people, not by the courts. Accordingly, this Court should grant the House's motion to dismiss.

BACKGROUND

Plaintiffs

Plaintiffs are various residents of Vermont, Connecticut, and New Hampshire. Am. Compl. (Jan. 14, 2011) (ECF No. 33) ¶ 2. Each of the plaintiffs is (or was, in the case of Gerald V. Passaro II whose partner died) considered legally married to a person of the same-sex by state law. *Id.* Each plaintiff or plaintiff's partner has attempted at one time or another to be treated as married for the sake of federal health care benefits, the Family Medical Leave Act (FMLA), federal taxes, Social Security, or state—or company—run pension or retirement benefits that are subject to federal law. *Id.* ¶¶ 4, 6-10. Pursuant to DOMA, the relevant agencies or administrators have treated the plaintiffs as individuals, rather than married couples. *Id.* ¶¶ 5-10. Plaintiffs brought this action seeking declaratory and injunctive relief and alleging that DOMA, as applied to them, violates the equal protection component of the Fifth Amendment's Due Process Clause and asking this Court to declare DOMA unconstitutional. *Id.* ¶ 11.

The Defense of Marriage Act of 1996

Section 3 of DOMA defines "marriage" for purposes of federal law as the legal union of a man and a woman:

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

1 U.S.C. § 7. Congress did not, of course, invent the definition of "marriage" and

the related term “spouse” in 1996. Rather, in DOMA, Congress merely codified and confirmed what Congress always has meant in using those words. Even before DOMA, whenever Congress used terms connoting a marital relationship, it meant a traditional male-female couple. See, e.g., Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting “a husband and wife living together” to file a joint tax return); 38 U.S.C. § 101(3) (1975) (“The term ‘surviving spouse’ means . . . a person of the opposite sex who was the spouse of a veteran”); Final Rule, *Family Medical Leave Act*, 60 Fed. Reg. 2180, 2190-91 (1995) (rejecting, as inconsistent with congressional intent, proposed definition of “spouse” that would include “same-sex relationships”); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (“Congress, as a matter of federal law, did not intend that a person of one sex could be a ‘spouse’ to a person of the same sex for immigration law purposes.”), *aff’d*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting 1901 District of Columbia marriage statute, intended “that ‘marriage’ is limited to opposite-sex couples”); 150 Cong. Rec. S7966 (daily ed. July 13, 2004) (Sen. Inhofe) (“In the late 19th century, Congress would not admit Utah into the Union unless it abolished polygamy and committed to the common national definition of marriage as one man and one woman.”); see *also* 152 Cong. Rec. S5473 (daily ed. June 6, 2006) (Sen. Talent) (“Marriage is our oldest social institution. It is older than our system of property. It is older than our system of justice. It certainly predates our political institutions and our Constitution.”).

Congress designed DOMA to apply comprehensively to all manner of

federal programs. According to the GAO, as of 2004, there were 1,138 provisions in the United States Code “in which marital status is a factor in determining or receiving benefits, rights, and privileges.” U.S. Gen. Accounting Office, *Defense of Marriage Act*, GAO-04-353R at 1 (Jan. 23, 2004). DOMA seeks to reaffirm the definition of marriage already reflected in those statutes, namely, the traditional definition of marriage as between one man and one woman.

DOMA’s Legislative Branch History

The 104th Congress enacted DOMA in 1996 with overwhelming, bipartisan support. DOMA passed by a vote of 342-67 in the House and 85-14 in the Senate. See 142 Cong. Rec. 17093-94 (1996) (House vote); 142 Cong. Rec. 22467 (1996) (Senate vote). In all, 427 Members of Congress voted for DOMA. President Clinton signed DOMA into law on September 21, 1996. See 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

DOMA was enacted in response to the Hawaii Supreme Court’s opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), finding that the denial of a marriage license to a same-sex couple was subject to strict scrutiny under the Hawaii Constitution. See H.R. Rep. No. 104-664 at 4-5 (1996) (“House Rep.”). The Hawaii courts “appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples.” *Id.* at 2. Congress was concerned that the decision by the Hawaii Supreme Court could interfere with the ability of other states and the federal government to define marriage along traditional lines. Section 2 of DOMA addressed the concern about the Hawaii decision being given preclusive effect in other states. And with Section 3, Congress ensured that, no

matter what Hawaii or any other state might do to redefine marriage under state law, the definition of marriage for purposes of federal law would remain, as it always has been, the lawful union of one man and one woman.

The legislative history confirms that, even in statutes enacted before DOMA, Congress never intended the word “marriage” to include same-sex couples. *See id.* at 10 (“[I]t can be stated with certainty that none of the federal statutes or regulations that use the words ‘marriage’ or ‘spouse’ were thought by even a single Member of Congress to refer to same-sex couples.”); *id.* at 29 (“Section 3 merely restates the current understanding of what those terms mean for purposes of federal law.”); 142 Cong. Rec. 16969 (1996) (Rep. Canady) (“Section 3 changes nothing; it simply reaffirms existing law.”); *id.* at 17072 (Rep. Sensenbrenner). In enacting DOMA, Congress was concerned with more than semantics: It intended to ensure that the meaning of federal statutes already on the books, and the legislative judgments of earlier Congresses, would be respected and that the array of federal benefits tied to marriage therefore would be reserved for traditional marital relationships. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 32 (1996) (hereinafter, “House Hrg.”) (statement of Rep. Sensenbrenner) (“When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages.”).

During its deliberations over DOMA, Congress repeatedly emphasized “[t]he enormous importance of marriage for civilized society.” House Rep. at 13

(quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)); see also House Rep. at 12 (quoting H.R. 3396, 104th Cong. (2d Sess. 1996)). The House Report quoted approvingly from *Murphy v. Ramsey*, in which the Supreme Court referred to “the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization.” House Rep. at 12 (quoting *Murphy*, 114 U.S. 15, 45 (1885)); see also 142 Cong. Rec. 16799 (1996) (Rep. Largent) (“[T]here is absolutely nothing that we do that is more important than protecting our families and protecting the institution of marriage.”); *id.* at 16970 (Rep. Hutchinson) (marriage “has been the foundation of every human society”); *id.* at 22442 (Sen. Gramm) (“[T]he traditional family has stood for 5,000 years. There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society—it is the oldest institution that exists.”); *id.* at 22454 (Sen. Burns) (“[M]arriage between one man and one woman is still the single most important social institution.”).

In enacting DOMA, Congress also recognized that, historically in American law, the institution of marriage consisted of the union of *one* man and *one* woman. See House Rep. at 3 (“[T]he uniform and unbroken rule has been that only opposite-sex couples can marry.”); House Hrg. at 1 (statement of Rep. Canady) (“Simply stated, in the history of our country, marriage has never meant anything else.”); 142 Cong. Rec. 16796 (1996) (Rep. McInnis) (“If we look at any definition, whether it is Black’s Law Dictionary, whether it is Webster’s Dictionary, a marriage is defined as [a] union between a man and a woman, and that should

be upheld . . . and this Congress should respect that.”). This historical definition was by no means a singling out of homosexual relationships: Rather, it identified one type of relationship (traditional marriage) as especially important, and excluded every other kind of relationship from the definition of “marriage.” And Congress concluded that such an important institution should not be radically redefined at the federal level to include same-sex relationships. Senator Dorgan expressed the views of many Members of Congress when he stated: “For thousands of years, marriage has been an institution that represents a union between a man and a woman, and I do not support changing the definition of marriage or altering its meaning.” 142 Cong. Rec. S10552 (Sept. 13, 1996); see *id.* at 16802 (Rep. Stearns) (“If we change how marriage is defined, we change the entire meaning of the family.”); *id.* at 22451 (Sen. Coats) (DOMA “merely restates the understanding of marriage shared by Americans, and by peoples and cultures all over the world”); *id.* at 22452 (Sen. Mikulski) (DOMA “is about reaffirming the basic American tenet of marriage”).

In adopting a single definition of marriage to govern all federal laws, Congress decided that eligibility for federal benefits should not vary depending on how a state might choose to define marriage. As Senator Ashcroft stated, a federal definition “is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently . . . , people in different States would have different eligibility to receive Federal benefits, which would be inappropriate.” *Id.* at 22459. He added that benefits “should be uniform for people no matter where they come from in this

country. People in one State should not have a higher claim on Federal benefits than people in another State.” *Id.*

In adhering to the historic definition of marriage, Congress explained that marriage is afforded a special legal status because only a man and a woman can beget a child together, and because historical experience has shown that a family consisting of a married father and mother is an effective social structure for raising children. For example, the House Report states that the reason “society recognizes the institution of marriage and grants married persons preferred legal status” is that it “has a deep and abiding interest in encouraging responsible procreation and child-rearing.” House Rep. at 12, 13. Many Members of Congress supported DOMA on that basis. See 142 Cong. Rec. 22446 (1996) (Sen. Byrd) (“The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere in which a man and a woman pledge themselves exclusively to one another and who bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large.”); 142 Cong. Rec. S10002 (daily ed. Sept. 6, 1996) (Sen. Lieberman) (“I intend to support the Defense of Marriage Act because I think that affirms another basic American mainstream value, . . . marriage as an institution between a man and a woman, the best institution to raise children in our society.”); House Hrg. at 1 (Rep. Canady) (“[Marriage] is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children.”); 142 Cong. Rec. 17081

(1996) (Rep. Weldon) (“[M]arriage of a man and woman is the foundation of the family. The marriage relationship provides children with the best environment in which to grow and learn.”).

Congress received and considered advice on DOMA’s constitutionality and determined that DOMA is constitutional. *See, e.g.*, House Rep. at 32 (DOMA “plainly constitutional”); *id.* at 33-34 (letters to House from DOJ advising that DOMA is constitutional); House Hrg. at 86-117 (testimony of Professor Hadley Arkes); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 2 (1996) (hereinafter, “Senate Hrg.”) (Sen. Hatch) (DOMA “is a constitutional piece of legislation” and “a legitimate exercise of Congress’ power”); *id.* at 2 (DOJ letter to Senate advising that DOMA is constitutional); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell); *see also* 150 Cong. Rec. S7879 (daily ed. July 9, 2004) (Sen. Hatch) (“There is an obvious[] rational basis for legislation that protects traditional marriage.”); 150 Cong Rec. H7896 (daily ed. Sept. 30, 2004) (Letter from former Attorney Gen. Edwin Meese to Rep. Musgrave) (“As marriage is a fundamental social institution, it is not only reasonable but also obligatory that it be preferred and defended in the law.”); 150 Cong. Rec. S8008 (daily ed. July 13, 2004) (Sen. Sessions) (“No one disputes that a two-parent traditional family is a healthy, positive force for our society. That is why it is perfectly legitimate for any government to provide laws that further [marriage].”).

DOMA’s Executive Branch History

During the Clinton Administration, the Justice Department three times

advised Congress that DOMA was constitutional, stating, for example, that it “continues to believe that [DOMA] would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. . . . [T]he Supreme Court’s ruling in *Romer v. Evans* does not affect the Department’s analysis.” Letter from Andrew Fois, Ass’t Att’y Gen., to Hon. Charles T. Canady (May 29, 1996), *reprinted in* House Rep. at 33; see also Letters from Andrew Fois, Ass’t Att’y Gen., to Hon. Henry J. Hyde (May 14, 1996), *reprinted in* House Rep. at 22-23, and to Hon. Orrin G. Hatch (July 9, 1996), *reprinted in* Senate Hrg. at 2.

During the Bush Administration, DOJ successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment. See *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (upholding Section 3 against due process and equal protection claims); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting plaintiff’s request for voluntary dismissal after defendants filed their motion to dismiss); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35) (upholding Section 3 against due process and equal protection claims); *In re Kandou*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding Section 3 against due process and equal protection claims), *vacated in relevant part for lack of standing*, 477 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006).

During the first two years of the Obama Administration, DOJ continued to defend DOMA, albeit without defending Congress’ stated justifications for the

law. However, in February of this year, the Executive Branch abruptly reversed course. The Attorney General notified Congress that DOJ had decided “to forgo the defense” of DOMA. Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, at 5 (Feb. 23, 2011) (ECF No. 10-2). Attorney General Holder stated that he and President Obama now are of the view “that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.” *Id.* at 6. At the same time, the letter acknowledged that:

- (1) at least *ten* federal appellate courts have issued binding circuit precedent holding that sexual orientation classifications are properly judged under the highly deferential rational basis test, not “heightened” scrutiny, *id.* at 3-4 nn.4-6;
- (2) in light of “the respect appropriately due to a coequal branch of government,” DOJ “has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense,” *id.* at 5; and
- (3) in fact, “a reasonable argument for Section 3’s constitutionality *may be proffered* under that permissive [rational basis] standard,” *id.* at 6 (emphasis added).

Despite the Obama Administration’s decision to decline to defend DOMA’s constitutionality, the Holder letter states that “the President has instructed Executive agencies to continue to comply with Section 3 of DOMA.” *Id.* at 5. Thus, Executive Branch officials now are in the seemingly untenable position of enforcing a statute that the head of the Executive Branch views as unconstitutional and that the Executive Branch’s chief law enforcement officer declines to defend when those Executive Branch officials’ actions are challenged

in court. All of this despite the fact that the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, surely includes the duty to defend as well as enforce the law.

ARGUMENT

I. DOMA FULLY COMPLIES WITH THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

Section 3 of DOMA does not violate the equal protection component of the Fifth Amendment.¹

A. As an Act of Congress, DOMA Is Entitled to a Strong Presumption of Constitutionality.

The Supreme Court has explained that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

For these reasons, the Supreme "Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite

¹ Section 3 also comports with due process: "[I]f a federal statute is valid under the equal protection component of the Fifth Amendment, it is perforce valid under the Due Process Clause of that Amendment." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 n.8 (1980).

gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power.” *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). “The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.” *Rostker*, 453 U.S. at 64. “This deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted” violates the Fifth Amendment. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985). The Supreme Court “accord[s] great weight to the decisions of Congress even though the legislation . . . raises equal protection concerns.” *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (quotation marks omitted) (*receded from on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995)).

B. Binding Supreme Court Precedent Supports DOMA’s Constitutionality.

No matter how this Court might view DOMA if it were an open question, this Court is bound by Supreme Court precedent squarely holding that defining marriage as between one man and one woman comports with equal protection.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court held that two men, Baker and McConnell, had no constitutional right to marry each other. Their application to the clerk of Hennepin County, Minnesota, for a marriage license was declined, based on state law, “on the sole ground that [they] were of the same sex.” *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) (en banc). The

Minnesota Supreme Court rejected their constitutional challenge to the state statute defining marriage as “the state of union between persons of the opposite sex.” *Id.* at 186. The court rejected their arguments “that the right to marry without regard to the sex of the parties is a fundamental right” and that “restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory.” *Id.* It held instead that “[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state’s classification of persons authorized to marry. There is no irrational or invidious discrimination.” *Id.* at 187. The court noted that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” *Id.* at 186.

The two men took an appeal as of right to the U.S. Supreme Court under former 28 U.S.C. § 1257(2) (repealed 1988). In their Jurisdictional Statement, they included on their list of “Questions Presented” the following: “Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.” Jurisdictional Statement for Appellant at 3, *Baker v. Nelson*, No. 71-1027 (1972), attached as Ex. A hereto. And they expressly argued that the Minnesota statutes violated equal protection. See *id.* at 11-18. The U.S. Supreme Court summarily affirmed the Minnesota Supreme Court’s decision, deeming the equal protection challenge insubstantial. The Supreme Court unanimously ordered: “The appeal is dismissed for want of a substantial federal question.” *Baker*, 409 U.S. at 810.

In Supreme Court practice, such a disposition is a decision on the merits. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*Hicks* “held that lower courts are bound by summary actions on the merits by this Court”). It means that “the Court found that the decision below was correct and that no substantial question on the merits was raised.” Eugene Gressman et al., *Supreme Court Practice* 365 (9th ed. 2007); see *White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984) (“A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question operates as a decision on the merits on the challenges presented in the statement of jurisdiction.”). The dismissal in *Baker* is no mere denial of certiorari. The Court’s certiorari jurisdiction is discretionary, whereas its appellate jurisdiction under 28 U.S.C. § 1257(2) was mandatory. Thus, in *Baker*, “the Supreme Court had no discretion to refuse to adjudicate the case on its merits.” *Wilson*, 354 F. Supp. 2d at 1304. The Jurisdictional Statement in *Baker* expressly argued that Minnesota’s refusal to license same-sex marriages violated equal protection, and “dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction.” *Mandel*, 432 U.S. at 176.

Referring specifically to *Baker*, the Eighth and Ninth Circuits have explained that “the Supreme Court’s dismissal of the appeal for want of a substantial federal question constitutes an adjudication on the merits which is binding on the lower federal courts.” *McConnell v. Nooner*, 547 F.2d 54, 56 (8th

Cir. 1976);² accord *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982). Other federal courts also have recognized *Baker's* effect. Rejecting an equal protection challenge to DOMA, the court in *Wilson* held that *Baker* “is binding precedent upon this Court and Plaintiffs’ case against Attorney General Ashcroft must be dismissed.” *Wilson*, 354 F. Supp. 2d at 1305; see also *Adams*, 486 F. Supp. at 1124 (“*Baker* . . . is controlling.”). State courts, too, have recognized that *Baker* remains binding precedent. See *Andersen v. King Cnty.*, 138 P.3d 963, 999 & n.19 (Wash. 2006) (equal protection claim in *Baker* “was so frivolous as to merit dismissal without further argument”); *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005); *In re Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1993).

Baker effectively holds that a state may define marriage as the union of one man and one woman without violating equal protection. Since “[the Supreme] Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment,” *Adarand Constructors*, 515 U.S. at 217, it necessarily follows from *Baker* that Congress rationally may define marriage, for federal law purposes, using that same historic definition of marriage consistent with equal protection. See *Wilson*, 354 F. Supp. 2d at 1305 (holding that *Baker* had “dispositive effect” on equal protection challenge to DOMA Section 3).

² After Hennepin County denied Baker and McConnell a marriage license, they obtained one from the clerk of Blue Earth County, and the two “were ‘married’ by a minister.” *McConnell v. Nooner*, 547 F.2d at 55. Despite this marriage, the Eighth Circuit in 1976 rejected their claim for federal veteran’s spousal benefits. *Id.* at 55-56. It also rejected, in 2006, their claim for a federal tax refund. See *McConnell v. United States*, 188 Fed. App’x 540 (8th Cir. 2006).

This Court is obligated to follow *Baker*, even if it believes that later Supreme Court cases have undermined *Baker* or that a majority of the current Justices might decide *Baker* differently today. See *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); see also *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (same); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (admonishing lower courts not to “conclude our more recent cases have, by implication, overruled an earlier precedent”).³ “The Supreme Court has not explicitly or implicitly overturned its holding in *Baker*.” *Wilson*, 354 F. Supp. 2d at 1305. Thus, this Court “is bound to follow the Supreme Court’s decision.” *Id.*

C. Rational Basis Review, Not Any Form of Heightened Scrutiny, Applies to DOMA.

In judging an equal protection claim, the deferential rational basis test applies where, as here, “a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class.” *Vacco v. Quill*, 521 U.S. 793, 799

³ When the Supreme Court has considered the weight of its summary affirmances *in subsequent Supreme Court cases*, it has noted that such affirmances “do not . . . have the same precedential value *here* as does an opinion of this Court after briefing and oral argument on the merits.” *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979) (emphasis added) (citing *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (discussing the *stare decisis* weight of summary affirmances)). This does not change the well-settled rule that these decisions are binding precedents for lower courts.

(1997) (quotation marks omitted); *see also Wilson*, 354 F. Supp. 2d at 1308 (judging equal protection challenge to DOMA under rational basis test); *Smelt*, 374 F. Supp. 2d at 879-80 (same); *In re Kandau*, 315 B.R. at 140-41 (same); *see also Adams*, 673 F.2d at 1042-43 (applying rational basis test to congressional definition of spouse as person of opposite sex).

1. DOMA Does Not Infringe the Fundamental Right to Marriage.

a. Same-Sex Marriage Is Not a Fundamental Right.

Fundamental rights are those rights that “are, objectively, ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citation omitted; quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Same-sex marriage simply cannot be described as a fundamental right under the Supreme Court’s definition. And, even if it could, DOMA does not prohibit same-sex marriage; it merely supplies a definition for purposes of federal law.

The right to marry someone of one’s own sex is, of course, not deeply rooted in American law and history—indeed, it has scarcely any roots at all. Although the landscape has changed somewhat in the past fifteen years, when Congress enacted DOMA in 1996, not one of the fifty states permitted same-sex marriage, and no American court had discovered a state or federal constitutional right to same-sex marriage. *See House Rep. at 3* (“[T]he uniform and unbroken rule has been that only opposite-sex couples can marry. No State now or at any time in American history has permitted same-sex couples to enter into the

institution of marriage.”). Only the Hawaii Supreme Court, by a bare 3-2 vote, had suggested that such a right *might* exist under its state constitution. See *Baehr*, 852 P.2d at 65; *but see id.* at 74 (Heen, J., dissenting) (“This court should not manufacture a civil right which is unsupported by any precedent.”).

Since DOMA’s enactment, same-sex marriage has gained legal recognition in some jurisdictions, often as the result of judicial interpretations of state constitutional provisions and increasingly through the democratic process. But those recent developments do not remotely amount to a deeply-rooted tradition. In America, same-sex marriage was first legally recognized in 2004 in Massachusetts, following the decision in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Same-sex marriage also currently is permitted in Vermont, New Hampshire, Connecticut, Iowa, the District of Columbia, and most recently in New York. And, for a time, California issued same-sex marriage licenses, after its Supreme Court held that such couples had a right under the state’s constitution to marry. (That ruling was superseded by a state constitutional amendment, which now is being challenged on equal protection grounds). Forty-one states have constitutional amendments or statutes defining marriage as the union of one man and one woman. See List of Statutes, attached as Ex. B hereto. As far as same-sex marriage has come in a short span of time, it cannot be said that an institution that first gained legal recognition in 2004 is, only seven years later, “deeply rooted.”

Before DOMA, every court to address the issue had held that there is no statutory, common law, or constitutional right to same-sex marriage. See *Baker*,

191 N.W.2d at 186-87, *appeal dismissed*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (“The law makes no provision for a ‘marriage’ between persons of the same sex. Marriage is and always has been a contract between a man and a woman.”); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (“We find no constitutional sanction or protection of the right of marriage between persons of the same sex.”); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (rejecting federal equal protection claim (“[T]he courts known by us to have considered the question have all concluded that same-sex relationships are outside of the proper definition of marriage.”)); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that two persons of the same sex cannot contract a common law marriage); *In re Cooper*, 592 N.Y.S.2d 797 (following *Baker v. Nelson*); *Dean*, 653 A.2d at 361-62 (Terry, J., concurring) (rejecting Fifth Amendment equal protection challenge to District of Columbia marriage statute enacted by Congress); *id.* at 362-64 (Steadman, J., concurring) (same); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996) (rejecting argument that “denial of a marriage license to a same sex couple destroys a fundamental right”).

Thus, every federal and state court to consider the question has held that same-sex marriage is not a fundamental federal right deeply rooted in American law and history. See *Smelt*, 374 F. Supp. 2d at 879 (“[T]he fundamental due process right to marry does not include a fundamental right to same-sex marriage”); *Wilson*, 354 F. Supp. 2d at 1307 (“[T]he right to marry a person of the same sex is not a fundamental right under the Constitution.”); *In re Kandou*, 315 B.R. at

140 (Supreme Court has not “conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship”); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675 (Tex. App. 2010) (“Plainly, [same-sex marriage] is not [deeply rooted]. Until 2003, no state recognized same-sex marriages.”); *Conaway v. Deane*, 932 A.2d 571, 624 (Md. 2007) (same-sex marriage not “so deeply embedded in the history, tradition, and culture of this State and the Nation that it should be deemed fundamental”); *Standhardt v. Superior Ct. of Ariz.*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) (“The history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.”); *see also Shahar v. Bowers*, 114 F.3d 1097, 1099 & n.2 (11th Cir. 1997) (en banc) (“Given the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be ‘married’ to another woman”; “[N]o federal appellate court or state supreme court has recognized the federal rights of same-sex marriage claimed by Plaintiff”).

As New York’s highest court aptly observed: “Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.” *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). The notion that same-sex marriage is a fundamental right, as the Supreme Court of Washington observed, would be “an astonishing conclusion, given the lack of any authority

supporting it; *no* appellate court applying a federal constitutional analysis has reached this result.” *Andersen*, 138 P.3d at 979.

By contrast, in cases involving traditional, opposite-sex marriage, the Supreme Court indeed has recognized a fundamental right to marry. *See Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 541 (1942). But it never has suggested, let alone held, that same-sex marriage comes within the scope of this right. Indeed, it has indicated to the contrary. The Court repeatedly has warned of the need for “a ‘careful description’ of the asserted fundamental liberty interest.” *Glucksberg*, 521 U.S. at 721. Here, careful consideration reveals that the Court has deemed marriage to be fundamental precisely because of its connection to procreation, something that same-sex spouses cannot accomplish, un-aided, with each other. *See, e.g., Zablocki*, 434 U.S. at 386 (referring to “decision to marry and raise the child in a traditional family setting”); *Skinner*, 316 U.S. at 541 (“Marriage and procreation are fundamental to the very existence and survival of the [human] race.”).

b. DOMA Implicates Federal Benefits, Not the Right of Same-Sex Couples to Marry.

Regardless of whether same-sex marriage is a fundamental right, DOMA does not “‘directly and substantially’ interfere” with the ability of same-sex couples to marry, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *In re Kandu*, 315 B.R. at 141 & n.6, because it does not bar same-sex marriages. Congress has defined marriage for purposes of federal law, but that definition implicates eligibility for federal benefits and burdens, it “does not . . . prevent any” same sex couple from

marrying under state law. *Lyng*, 477 U.S. at 638. DOMA does not operate “by banning, or criminally prosecuting nonconforming marriages.” *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977).

DOMA only defines marriage for purposes of benefits—and *burdens*⁴—created by other federal laws. As Senator Nickles, the principal sponsor of DOMA in the Senate, stated: “These definitions apply only to Federal law. We are not overriding any State law. We are not banning gay marriages.” Senate Hrg. at 5. Congress “did not penalize” same sex couples; it “decided not to offer them a special inducement.” *Alexander v. Fioto*, 430 U.S. 634, 640 (1977). Furthermore, DOMA does not prevent federal agencies from extending benefits to same-sex couples, or their dependents, on an otherwise lawful basis apart from marital status. See *Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child’s Insurance Benefits Under the Social Security Act*, 2007 WL 5254330, at *1 (Opinion of the Office of Legal Counsel, Oct. 16, 2007) (opining that DOMA permits such benefits); *Smelt*, 447 F.3d at 683 (DOMA “does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not

⁴ For only a few examples, covering only federal statutes (not agency regulations), see, for example: *Druker v. Comm’r*, 697 F.2d 46 (2d Cir. 1982) (rejecting challenge to “marriage penalty” in federal tax code); 42 U.S.C. § 1396a(a)(17)(D) (non-spouses’ income cannot be counted against an individual in determining Medicaid eligibility); 20 U.S.C. § 1087nn(b)(1) (spousal income counted in determining amount of student loan eligibility); *id.* § 1087oo(f)(3) (stepparent’s income counted in determining amount of student loan eligibility); *id.* § 1087e(e) (spousal income counted in determining income-contingent repayment amounts on student loans); 31 U.S.C. § 1353(a) (mandating regulations under which travel by Executive-Branch spouses may be reimbursed by non-federal sources).

included within [DOMA's] definition"). Nor does DOMA alter marital benefits under state law. See House Rep. at 31 ("Whether and to what extent benefits available to married couples available under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.").

Both of these features dramatically distinguish DOMA from other laws that the Supreme Court has found to infringe the right to marry. In these cases the states had not merely declined to offer benefits to some married couples, but instead affirmatively (1) had *prohibited* their marriages and (in two of the three cases) (2) had attached severe penalties to the celebration of such marriages. *Loving*, 388 U.S. at 4 (Virginia voided interracial marriages and punished them with one to five years' imprisonment); *Zablocki*, 434 U.S. at 375 & n.1, 387 (Wisconsin prohibited marriage without court order for certain persons, on pain of criminal sanctions); *Turner*, 482 U.S. at 82 (prohibition on marriage by prisoners except with permission of superintendent for "compelling reasons"). DOMA does neither.

As a result, even assuming that the fundamental right to marriage included the ability to enter a same-sex marriage (which, as discussed above, it does not), in order to conclude that DOMA restricts the fundamental right to marriage, a court would have to expand equal protection from the current rule that *prohibitions* on marriage are subject to strict scrutiny to a rule that offering different or lesser *benefits* to any category of potential marriages is subject to strict scrutiny. The Supreme Court expressly has held that "reasonable

regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.” *Zablocki*, 434 U.S. at 386. While same-sex couples may object to the government’s refusal to treat their decisions to enter state-law marriages in the same manner as those of opposite-sex couples, Section 3 of DOMA does absolutely nothing to “interfere with” those decisions in any way.

2. DOMA Does Not Employ a Suspect or Quasi-Suspect Classification.

The recognized suspect classes are “race, alienage, [and] national origin.” *City of Cleburne*, 473 U.S. at 440. Classifications based on sex or illegitimacy are quasi-suspect. *Id.* at 440-41. The Supreme Court has rejected many other proposed suspect and quasi-suspect classes, such as mental retardation, *id.* at 442-47, age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). It would be inappropriate for this Court to add to the list of suspect and quasi-suspect classes, particularly in light of the Supreme Court’s binding decision in *Baker*. The Supreme Court has not expanded the list in nearly forty years, *see Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex), and since that time no federal district court or court of appeals has added to the list of suspect and quasi-suspect classes without being reversed by a higher court.

DOMA’s definitions of “marriage” and “spouse” do not implicate any suspect or quasi-suspect class. The definitions do not turn on homosexuality as such, and in situations in which federal burdens are at issue, DOMA actually benefits same-sex couples. *See supra* p. 24 n.4. To be sure, the overwhelming

majority of same-sex marriages will be between two individuals who share the same sexual orientation. But sexual orientation never has been viewed as a suspect or quasi-suspect classification by federal courts.

First, “the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes.” *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006). On the contrary, the Supreme Court has applied the rational basis test to equal protection challenges of classifications based on sexual orientation. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

Second, every circuit court that has addressed the question has concluded that homosexuals are not a suspect or quasi-suspect class. No fewer than eleven federal circuits have held that homosexuals are not a suspect class. *See Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008) (“Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read *Romer* as recognizing homosexuals as a suspect class for equal protection purposes.”), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009); *Citizens for Equal Prot.*, 455 F.3d at 866; *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing cases from the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits) (“[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.”), *cert. denied*, 543 U.S. 1081 (2005); *see, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (“Our review compels us to agree with the other circuits that have ruled on

this issue and to hold that homosexuals do not constitute a suspect or quasi-suspect class.”); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (“[W]e must depart from [the district court’s] analysis, in which [it] found that homosexuals constitute a suspect class, justifying heightened scrutiny of the regulation . . .”).

In *Cook*, for instance, the First Circuit considered the constitutionality of the federal “Don’t Ask, Don’t Tell” Act, 10 U.S.C. § 654. The plaintiffs in *Cook* “contend[ed] that the district court erred by applying rational basis review” to the Act and that “the Supreme Court’s decisions in *Romer* and *Lawrence* mandate[d] a more demanding standard.” *Cook*, 528 F.3d at 61 (citation omitted). The First Circuit *expressly* rejected those contentions, holding that “neither *Romer* nor *Lawrence* mandate heightened scrutiny of the Act because of its classification of homosexuals.” *Id.* The court further held that “the district court was correct to analyze the plaintiffs’ equal protection claim under the rational basis standard.” *Id.*

Nor does DOMA discriminate based on sex. No court ever has concluded to the contrary, and the House is unaware of *any* traditional-marriage provision, State or federal, that ever has been held to classify based on sex within the meaning of the federal Constitution. Instead, every court to have considered the question as a matter of federal law has concluded that DOMA classifies, if at all, on the basis of sexual orientation, not of sex. *Dragovich v. U.S. Dep’t of Treasury*, 764 F. Supp. 2d 1178, 1182 (N.D. Cal. 2011); *Collins v. Brewer*, 727 F.

Supp. 2d 797 (D. Ariz. 2010); *Wilson v. Ake*, 354 F. Supp. 2d 1298; *Smelt*, 374 F. Supp. 2d 861; *In re Kandou*, 315 B.R. 123; *Conaway*, 932 A.2d 571; *see also In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Andersen*, 138 P.3d 963; *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Baker v. State*, 744 A.2d 864, 890 (Vt. 1999).⁵

This common-sense conclusion is not inconsistent with *Loving v. Virginia*. In *Loving*, recognizing that “the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination,” the Court struck down a Virginia statute prohibiting interracial marriage. 388 U.S. at 10. Anti-miscegenation statutes such as the one struck down in *Loving* were, of course, enacted precisely to disadvantage racial minorities and “maintain White Supremacy.” *Id.* at 11. While they necessarily prohibited some marriages to members of any race, in doing so they imposed—and were obviously intended to impose—vastly greater social and numerical restrictions on the choice of potential spouses by members of the

⁵ State courts have reached the same conclusion with respect to state laws defining marriage. *See, e.g., Conaway*, 932 A.2d at 598 (Maryland’s “marriage statute does not discriminate on the basis of sex”); *Andersen*, 138 P.3d at 969 (Washington’s “DOMA treats both sexes the same”); *In re Marriage Cases*, 103 P.3d at 401. Although dealing with the California constitution, the California Supreme Court actually *rejected* the contention “that the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender.” *Id.* Only *Baehr v. Lewin* is to the contrary, and the court there expressly noted that it was interpreting the Hawaii constitution, that “[t]he equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another,” 852 P.2d at 59, and that Hawaii’s equal protection clause “is more elaborate” than the federal one, *id.* at 60. In any event, *Baehr* has since been rejected by an amendment to Hawaii’s constitution.

disfavored minority group. By contrast, there is not the slightest indication in either history or reason that DOMA was intended to effect or perpetuate any inequality between the sexes. Nor does it do so: The numbers of men and women in the population are very nearly equal, and in stark contrast to anti-miscegenation statutes, the very nature of traditional-marriage statutes precludes any possibility that they could be intended to prevent members of a supposedly inferior sex from marrying outside their sex. Instead, and quite obviously, DOMA was intended to distinguish between same-sex and opposite-sex *relationships*. It therefore is not sex discrimination.

In sum, a governmental definition of marriage as between a man and a woman does not classify based upon a suspect or quasi-suspect class, as four federal courts already specifically have held. See *Citizens for Equal Prot.*, 455 F.3d at 866-67; *Wilson*, 354 F. Supp. 2d at 1307-08; *In re Kandou*, 315 B.R. at 144 (holding that *Lawrence* did “not eviscerate” the Ninth Circuit’s holding in *High Tech Gays* that homosexuals did not constitute suspect or quasi-suspect class); *Smelt*, 374 F. Supp. 2d at 874-75, *vacated for lack of standing*, 447 F.3d 673, *cert. denied*, 549 U.S. 959 (2006); see also Mem. in Supp. of House’s Opp’n to Pls.’ Mot. for Summ. J. (Aug. 15, 2011) at 6-28 (discussing why homosexuality fails to meet criteria for suspect or quasi-suspect class).⁶

⁶ While the House does not concede in the least that any form of heightened scrutiny is applicable to DOMA, even under a more searching standard DOMA’s classification is constitutional.

D. DOMA Easily Satisfies Rational Basis Review.

Rational basis review “is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.” *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). Under such review, a classification in a statute receives “a strong presumption of validity,” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993), and must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 313. “[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.” *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The government “has no obligation to produce evidence to sustain the rationality of a statutory classification,” and “a statute is presumed constitutional, and the *burden* is on the *one attacking* the legislative arrangement to *negative every conceivable basis* which might support it, whether or not that basis has a foundation in the record.” *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (quotation marks, brackets, and citations omitted) (emphasis added). Under rational basis review, a court must accept a legislature’s generalizations even when there is an imperfect fit between means and ends. *Leib v. Hillsborough Cnty. Pub. Transp. Comm’n*, 558 F.3d 1301, 1306 (11th Cir. 2009) (citing *Heller*, 509 U.S. at 320). Furthermore, the courts may not “substitute [their] personal notions of good public policy for those of Congress.” *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). And on rational basis review, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged

distinction actually motivated the legislature.” *Beach Commc’ns*, 508 U.S. at 315. “[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 315.

The Supreme Court has recognized the existence of a broad category of regulations in which “Congress had to draw the line somewhere,” *id.* at 316, and where “inevitably . . . some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.” *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see also Schweiker*, 450 U.S. at 238 (line-drawing statutes “inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle”) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)). In such cases, Congress’ decision about precisely where to draw the line is “virtually unreviewable.” *Beach Commc’ns*, 508 U.S. at 316. “The only remaining question” is whether the line that Congress drew was “patently arbitrary or irrational.” *U.S. R.R. Ret. Bd.*, 449 U.S. at 177.

Here, it is beyond dispute that “some line is essential” to delineate the boundaries of the institution of marriage. *Cf. Mathews*, 426 U.S. at 83. No matter what definition of “marriage” one adopts, there will remain some relationships that fall outside that definition; the only question is precisely where the line will be drawn. Until 2004, the constant practice in this country had been to draw the line defining marriage as including relationships between one adult man and one adult woman who were not closely related by blood, and to exclude all other relationships. DOMA merely reinforced this historical line, and Plaintiffs simply wish that it had been drawn slightly differently.

Deference to congressional line-drawing is particularly appropriate when it comes to questions of federal benefits because such a limitation always furthers the legitimate purpose of conserving the public fisc. For example, in *Schweiker* the Supreme Court considered an equal-protection challenge to Congress' decision to extend Supplemental Security Income benefits to elderly, blind, or disabled citizens, including (on a more limited basis) to those residing in hospitals or nursing homes that receive Medicaid funds, but to deny SSI benefits to such persons residing in non-Medicaid facilities. 450 U.S. at 226. Applying rational basis review, the Supreme Court did not ask whether the denial of benefits to persons in non-Medicaid institutions would somehow further Congress' purpose of aiding other aged, blind, or disabled people. Instead, the Court simply noted that Congress rationally could have concluded that the care and maintenance of persons in non-Medicaid institutions was primarily a state and not a federal responsibility, and upheld the statute on that basis. *Id.* at 238-39.

1. Myriad Rational Bases Support DOMA.

a. Congress Rationally Could Have Acted with Caution in the Face of the Unknown Consequences of a Proposed Novel Redefinition of the Foundational Social Institution.

In DOMA, Congress acted to maintain the definition of marriage that was universally accepted in American law, and indeed largely normative throughout world history, until just a few years ago. *See supra* pp. 3-10; *Murphy v. Ramsey*, 114 U.S. at 45 (marriage is “the union for life of one man and one woman”); *Baker*, 191 N.W.2d at 186 (“The institution of marriage as a union of man and woman,

uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”); *Adams*, 486 F. Supp. at 1122 (“The term ‘marriage’ . . . necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes. That is the way the term ‘marriage’ is defined in every legal source I have examined, starting with Black’s Law Dictionary.”); *Black’s Law Dictionary* 756 (1st ed. 1891) (“the civil status of one man and one woman united in law for life”); *Webster’s Third New Int’l Dictionary* 1384 (1976) (“The state of being united to a person of the opposite sex as husband or wife.”). Whatever else may be at issue in the debate over marriage, no one can deny that Congress reasonably could have found the institution of central importance to civilized society, as it has been virtually everywhere for all of recorded history.

Viewed in this light, Congress had a supremely rational basis to proceed with caution in considering whether to drop a criterion—opposite-sex couples—that until now has been an essential element of such an enormously important social concept as marriage. See 150 Cong. Rec. S7994 (daily ed. July 13, 2004) (Sen. Clinton) (“marriage is not just a bond but a sacred bond between a man and a woman” and is “the fundamental bedrock principle that exists between a man and a woman, going back into the midst of history as one of the foundational institutions of history and humanity and civilization”). Congress’ valid and specifically declared purpose of “nurturing” the foundational institution of

marriage, and all the social benefits that flow from it, House Report at 12, would more than justify its acting with caution.⁷

As an empirical matter, the long-term social consequences of granting legal recognition to same-sex relationships remain unknown. In these circumstances, Congress was justified in waiting for evidence spanning a longer term before engaging in what it reasonably could regard as a major redefinition of a foundational social institution. See 150 Cong. Rec. S2836 (daily ed. Mar. 22, 2004) (Sen. Cornyn) (“The institution of marriage is just too important to leave to chance. . . . The burden of proof is on those who seek to experiment with traditional marriage, an institution that has sustained society for countless generations.”); 150 Cong. Rec. S7880 (daily ed. July 9, 2004) (Sen. Hatch) (“The jury is out on what the effects on children and society will be and only legislatures are institutionally-equipped to make these decisions. If nothing else, given the uncertainty of a radical change in a fundamental institution like marriage, popular representatives should be given deference on this issue.”); *id.* at S7887 (Sen. Frist) (calling same-sex marriage “a vast untested social experiment for which children will bear the ultimate consequences”); *id.* at S7888 (Sen. Sessions) (“I think anybody ought to be reluctant to up and change [the traditional definition of marriage]; to come along and say, well, you know, everybody has been doing this for 2000 years, but we think we ought to try

⁷ As was explained above, see *supra* pp. 23-26, Congress did not “ban” gay marriage in DOMA, instead leaving that question to the states. But it did express a policy judgment that, even if states choose to experiment in this fashion, it would be unwise or at least premature for the United States to throw its weight behind the venture.

something different.”); 150 Cong. Rec. S7914 (daily ed. July 12, 2004) (Sen. Kyl) (“We cannot strip marriage of its core—that it be the union of a man and woman—and expect the institution to survive.”); 150 Cong. Rec. S8089 (daily ed. July 14, 2004) (Sen. Smith) (“[W]hen we tinker with the most basic institution that governs relationships of men and women, we are tinkering with the foundations of our culture, our civilization, our Nation, and our future.”); 152 Cong. Rec. S5473 (daily ed. June 6, 2006) (Sen. Talent) (“[T]he evidence is not even close to showing that we can feel comfortable making a fundamental change in how we define marriage so as to include same-sex marriage within the definition.”).

In other words, in DOMA, Congress rationally could distinguish between opposite-sex marriage and same-sex marriage because opposite-sex marriage is a deeply rooted, historic institution—and a fundamental constitutional right—and same-sex marriage is neither of those things and, by comparison with our civilization’s appreciation of traditional marriage, a relative unknown. *See supra* pp. 19-23. Traditional marriage, to borrow the Supreme Court’s description of another longstanding practice, “is deeply embedded in the history and tradition of this country” and “has become part of the fabric of our society.” *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). In sharp contrast, same-sex marriage has existed as a legal right in some American jurisdictions only since 2004, and did not exist at all in 1996.

To be sure, “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns.” *Id.* at 790. Because DOMA does not implicate a

suspect class, Congress rationally could decide to adhere to the historic, fundamental-rights definition of marriage—for purposes of federal law only, and without prohibiting any marital arrangements that a particular state might choose to permit. Consistent with equal protection principles, Congress reasonably could choose to extend federal benefits based on the historic definition of marriage rather than a recently-minted definition that would encompass same-sex marriages. See *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring) (“preserving the traditional institution of marriage” is a rational basis for “laws distinguishing between heterosexuals and homosexuals”); cf. *Regan v. Taxation With Representation*, 461 U.S. 540, 550-51 (1983) (holding that it was “not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans’ organizations” because “[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages”). And in choosing to define marriage as it did in Section 3 of DOMA, Congress reasonably could rely upon the Supreme Court’s decision in *Baker*.

b. Congress Rationally Could Have Acted to Protect the Public Fisc and Preserve the Balance Struck by Earlier Congresses in Allocating Federal Benefits and Burdens.

Wholly apart from the broader debate about the definition of marriage, Congress had ample rational bases for preserving the traditional definition of marriage for the specific purpose of allocating federal benefits and burdens, which is all that Section 3 of DOMA addresses. In particular, by maintaining the traditional definition of marriage, Congress preserved both the public fisc and the

legislative judgments of countless earlier Congresses that used terms like “marriage” and “spouse” with reference to traditional marriages and traditional marriages alone.

First, unlike state laws confining marriage to the traditional definition, DOMA is justified by a unique and independent federal interest—the protection of the public fisc. Although DOMA applies to both federal burdens as well as benefits, on balance, Congress reasonably could have concluded that a more restricted definition of marriage would save money and preserve the federal fisc.⁸ That is certainly the case with respect to the application of DOMA challenged here. In the context of a statute that apportions federal benefits, saving money by declining to expand pre-existing eligibility requirements is itself a rational basis. Congress expressly relied on this rationale in enacting DOMA. See House Rep. at 18.

Furthermore, the particular context of DOMA makes that judgment particularly rational. DOMA recognized that a host of pre-existing federal statutes allocating benefits and, in some cases, burdens all necessarily were premised on

⁸ In 2004, the Congressional Budget Office opined that treating same-sex couples as married under federal law would result in so many of them becoming ineligible for federal means-tested benefits (after the incomes of their same-sex partners were included) that it would result in a net benefit to the Treasury, even after consideration of the resultant tax revenue decrease. Douglas Holtz-Eakin, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>. This report is a little more than nine pages in length, lacks a high degree of detailed analysis, and, of course, did not exist in 1996. In any event its estimate—and that is all it claims to be—that marriage actually would constitute a net fiscal *detriment* to same-sex couples as a class is implausible enough that Congress rationally could have chosen to reject it even if it had existed in 1996.

the traditional definition of marriage. Pre-DOMA statutes that classified by marital status used the traditional definition of marriage because at the time of classification there was no other definition. Each of those statutes involved its own unique legislative debate about the importance of the benefit and the countervailing importance of fiscal restraint and related issues. In the case of the estate tax, the impact on tax revenues would loom large, while in the immigration context, the total level of immigration and asylum requests might have been relevant. But whatever the precise dynamic of the earlier debates, by preserving the traditional definition of marriage, Congress acted in 1996 to preserve the balance between the objectives of hundreds of federal programs and the countervailing concerns, such as fiscal constraint. DOMA thus not only conserves the federal fisc, but even apart from the net effect on the fisc, it preserves the balance struck in countless earlier congressional debates. In the context of federal spending, that is surely a rational basis.

c. Congress Rationally Could Have Acted to Provide for Consistency in Eligibility for Federal Benefits Based on Marital Status.

There is another rational basis for DOMA rooted in its unique character as a federal statute, with no precise analog in the context of state definitions of marriage: The federal interest in uniform treatment of federal benefits. Congress rationally could decide to base eligibility for federal benefits on the traditional definition of marriage to avoid arbitrariness and inconsistency in such eligibility. See 142 Cong. Rec. S4870 (daily ed. May 8, 1996) (Sen. Nickles) (DOMA “will eliminate legal uncertainty concerning Federal benefits”); 142 Cong. Rec. S10121

(daily ed. Sept. 10, 1996) (Sen. Ashcroft) (stating that federal definition “is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently;” and “people in different States would have different eligibility to receive Federal benefits, which would be inappropriate”).

Opposite-sex couples can, of course, marry in every American jurisdiction while same-sex couples can marry in only a few states and the District of Columbia. If same-sex couples were eligible for federal marriage benefits, some same-sex couples would be eligible and some would not depending on the vagaries of state law. A same-sex couple living in a same-sex marriage state could marry and become eligible for federal benefits, whereas a couple residing in a non-same-sex marriage state could not do so in their home state.

More confusion would arise regarding the status of a same-sex couple that obtains a marriage license in a state where same-sex marriage licenses are available but resides in a state where same-sex marriage is not permitted. Such a couple might or might not be recognized as “married” in their state of residence. See 152 Cong. Rec. S5481 (daily ed. June 6, 2006) (Sen. Carper) (“If we have a same-sex couple in Delaware who decide to go to another country or another place where same-sex marriages are allowed, and then that couple comes back to Delaware and claims they are married, they are not married in my State.”). Differing state rules about the recognition of foreign same-sex marriage licenses add further complexity and disuniformity. *Compare, e.g.*, Mass. Gen. Laws Ann. ch. 207 § 10 (West 2011) (recognizing out-of-state same-sex marriages); *and*

Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland, 95 Md. Op. Att’y Gen. 3, 2010 WL 886002 (Feb. 23, 2010) (predicting that Maryland would recognize foreign same-sex marriages despite not permitting in-state celebrations), *with* Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, Op. No. 3-2007, N.J. Op. Att’y Gen., 2007 WL 749807 (Feb. 16, 2007) (foreign same-sex marriages recognized as civil unions) *and with, e.g.*, Okla. Const. art. II, § 35 (West, Westlaw current with amendments through Nov. 1, 2010) (declining recognition); Fla. Const. art I, § 27 (West, Westlaw current through Nov. 4, 2008 General Election) (same); *and* 750 Ill. Comp. Stat. Ann. § 5/216 (West 2011) (same). In enacting DOMA Section 3, Congress rationally could and did decide to avoid creating such a patchwork. See 142 Cong. Rec. S10121 (daily ed. Sept. 10, 1996) (Sen. Ashcroft) (discussed *supra* pp. 30-33); see also 150 Cong. Rec. S7966 (daily ed. July 13, 2004) (Sen. Inhofe) (same-sex marriage “should be handled on a Federal level [because] people constantly travel and relocate across State lines throughout the Nation. Same-sex couples are already traveling across country to get married”).

Congress’ interest in a uniform definition of marriage for purposes of federal benefits based on marital status also is revealed by Section 2 of DOMA, which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between

persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738c. Congress foresaw that, with the advent of same-sex marriage, same-sex couples residing in jurisdictions where same-sex marriage is not permitted would travel to jurisdictions that issue same-sex marriage licenses to become married and then return home. And that is exactly what has happened, including in this case. See 150 Cong. Rec. S7961 (daily ed. July 13, 2004) (Sen. Hutchison) (“Today, same-sex couples from 46 States have traveled to Massachusetts, California, and Oregon to receive marriage licenses with the intention of returning to their respective States”). Section 2 of DOMA advances Congress’ interest in uniformity by ensuring that States that do not permit same-sex marriage need not recognize same-sex marriage licenses obtained out of state.

- d. Congress Rationally Could Have Acted to Avoid Creating a Social Understanding That Begetting and Rearing Children Is Not Inextricably Bound up with Marriage.

Beyond these bases for the uniquely federal actions taken to address federal benefits and burdens in 1996, Congress could and did rely on the rational bases that support traditional marriage itself. Importantly, the rationales discussed above provide independent rational bases for the federal action that have no precise analog in the context of state decisions to maintain the traditional definition. But, in addition, Congress’ action could and did draw on the underlying rational bases for the traditional definition itself. Whether or not same-sex marriages are as beneficial to society as traditional marriages in other

respects, it would have been reasonable for Congress to have been concerned that extending the definition of marriage to same-sex relationships—which, by their nature, do not involve the same concerns with unplanned pregnancies and which are (and particularly in 1996, were) less likely to involve children at all—would weaken society’s understanding of the importance of marriage for children. Accordingly, Congress rationally could have been concerned that, by undermining the logic and message that children are a central reason why the state recognizes marriage, recognition of same-sex marriages would lead to an increase in the number of children being raised outside the marital context. *Cf.* 150 Cong. Rec. S7922 (daily ed. July 12, 2004) (Sen. Cornyn) (“[C]ountless statistics and research attest to the fact that when marriage becomes less important because it is expanded beyond its traditional definition to include other arrangements, that untoward consequences such as greater out-of-wedlock childbirths occur.”); *id.* at S7927 (Sen. Brownback) (“There is a real question about the future of societies that do not uphold traditional marriage.”).

In fact, in 2004 Congress heard testimony vividly illustrating the impact on communities of racial minorities of the corrosion of the social sense that children are a fundamental purpose of marriage.⁹ *See Judicial Activism v. Democracy:*

⁹ This testimony obviously was not before Congress as a formal matter in 1996 when it enacted DOMA, but “[t]he absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis,” because “a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.” *Beach Commc’ns*, 508 U.S. at 315 (citation, quotation marks, and brackets omitted). And, while this testimony was in the context of marriage in general rather than same-sex marriage in particular, it reveals Congress’ concern with the strength of the societal link between marriage

(Continued)

Nat'l Implications of the Mass. Goodrich Decision & Judicial Invalidation of Traditional Marriage Laws, Hrg. Before S. Subcomm. on the Constitution, 108th Cong. at 10 (Mar. 3, 2004) (testimony of Rev. Richard Richardson) (“That [traditional] institution [of marriage] plays a critical role in ensuring the progress and prosperity of the black family and the black community at large. . . . The dilution of the ideal—of procreation and child-rearing within the marriage of one man and one woman—has already had a devastating effect on [the African-American] community.”); *id.* at 12-15 (testimony of Pastor Daniel de Leon) (similar observations regarding the importance of traditional marriage to the Hispanic community).

Members of Congress also expressed a concern in 2004 that legal recognition of same-sex relationships has had precisely this effect in Scandinavia and the Netherlands. See 150 Cong. Rec. S7921 (daily ed. July 12, 2004) (Sen. Cornyn) (“Today, about 15 years after Denmark created this new institution [in 1989], a majority of children in Scandinavia are born out of wedlock, including more than 50 percent in Norway, and 55 percent of the children in Sweden, and in Denmark, a full 60 percent of first-born children have unmarried parents. In Scandinavia, as a whole, traditional marriage is now an institution entirely separated from the idea of child rearing or childbearing or child-rearing”); 150 Cong. Rec. H5951 (daily ed. July 19, 2004) (Rep. Osborne) (“[Several Scandinavian countries] have changed the traditional definition of marriage. The

and children. In enacting DOMA, Congress rationally could have anticipated the kinds of problems illustrated by the 2004 hearings.

result has been a decline in traditional marriage and a surge in out-of-wedlock births in these countries.”); 150 Cong. Rec. S7880 (daily ed. July 9, 2004) (Sen. Hatch) (noting scholars’ findings regarding the “marked decline in marriage culture” and “spectacular rise in the number of illegitimate births” in the Netherlands since adoption of domestic partnerships and same-sex marriage); 150 Cong. Rec. S8003-07 (daily ed. July 13, 2004) (reprinting Stanley Kurtz, *The End of Marriage in Scandinavia*, Weekly Standard (Feb. 2, 2004)); 150 Cong. Rec. H7912 (daily ed., Sept. 30, 2004) (Rep. Pence) (“In some parts of Norway, as many as 80 percent of first-born children and two-thirds of subsequent children are now born out of wedlock.”). While some have disputed this conclusion, such disagreement is hardly sufficient to render Congress’ decision irrational.

Members of Congress noted the publication in July 2004 of an open letter by five Dutch scholars cautioning that, while “definitive scientific evidence” does not yet exist, “there are good reasons to believe the decline in Dutch marriage may be connected to the successful public campaign for the opening of marriage to same-sex couples in The Netherlands.” 150 Cong. Rec. S7928 (daily ed. July 12, 2004). They reported:

Until the late 1980[*s*], marriage was a flourishing institution in The Netherlands. . . . It seems, however, that legal and social experiments in the 1990[*s*] have had an adverse effect on the reputation of man’s most important institution. Over the past fifteen years, the number of marriages has declined substantially, both in absolute and relative terms. . . . This same period also witnessed a spectacular rise in the number of illegitimate births—in 1989 one in ten children were born out of wedlock (11 percent), by 2003 that number had risen to almost one in three (31 percent). . . . It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their offspring.

Id. at S7927. In short, in enacting DOMA, Congress rationally could have been concerned about the effect that changing the federal definition of marriage could have on the institution of marriage and out-of-wedlock births.

e. Congress Rationally Could Have Acted to Foster Marriages That Provide Children with Parents of Both Sexes.

Another rationale that supports both the traditional understanding of marriage and Congress' passage of DOMA is the differences between men and women. Congress rationally could distinguish between opposite-sex couples and same-sex couples based on biological differences. The equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439; see *Miller v. Albright*, 523 U.S. 420, 445 (1998) (plurality opinion) (recognizing that "biological differences" between paternity and maternity can "provide a relevant basis" for statutory classification). Congress rationally could decide to base eligibility for federal marital benefits on the basic biological differences between the two classes of relationships. Opposite-sex spouses generally are capable of procreating with each other; same-sex couples are not. 150 Cong. Rec. S7913 (daily ed. July 12, 2004) (Sen. Bunning) ("Only a man and a woman have the ability to create children. It is the law of nature."). Indeed, most sexually-active opposite-sex relationships have an inherent ability to produce children whether or not the spouses are seeking to do so at any given time. And the fact that opposite-sex relationships produce unplanned and unintended pregnancies is at the heart of society's traditional interest in promoting the institution of marriage and

providing incentives for these unplanned offspring to be raised in the context of a traditional family unit. Whatever else is true of the procreative potential of same-sex couples, the phenomena of unplanned and unintended pregnancies is limited to opposite-sex couples. Congress rationally could have concluded that a special legal category was necessary to recognize the special concerns that face a couple who must take account of this inherent possibility of their relationship, and to support and incentivize such relationships despite the increased responsibility they place upon the spouses.

In enacting DOMA, Congress found that “society recognizes the institution of marriage and grants married persons preferred legal status” because of the “deep and abiding interest in encouraging responsible procreation and child-rearing.” House Rep. at 12, 13. This rationale explains DOMA’s definition of marriage as between one man and one woman. Encouraging couples to raise children in the context of the traditional marital family is, without question, a legitimate objective,¹⁰ and Congress rationally could conclude that this objective is advanced by extending benefits to couples meeting the historic definition of marriage. *See, e.g., Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 607 (7th Cir. 2001) (“[S]o far as heterosexuals are concerned, the evidence that” marriage “provides a stable and nourishing framework for child rearing refutes any claim that policies designed to promote marriage are irrational.”) (citing Linda J. Waite

¹⁰ *See, e.g., Lofton*, 358 F.3d at 819 (“It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society . . .”).

& Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (2000); David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood & Marriage are Indispensable for the Good of Children & Society* (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999)); *Lofton*, 358 F.3d at 820 (“Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.”); *see also Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (noting that “considerable scholarly research . . . indicates that ‘[t]he optimal situation for the child is to have both an involved mother and an involved father’”) (quoting H. Biller, *Paternal Deprivation* 10 (1974)); 150 Cong. Rec. S683 (daily ed. Feb. 6, 2004) (Sen. Cornyn) (traditional marriage “has been found over countless years to benefit children, to provide a stable emotional and economic foundation for children so that they then prosper and become responsible, productive adults”); 150 Cong. Rec. S1507 (daily ed. Feb. 24, 2004) (traditional marriage is the “best and most optimal arrangement found yet in the history of mankind to have and raise children so that they will be productive citizens”).¹¹

¹¹ In 2004, Congress extensively reviewed the evidence that children whose mother or father is absent are comparatively worse off. *See* 150 Cong. Rec. S5894 (daily ed. May 20, 2004) (Sen. Brownback) (“a marriage between a man and a woman . . . is the best place to raise children according to all of our sociological data.”); 150 Cong. Rec. H5951 (daily ed. July 19, 2004) (Rep. Osborne) (“[R]esearch shows that children do better when they live with their biological father and mother in a long-term stable relationship. Twelve leading

(Continued)

Congress also could “rationally decide that, for the welfare of children, it is more important to promote stability and to avoid instability, in opposite-sex [rather] than in same-sex relationships.” *Hernandez*, 855 N.E.2d at 7. This is because “[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.” *Id.* Congress could have found that

family scholars summarized thousands of studies on child rearing as follows: children raised by both biological parents within a marriage are less likely to become unmarried parents, live in poverty, drop out of school, have poor grades, experience health problems, die as infants, abuse drugs and alcohol, experience mental illness, commit suicide, experience sexual and verbal abuse, engage in criminal behavior.”); 150 Cong. Rec. H7826 (daily ed. Sept. 29, 2004) (Rep. Pence) (citing Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *The Atlantic*, Apr. 1993, at 47; 150 Cong. Rec. S7914 (daily ed. July 12, 2004) (Sen. Kyl) (noting the “overwhelming body of social science testimony” that “children on average experience the highest levels of overall well-being in the context of healthy marital relationships”); *id.* at S7926 (Sen. Brownback) (“Study after study shows children do best in a home with a married, biological mother and father ‘[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage.’”) (quoting Child Trends organization); 150 Cong. Rec. S7994 (daily ed. July 13, 2004) (Sen. Clinton) (recognizing that marriage’s “primary, principal role during th[e] millennia has been the raising and socializing of children for the society into which they become adults”); 152 Cong. Rec. H5295 (daily ed. July 18, 2006) (Rep. Ryan) (citing President Clinton’s domestic policy advisor, Dr. Bill Galston); 150 Cong. Rec. S7886 (daily ed. July 9, 2004) (Sen. Frist) (“Marriage is the union between a man and a woman for the purpose of procreation, and has been, until this point, one of the great settled questions of human history and culture.”); *id.* at S7889 (Sen. Sessions) (“The reason a State has an interest in preserving marriage, traditional marriage, is because children are produced in that arrangement.”); 150 Cong. Rec. H7896 (daily ed. Sept. 30, 2004) (Rep. Musgrave); 150 Cong. Rec. S7967 (daily ed. July 13, 2004) (Sen. Inhofe) (“The evidence of the benefits to children being raised by a mother and father is overwhelming.”) (citing, *inter alia*, the Senate testimony and research of Barbara Dafoe Whitehead and Patrick Fagan); 150 Cong. Rec. S8088 (daily ed. July 14, 2004) (Sen. McConnell) (“Two decades of modern social science have arrived at the conclusion borne out by at least two millennia of human experience: that family structure matters for children and hence for society, and the family structure that helps children the most is a family headed by a mom and a dad.”).

“it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman . . . and find that this will continue to be true.” *Id.* Accordingly, Congress “could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite sex couples who make a solemn, long-term commitment to each other.” *Id.* Furthermore, Congress could “find that this rationale for marriage does not apply with comparable force to same-sex couples” and that “unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples.” *Id.* Once again, the general ability of opposite-sex couples not only to procreate but to do so unintentionally is at the heart of the need to incentivize marriage and stable relationships in opposite-sex couples. Couples who can procreate only with considerable pre-meditation raise different issues and Congress rationally could treat those different groups differently. That is all rational basis review requires.

Finally, the experience of a child raised by a man and a woman likely differs from that of a child raised by same-sex caregivers. *See Popenoe, supra* p. 48, at 146 (“The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.”); James Q. Wilson, *The Marriage Problem* 169 (2002) (“The weight of scientific evidence seems clearly to support the view that fathers matter.”); Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 *Soc’y* 27 (2004) (“[T]here are strong theoretical reasons for believing that both fathers and mothers are important, and

the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself.”); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.”) (quotation marks and brackets omitted); 150 Cong. Rec. H7913 (daily ed. Sept. 30, 2004) (Rep. Jo Ann Davis) (mothers and fathers play important but different roles in child-rearing). The federal courts that have upheld DOMA all have recognized that encouraging child-rearing by a married mother and father is a legitimate governmental interest, and that DOMA furthers that interest. *See Wilson*, 354 F. Supp. 2d at 1308-09; *Smelt*, 374 F. Supp. 2d at 880; *In re Kandu*, 315 B.R. at 146-47. Given the evidence that sexually-differentiated parents matter and the basic intuition that this evidence confirms, Congress rationally could conclude that each child will benefit from (1) having a role model of his or her own sex as a parent and (2) from being exposed within the family to how that parent relates to an adult of the opposite sex. 150 Cong. Rec. S1507 (daily ed. Feb. 24, 2004) (Sen. Cornyn) (marital family consisting of a husband and a wife provides role models for children); 150 Cong. Rec. S7960 (daily ed. July 13, 2004) (Sen. Talent) (noting that “one thing that two people of the same sex cannot give children” is “a mom *and* a dad”) (emphasis added); 150 Cong. Rec. H5951-52 (daily ed. July 19, 2004) (Rep. Osborne) (“a man and a woman produce a child” and each makes “a unique contribution” to a child’s well-being); 150 Cong. Rec. H7892 (daily ed. Sept. 30, 2004) (Rep. Akin) (“[W]e all

know from experience that kids are best off when they have a mom and a dad.”). But while some same-sex couples may prove capable parents in many regards, children raised by them inevitably will miss out on one or both of these benefits. State constitutional amendments and statutes defining marriage in accord with its historic definition also have been upheld on this basis. *See, e.g., Citizens for Equal Prot.*, 455 F.3d at 867-68; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway*, 932 A.2d at 630-34; *Andersen*, 138 P.3d at 982-85; *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 22-27; *Standhardt*, 77 P.3d at 462-64; *see also* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773 (2002); Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol’y 771 (2001).

Moreover, the debate about the child-rearing abilities of same-sex couples who undergo significant advanced planning to have children need not be resolved or even engaged in order to uphold DOMA. Concerns about the experience of children who are the product of unintended pregnancies and the provision of incentives for those children to be raised by married couples are rational bases for providing incentives for traditional marriages in the first place. For those purposes, the relevant comparison is unplanned children raised by two married parents versus unplanned children raised in an alternative arrangement. Congress’ decision to preserve that traditional relationship and not extend it to a group that due to biological differences simply does not raise the same concern about unintended offspring is rational because of the biological differences.

II. ANY REDEFINITION OF MARRIAGE SHOULD BE LEFT TO THE DEMOCRATIC PROCESS.

Any effort to redefine the institution of marriage as something other than the union of one man and one woman is a matter best left in the hands of the elected, politically accountable branches of the federal government and the citizenry through the democratic process. As the Ninth Circuit has noted, “it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative.” *Smelt*, 447 F.3d at 681. And there is an alternative: Determining the federal rights of same-sex couples “remains a fit topic for [Congress] rather than the courts.” *Id.* at 684 n.34 (citing several bills pending in the 109th Congress). Those that support same sex-marriage do not lack political power in Congress or the executive branch. See, e.g., Don’t Ask Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); Presidential Memorandum, *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, 75 Fed. Reg. 32247 (June 2, 2010); Presidential Memorandum, *Federal Benefits and Non-Discrimination*, 74 Fed. Reg. 29393 (June 17, 2009) (directing State Department and OPM to extend benefits “to qualified same-sex domestic partners of Federal employees” consistent with federal law). See generally Mem. in Supp. of House’s Opp’n to Pls.’ Mot. for Summ. J. at 12-21 (Aug. 15, 2011). Unlike the blunt, binary instrument of judicial review, which only can declare a practice to be constitutional or not, the legislative process is well-suited to accommodating differing viewpoints and finding satisfactory compromises between competing interests.

Congress and the states are the proper fora for resolving the issue of same-sex marriage. Just last month, New York—the nation’s third-most-populous state—enacted same-sex marriage through the democratic process. It is “not this Court’s role” to declare same-sex marriage a constitutional right and eliminate that discussion and resolution. *Wilson*, 354 F. Supp. 2d at 1309. “The legislatures of the individual states may decide to permit same-sex marriage or the Supreme Court may decide to overturn its precedent and strike down DOMA. But, until then, this Court is constrained to [up]hold DOMA.” *Id.*; see also *In re Kandu*, 315 B.R. at 145 (“[T]he creation of new and unique rights is more properly reserved for the people through the legislative process.”); *Hernandez*, 855 N.E.2d at 9 (“[A]ny expansion of the traditional definition of marriage should come from the Legislature.”). Indeed, “it would not be proper for judges to use the vague concept of ‘equal protection’ to undermine marriage just because it is a heterosexual institution.” *Irizarry*, 251 F.3d at 609. The equal protection doctrine “is not a charter for restructuring the historic institution of marriage by judicial legislation.” *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 681 n.12 (brackets omitted) (citing *Baker*, 191 N.W.2d at 186).

CONCLUSION

For all of the foregoing reasons, the House respectfully requests that this action be dismissed with prejudice.

Respectfully submitted,

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August 15, 2011

CERTIFICATE OF SERVICE

I certify that on August 15, 2011, I served one copy of the Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Its Motion to Dismiss by CM/ECF and by electronic mail (.pdf format) on the following:

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Exhibit A

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 11-1027

ED
FEB 10 1972
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RICHARD JOHN BAKER, et al.

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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REPRODUCED AT THE NATIONAL ARCHIVES

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 10a-17a and 18a-23a.

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra*, pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case¹

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County² (T. 10).

¹ T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

² Appellant McConnell is also petitioner before this Court in *McConnell v. Anderson*, petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently precipitated the Regents' decision not to employ Mr. McConnell.

Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.³

³ In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra*, pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra*, p. 12a), and to the Supreme Court of Minnesota (App. *infra*, p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); Finger, *Sex Beliefs and Practices Among Male College Students*, 42 *J. ABNORMAL AND SOCIAL PSYCH.* 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

Only then will the public perceive that homosexuals are not freaks or unfortunate aberrations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarek, *2 Origin and Development of the Moral Idea* 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, *Homosexual Behavior Among Males* 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.*, at 17; see also W. James, *The Varieties of Religious Experience*, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra*, at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.*, at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homo-

sexuality causes earthquakes. H. Hart, *Law, Liberty and Morality* 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

"Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, *Crime and the Human Mind* 117 (1944), it is stated:

"All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

“Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too.” Reprinted in 107 *Am. J. of Psychiatry* 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, “a great injustice” to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.⁴ This Court’s decision, therefore, would affect the marriage laws of virtually every State in the Union.

⁴ See, e.g., *Jones v. Hallihan*, W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent’s refusal to sanctify appellants’ marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State’s refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie v. Connecticut, supra*; *Loving v. Virginia, supra*; *Griswold v. Connecticut, supra*; *Skinner v. Oklahoma, supra*; *Meyer v. Nebraska, supra*. Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer v. Nebraska, supra*. In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie v. Connecticut, supra*; *Griswold v. Connecticut, supra* (all the majority opinions); *Meyer v. Nebraska, supra*. With regard to the equal protection component of this argument, see *Loving v. Virginia, supra*; *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma, supra*; cf. *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving v. Virginia, supra*. Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra*, pp. 20a-21a). On its face, however, Minnesota law neither

states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold v. Connecticut, supra.*

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving v. Virginia, supra*; *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving v. Virginia*, 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving v. Virginia*, 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra*, p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*), has not yet been extended to classifications based upon sex (see *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed v. Reed*, 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

difference is drawn between same sex and different sex marriages.⁵

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. Connecticut, 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

⁵ The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed v. Reed*, *supra*; *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*.

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold v. Connecticut*, *supra*; *Loving v. Virginia*, 388 U.S. 1 (1967); cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold v. Connecticut*, *supra*.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

Statutes Involved

CHAPTER 517

[Minnesota Statutes]

517.01 **MARRIAGE A CIVIL CONTRACT.** Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

517.02 **PERSONS CAPABLE OF CONTRACTING.** Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent. A male person of the full age of 18 years may, with the consent of his parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry. A female person of the full age of 16 years may, with the consent of her parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, her application for a license is approved by the judge of the juvenile court of the county in which she resides. If the judge of juvenile court of the county in which she resides is absent from the county and has not by order assigned another probate judge or a retired probate judge to act in his stead, then the court commissioner or any judge of

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district court of the county may approve her application for a license.

517.03 **MARRIAGES PROHIBITED.** No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; or between parties who are nearer than second cousins; whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age of 16 years; provided, however, that mentally deficient persons committed to the guardianship of the commissioner of public welfare may marry on receipt of written consent of the commissioner. The commissioner may grant such consent if it appears from his investigation that such marriage is for the best interest of the ward and the public. The clerk of the district court in the county where the application for a license is made by such ward shall not issue the license unless and until he has received a signed copy of the consent of the commissioner of public welfare.

517.04 **SOLEMNIZATION.** Marriages may be solemnized by any justice of the peace in the county in which he is elected, and throughout the state by any judge of a court of record, the superintendent of the department for the deaf and dumb, in the state school for the deaf and blind,

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or any licensed or ordained minister of the gospel in regular communion with a religious society.

517.05 **CREDENTIALS OF MINISTER.** Ministers of the gospel, before they are authorized to perform the marriage rite, shall file a copy of their credentials of license or ordination with the clerk of the district court of some county in this state, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be endorsed upon and recorded with each certificate of marriage granted by a minister.

517.06 **PARTIES EXAMINED.** Every person authorized by law to perform the marriage ceremony, before solemnizing any marriage, may examine the parties on oath, which oath he is authorized to administer, as to the legality of such intended marriage, and no such person shall solemnize a marriage unless he is satisfied that there is no legal impediment thereto.

517.07 **LICENSE.** Before any persons shall be joined in marriage, a license shall be obtained from the clerk of the district court of the county in which the woman resides, or, if not a resident of this state, then from the clerk of the district court of any county and the marriage need not take place in the county where the license is obtained.

517.08 **APPLICATION FOR LICENSE.** Subdivision 1. Application for a marriage license shall be made at least five days before a license shall be issued. Such application shall be made upon a form provided for the purpose and shall contain the full names of the parties, their post office addresses and county and state of residence, and their full

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ages. The clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage and, if at the expiration of this five-day period, he is satisfied that there is no legal impediment thereto, he shall issue such license, containing the full names of the parties and county and state of residence, with the district court seal attached, and make a record of the date of issuance thereof, which license shall be valid for a period of six months. In case of emergency or extraordinary circumstances, the judge of the probate court, the court commissioner, or any judge of the district court, of the county in which the application is made, may authorize the license to be issued at any time before the expiration of the five days. If a male person intending to marry shall be under the age of 21 and shall not have had a former wife, such license shall not be issued unless the consent of the parents or guardians or the parent having the actual care, custody and control of said party shall be given under the hand of such parent or guardian and duly verified by an officer duly authorized to take oaths and duly attested by a seal, where such officer has a seal. Provided, that if there be no parent or guardian having the actual care, custody and control of said party, then the judge of the juvenile court, the court commissioner, or any judge of the district court in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party. The clerk shall collect from the applicant a fee of \$10 for administering the oath, issuing, recording, and filing all papers required, and preparing and transmitting to the state registrar of vital statistics the reports of marriage required by this section. If the license should not be used within the period of six months

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due to illness or other extenuating circumstances, it may be surrendered to the clerk for cancellation, and in such case a new license shall issue upon request of the parties of the original license without fee therefor. Any clerk who shall knowingly issue or sign a marriage license in any other manner than in this section provided shall forfeit and pay for the use of the parties aggrieved not to exceed \$1,000.

Subd. 2. On or before the 11th day of each calendar month, the clerk of the district court shall prepare and transmit to the state registrar of vital statistics, on a form prescribed and furnished by the state registrar of vital statistics, a certified summary of the identifying information and statistical data concerning persons for whom certificates of marriage were filed in the office of the clerk of the district court during the previous month. The state registrar of vital statistics shall prepare and maintain a state-wide index of such identifying information and compile therefrom data for statistical purposes.

Subd. 3. The personal information necessary to complete the report of marriage shall be furnished by the applicant prior to the issuance of the license. The report shall contain only the following information:

- (a) Personal information on bride and groom.
 1. Name.
 2. Residence.
 3. Date and place of birth.
 4. Race.
 5. If previously married, how terminated.
 6. Signature of applicant and date signed.

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(b) Information concerning the marriage.

1. Date of marriage.
2. Place of marriage.
3. Civil or religious ceremony.

(c) Signature of clerk of court and date signed.

517.09 SOLEMNIZATION. In the solemnization of marriage no particular form shall be required, except that the parties shall declare in the presence of a person authorized by section 517.04 to solemnize marriages, and the attending witnesses that they take each other as husband and wife. In each case at least two witnesses shall be present besides the person performing the ceremony.

517.10 CERTIFICATE; WITNESSES. The person solemnizing a marriage shall prepare under his hand three certificates thereof. Each certificate shall contain the full names and county and state of residences of the parties and the date and place of the marriage. Each certificate shall also contain the signatures of at least two of the witnesses present at the marriage who shall be at least 16 years of age. The person solemnizing the marriage shall give each of the parties one such certificate, and shall immediately make a record of such marriage, and file one such certificate with the clerk of the district court of the county in which the license was issued within five days after the ceremony. The clerk shall record such certificate in a book kept for that purpose.

517.11, 517.12 [Repealed, 1951 c 700 s 5]

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517.13 PENALTY FOR FAILURE TO DELIVER AND FILE CERTIFICATE. Every person solemnizing a marriage who shall neglect to make and deliver to the clerk a certificate thereof within the time above specified shall forfeit a sum not exceeding \$100, and every clerk who neglects to record such certificate shall forfeit a like sum.

517.14 ILLEGAL MARRIAGE; FALSE CERTIFICATE; PENALTY. If any person authorized by law to join persons in marriage shall knowingly solemnize any marriage contrary to the provisions of this chapter, or wilfully make any false certificate of any marriage, or pretended marriage, he shall forfeit for every such offense a sum not exceeding \$500, or may be imprisoned not exceeding one year.

517.15 UNAUTHORIZED PERSON PERFORMING CEREMONY. If any person undertakes to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be guilty of a gross misdemeanor; and, upon conviction thereof, punished by imprisonment of not more than one year, or by a fine of not more than \$500, or by both such fine and imprisonment.

517.16 IMMATERIAL IRREGULARITY OF OFFICIATING PERSON NOT TO VOID. No marriage solemnized before any person professing to be a judge, justice of the peace, or minister of the gospel shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed officer or person; provided, the marriage is consummated with the full belief on the part of the persons

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so married, or either of them, that they have been lawfully joined in marriage.

517.17 SOLEMNIZING UNLAWFUL MARRIAGES. Every minister or magistrate who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which, within his knowledge, a legal impediment exists, shall be guilty of a gross misdemeanor.

517.18 MARRIAGE AMONG QUAKERS; BAHAI'S; HINDUS; MUSLIMS. All marriages solemnized among the people called Friends or Quakers, in the form heretofore practiced and in use in their meetings, shall be valid and not affected by any of the foregoing provisions; and the clerk of the meeting in which such marriage is solemnized, within one month after any such marriage, shall deliver a certificate of the same to the clerk of the district court of the county where the marriage took place, under penalty of not more than \$100, and such certificate shall be filed and recorded by the clerk under a like penalty; and, if such marriage does not take place in such meeting, such certificate shall be signed by the parties and at least six witnesses present, and filed and recorded as above provided under a like penalty, and marriages may be solemnized among members of the Baha'i faith by the Chairman of an incorporated local Spiritual Assembly of the Baha'is, according to the form and usage of such society, and marriages may be solemnized among Hindus or Muslims by the person chosen by a local Hindu or Muslim association, according to the form and usage of their respective religions, but in the presence of at least two witnesses be-

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sides the person performing the ceremony, and who shall issue and record a certificate thereof as provided by Minnesota Statutes 1945, Section 517.10.

517.19 ILLEGITIMATE CHILDREN. Illegitimate children shall become legitimized by the subsequent marriage of their parents to each other, and the issue of marriages declared null in law shall nevertheless be legitimate.

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Alternative Writ of Mandamus

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Petitioners Richard John Baker and James Michael McConnell show to the Court as follows:

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota statutes, section 517.08.

2. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

3. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, section 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

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4. That on the above date, pursuant to Minnesota Statutes, section 517.08, subdivision (3), petitioners were not questioned as to which physical sex classification they belonged.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license which petitioners had duly and truthfully completed.

6. That the refusal of Clerk Gerald R. Nelson to issue the marriage to petitioners violated Minnesota Statutes, sections 517.02 and 517.08, subdivision (3), and was therefore an unlawful act.

7. That in the alternative, the refusal of Clerk Gerald R. Nelson to issue the marriage license to petitioners violated the First Amendment, the Eighth Amendment, the Ninth Amendment and the Fourteenth Amendment of the United States Constitution.

WHEREFORE: Gerald R. Nelson, Clerk of District Court of Hennepin County, is hereby commanded to issue to Richard John Baker or James Michael McConnell on or before the 22 day of December, 1970 a marriage license or show cause before Special Term Judge Donald T. Barbeau, on the 22 day of December, 1970 at 9:30 a.m./p.m. at the Hennepin County Courthouse why he has not done so, and that he then and there make his return to this writ, with his certificate thereon of having done as commanded.

Signed: /s/

Donald T. Barbeau
District Court Judge

Dated this 10 day
of December, 1970

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Order Quashing the Writ

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL McCONNELL,

Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on January 8, 1971, on the motion of plaintiffs for the issuance of an alternative writ of mandamus to require defendant, Clerk of District Court of Hennepin County, to issue a marriage license to plaintiffs.

R. Michael Wetherbee, Esq., appeared for and on behalf of plaintiffs and in support of said motion. George M. Scott, County Attorney of Hennepin County, by David E. Mikkelsen, Esq., Assistant County Attorney, appeared for and on behalf of defendant, and in opposition thereto.

The Court having heard the evidence adduced and the arguments of counsel, and on all the files, records and

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proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the alternative writ of mandamus be and the same hereby is quashed.

IT IS FURTHER ORDERED That the defendant, Gerald R. Nelson, Clerk of District Court in and for the County of Hennepin, Minnesota, is specifically ordered not to issue a marriage license to the petitioners Richard John Baker and James Michael McConnell.

BY THE COURT,

/s/ TOM BERGIN
Judge

Dated: January 8, 1971

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Amended Order, Findings and Conclusions

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL MCCONNELL,
Plaintiffs,

vs.

GERALD R. NELSON,
Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on Friday, January 29, 1971, on the motion of Plaintiffs requesting that Findings of Fact be specifically set forth, together with Conclusions of Law, and that the same be incorporated into the Order of the Court issued in the above entitled matter on January 8, 1971, which Order quashed the Alternative Writ of Mandamus and directed the Defendant, Gerald R. Nelson, specifically to not issue a marriage license sought by the Petitioners.

R. Michael Wetherbee, Esquire, appeared for and on behalf of the Plaintiffs and in support of said motion. George M. Scott, County Attorney for Hennepin County

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by David E. Mikkelson, Assistant County Attorney, appeared for and on behalf of the Defendant.

The Court having heard the evidence, arguments of counsel, and on all the files, records and proceedings herein, the Court hereby grants the motion of the Plaintiffs and directs that the following Findings of Fact and Conclusions of Law be incorporated into and made a part of the earlier Order of this Court in this matter dated January 8, 1971:

FINDINGS OF FACT

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota Statutes, Section 517.08.

2. That the petitioners-plaintiffs, Richard John Baker and James Michael McConnell, were both of the male sex and that they presented themselves to the Clerk of District Court as such in making their application for marriage license.

3. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

4. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, Sec-

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tion 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license, however, the said defendant, Gerald R. Nelson, subsequently refused to issue such marriage license on the grounds that there was a legal impediment to such contemplated marriage in that both parties were of the same sex. Such denial to issue the marriage license was based in part on an opinion of the County Attorney of Hennepin County which had been requested by said defendant, Gerald R. Nelson.

Based upon the foregoing Findings of Fact, the Court does hereby make the following

CONCLUSIONS OF LAW

1. That the refusal of the Defendant, Gerald R. Nelson, Clerk of Hennepin County District Court, to issue the marriage license to the Plaintiffs Richard John Baker and James Michael McConnell was not a violation of Minnesota Statutes, Chapter 517.

2. That such refusal to issue the marriage license applied for by the Plaintiffs was not in violation of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

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IT IS THEREFORE ORDERED That the foregoing Findings of Fact and Conclusions of Law be incorporated into and made a part of the Order of this Court heretofore made in the above entitled matter and dated January 8, 1971.

BY THE COURT,

/s/ TOM BERGIN
Tom Bergin
Judge of District Court

Dated: January
29, 1971

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have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as "husband and wife" and "bride and groom" (the latter words inserted by L. 1969, c. 1145, § 3, subd. 3).

We hold, therefore, that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.

2. Petitioners contend, second, that Minn. St. c. 517, so interpreted, is unconstitutional. There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.²

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of

² We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.

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children within a family, is as old as the book of Genesis. *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965), upon which petitioners rely, does not support a contrary conclusion. A Connecticut criminal statute prohibiting the use of contraceptives by married couples was held invalid, as violating the due process clause of the Fourteenth Amendment. The basic premise of that decision, however, was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship. Mr. Justice Douglas, author of the majority opinion, wrote that this criminal statute "operates directly on an intimate relation of husband and wife," 381 U. S. 482, 85 S. Ct. 1680, 14 L. ed. 2d 513, and that the very idea of its enforcement by police search of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives * * * is repulsive to the notions of privacy surrounding the marriage relationship," 381 U. S. 485, 85 S. Ct. 1682, 14 L. ed. 2d 516. In a separate opinion for three justices, Mr. Justice Goldberg similarly abhorred this state disruption of "the traditional relation of the family—a

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relation as old and as fundamental as our entire civilization." 381 U. S. 496, 85 S. Ct. 1688, 14 L. ed. 2d 522.³

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.⁴

Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. ed. 2d 1010 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's anti-miscegenation statute, prohibiting interracial marriages,

³ The difference between the majority opinion of Mr. Justice Douglas and the concurring opinion of Mr. Justice Goldberg was that the latter wrote extensively concerning this right of marital privacy as one preserved to the individual by the Ninth Amendment. He stopped short, however, of an implication that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment.

⁴ See, *Patson v. Pennsylvania*, 232 U. S. 138, 144, 34 S. Ct. 281, 282, 58 L. ed. 539, 543 (1914). As stated in *Tigner v. Texas*, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. ed. 1124, 1128, 130 A. L. R. 1321, 1324 (1940), and reiterated in *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 540, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1659, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

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was invalidated solely on the grounds of its patent racial discrimination. As Mr. Chief Justice Warren wrote for the court (388 U. S. 12, 87 S. Ct. 1824, 18 L. ed. 2d 1018):

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."⁵

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

⁵ See, also, *McLaughlin v. Florida*, 379 U. S. 184, 85 S. Ct. 283, 13 L. ed. 2d 222 (1964), in which the United States Supreme Court, for precisely the same reason of classification based only upon race, struck down a Florida criminal statute which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.

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Exhibit B

Forty-one states have promulgated constitutional amendments or enacted statutes limiting marriage to opposite-sex couples:

1. **Alabama.** See Ala. Const. art. I, § 36.03; Ala. Code § 30-1-19 (2011).
2. **Alaska.** See Alaska Const. art. I, § 25; Alaska Stat. Ann. § 25.05.013 (West 2011).
3. **Arizona.** See Ariz. Const. art. XXX § 1; Ariz. Rev. Stat. Ann. §§ 25-101 & 25-112 (2011).
4. **Arkansas.** See Ark. Const. amend. 83, § 1; Ark. Code Ann. §§ 9-11-109, 9-11-107, 9-11-208 (West 2011).
5. **California.** See Cal. Const. art. I, § 7.5.
6. **Colorado.** See Colo. Const. art. II, § 31; Colo. Rev. Stat. Ann. § 14-2-104 (West 2011).
7. **Delaware.** See 13 Del. Code Ann. § 101 (West 2011).
8. **Florida.** See Fla. Const. art. I § 27; Fla. Stat. Ann. § 741.212 (West 2011).
9. **Georgia.** See Ga. Const. art. I, § 4, para. I; Ga. Code Ann. § 19-3-3.1 (West 2011).
10. **Hawaii.** See Haw. Const. art. I, § 23; Haw. Rev. Stat. § 572-1 (2011).
11. **Idaho.** See Idaho Const. art. III, § 28; Idaho Code Ann. §§ 32-201 & 32-209 (West 2011).
12. **Illinois.** See 750 Ill. Comp. Stat. 5/212 (West 2011).
13. **Indiana.** See Ind. Code Ann. § 31-11-1-1 (West 2011).
14. **Kansas.** See Kan. Const. art. XV, § 16; 2011 Kan. Legis. Serv. 26 (West), Kan. Stat. Ann. § 23-115 (West 2011).
15. **Kentucky.** See Ky. Const § 233A; Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (West 2011).
16. **Louisiana.** See La. Const. art. XII, § 15; La. Civ. Code Ann. art. 86, 89 (2011).
17. **Maine.** See Me. Rev. Stat. Ann. tit. 19-A, § 701(5) (2011).
18. **Maryland.** See Md. Code Ann., Fam. Law § 2-201 (West 2011).

19. Michigan. See Mich. Const. art. I, § 25; Mich. Comp. Laws Ann. § 551.1 (West 2011).
20. Minnesota. See Minn. Stat. § 517.03(4) (West 2011).
21. Mississippi. See Miss. Const. art. XIV, § 263A; Miss. Code Ann. § 93-1-1(2) (West 2011).
22. Missouri. See Mo. Const. art. I, § 33; Mo. Rev. Stat. § 451.022 (West 2011).
23. Montana. See Mont. Const. art. XIII, § 7; Mont. Code Ann. § 40-1-401 (2011).
24. Nebraska. See Neb. Const. art. I, § 29.
25. Nevada. See Nev. Const. art. I, § 21.
26. North Carolina. See N.C. Gen. Stat. § 51-1.2 (West 2011).
27. North Dakota. See N.D. Const. art. XI, § 28; N.D. Cent. Code §§ 14-03-01 & 14-03-08 (West 2011).
28. Ohio. See Ohio Const. art. XV, § 11; Ohio Rev. Code Ann. § 3101.01(C) (West 2011).
29. Oklahoma. See Okla. Const. art. II, § 35; Okla. Stat. Ann. tit. 43, § 3.1 (2011).
30. Oregon. See Or. Const. art. XV, § 5a.
31. Pennsylvania. See 23 Pa. Cons. Stat. Ann. §§ 1102, 1704 (West 2011).
32. South Carolina. See S.C. Const. art. XVII, § 15; S.C. Code Ann. § 20-1-15 (2011).
33. South Dakota. See S.D. Const. art. XXI, § 9; S.D. Codified Laws § 25-1-1 (2011).
34. Tennessee. See Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113 (West 2011).
35. Texas. See Tex. Const. art. I, § 32; Tex. Fam. Code Ann. §§ 2.001(b) & 6.204 (West 2011).
36. Utah. See Utah Const. art. I, § 29; Utah Code Ann. §§ 30-1-2(5) & 30-1-4.1 (West 2011).
37. Virginia. See Va. Const. art. I, § 15-A; Va. Code Ann. §§ 20-45.2 & 20-45.3 (West 2011).
38. Washington. See Wash. Rev. Code § 26.04.010(1) (West 2011).

39. **West Virginia. See W. Va. Code § 48-2-603 (West 2011).**
40. **Wisconsin. See Wis. Const. art. XIII, § 13; Wis. Stat. §§ 765.001(2) & 765.04 (West 2011).**
41. **Wyoming. See Wyo. Stat. Ann. § 20-1-101 (West 2011).**