No. 12-13

IN THE

Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioners,

v.

NANCY GILL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, GEORGIA, IDAHO, KANSAS, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether Congress may define marriage as the legal union of one man and one woman and confer marital benefits based on that definition.

2. Whether a novel standard of review invented by the court below applies to marriage laws.

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INTEREST OF THE *AMICI* STATES[1]

Congress and the overwhelming majority of States—forty-two in all—define marriage as the union of one man and one woman, consistent with the historical definition of marriage. In a decision that casts doubt on all traditional definitions of marriage and confuses longstanding equal protection principles, the court below rejected Congress's definition of marriage. The *amici* States have two interests at stake: (1) protecting their power to define marriage in the traditional manner, and (2) clarifying equal protection principles that apply to marriage laws.

SUMMARY OF THE ARGUMENT

The Court's decision upholding Minnesota's traditional marriage law in *Baker v. Nelson*, 409 U.S. 810 (1972), has long protected both state and federal laws defining marriage from federal constitutional attack. Although purporting to respect *Baker*, the decision below deftly avoids its obvious implications by creating a novel standard of review—dubbed "closer than usual" scrutiny—that invites constitutional challenges to marriage laws of all stripes. The court nominally predicated

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[1] Pursuant to Supreme Court Rule 37.2(a), the *amici* States provided all parties' counsel of record with timely notice of their intent to file this brief. Consent of the parties is not required for the States to file an *amicus* brief. Sup. Ct. R. 37.4.

such heightened scrutiny—which runs contrary to this Court's repeated refusal to divide rational basis review into multiple standards—on federalism concerns, but its actual analysis implies similar skepticism of state marriage laws. The reasoning and result deviate so far from this Court's longstanding precedents and injects such confusion into equal protection doctrine that it cannot be ignored.

As Congress and forty-two States recognize, the different procreative capacities of same-sex and opposite-sex couples support a constitutionally legitimate distinction for defining marriage and affording special benefits to its participants. Traditional marriage and benefit policies further state interests in responsible procreation by encouraging biological parents to remain together, a rationale that cannot extend to same-sex couples. Congress and the States may conclude that discarding a distinction so deeply rooted in history and social experience could carry undesirable consequences, particularly where such change would utterly negate any apparent rationale for the government to afford special recognition and benefits to a limited set of relationships as "marriages."

Review is justified not only because the decision below invalidated a federal statute, but also because it denies any relationship between DOMA and responsible procreation, and thereby casts doubt on all traditional marriage laws.

ARGUMENT

I. The Constitutionality of Conferring Exclusive Benefits on Traditional Marriage Status is Nationally Important

This case presents a devastating constitutional rejection of traditional marriage policy. Section 3 of DOMA defines the basic attributes of marriage for federal purposes and affects the availability of approximately 1,138 federal rights, privileges, and benefits tied to marital status. *See* 1 U.S.C. § 7; U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004). Although the federal government does not license marriages or dictate marriage policy for states, the decision below invalidated the very definition of marriage long employed by most states (indeed, until recently, *all* states) and rejected the longstanding tradition of both states and the federal government of conferring exclusive benefits based on marital status.[2] This holding warrants plenary review by this Court.

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[2] District courts in the Second and Ninth Circuits have also invalidated Section 3 of DOMA, holding that Congress's definition of marriage is not rationally related to any legitimate governmental interest. *See Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Dragovich v. U.S. Dep't of Treasury*, --- F. Supp. 2d ---, 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski v. Office of Pers. Mgm't*, 824 F. Supp. 2d 968 (N.D. Cal. 2012). The U.S. Department of Justice has filed a petition for a writ of certiorari in *Golinski*.

In addition to the inherent importance of DOMA as a far-reaching federal statute, *see* Pet. at 17-19, this case has national significance owing to its likely consequences for state marriage laws. Like Congress, few states promote marriage through labels alone; most join official recognition with access to particular rights, privileges, and benefits. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock.")).

Of the forty-two states retaining a traditional definition of marriage, all but eight condition certain rights and benefits on marital status. *See* App. at 4a-5a. The other eight grant nearly identical rights, privileges, and benefits to same-sex couples and married couples. *See* App. at 5a.

It requires no great leap of logic to conclude that a judicial declaration that DOMA serves no legitimate government purpose erodes the constitutional support for similar state laws. The same equal protection principles have generally applied to state and federal laws. *See Adarand Constructors v. Pena*, 515 U.S. 200, 213-18, 226-27 (1995). Therefore, if the federal government has no

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Petition for a Writ of Certiorari, *Office of Pers. Mgm't v. Golinski*, No. 12-16 (S. Ct. July 3, 2012).

legitimate reason to define for the purpose of federal programs, considerations of tradition or gradualism are unlikely to save state marriage laws—especially those that differentiate between opposite-sex and same-sex unions in name only. *See* Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471, 477 & n.25 (2012).

II. The Decision Below Contravenes Equal Protection Doctrine and Warrants Immediate Correction

The need for definitive guidance concerning the constitutionality of traditional exclusive marriage benefits is all the more pressing because until now *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972), seemed to stop federal same-sex marriage claims in their tracks. The court below, in short, invented a novel standard of review that conflicts directly with *Baker* and undermines the logic of multitudinous other equal protection decisions. Immediate review is necessary to resolve the resulting confusion about how this Court's precedents apply to traditional marriage laws.

A. *Baker v. Nelson* should have controlled the outcome of this case

In *Baker*, the Supreme Court of Minnesota rejected Fourteenth Amendment challenges to the State's ban on same-sex marriage. The court held

that the Constitution did not protect a fundamental right to same-sex marriage and that the State's refusal to solemnize same-sex marriages was not "irrational or invidious discrimination." *Id.* at 186-87. The plaintiffs appealed to this Court, which dismissed the case "for want of a substantial federal question." *Baker*, 409 U.S. 810.

This dismissal constituted a decision on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). Although no opinion accompanied the dismissal, a summary dismissal precludes courts from "coming to opposite conclusions on the precise issues presented and necessarily decided" by it. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

As it happens, the *Baker* Appellants argued to this Court that Minnesota's refusal to solemnize same-sex marriages was "arbitrary and invidiously discriminatory conduct" that violated the Fourteenth Amendment's Due Process and Equal Protection Clauses. Jurisdictional Statement at 3, 13, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027). In addition to advancing the theory that Minnesota "invade[d] a fundamental right," the Appellants argued in the alternative that the ban "has not been shown to be rationally related to *any* governmental interest." *Id.* at 15 (emphasis added). Therefore, among the issues necessarily decided by this Court in *Baker* was the constitutionality of the traditional definition of marriage. *See McConnell v. United States*, 188 F.

App'x 540, 542 (8th Cir. 2006) (per curiam); *McConnell v. Nooner*, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam).

On its face, therefore, *Baker* leaves no doubt as to the constitutionality of DOMA and all other traditional definitions of marriage. *See Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304 (M.D. Fla. 2005) (concluding that *Baker* required dismissal of a federal challenge to DOMA); *Morrison v. Sadler*, 821 N.E.2d 15, 20 (Ind. Ct. App. 2005) (lead opinion) ("[*Baker*] is binding precedent . . . that state bans on same-sex marriage do not violate the United States Constitution."); *see also McConnell*, 188 F. App'x at 542 (recognizing that *Baker* affirmed, on the merits, the Minnesota Supreme Court's holding that "same-sex marriage is prohibited in Minnesota and that this prohibition does not offend the United States Constitution"); *Nooner*, 547 F.2d at 55-56 (same); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) (concluding that *Baker* precluded any constitutional challenge to Colorado's traditional definition of marriage if the definition controlled for immigration purposes); *Hernandez v. Roubles*, 855 N.E.2d 1, 17 n.4 (N.Y. 2006) (Graffeo, J., concurring) (recognizing that *Baker* is binding precedent that there is no fundamental right to same-sex marriage under the U.S. Constitution); *Anderson v. King County*, 138 P.3d 963, 999-1002 (Wash. 2006) (en banc) (same). This accounts for the apparent national strategy employed by

proponents of same-sex marriage of challenging traditional marriage laws using state constitutional theories rather than the Fourteenth Amendment.

Although it acknowledged *Baker* had never been overruled or even questioned by this Court, *see* Pet. App. at 8a, the panel below did not regard *Baker* as dispositive on the rationality of traditional marriage. Citing decisions invalidating both federal and state laws, the panel suggested an "intensified scrutiny of purported justification" is permissible whenever "minorities are subject to discrepant treatment." Pet. App. at 11a-13a (relying for support on *USDA v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996)).

Yet the panel also acknowledged that the *Romer* Court "conspicuously failed" to hold that homosexuals are members of a protected class that receives heightened protection—a path all courts of appeals to address the issue have followed. Pet. App. at 11a. Lest its "intensified scrutiny" sound too much like protected-status scrutiny, the panel quickly added that "a closer examination" of DOMA is "uniquely reinforced by federalism concerns," because DOMA "intrudes broadly into an area of traditional state regulation." Pet. App. at 18a-19a. Based on these rationales, it manufactured a novel standard of "closer than usual [rational basis] review," Pet. App. at 15a, which it used to invalidate Section 3.

Although imposing closer than usual review based on federalism principles is concerning in its own right (see, *infra*, Part II.B), the invocation of equal protection cases only creates further confusion. By relying in part on *Romer* and *City of Cleburne*, which involve state or local actions, the panel below unavoidably suggests that these decisions may also have undermined *Baker* with respect to state marriage laws. This implication is facially contrary to *Baker*. Despite assurances to the contrary, the decision below thus saps *Baker* of its vitality and invites attacks on all laws defining marriage and its benefits.

B. The decision below invents a novel, unfounded equal protection standard of review, which cannot be reconciled with constitutional text, history or structure

In avoiding *Baker*, the First Circuit has also created utter confusion as to what principles affect standards of review for marriage laws. Imposing heightened equal protection scrutiny based on federalism concerns is deeply troubling to the *amici* States.

The First Circuit's purported concern for areas of traditional state regulation echoes Tenth Amendment doctrine, yet the decision below separately (and properly) *rejected* Massachusetts' actual Tenth Amendment claims. *See* Pet. App. at 15a. The court did not explain how federalism had

any residual connection to the equal protection standard applicable to the federal government.

While the *amici* States respect and appreciate efforts to police the proper boundaries between state and federal power, they object to the idea of leveraging individual rights claims using the Constitution's structural safeguards. For if concern for state prerogatives justifies heightened Fifth Amendment equal protection scrutiny even where there is no Tenth Amendment violation, it would seem to follow that general concern for the limits of state authority in light of dormant Commerce Clause doctrine could ratchet up Fourteenth Amendment scrutiny even when there is no Commerce Clause violation.[3] Or, similarly, the mere assertion of a colorable preemption theory might be enough to justify "intensified scrutiny" of

[3] This would be especially troubling when states are alleged to discriminate against out-of-state commerce, but where Commerce Clause doctrine would permit such overt classifications. *See, e.g.*, *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (upholding a state income tax exemption for interest earned from bonds issued by the taxing state); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding a state policy that prohibited sales of cement produced by a state-owned cement plant to out-of-state residents); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (upholding a state law prohibiting the importation of most out-of-state waste); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding a state law providing bounties to in-state scrappers with indemnity agreements but requiring more extensive documentation from out-of-state scrappers).

state laws under the Fourteenth Amendment even where the state and federal statutes are ultimately deemed compatible.

Constitutional structure and individual rights protections both protect individual liberty, but they are properly kept distinct in order to safeguard their independent vitality. The Constitution contains both safeguards to prevent different political excesses, and a doctrine that conflates them risks losing some measure of the liberty protection each was meant to achieve.

The Founders were acutely aware of the danger of concentrated power, particularly in the hands of a distant, unresponsive government. Their primary solution to this threat was structural: a national government of limited and enumerated powers divided among three branches. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-78 (2012) (Roberts, C.J.); The Federalist No. 84 (Alexander Hamilton) (arguing that the Constitution was itself a bill of rights). Guarantees of individual rights, Alexander Hamilton argued, were "unnecessary" and "dangerous" as they might imply Congress possessed powers not granted. *See* The Federalist No. 84 (Alexander Hamilton); *see also* 1 Annals of Cong. 436-40 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

But as the Anti-Federalists argued, distance from the local electorate, collusion among the branches, and broad grants of power could

undermine the effectiveness of structural guarantees. *See* Centinel, To the Freemen of Pennsylvania (Oct. 5, 1787), *reprinted in* 1 The Debate on the Constitution 52, 52-62; Cincinnatus, Reply to James Wilson's Speech (Nov. 1, 1787), *reprinted in* 1 The Debate, *supra*, 92, 92-94; Brutus, To the Citizens of the State of New York (Oct. 18, 1787), *reprinted in* 1 The Debate, *supra*, 168-69, 171-72; Brutus, To the Citizens of the State of New York (Jan. 31, 1788), *reprinted in* 2 The Debate, *supra*, 129, 133-35; Patrick Henry, Speech at the Virginia Ratifying Convention (June 7, 1788), *reprinted in* 2 The Debate, *supra*, 623, 635-36; *see also* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217, 239-46 (2004). The Anti-Federalists' opposition to ratification yielded guarantees that the first Congress would enact a Bill of Rights designed to address these political threats to liberty. *See* Smith, *supra*, at 246.

Experience has proved the genius of dual safeguards. On the one hand, federalism enhances individual liberty by limiting central authority, putting States into competition with one another, and bringing the organs of government into closer contact with the people. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-5 (1988). On the other hand, American difficulties with invidious discrimination (racial and otherwise) revealed dangers of majority

oppression at the state level, which Madison warned against in The Federalist No. 10. *See* Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 366 (1997).

Structural protections and specific guarantees are complementary: any one mechanism to preserve liberty may be incomplete or even contain dangers that must be counteracted by another. Intermixing doctrines that animate structure and individual rights may thus obscure the value and erode the effectiveness of these independent protections.

Because the role of structure in preserving freedom is easily overlooked, *see, e.g.*, *Florida v. U.S. Dep't Health & Human Srvs.*, 648 F.3d 1235, 1361-65 (11th Cir. 2011) (Marcus, J., dissenting) (seeing the plaintiffs' individual liberty concerns as relevant to due process but not Tenth Amendment arguments), *aff'd in part & rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), courts should avoid implying that structural provisions affect individual liberty only insofar as they enhance or limit the operation of individual rights guarantees. If federalism supports the cause of individual liberty in this case, the Tenth Amendment is the natural mode of giving effect to structural principles. The rerouting of federalism arguments, which the court below rejected, into a new equal protection standard of review only serves to reinforce the dangerous misconception that only specific rights guarantees are important for individual liberty. And as legal

challenges to DOMA and state marriage laws proliferate, immediate review is warranted to avoid further muddling of equal protection principles.[4]

III. The First Circuit Erred in Rejecting the Responsible Procreation Rationale for DOMA and Marriage Laws Generally

A. The decision below undermines all laws predicated on a traditional definition of marriage

Although it held that DOMA warranted more stringent review than rational basis, the decision below so thoroughly rejects the distinction between same-sex and opposite-sex couples that it casts doubt on *all* laws embodying the traditional definition of marriage. The panel concluded that

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[4] Since the panel below issued its decision, another federal district court has invalidated Section 3 of DOMA. *See Windsor v. United States,* 833 F. Supp. 2d 394 (S.D.N.Y. 2012). Another seven federal courts are considering similar challenges. *See Bishop v. United States*, No. 04-848 (N.D. Okla.); *Pedersen v. Office of Pers. Mgm't*, No. 10-1750 (D. Conn.); *Revelis v. Napolitano*, No. 11-1991 (N.D. Ill.); *Cozen O'Connor, P.C. v. Tobits*, No. 11-45 (E.D. Pa.); *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.); *Cooper-Harris v. United States*, No. 12-887 (C.D. Cal.); *Blesch v. Holder*, No. 12-1578 (E.D.N.Y.). There are also ongoing Fourteenth Amendment challenges to state marriage laws in state and federal court. *See, e.g.*, *Sevcik v. Sandoval*, No. 12-00578 (D. Nev.); *Garden State Equality v. Dow*, No. 1729-11 (N.J. Super. Ct.).

the problem with DOMA was "not merely a matter of poor fit of remedy to perceived problem" but rather "a lack of *any* demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." Pet. App. at 22a (emphasis added).

In reaching this startling conclusion, the panel explained that DOMA neither affected Massachusetts's domestic relations law nor increased federal benefits for opposite-sex couples. Pet. App. at 21a-22a. Even under "closer than usual" scrutiny, this answers the wrong question.

Asking how excluding same-sex couples benefits opposite-sex couples ignores that DOMA was not an isolated legislative act. It expressly codified a preexisting understanding of marriage that occurs over 1,000 times in federal law. When originally conferring marriage rights and benefits, Congress undoubtedly assumed that it was incenting eligible couples—which at the time would have meant opposite sex couples only—to marry. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (recognizing as rational the practice of giving benefits to incentivize marriage); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion) (same); *Feliciano v. Rosemar Silver Co.,* 514 N.E.2d 1095, 1096 (Mass. 1987) (observing that extending a right to recover for loss of consortium to a cohabitating partner would "subvert[]" the state purpose of promoting

marriage). Therefore, the panel below simply needed to ask why Congress sought to incentivize traditional marriages and whether that rationale extends to same-sex couples.

The constitutionality of DOMA turns on whether Congress may expressly perpetuate its long-assumed distinction between same-sex and opposite-sex couples even when some states have rejected it. To state the obvious, if there is a sufficient reason for Congress to distinguish between opposite-sex and same-sex relationships, it is fitting to enact laws that promote marriages among opposite-sex couples alone. *See Citizens for Equal Prot.*, 455 F.3d at 867-68; *see also Johnson v. Robinson*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940) ("'[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.'").

Conferring exclusive benefits on opposite-sex couples promotes a legitimate governmental purpose if any relevant differences exist between same-sex and opposite-sex couples. In striking down such benefits the decision below necessarily rejected the existence of a legitimate distinction

between them and, in so doing, cast doubt on all traditional marriage laws. The implications of this grave error for the laws of forty-two states justify certiorari.

B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

The choice to promote traditional marriages is based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the *only* procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for.

In other words, civil recognition of marriage historically has not been based on a state interest in adult relationships in the abstract. Marriage instead is predicated on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541.

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. It is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large. Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 781-82 (2002). "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

Marriage also perfectly joins the full biological mother-father-child relationship to the original mother-father *legal* responsibility for the child. In doing so, marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation." 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, 792 (2001).

This ideal does not disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. But these relationships are exactly that—alternatives to the model. States may rationally conclude that, all things being equal, it is better for the biological parents also to be the legal parents, and that marriage promotes that outcome.

C. Appellate courts across the country have long recognized the responsible-procreation rationale for marriage, and the decision below cannot be reconciled with those precedents

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships based on the latter's procreative capacity. In *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), the court held that both the state and federal constitutions allowed the state to regulate marriage. The court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." *Id.* at 1195. Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

This analysis remains dominant in our legal culture, both with regard to federal equal protection doctrine[5] and state constitutional law.[6] The Eighth Circuit, for instance, held that Nebraska's laws "defining marriage as the union of one man and one woman and extending a variety of benefits to married couples" were rationally related to the state's interest in promoting responsible procreation. *Citizens for Equal Prot.,* 455 F.3d at 867-68. As a matter of both federal and state constitutional law, the Supreme Court of Washington similarly concluded that "limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging

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[5] *See, e.g.*, *Citizens for Equal Prot.*, 455 F.3d at 867; *Lofton v. Sec'y of Dep't of Children & Fam. Servs.,* 358 F.3d 804, 818-20 (11th Cir. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part).

[6] *See, e.g.*, *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005) (lead opinion); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Hernandez*, 855 N.E.2d at 7; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Anderson v. King County,* 138 P.3d 963, 982-83 (Wash. 2006) (en banc).

families with a mother and father and children biologically related to both." *Anderson v. King County,* 138 P.3d 963, 985 (Wash. 2006) (en banc). So too, relying on this Court's due process and equal protection decisions, the Maryland Court of Appeals held that laws enshrining the traditional definition of marriage were rationally related to the goal of responsible procreation. *See Conaway v. Deane*, 932 A.2d 571, 629-34 (Md. 2007).

Indeed, the *only* appellate opinions to say that refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.), and *Perry v. Brown*, 671 F.3d 1052, 1080-95 (9th Cir. 2012).[7] The *Goodridge*

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[7] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Goodridge*, 798 N.E.2d. at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa and Vermont invalidated their states' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 441-44, 455-56 (Cal. 2008); *Kerrigan v. State,* 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009); *Baker v. State*, 744 A.2d 864, 878-80 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the

opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents), considerations that misperceive the point and that are ordinarily irrelevant to rational-basis analysis in any event. *Goodridge*, 798 N.E.2d at 961-62.

Perry, in turn, purports to rely on the specific circumstances of California laws other than Proposition 8, laws that confer on same-sex civil unions the same benefits accorded to married couples. *See Perry*, 671 F.3d at 1076-80; *see also Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012) (opinion of Reinhardt and Hawkins, JJ., concurring in the denial of en banc rehearing) ("We held only that under the particular circumstances relating to California's Proposition 8, that measure was invalid.").

What is more, like the decision below, neither *Goodridge* nor *Perry* identified an alternative coherent justification for marriages of *any* type. *Goodridge* equated same-sex and opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge*, 798 N.E.2d at 961. *Perry* similarly located the significance of marriage in "stable and committed lifelong relationships." *Perry*, 671 F.3d at 1078.

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validity of the responsible procreation theory as a justification for traditional marriage.

Having identified mutual dedication as one of the central *incidents* of marriage, however, neither opinion explained why the state should care about that commitment between sexual partners any more than it cares about other voluntary relationships of two, or even more, people. *See Morrison*, 821 N.E.2d at 29 (lead opinion).

A constitutional doctrine that requires the same benefits for same-sex and opposite-sex couples must supply a coherent rationale for government recognition of both, not simply attack traditional marriage as antiquated or somehow ill-considered. The failure of the decision below to do so—and indeed of *any* of the courts invalidating traditional marriage and its benefits to do so—while abnegating one of the most fundamental and enduring civil institutions in American life, justifies this Court's intervention.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Dated: August 2, 2012

APPENDIX A:
TRADITIONAL MARRIAGE STATES

STATES WITH CONSTITUTIONAL AMENDMENTS DEFINING MARRIAGE (30 STATES)	
STATE	CITATION
Alabama	Ala. Const. art. I, § 36.03
Alaska	Alaska Const. art. 1, § 25
Arizona	Ariz. Const. art. 30, § 1
Arkansas	Ark. Const. amend. 83, § 1
California*	Cal. Const. art. 1, § 7.5
Colorado	Colo. Const. art. 2, § 31
Florida	Fla. Const. art. 1, § 27
Georgia	Ga. Const. art. 1, § 4 ¶ I
Idaho	Idaho Const. art. III, § 28
Kansas	Kan. Const. art. 15, § 16
Kentucky	Ky. Const. § 233A
Louisiana	La. Const. art. XII, § 15
Michigan	Mich. Const. art. I, § 25
Mississippi	Miss. Const. art. 14, § 263A
Missouri	Mo. Const. art. I, § 33
Montana	Mont. Const. art. XIII, § 7
Nebraska	Neb. Const. art. I, § 29
Nevada	Nev. Const. art. I, § 21

*California's amendment, of course, has been ruled unconstitutional. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

North Carolina	N.C. Const. art. XIV, § 6
North Dakota	N.D. Const. art. XI, § 28
Ohio	Ohio Const. art. XV, § 11
Oklahoma	Okla. Const. art. 2, § 35
Oregon	Or. Const. art. XV, § 5a
South Carolina	S.C. Const. art. XVII, § 15
South Dakota	S.D. Const. art. XXI, § 9
Tennessee	Tenn. Const. art. XI, § 18
Texas	Tex. Const. art. 1, § 32
Utah	Utah Const. art. 1, § 29
Virginia	Va. Const. art. I, § 15-A
Wisconsin	Wisc. Const. art. XIII, § 13

STATES WITH STATUTES DEFINING MARRIAGE (9 STATES)	
STATE	CITATION
Delaware	Del. Code Ann. Tit. 13, § 101 (a) & (d)
Hawaii	Haw. Rev. Stat. § 572-1
Illinois	750 Ill. Comp. Stat. 5/201, 212, 213.1
Indiana	Ind. Code § 31-11-1-1
Maine	Me. Rev. Stat. Ann. tit. 19, §§ 650, 701
Minnesota	Minn. Stat. §§ 517.03; 518.01
Pennsylvania	17 Pa. Cons. Stat. § 1704
West Virginia	W. Va. Code § 48-2-603
Wyoming	Wyo. Stat. Ann. § 20-1-101

STATES WITHOUT EXPLICIT DEFINITIONS OF MARRIAGE (3 STATES)	
STATE	CITATION
New Jersey	*Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006)
New Mexico**	N.M. Stat. §§ 40-1-1 to 7
Rhode Island**	R.I. Gen. Laws §§ 15-1-1 to 5

**New Mexico and Rhode Island recognize same-sex marriages performed elsewhere, even though the states do not solemnize same-sex marriages themselves. *See* N.M. Stat. § 40-1-4; Opinion of the New Mexico Attorney General, 2011 WL 111243, No 11-01 (January 4, 2011); R.I. Exec. Order No. 12-02 (May 14, 2012), *available at* www.governor.ri.gov/documents/executive orders/2012/Executive_Order_2012.02.pdf.

APPENDIX B:
MARITAL BENEFITS IN TRADITIONAL MARRIAGE STATES

BENEFITS FOR SPOUSES ONLY (28 STATES)	
STATES	
Alabama	New Mexico
Arkansas	North Carolina
Florida	North Dakota
Georgia	Ohio
Idaho	Oklahoma
Indiana	Pennsylvania
Kansas	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Michigan	Texas
Minnesota	Utah
Mississippi	Virginia
Missouri	West Virginia
Nebraska	Wyoming

LIMITED BENEFITS FOR SAME-SEX COUPLES (6 STATES)	
STATE	CITATION
Arizona	Ariz. Rev. Stat. §§ 36-848 & 36-3231; *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011)
Alaska	2 AAC §§ 38.010 & 38.030;

Alaska (cont'd)	*ACLU v. State*, 122 P.3d 781 (Alaska 2005)
Colorado	Colo. Rev. Stat. §§ 24-50-603 to 608
Maine	Me. Rev. Stat. tit. 15, 18-A, 19-A, & 22
Montana	*Snetsinger v. Mon. Sys.*, 104 P.3d 445, 447(Mon. 2004)
Wisconsin	Wis. Stat. Ann. § 770.001

NEARLY IDENTICAL BENEFITS FOR SPOUSES AND LICENSED SAME-SEX COUPLES (8 STATES)	
STATE	CITATION
California	Cal. Fam. Code § 297.5(k)(1)
Delaware	Del. Code Ann. tit. 13, § 212
Hawaii	Haw. Rev. Stat. § 572B-9
Illinois	750 Ill. Comp. Stat. 75/20
New Jersey	N.J. Stat. Ann. § 37:1-29; *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)
Nevada*	Nev. Rev. Stat. §§ 122A.200-210
Oregon	Or. Rev. Stat. § 106.340
Rhode Island	R.I. Gen. Laws § 15-3.1-6

*Nevada confers nearly all incidents of marriage on registered domestic partnerships but does not require public and private employers to provide employment benefits to their employees' domestic partners. *See* Nev. Rev Stat. §§ 122A.200-210.