United States Court of Appeals

for the

First Circuit

Docket No. 10-2204

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; ERIC K. SHINSEKI, in his official capacity as the Secretary of the United States Department of Veterans Affairs; UNITED STATES,

Defendants-Appellants.

(continuation of caption on next page)

Appeals from the United States District Court for the District of Massachusetts, Boston, Civil Action Nos. 1:09-cv-11156-JLT and 1:09-cv-10309-JLT (Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE,* PACIFIC JUSTICE INSTITUTE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

KEVIN T. SNIDER, ESQ.
PACIFIC JUSTICE INSTITUTE
212 Ninth Street, Suite 208
Oakland, California 94607
(510) 834-7232

Attorney for Amicus Curiae Pacific Justice Institute

Docket Nos. 10-2207
and 10-2214

DEAN HARA,

Plaintiff-Appellee/Cross-Appellant,

v.

NANCY GILL; MARCELLE LETOURNEAU; MARTIN KOSKI; JAMES FITZGERALD; MARY RITCHIE; KATHLEEN BUSH; MELBA ABREU; BEATRICE HERNANDEZ; MARLIN NABORS; JONATHAN KNIGHT; MARY BOWE-SHULMAN; DORENE BOWE-SHULMAN; JO ANN WHITEHEAD; BETTE JO GREEN; RANDELL LEWIS-KENDELL; HERBERT BURTIS,

Plaintiffs-Appellees,

KEITH TONEY; ALBERT TONEY, III,

Plaintiffs,

v.

OFFICE OF PERSONNEL MANAGEMENT; UNITED STATES POSTAL SERVICE; JOHN E. POTTER, in his official capacity as the Postmaster General of the United States of America; MICHAEL J. ASTRUE, in his official capacity as the Commissioner of the Social Security Administration; ERIC H. HOLDER, JR., in his official capacity as the United States Attorney General; UNITED STATES,

Defendants-Appellants/Cross-Appellees,

HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,

Defendant.

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IDENTITY OF *AMICUS CURIAE* – PACIFIC JUSTICE INSTITUTE

This *amicus curiae* brief is being filed by Pacific Justice Institute.

The Pacific Justice Institute is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. *Amicus* is dedicated to providing legal services to the community without charge in the areas of First Amendment rights, particularly relating to of religious liberties, speech and association including traditional family values. In that the Pacific Justice Institute routinely represents the faith community, which historically serves as the conscience of the community on moral and social issues, it has an interest in the outcome of the case. The brief submitted herein does not repeat arguments of the parties or other *amici*, but will provide a unique perspective with the goal of assisting the Court in its analysis.

This brief is filed pursuant to the consent of all parties as per FRAP Rule 29(a).[1]

[1] Pursuant to FRCP 29(c)(5), the undersigned represents that no party's counsel authored this brief in whole or in part, contributed money that was intended to fund preparing or submitting the brief and that any person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

I. INTRODUCTION AND STATEMENT OF THE ISSUE

Can a court substitute the views of social scientists for the collective judgment of the People's elected representatives a law subject to rational basis review? To state the question is to answer it. The District Court's respective opinions are more reflective of a judgment from a philosopher king in a utopian city-state[2] rather than a court in a constitutional republic. The opinions are inconsistent with what is now black letter law on the deference that must be given to a legislative enactment under rational basis review. In contrast, the lower court did not require the Gill plaintiffs and the Commonwealth of Massachusetts to negate every basis which might support Section 3 of the Defense of Marriage Act ("DOMA").[3] Instead, the burden of persuasion was erroneously placed on the United States. Hence, both decisions must be reversed and judgment entered for the federal defendants.

Summary of the Argument:

Most infants (98%) are the results of heterosexual coitus. The raising of children is an enormous undertaking in terms of cost, loss of privacy, time, and personal freedom. Congress could reasonably determine that directing

[2] *Republic*, Book VI from Dialogues of Plato, pp. 347- 352, The Jowett Translations, edited and with Introductory Notes by Justin D. Kaplan. Simon & Schuster, Inc. New York, NY, © 1950.

[3] 1 U.S.C. §7.

heterosexuals into long term relationships (marriage) so that children are raised in a societally recognized unit (family) promotes public policy. Thus, it is rational for lawmakers to single out heterosexual unions for official recognition and provide a bundle of rights as an incentive to form families. The brief will also argue that concepts of equal protection are such that, to survive rational basis review, Congress need not provide identical benefits to every and any alternative living arrangement.

This brief, however, will begin by surveying the case law which analyzes claims brought by homosexuals against government entities for alleged violations of equal protection rights provided under either the Fifth or Fourteenth Amendments.[4] The brief will demonstrate that there is a consensus in the federal courts that sexual orientation is analyzed via the rational basis standard for equal protection claims. [NOTE: If the Court is already persuaded that equal protection claims receive rational basis review, then to preserve judicial resources, please skip to **Section b** of the brief entitled: "**The Legislature's proffered reasons for DOMA are consistent with orthodox understandings of the purpose of marriage and thus survive rational basis review**," *infra* at page 13.]

[4] Equal protection analysis under both the Fifth and Fourteenth Amendment are the same. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 footnote 2 (1975).

II. ARGUMENT

a. There is a consensus among the federal courts that an equal protection claim relative to sexual orientation receives rational basis review.

The U.S. Supreme Court and nine federal circuits have reviewed alleged equal protection violations by homosexual claimants. All of these courts have consistently held that sexual orientation is not a suspect classification and thus is reviewed under the level of scrutiny which provides the greatest deference to legislative and administrative bodies. A survey of the case law makes this abundantly clear.

i. U.S. Supreme Court Cases:

Baker v. Nelson, 409 U.S. 810 (1972): In a case coming to the U.S. Supreme Court from the Minnesota State Supreme Court (Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971)), the federal high court reviewed a denial of a marriage license to two male applicants. The same-sexed couple brought a claim under the Equal Protection Clause of the Fourteenth Amendment. Their arguments proved to be a precursor to the same sex marriage and benefits cases that would be brought in the decades that follow up to and including the present.

The core premise proffers: "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." Id., 291 Minn. at 312. But the Minnesota State Supreme Court rejected this argument

stating: "We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court." Id., 291 Minn. At 310. The Court further opined: "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." Id., 291 Minn. at 313. Hence, Minnesota's high court, using rational basis analysis, determined that there was no violation of the Equal Protection Clause in reviewing classifications based upon sexual orientation.

Subsequent to that decision, the same sex couple exercised their rights to the mandatory appeal procedure to the U.S. Supreme Court available at the time.[5] The Supreme Court issued a summary affirmance of the decision.[6] Although repealed, it is important to remember that a summary affirmance is a decision on the merits and lower courts are bound thereby. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). Summary affirmances "prevent lower courts from coming to opposite

[5] It should be noted that the procedure for mandatory review of the highest court of a State (28 U.S.C. §1257(2)) was repealed in 1988 under the Supreme Court Case Selections Act.

[6] The circuits are split as to whether Baker applies exclusively to challenges to opposite sex marriage statutes or is dispositive of government benefits cases as well, e.g., DOMA. That question, though relevant to the consolidated appeals, is outside of the scope of this brief.

conclusions on the precise issues presented and necessarily decided by those actions...." Mandel v. Bradley, 432 U.S. 173, 176, (1977).

Romer v. Evans, 517 U. S. 620 (1996): The high court struck down an amendment to the Colorado Constitution which "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class" (Id., at 624) e.g., those whose orientation is "homosexual, bisexual or lesbian." Id. Not surviving rational basis review, the amendment was found wanting under equal protection principles. Id., at 631-32.

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests. Id., at 632.

There are two Supreme Court cases that ironically are not included in this overview, i.e., Bowers v. Hardwick, 478 U.S. 186 (1982) and Lawrence v. Texas, 539 U. S. 558 (2003). Although both cases involve challenges by gay men to state criminal statutes prohibiting sodomy, neither decision was based upon the Equal Protection Clause. Rather, the majority opinions were founded on the Due Process Clause. (Bowers, 478 U.S. at 196, footnote 8 and Lawrence, 539 U.S. at 575). This is brought to the Court's attention because the present consolidated appeals at bar are both alleging violations of equal protection.

ii. U.S. Court of Appeals:

First Circuit

Cook v. Gates, 528 F.3d 42 (1st Cir. 2008): Former members of the United States armed services brought an action alleging that 10 U.S.C. § 654 (hereinafter "Don't Ask, Don't Tell"),[7] requiring separation of openly homosexual members, violated equal protection. This Court found that "neither Romer nor Lawrence mandate heightened scrutiny of the Act because of its classification of homosexuals…." Id. 61. As such, the correct analysis of an equal protection claim for sexual orientation is the rational basis standard, though heightened scrutiny is appropriate for due process claims. Id., at 49.

Fourth Circuit

Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996): Naval lieutenant sued Secretary of Defense and Secretary of the Navy, seeking declaratory and injunctive relief to prevent his discharge pursuant to "Don't Ask, Don't Tell" policy governing homosexuality in the military, following his disclosure that he was gay. The District Court granted summary judgment for the government and the Fourth Circuit affirmed. "The statutory classification here is not suspect, nor does it

burden any fundamental right… Rational basis is accordingly the suitable standard of review." Id. at 928.

Fifth Circuit

Johnson v. Johnson, 385 F.3d 503 (5th Cir.2004): A former prisoner, who is homosexual, sued prison officials, alleging that their failure to protect him from repeated sexual assault over an 18-month period violated his rights under the Eighth Amendment and the Equal Protection Clause. The Court determined that neither the Supreme Court nor the Fifth Circuit has recognized sexual orientation as a suspect classification. Thus the Court used a rational basis standard for reviewing the alleged violation of the Equal Protection Clause. Id., at 532.

Sixth Circuit

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995): Suit was commenced challenging constitutionality of city charter amendment which prohibited city from providing preferential treatment based on homosexual sexual orientation. District Court granted an injunction, but the Sixth Circuit reversed. "Because the Amendment implicated no suspect or quasi-suspect class and burdened no fundamental right, the rational relationship

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[7] The statute was repealed on December 22, 2010. "The President Signs Repeal of 'Don't Ask Don't Tell': 'Out of Many, We Are One'", The White House Blog http://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one. (Accessed January 17, 2011).

test (which dictates that the legislation must stand if it is rationally related to any legitimate state interest) is the appropriate standard by which the constitutionality of the Charter Amendment should be judged." Id., at 270.

Scarbrough v. Morgan County Board of Education, 470 F.3d 250 (6th Cir.2006): Former elected school superintendent sued county board of education over violation of constitutional rights, including equal protection of the law. It was alleged that he was not appointed as director of schools as the result of newspaper article which announced that he would be the featured speaker at a convention sponsored by a church with a predominantly homosexual congregation. The plaintiff's claim under the Equal Protection Clause was reviewed under the rational basis standard. Id., at 261.

Seventh Circuit

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir.1989): Army Reserve sergeant, barred from reenlistment on grounds she was admitted homosexual, brought an action alleging that regulation which made status of homosexuality nonwaivable disqualification for service, regardless of conduct, violated her rights to free expression and equal protection. Deferential rational basis standard was applicable in reviewing the equal protection claim. Id., at 464-65.

Eighth Circuit

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir.2006): Lesbian and gay advocates sued the State of Nebraska challenging the State's constitutional amendment which defined marriage as the union "between a man and a woman" under several theories, including the Fourteenth Amendment's Equal Protection Clause. The Court discussed at length the standard of review and concluded, "Though the most relevant precedents are murky, we conclude for a number of reasons that § 29 should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny." Id., at 866.

In view of the deferential standard found under rational basis, the Court afforded the marriage amendment with a "strong presumption of validity." Id., at 867. "Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.'" Id., at 867 citing Romer v. Evans, 517 U.S. at 632.

Ninth Circuit

Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982): After the expiration of a foreign male's visitor's visa, the alien and a male American citizen obtained a marriage license from the county clerk in Boulder, Colorado, and were married by a minister. The U.S. citizen then petitioned the Immigration and Naturalization

Service for classification of the alien as an immediate relative of the U.S. citizen, based upon the alleged spousal status. The Ninth Circuit addressed two issues on appeal as follows: "first, whether a citizen's spouse within the meaning of section 201(b) of the Act must be an individual of the opposite sex; and second, whether the statute, if so interpreted, is constitutional." The appellate court could not conclusively determine whether a same-gender marriage was permissible under Colorado law. Despite this, the Court opined that "[i]t is clear to us that Congress did not intend the mere validity of a marriage under state law to be controlling." Id., at 1039. A marriage must also be valid under federal law. Id. The Court found that pursuant to 8 U.S.C. 1101(a)(35) "valid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes." Id., at 1040. Using rational basis review to analyze whether the statute limiting marriage to heterosexual unions is constitutional, the Ninth Circuit found the law did not violate equal protection under the Fifth Amendment. Id., at 1042.

High Tech Gays v. Defense Security Clearance Office, 895 F.2d 535 (9th Cir. 1990): Class action was brought challenging Department of Defense policy of conducting expanded investigation into backgrounds of all gay and lesbian applicants for secret and top secret security clearances. The Ninth Circuit held that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater

than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment." Id., at 574.

Holmes v. California Army Nat. Guard, 124 F.3d 1126 (9th Cir.1997): Discharged members of armed services brought separate actions challenging military's "Don't Ask, Don't Tell" policy regarding homosexuals. One district court granted summary judgment for member and another court for the National Guard. The Ninth Circuit consolidated the appeals. The Court found no violation of equal protection. "Because homosexuals do not constitute a suspect or quasi-suspect class, we subject the military's 'Don't Ask, Don't Tell' policy to rational basis review." Id., at 1132.

Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir.2003): Students brought suit against a school district alleging that school's response, or lack of response, to student to student anti-homosexual harassment denied them the equal protection of the laws. The court cited High Tech Gays for the holding that "homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes." Id., at 1137.

Eleventh Circuit

Lofton v. Sec'y of the Dep't of Children & Family Services, 358 F.3d 804 (11th Cir. 2004): Homosexual foster parents and guardians challenged constitutionality of Florida law prohibiting homosexuals from adopting children.

The Eleventh Circuit found that "[a]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class. Because the present case involves neither a fundamental right nor a suspect class, we review the Florida statute under the rational-basis standard." Id., at 818. Reviewing the law under that lowered level of scrutiny, the Court found no equal protection violation.

Federal Circuit

Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989): A naval officer was released from active duty after admitting to being a homosexual. In viewing the equal protection claim, the Federal Circuit found that the Navy's challenged practice regarding homosexuals need only be rationally related to a permissible governmental end.

D.C. Circuit

Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984): Discharged Navy petty officer (for homosexual conduct) brought action seeking to enjoin discharge and an order for his reinstatement. Viewing the equal protection challenge, the Court stated, "[w]e conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one. We need ask, therefore, only whether the Navy's policy is rationally related to a permissible end." Id., at 1397-98.

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987): Claiming a violation of equal protection, a rejected applicant for a special agent position challenged the FBI's refusal to hire her because she was homosexual. The District Court granted summary judgment for government and the D.C. Circuit affirmed using rational basis review.

Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994): Homosexual Naval midshipman brought action that challenged Naval Academy regulations and Department of Defense Directives prohibiting homosexuals from attending Academy or serving in Navy. In an *en banc* decision the Court used rational basis analysis for the equal protection claim. "[W]e are required to ask two questions of the regulations. First, are they directed at the achievement of a legitimate governmental purpose? Second, do they rationally further that purpose?" The Court answered both of these questions in the affirmative.

b. The Legislature's proffered reasons for DOMA are consistent with orthodox understandings of the purpose of marriage and thus survive rational basis review.

There is a line of Supreme Court cases which explicitly lay out the standard for rational basis review. Despite this, the District Court engaged in a radical departure from clear precedent hence committing reversible error.

i. The inquiry begins with the judicial presumption that DOMA is constitutional.

In construing a challenged classification found in the law, there is an implied antecedent condition of legitimacy. "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." Heller v. Doe by Doe, 509 U.S. 312, 320 (1993). By starting with this presupposition, the judiciary is compelled to accept the legislative generalizations as given "even when there is an imperfect fit between means and ends." Id., at 321.

Here, when Congress passed Section 3 of DOMA in 1996, it was standardizing the definition of marriage for federal purposes.[8] The reasons for this were as follows:

- encouraging responsible procreation and child-bearing
- defending and nurturing the institution of traditional heterosexual marriage
- defending traditional notions of morality

[8] The definition used by Congress is summarized in the Congressional Report as follows: "The definition of 'marriage is derived from a case from the State of Washington, *Singer* v. *Hara*, 522 P.2d 1187, 1191–92 (Wash. App. 1974); that definition – a 'legal union of one man and one woman as husband and wife'—has found its way into the standard law dictionary. It is fully consistent with the Supreme Court's reference, over one hundred years ago, to the 'union for life of one man and one woman in the holy estate of matrimony.' *Murphy* v. *Ramsey,* 114 U.S. 15, 45 (1885). House Report, at 2-3, 7-10. (citing *Black's Law Dictionary* 972 6th Edition 1990). It is remarkable that citation to court opinions and the law dictionary as the basis for defining a word is deemed by the District Court to be arbitrary, capricious or otherwise nefarious.

- preserving scarce resources

H.R. Rep. No. 104-664 at 12-18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07 ("House Report").

In a similar context, the Eighth Circuit analyzed a nearly identical definition of marriage as found in DOMA, as well as, provisions extending a variety of benefits to married heterosexual couples. The Court determined that the law serves the government's interest in "steering procreation into marriage." Citizens for Equal Protection v. Bruning, Id., 455 F.3d at 867. Hence, "by affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws encourage procreation to take place within the socially recognized unit that is best situated for raising children." Id. (internal quotations omitted.)

The objection that the exclusive reason for marriage is not procreation has little merit. The U.S. Supreme Court granted summary affirmance of a decision by the Minnesota Supreme Court in a challenge to a statute prohibiting same-sex marriage in which that very proposition – procreation is not the only reason for marriage – was invoked. That argument was unequivocally rejected.

> 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.

Baker v. Nelson, 291 Minn. at 314.

Along this same stream of thought, the position of Judge Tauro, that denying same-sex couples the opportunity to marry does not strengthen heterosexual marriage, is also irrelevant. Congress has the prerogative of giving special treatment to heterosexual marriage by conferring on those who undertake that responsibility a specific basket of rights. For the duties associated with raising children to the age of majority are heavy. Those duties include, in part, financial undertakings, loss of personal freedom, legal obligations, diminished privacy, and the inevitable expenditure of emotional capitol involved in raising a family.

Because families are historically the recognized building blocks of society, Congress could rationally decide that the government will provide some offset to the enormous burdens described above by giving benefits wherever that is feasible. The fact that lawmakers have not given these identical benefits to those who are single or same-sex couples does not cause Section 3 of DOMA to flunk the rational basis test. To the contrary. "A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" Heller, 509 U.S. at 321, (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress

imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" Vance v. Bradley, 440 U.S. 93, 108 (1979).

Although it is true that homosexual marriages are not afforded the same federal benefits under DOMA, Congress has the constitutional authority to make reasonable distinctions between different categories of persons. Indeed, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. New Orleans v. Dukes, 427 U. S. 297 (1976).

Consider that heterosexual marriage is the universally recognized starting point for a family. In view of that reality, the accommodations that the legislature has given to heterosexual couples who enter into long term unions via marriage are undeniably logical. But even if they were not, courts must give lawmakers deference in the lines that they draw. This is true particularly in the matter of heterosexual marriage. For it is the collective judgment of history and the great thinkers of the ages that families are foundational for society and that opposite sex marriage is the preferred normative initiating event for a family.[9]

[9] Gautama Buddha, *Sigalovada Sutta: The Discourse to Sigala* (Narada Thera trans.), *available at* http://www.accesstoinsight.org/tipitaka/dn/dn.31.0.nara.html (last visited Jan. 19, 2011); 1 Aristotle, THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., Princeton University Press 1971); Marcus Tullius Cicero, *Cicero: On Duties, available at* http://www.bostonleadershipbuilders.com/cicero/duties/book3.htm (last visited

ii. Under rational basis review the burden is on Gill and the Commonwealth to negative every conceivable basis which might support DOMA.

The tenor of the District Court's opinion was to place Congress on trial as to the reasonableness of Section 3 of DOMA. Such a positioning is in direct contrast with established law. It has long been held that a statute is presumed valid. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). Thus, those who challenge a law are burdened with proving that it is unconstitutional. Baker v. Carr, 369 U.S. 186, 266 (1962).

This is not a new proposition. "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it…." Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935). Thus, the Gill plaintiffs as well as the Commonwealth are required to negative every conceivable basis which might support DOMA "whether or not the basis has a foundation in the record." Heller,

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Jan. 19, 2011) ; Confucius cited in 27 MAX MULLER, THE SACRED BOOKS OF THE EAST SERIES, (Max Muller ed., Adamant Media Corporation 2001); PLATO, REPUBLIC, TRANSLATED IN THE COLLECTED WORKS OF PLATO, INCLUDING THE LETTERS, 575, 698 (Edith Hamilton & Huntington Cains eds., 1961); SOLOMON, Proverbs 5,7,12-15 (King James Version); John Locke, THE SECOND TREATISE ON GOVERNMENT (Thomas P. Peardon ed., Bobs-Merrill Co.,Inc. 1980); SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 421 (1st ed. Oxford 1765-1769); LAO TZE, DAO DE QING, A NEW-MILLENNIUM TRANSLATION, (David H. Li trans., Premier Publishing 2001).

509 U.S. at 320-21. In stark contrast, the federal defendants have no obligation to produce evidence to sustain the rationality of DOMA's classification. Id., 509 U.S. at 320.

In the present case, the reasoning of Congress is consistent with orthodox understanding of the responsibility of marriage and by extension family. Lawmakers, through DOMA, have decided to offset the monumental financial and personal undertakings that are a part of raising a family. Such domestic responsibilities have, since all of recorded history, fallen primarily on the shoulders of those entering into long term heterosexual covenants via marriage. The actions of Congress are therefore quite rational. "A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" Heller, 509 U.S. at 324 (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978)). In light of this, the Gill plaintiffs and the Commonwealth have not shouldered their burden to negate this conceivably rational basis in support of DOMA.

Ignoring this established rule of statutory interpretation, the lower court clearly prefers the opinions of social scientists on the issue of procreation and what is the best unit for raising children. The Court writes: "Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social

welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." (Gill, Id., at 23-24).

On its face, the District Court's position constitutes reversible error. Can a court adopt the views of university professors and substitute those for the collective judgment of the People's elected representatives and their President? Under rational basis review it clearly cannot. The lower court's opinion fails to come to terms with the legal reality that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." FCC v. Beach Communications, 508 U.S. 307, 315 (1993).

In like manner, the lower court further complains that "the relevant committees did not engage in a meaningful examination of the scope or effect of the law. For example, Congress did not hear testimony from agency heads regarding how DOMA would affect federal programs. Nor was there testimony from historians, economists, or specialists in family or child welfare." Gill, Id., at 5-6. This is more than criticism of the legislative process. It is the judiciary putting lawmakers on trial for not relying on social scientists. From this it can be seen that for the District Court, the academy is the ultimate source of authority.

Testimony by its representatives are the equivalent to papal utterances. Academic publications are inerrant holy writ.

This judicial awe of the judgments of those from the elite universities is not only misplaced, it forgets the proper role of the court when undertaking rational basis review. The doctrine behind rational basis review is to protect the carefully crafted constitutional framework of separation of powers. Rational basis review is "a paradigm of judicial restraint" and "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Beach Communications, Id., 508 U.S. at 313-14. In light of this, a court cannot "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." New Orleans v. Dukes, 427 U.S. 297, 303, (1976) (per curiam). "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational…Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937).

Having embraced the academy's doctrine of relativism as an absolute truth, the lower court complains as follows: "What remains, therefore, is the possibility that Congress sought to deny recognition to same-sex marriages in order to make

heterosexual marriage appear more valuable or desirable." (Gill, Id., at 25). But Congress has the constitutional authority to do just that. Heterosexual marriage is historically the preferred norm as the starting point for families. The District Court protests by suggesting that this smacks of morality and that laws cannot be based upon "defending traditional notions of morality." (Id., at 26). But it is often the case that what is normative runs parallel to what is moral. Indeed, what comes first – morals or norms – is difficult to determine. In other words, do morals form norms or do norms form morals? Regardless, it is sufficient to say that DOMA may be seen as undergirding the ancient view that the family, and by extension, heterosexual marriage, is crucial in a stable society.

Indeed, because the overwhelming majority of people are created by heterosexual copulation, rather than assisted reproductive technology,[10] there is a strong public policy to place the burden of raising the fruit of these unions on those who have produced them. The increased divergence of both child-bearing and child-rearing from marriage may be a trend that Congress sees as harmful to the greater good of society. Congress thus can single out heterosexual marriage for specific benefits because maintaining long term heterosexual unions has a

[10] According to the U.S. Center for Disease Control the number of live births in the United States using assisted reproductive technology is over 1%. (http://www.cdc.gov/ART/ accessed January 14, 2011).

utilitarian benefit for society. The fact that this may mirror a segment of society's moral views does not cause DOMA to collapse under constitutional review.

The blatant disregard for the separation of powers when applying rational basis is further evident in the lower court's multiple pages of sophistry wherein the outlandish proposition is made that Section 3 of DOMA is "arbitrary and irrational." (Gill, Id., at 19-38). For example, the lower court writes: "a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages." Id., 24. Of course, the same thing can be claimed about a whole variety of living arrangements, e.g., single parent families, a grandparent raising her child's children, an adult taking children in from off the streets and raising them, communitarians, or polyamorous homes.[11] Taken to its logical

[11] It should be noted that there are significantly more plural marriages in the United States than gay marriages, civil unions or domestic partnerships combined. For example, there are between 50,000 to 100,000 Muslims who practice polygamy in the United States. Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy* (May 28, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=90857818 (last visited Jan. 17, 2011.) Further, it is estimated that between 30,000 and 100,000 Fundamentalist Mormons practice polygamy in Utah, Arizona, Canada and Mexico alone. Cassiah M. Ward, I *Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 Wm.& Mary J. Women & L. 131, 132 (2004), citing JON KRAKAUER, UNDER HEAVEN: A STORY OF VIOLENT FAITH 41 (2003) citing RICHARD & JOAN OSTLING, MORMON AMERICAN: THE POWER AND THE PROMISE (1999). In addition to those who practice traditional polygamy, "openly polyamorous families in the United States number more than

conclusion, it is just as easy to argue that a "desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to persons" in any of these other nonorthodox living arrangements.

However, in making classifications under equal protection, lawmakers are not required to provide mathematical precision for every possible living arrangement, even if those arrangements are in theory just as viable, practical or moral as heterosexual marriage. As the Supreme Court stated nearly one hundred years ago, "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69-70 (1913). In contrast, the essential premise of the lower court is that a law must be like an algebraic equation

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half a million with thriving communities in nearly every city." Jessica Bennet, *Only You. And You. And You: Polyamory—relationships with multiple, mutually consenting partners—has a coming-out party*, Newsweek (July 29, 2009), *available at* http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html (last visited Jan. 17, 2011). Compare those numbers with the mere 150,000 same-sex couples reporting in the 2010 Census. Whether or not these are all living within a government recognized relationship is a subject of some debate. For example, a consultant to the Census Department stated that there were only about 100,000 same-sex marriages, civil unions and domestic partnerships in 2008. "150,000 Gay Couples Married, Census Shows: Number of Reported Marriages Higher than Actual Weddings, Civil Unions." September 22, 2009. http://www.cbsnews.com/stories/2009/09/22/national/main5328794.shtml (accessed January 17, 2011).

where there is an equal sign (=) dividing left and right. Both sides must come out exactly the same. But legislation, like life, is messy and complex. Rational basis review thus does not require mirror image symmetry.

Further, the issue is not, as the District Court would frame it, the denial of benefits to persons in same-sex marriages or other living arrangements. The question is what will be promoted. Congress need not promote every conceivable living arrangement. Because 98% of infants are still conceived through heterosexual coitus,[12] there is a recognized governmental interest in having the male and female participants take upon themselves the all consuming task of rearing their own offspring until the age of majority.

It is neither arbitrary nor irrational for Congress to exclusively bestow a basket of rights – and even foist a bundle of legal duties – on men and women who procreate by recognizing their unions as a marriage. Because of this biological and sociological normative reality, lawmakers can reasonably promote heterosexual marriage as the preferred norm. DOMA does just that.

For example, a group of monks or nuns, or for that matter, single men, who live communally with each other, can take in children and give the prime of their lives to raising them. This is undoubtedly admirable and circumstances may indeed necessitate this from time to time. But it is not the historical, societal or

biological norm and is not something that lawmakers are constitutionally obligated to promote by bestowing the same quiver full of rights as are given to heterosexual marriages. The legislature can and must draw lines to promote what is believed to be a preferred norm. It need not embrace other exceptions.

Continuing its same line of reasoning the District Court writes: "[M]ore generally, this court cannot discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex." Gill, Id., at 25. Like a boy playing with toy soldiers, the lower court sets up phantom arguments, declares war, and topples the diminutive combatants to the floor. But this enemy is the product of an active imagination.

The purpose of DOMA is not to encourage homosexuals to marry opposite sex persons and make an attempt to engage in acts by which children may result. Instead, by providing a bundle of rights to heterosexuals who engage in procreative activities, DOMA steers these persons into family units.

The District Court is further battling a make-believe opponent by asserting that Congress is seeking to achieve its goal "*only* by punishing same-sex couples who exercise their rights under state law" (Id., at 25 – emphasis in original). Congress clearly was not punishing persons engaging in same-sex marriages. For

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[12] U.S. Center for Disease Control, Id., at footnote 9.

at the time that DOMA was signed into law by President Clinton, there was no homosexual matrimony.

Further, federal legislators did not punish those in homosexual unions, or any other form of alternative living arrangement for that matter. Rather, Congress was promoting hetero-normative families. The use of charged vocabulary such as "punish", "deny" and "fear" is merely an attempt by the lower court to paint a dark picture of legislative animus against homosexuals. The truth of the matter is that the actual terminology used by Congress was "preserve", "encourage" and "defend." House Report at 12-18. This demonstrates the District Court's utter contempt for the deference that is to be given a legislative body when a law is challenged.

Finally, in order to carry their burden, those challenging DOMA must articulate what they believe is the rationale for governmental recognition and endorsement of marriage. If the defendants fundamentally do not accept the premises provided by Congress which essentially comport with historical realities, the question must be asked, what do the defendants believe to be the rationale for marriage of any type? (See, for example, John G. Culhane, Marriage Equality? First Justify Marriage (If You Can), 1 Drexel L. Rev. 485 (2009). As commentators have noted, "[r]evisionists…have said what they think marriage is not (…inherently opposite sex), but have only rarely (and vaguely) explained what

they think marriage is. Consequently, because it is easier to criticize a received view than to construct a complete alternative, revisionist arguments have had an appealing simplicity." Sherif Girgis, Robert George, Ryan Anderson, What is Marriage?, 34 Harv.J.L.& Pub. Pol'y 245, 247 (2011).

Whatever the plaintiffs rationale may be, they must also answer the question as to why the government should provide official recognition to marriage – however it is defined? Both the Gill plaintiffs and the Commonwealth have not provided a reasoned position on that count. Hence, plaintiffs have utterly failed to make their case that Congress' definition of marriage and reasoning for Section 3 of DOMA falls short under rational basis review.

III. CONCLUSION

For the foregoing reasons, *amicus* urges that this Court find that the Gill defendants and the Commonwealth of Massachusetts have failed to carry *their* burden as to negating every conceivable reason for Congress' providing federal benefits exclusively for heterosexual marriage. Said benefits are based upon a definition of marriage which is consistent with the law dictionary, language from the Supreme Court, and with the collective judgment of history. For that reason, DOMA should be upheld.

Respectfully submitted,

Date: January 26, 2011.

By: /s/ Kevin T. Snider
Kevin T. Snider
Attorney for *Amicus Curiae*
PACIFIC JUSTICE INSTITUTE

STATEMENT OF RELATED CASES

There are no related cases.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 6,656 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point font.

/s/ Kevin T. Snider
Kevin T. Snider

Attorney for Amicus

Dated: January 26, 2011

CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on January 26, 2011, the foregoing **Brief of Amicus Curiae** was filed through the CM/ECF system and served electronically as well as Express Mail on the individual listed below:

See Attached List

/s/ Elissa Matias
Elissa Matias

Service List

Christopher K. Barry-Smith, Esq.
Maura T. Healey, Esq.
Jessica M. Lindemann, Esq.
Jonathan B. Miller, Esq.
617-963-2539
MA Attorney General's Office
1 Ashburton Place,18th Floor
Boston, MA 02108

Dina M. Chaitowitz, Esq.
617-748-3361
US Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02110

August E. Flentje, Esq.
202-514-1278
US Dept of Justice
Civil Division, Room 7242
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Benjamin S. Kingsley, Esq.
202-353-8253
US Dept of Justice
Civil Division, Room 7261
950 Pennsylvania Ave NW
Washington, DC 20530

Michael J. Singer, Esq.
202-514-5432
US Dept of Justice
Civil Division, 7266
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Robert E. Kopp, Esq.
202-514-3311
US Dept of Justice
Civil Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Christopher R. Hall, Esq.
202-514-4778
US Department of Justice, Room 7128
20 Massachusetts Avenue, NW
Washington, DC 20530

Philip D. Moran, Esq.
978-745-6085
Philip D. Moran PC
265 Essex Street, Suite 202
Salem, MA 01970

Mark Thomas
[NTC Pro Se]
617-267-2859
482 Beacon Street
Boston, MA 02115

Lawrence J. Joseph, Esq.
202-669-5135
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Joshua K. Baker, Esq.
888-894-3604
National Organization For Marriage
2029 K St, NW, Suite 300
Washington, DC 20006

William C. Duncan, Esq.
801-367-4570
Marriage Law Foundation
1868 N 800 E
Lehi, UT 84043

Thomas Brejcha, Esq.
Thomas More Society
312-782-1680
29 S. La Salle Street, Suite 440
Chicago, IL 60603

Paul B. Linton, Esq.
847-291-3848
921 Keystone Avenue
Northbrook, IL 60062

Christopher M. Gacek, Esq.
202-393-2100
Family Research Council
801 G Street, N.W.
Washington, DC 20001
George I. Goverman
[NTC Pro Se]
617 876-0700
1643 Cambridge Street, #51
Cambridge, MA 02138

Mary L. Bonauto, Esq.
Gary D. Buseck, Edq.
Vickie Lynn Henry, Esq.
Janson Wu, Esq.
617-426-1350
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108

Catherine C. Deneke, Esq.
Ara B. Gershengorn, Edq.
Claire Laporte, Esq.
Matthew E. Miller, Edq.
Amy Senier, Esq.
617-832-1000
Foley Hoag LLP
Seaport West
155 Seaport Blvd
Boston, MA 02210-2600

Paul M. Smith, Esq.
202-639-6000
Jenner & Block LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001-4412

William E. Halmkin, Esq.
Richard L. Jones, Esq.
David J. Nagle, Esq.
617-338-2436
Sullivan & Worcester, LLP
1 Post Office Square
Boston, MA 02109

W. Scott Simpson. Esq.
202-514-3495
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044

George I. Goverman
[NTC Pro Se]
617 876-0700
1643 Cambridge Street, #51
Cambridge, MA 02138

Benjamin D. DuPre, Esq.
John A. Eidsmoe, Esq.
Roy S. Moore, Esq.
334-262-1245
Foundation for Moral Law
One Dexter Avenue
Montgomery, AL 36104

David Ramos-Pagan, Esq.
787-423-3114
Law Office of David Ramos
497 Avenue E. Pol #187
San Juan, PR 00926

John A. Simmons, Sr., Esq.
603-929-9100
John Anthony Simmons PLLC
886 Lafayette Road
Hampton, NH 03842

W. Scott Simpson
202-514-3495
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044