

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH

AND HUMAN SERVICES *et al.,*

Defendants-Appellants

DEAN HARA,

Plaintiff-Appellee / Cross-Appellant,

NANCY GILL *et al.,*

Plaintiffs-Appellees,

v.

OFFICE OF PERSONNEL MANAGEMENT *et al.,*

Defendants-Appellants / Cross-Appellees

On appeal from final orders of the
United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156, 1:09-cv-10309

**BRIEF OF MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES—
INCLUDING OBJECTING MEMBERS OF THE BIPARTISAN LEGAL
ADVISORY GROUP, REPRESENTATIVES NANCY PELOSI AND
STENY H. HOYER—AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE***

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INTEREST OF THE *AMICI CURIAE*

Some *amici* voted against the Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), while others voted for it; still others were not in Congress when DOMA was enacted. But all believe, today, that Section 3 of DOMA, which defines marriage for all federal purposes as “only a legal union between one man and one woman,” lacks a rational relationship to any legitimate federal purpose and accordingly is unconstitutional.¹

Having concluded that Section 3 fails to fulfill the equal protection component of the Fifth Amendment, *amici* wish to share their unique perspective on why this is so. *Amici* also wish to make clear that the Bipartisan Legal Advisory Group (“BLAG”), which has intervened in this case to defend Section 3’s constitutionality, does not speak for a unanimous House on this issue. While Speaker Boehner has the authority to direct the defense of DOMA by virtue of the divided 3-2 vote of the BLAG, many Members believe that Section 3 of DOMA violates the Constitution and should be struck down.

¹ At the direction of the Clerk’s office, a full list of the 133 Members of the U.S. House of Representatives participating as *amici* appears on the reverse of the cover to this brief. All parties have consented to the filing of this brief. No counsel to any party to this lawsuit authored this brief in whole or in part, nor did any party, party’s counsel, or other person contribute money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted DOMA in 1996, gay and lesbian couples could not marry anywhere in the world. *Bowers v. Hardwick*, 478 U.S. 186 (1986), was still good law, inviting discrimination as a means of expressing moral disapproval of lesbians and gay men.² In this atmosphere, many were reluctant to speak openly about themselves or their families. This understandable reticence permitted false stereotypes and reflexive bias to dominate the public and congressional debate about allowing same-sex couples to marry.

DOMA's proponents capitalized on this, portraying the possibility of same-sex couples joining in marriage as a concerted attack by "homosexual extremists" on heterosexual marriage and exhorting Congress to act quickly to preempt this possibility. *See, e.g.*, 142 Cong. Rec. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by homosexual extremists all across this country"); *id.* at H7443 (statement of Rep. Largent) ("There is . . . a radical element, a homosexual agenda that wants to redefine what marriage is."). While some

² The Judiciary Committee relied on *Bowers* as support for DOMA. *See* H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905, at *16 n.54 (July 9, 1996) (describing *Bowers* as permitting, as a rational government interest, the "presumed belief of a majority . . . that homosexual sodomy is immoral and unacceptable").

Members fought for rational consideration of the issues,³ Congress passed DOMA without examining its impact on any of the thousand-plus federal laws that take marital status into account or hearing from child welfare or family law experts. Nor did Congress pause to examine why the federal government traditionally has respected state marriages for purposes of federal law despite the non-trivial differences in state marriage laws over this Nation's history before rupturing this longstanding federalist practice.

Congress did not "procee[d] with caution" as BLAG now suggests (BLAG Br. 39), but acted hastily, and in a manner that reflects the reality that, as a historically disfavored minority, gay men and lesbians have often been targeted for harm based on stereotypes, bias, and the unfortunate desire to create partisan wedge issues for political gain.

Amici agree with the Department of Justice ("DOJ") that laws like DOMA that disadvantage lesbians and gay men warrant heightened judicial review, and that DOMA cannot survive such review. *See* Superseding Br. for U.S. Dep't of Health & Human Servs. et al., *Gill v. OPM*, No. 10-cv-2204, at 3-4 (1st Cir. Sept. 22, 2011). *Amici* agree with DOJ that lesbians and gay men are the type of minority group that warrants the protection

³ *See, e.g.*, H.R. Rep. 104-664, at 42 (dissenting views) ("In a rational legislative atmosphere . . . committees of the Congress would be holding hearings on the various aspects of this so that we would not have to use ignorance as an excuse for haste.").

that heightened judicial review provides, and illustrate below that this group lacks sufficient political power to obtain equality through the democratic process alone.

But the Fifth Amendment's equal protection guarantee renders Section 3 invalid under any judicial standard. The driving force behind this law was the desire to disapprove and disadvantage gay and lesbian couples, which is not a legitimate federal interest. There certainly was no need to change the law to include heterosexual couples; the federal government recognizes their marriages regardless of DOMA. Unlike most acts of Congress, which are presumed valid and appropriately given judicial deference, DOMA was not the rational result of impartial lawmaking.

In 1996, Congress relied on implausible assertions about potential harms that might flow from allowing same-sex couples to marry, but the question for Congress is not whether to allow such marriages. In our constitutional system, that decision belongs to the States, six of which and the District of Columbia now allow gay and lesbian couples to marry. An estimated 132,000 gay and lesbian couples have done so. *See* Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), *available at* <http://tinyurl.com/43qu56t>.

DOMA harms these couples, their families, and the States that now allow them to marry; that harm was hypothetical fifteen years ago, but it

is very real today. As a result—and as more Americans have come to know a lesbian or gay relative, friend, or colleague—public opinion has shifted dramatically. While nearly seventy-five percent of the public opposed marriage for same-sex couples when Congress enacted DOMA, a majority of Americans now support it. *Amici* are part of the communities we represent, and our understanding reflects the same arc of experience, making clear what should have been apparent in 1996: the refusal to recognize the legal marriages of a category of our citizens serves no legitimate federal interest. Put simply, DOMA is one of those laws enacted when “times . . . blind[ed] us to certain truths,” but that “later generations can see . . . in fact serve only to oppress.” *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). DOMA was not constitutional in 1996; it is not constitutional now.

ARGUMENT

I. CONGRESS’S TREATMENT OF LESBIANS AND GAY MEN CONFIRMS THAT LAWS TARGETING THIS GROUP WARRANT HEIGHTENED JUDICIAL REVIEW.

Amici agree with DOJ that laws that single out lesbians and gay men should be reviewed under heightened scrutiny. Although DOJ amply demonstrates why heightened review is necessary, *amici* elaborate upon the lack of political power of this identifiable minority group. Congress has recognized over time that sexual orientation is not a characteristic that bears on one’s “ability to perform or contribute to society.” *City of Cleburne*

v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).⁴ Nevertheless, gay men and lesbians have been unable to obtain basic protections routinely afforded others or to prevent hostile legislation on matters that significantly and directly impact their lives.

BLAG argues that the courts should leave lesbian and gay Americans to the mercy of the democratic process. BLAG Br. 8. But Congress already has acted to prevent federal recognition of their lawful marriages. All persons are entitled to seek equal protection of the law through the courts and where, as here, an identifiable minority has not received favorable attention from lawmakers and has been targeted repeatedly for harm, heightened judicial review is warranted.

• ***DOMA demonstrates that lesbians and gay men cannot prevent even de jure discrimination.*** Gay men and lesbians were una-

⁴ For example, hearings and debate over legislation to extend protection from employment discrimination to gay and lesbian Americans have shown that sexual orientation “has no relation to ability in the workplace.” *Employment Non-Discrimination: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 111th Cong. (Nov. 5, 2009) (testimony of Helen Norton, Assoc. Professor of Law, Univ. of Colo. School of Law). Congress’s debate over the repeal of the “Don’t Ask, Don’t Tell” (“DADT”) policy similarly confirmed that sexual orientation does not predict one’s ability to serve the country with valor and courage. See, e.g., *Testimony Relating to the “Don’t Ask, Don’t Tell” Policy: Hearing Before S. Comm. on Armed Services*, 111th Cong., at 5 (Mar. 18, 2010) (statement of Sen. John McCain) (“[DADT] has allowed many gay and lesbian Americans to serve their country. I honor their service. I honor their sacrifices, and I honor them.”).

ble to prevent enactment of DOMA, a law that is remarkable in both its dramatic departure from Congress's previous respect for state marriage determinations and in its facially invidious discrimination against this identifiable minority group. While repeal bills have now been introduced in both Chambers of Congress, some Members who support repeal have been told that they "do so at their own peril" and targeted for aggressive opposition. *See, e.g., Nat'l Org. for Marriage, Will Pro-Gay Marriage Millionaires Divide and Conquer the GOP* (Sept. 27, 2011), available at <http://tinyurl.com/3t2ddf4>. These are not idle threats; those opposed to protections for gay men and lesbians have successfully mounted well-funded political campaigns to punish those who have safeguarded the rights of this group or to prevent or reverse legal gains.⁵ Gay men and lesbians have lacked the political power to counteract this organized opposition, which unquestionably impairs their ability to obtain the consistent and favorable attention of lawmakers.

⁵ For example, national organizations spent nearly \$1 million to unseat three Iowa Supreme Court justices who came up for retention following the Iowa Supreme Court's unanimous ruling that the Iowa constitution required that State to allow lesbian and gay couples to marry. *See, e.g., David Pitt and Michael Crumb, 3 Iowa justices ousted, rulings likely slowed*, Wash. Post (Nov. 3, 2010), available at <http://tinyurl.com/5u2zlbo>. The National Organization for Marriage claimed that it "was the largest single donor to the effort, giving roughly \$600,000," and stated that the non-retention vote would "send shockwaves through the political establishment." *See* <http://tinyurl.com/5sk8qyn>.

Moreover, in their efforts to first prevent and now repeal DOMA, gay men and lesbians have not received due consideration from Congress. In 1996, DOMA's proponents refused to grapple with the relevant issues, and though the district court acknowledged this failure (*Gill v. OPM*, 699 F. Supp. 2d 374, 379 (D. Mass. 2010)), the House still has not re-examined the law's validity. See *Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong., at 6 (Apr. 15, 2011) (statement of Rep. Nadler). In fact, in the fifteen years since DOMA's passage, only one hearing has considered possible repeal. See *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before S. Comm. on the Judiciary*, 112th Cong. (July 20, 2011). In this same time period, however, Congress held at least ten hearings dedicated to preventing marriage equality for gay and lesbian couples.⁶

⁶ *Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong. (Apr. 15, 2011); *An Examination of the Constitutional Amendment on Marriage: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 109th Cong. (Oct. 20, 2005); *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (June 24, 2004); *Preserving Traditional Marriage: A View from the States: Hearing Before S. Comm. on the Judiciary*, 108th Cong. (June 22, 2004); *The Federal Marriage Amendment (The Musgrave Amendment): Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (May 13,

• *Lesbians and gay men have been unable to obtain basic protection from discrimination.* While frequently finding themselves the target of negative attention, gay men and lesbians have not obtained similar positive attention or been able to obtain desired legislative outcomes. For example, efforts to obtain protection from discrimination in the critical areas of housing, employment, public accommodation, public education, and federally-funded programs have failed. Those efforts started in 1977, with introduction of a bill to amend the Civil Rights Act of 1964 and Fair Housing Act. *See* H.R. 8269, 95th Cong. (1977). That bill was re-introduced in every Congress over the next twenty years, but never received broad support. A more targeted approach that focuses on protecting gay men and lesbians just from employment discrimination has not yet

2004); *Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (Apr. 22, 2004); *The Defense of Marriage Act: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (Mar. 30, 2004); *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 108th Cong. (Mar. 3, 2004); *Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 108th Cong. (Jan. 27, 2004); *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 108th Cong. (Sept. 4, 2003).

passed Congress despite the fact that 89% of Americans believe that such protection should exist. *Gay and Lesbian Rights*, Gallup, 2008, available at <http://tinyurl.com/278saqd>. The Employment Non-Discrimination Act (“ENDA”), which would provide that protection, has been introduced in nine of the last ten Congresses. *See, e.g.*, H.R. 1397, 112th Cong. (2011); S.R. 811, 112th Cong. (2011). It has been passed by the House just once (H.R. 3685, 110th Cong. (2007); 153 Cong. Rec. H13,252 (daily ed. Nov. 7, 2007) (recorded vote)), and has never passed in the Senate.

- ***Hard-fought legislative advances remain the exception, not the rule, and do not signal political power.*** It was not until 2009—more than ten years after the torture and murder of Matthew Shepherd brought sympathetic attention to the problem of anti-gay violence—that supporters of a bill that includes lesbian, gay, and transgender people in federal hate crimes legislation had sufficient votes to pass that bill. Despite congressional findings that gay men and lesbians are among the most frequent victims of reported hate crimes,⁷ there still was insufficient support to ensure passage as a stand-alone measure; supporters had to attach hate crimes legislation to a must-pass defense bill. *See* Matthew She-

⁷ *See* H.R. Rep. 111-86, at 9-10 (2009) (“According to 2007 FBI statistics, hate crimes based on the victim’s sexual orientation . . . constituted the third highest category reported—1,265 incidents, or one-sixth of all reported hate crimes.”).

pard and James Byrd, Jr. Hate Crimes Prevention Act, Rider to the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, Pub. L. No. 111-84 (2009). Even then, the effort to include protections for the gay community met substantial opposition.⁸

Congress's "Don't Ask, Don't Tell" ("DADT") policy resulted in the discharge of more than 13,000 service men and women from the military. See Dep't of Defense, Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell," at 23 (Nov. 30, 2010), available at <http://tinyurl.com/3by3olg>. The policy cost the federal government between \$190.5 and \$363.8 million dollars in recruiting and training costs related to these discharges. See USA Today, *Report: 'Don't Ask, Don't Tell' costs \$363M* (Feb. 14, 2006), available at <http://tinyurl.com/3zyvztv>. Yet Congress authorized the repeal of DADT in a lame-duck session just last year, and only after two federal courts had *already* declared the policy unconstitutional. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010); *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008). Elimination of this discriminatory policy hardly illustrates affirmative political power, particularly given that the majority of Ameri-

⁸ For example, Representative Virginia Foxx stated on the House floor that characterizing Matthew Shepard's murder as a hate crime was a "hoax" used to gain support for inclusive hate crimes legislation, thereby denying the legitimacy of anti-gay violence. See 155 Cong. Rec. H4934 (daily ed. Apr. 29, 2009) (statement of Rep. Foxx).

cans favored repeal long before it was achieved. *See* Lymari Morales, *In U.S., 67% Support Repealing “Don’t Ask, Don’t Tell”*, Gallup, Dec. 9, 2010, available at <http://tinyurl.com/2abb22l> (since 2005, more than 60% of Americans favored allowing gay men and lesbians to serve openly in the military).

Limited legislative success, matched against a pervasive history of discrimination, confirms the need for a more exacting standard of review for laws that single out lesbians and gay men for unfavorable treatment. *Amici* urge the Court to confirm that sexual orientation is not a presumptively valid ground upon which to legislate and thus triggers heightened judicial review.

II. SECTION 3 IS UNCONSTITUTIONAL.

BLAG argues that DOMA is a routine “line-drawing exercise[]” that is “virtually unreviewable” by the courts. BLAG Br. 35 (internal quotation marks omitted). But a judicial determination that heightened scrutiny does not apply “does not leave [the disadvantaged class] entirely unprotected from invidious discrimination.” *City of Cleburne*, 473 U.S. at 446.

Striving to portray DOMA as a benign definitional measure, BLAG fails to acknowledge that Congress explicitly sought through DOMA to express moral disapproval of lesbians, gay men, and their relationships; and that a clear aim and effect of the law was to disadvantage this class of citi-

zens. *See, e.g.*, H.R. Rep. 104-664, at 15-16 (express purpose of DOMA was to “honor a collective moral judgment” reflecting “moral disapproval of homosexuality”); *see also, e.g.*, 142 Cong. Rec. H7498 (daily ed. July 12, 1996) (statement of Rep. Hyde) (“[M]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law.”). This purpose, which was cited repeatedly in the official House Report and during floor debate, unquestionably dominated Congress’s consideration of DOMA. It is also the only rationale for the law that actually finds support in logic, as DOMA in fact accomplishes what some in Congress in 1996 regrettably sought to do: it places a stamp of disapproval on gay men, lesbians, and their families. H.R. Rep. 104-664, at 15-16.

This fact not only warrants judicial suspicion, it proves fatal to the law: “Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” *Lawrence*, 539 U.S. at 582; *see also U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1972) (explaining that “a purpose to discriminate against [a politically unpopular group] cannot, in and of itself and without reference to some independent considerations in the public interest,” support the constitutionality of a law). Because the blanket refusal to recognize married same-sex couples for all federal purposes does not rationally serve any legitimate federal interest, but only advances

the illegitimate desire to disapprove and disadvantage gay and lesbian couples, Section 3 is unconstitutional.

A. Section 3 is not the rational result of impartial lawmaking and violates our constitutional commitment to neutrality of the law where the rights of citizens are at stake.

The fact that same-sex couples had been excluded in the past from marriage, and therefore from federal responsibilities and rights that hinge on marriage, cannot itself justify their continued exclusion. *See, e.g., Williams v. Illinois*, 399 U.S. 235, 239-40 (1970) (the equal protection guarantee imposes a “need to be open to reassessment” as “neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack”). A mere desire to preserve a “traditional” (heterosexual) definition of marriage is insufficient: the equal protection “commitment to the law’s neutrality where the rights of persons are at stake” (*Romer v. Evans*, 517 U.S. 620, 623 (1996)) requires, instead, that there be “a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature” (*U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180-82 (1980) (Stevens, J., concurring)). Section 3 fails this test.

In passing DOMA, Congress did not intend to further the purposes underlying the myriad federal laws and programs affected by it. In fact, Congress deliberately rejected suggestions that it consider whether its refusal to recognize married lesbian and gay couples would serve the federal policy objectives reflected in the thousand-plus federal laws that take marital status into account. *See, e.g.*, Markup Session, H.R. 3396, Subcomm. on the Constitution of the H. Comm. on Judiciary, at 67-68 (May 30, 1996) (statement of Rep. Frank) (“We have things here that are within the jurisdiction of the Social Security subcommittee . . . we have bankruptcy . . . there are significant responsibilities, as well as benefits involved. Let’s look at them.”).

In the fifteen years since DOMA’s passage, Congress has considered whether the exclusion of gay and lesbian couples serves a legitimate programmatic interest in only one specific context: the refusal to extend health and survivor benefits to the partners of federal employees. There, expert testimony established that excluding same-sex partners serves no legitimate interest but, instead, “directly undermines the Federal Government’s ability to recruit and retain the nation’s best workers.” *The Domestic Partnership Benefits and Obligations Act of 2009: Hearing Before the Subcomm. on Federal Workforce, Postal Service, & D.C. of the Comm.*

on Oversight and Gov't Reform, 111th Cong. (July 8, 2009) (statement of John Berry, Dir. of U.S. Office of Personnel Mgmt.) (hereinafter "Berry Statement"), available at <http://tinyurl.com/3r34xst>.⁹

Judges similarly have concluded that excluding married gay and lesbian couples fails to serve—and affirmatively undermines—any legitimate programmatic goals. *See, e.g., In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009); *In re Balas*, No. 2:11-bk-17831-TD (Bankr. C.D. Cal. June 13, 2011). Indeed, it is impossible to believe that any legitimate federal interest is rationally served by denying widowed Americans like plaintiff Dean Hara, the widower of former Congressman Gerry Studds, the marriage-based Social Security survivor benefits that help secure the wellbeing of our senior citizens or the health insurance benefits that surviving spouses of federal employees are otherwise assured. *See Gill* 2d Am. Compl. ¶ 6.

Section 3 does not serve but affirmatively undercuts the interests that Congress sought to advance in the laws and programs affected by DOMA. Where Congress has allocated federal burdens or benefits based

⁹ Congress has not yet remedied even this specific exclusion of same-sex partners, which only further demonstrates the lack of political power of this minority group. The relevant Committees in both the House and Senate reported favorably the *Domestic Partnership Benefits and Obligations Act of 2009*, H.R. 2517 and S. 1102, 111th Cong. (2009), but no further action was taken in either Chamber and this Congress has yet to revisit this issue.

on marital status, the decision to exclude an entire class of married citizens is not the rational result of impartial lawmaking.

B. Section 3 undermines Congress’s legitimate interest in respecting state marriages as a means of ensuring the stability and welfare of American families.

Marriage is an important social and legal institution; among other things, it increases the likelihood of stable relationships, which in turn promotes the stability and productivity of adults, their children, and society as a whole. But Section 3 does not enhance stability or security for anyone. Six States and the District of Columbia have now determined that allowing gay and lesbian couples to marry promotes the welfare of adults, children, and their States. Section 3 represents an unprecedented attempt by Congress to displace these determinations with its own policy judgments. But Congress has no legitimate federal interest in doing so.

1. “Responsible procreation and childrearing” does not justify discriminating against married gay and lesbian couples and their children.

In 1996, DOMA’s supporters insisted that Congress’s exclusive interest in marriage is “encouraging responsible procreation and childrearing,” and that limiting federal marriage-based rights to different-sex couples is rational because of “the possibility of begetting children inherent in heterosexual unions.” H.R. Rep. 104-664, at 13-14. But it is not plausible that denying federal marriage-based benefits to gay and lesbian

couples who already are married, with many already raising children, rationally serves any such interest.

Section 3 does not strengthen the marriages of different-sex couples or provide any benefit to their children. The benefits of marriage are available to these families regardless of DOMA, and it is nonsensical to claim that there is a rational connection between discriminating against lesbian and gay couples and the marital or parenting behavior of different-sex couples. Indeed, and as common-sense dictates, the trends in marriage and divorce in the States that now allow same-sex couples to marry have been unaffected. *See, e.g.,* Laura Langbein & Mark A. Yost, *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292, 305-306 (June 1, 2009) (“[L]aws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women.”).

BLAG mistakenly argues that rational basis review is satisfied so long as married different-sex couples benefit from federal recognition. *See* BLAG Br. 36. But Section 3 classifies married individuals in a manner that favors *some* (different-sex) and disfavors *others* (same-sex); and it does so not for the purpose of including heterosexual married couples (who qualify regardless of DOMA), but to *exclude* married same-sex couples. It

is this exclusion—and the resulting harm to married same-sex couples—that triggers equal protection concerns and that must rationally serve a legitimate federal interest, which it fails to do. *See, e.g., Moreno*, 413 U.S. at 534 (exclusion of “unrelated” households—not the inclusion of “related”—must rationally serve a legitimate federal interest).

Nor can the harm imposed by Section 3 be justified on the ground that same-sex couples do not have “the same ability to produce unplanned offspring” as different-sex couples. *See* BLAG Br. 49-50. Many married different-sex couples choose not to have children at all or, like many of their same-sex counterparts, plan for their children through adoption or surrogacy, insemination, egg donation, or other methods of assisted reproduction. Denying any of these married different-sex couples federal marriage-based benefits would not only be unwise as a matter of policy, it would also implicate constitutional concerns if Congress sought to do so. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the individual right to decide “whether to bear or beget a child”). Congress has never distinguished among married different-sex couples based on the desire or ability to “produce unplanned offspring”; this is not a valid distinguishing characteristic when it comes to married same-sex couples either. *See, e.g., City of Cleburne*, 473 U.S. at 448-49.

2. Section 3 unjustifiably harms married gay and lesbian couples and their children, undermining Congress's legitimate interest in respecting state-sanctioned marriages.

Marriage encourages stable family relationships, fosters economic interdependence and security for all household members, and can enhance the financial and emotional wellbeing both of the adult partners and any children they may have. Through their marriage laws, States create legally enforceable obligations of adults to each other and their dependents, thus promoting economic and social stability that benefits particular individuals and society as a whole. *See, e.g.*, Charlotte A. Schoenborn, *Marital Status and Health: United States, 1999-2002*, Advance Data From Vital and Health Statistics Report 351 (Dec. 15, 2004), *available at* <http://tinyurl.com/pfj75>; Michael A. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 301-304 (2001).

A litany of federal laws and programs use marital status to allocate responsibilities and rights to married adults, regardless of whether they have children,¹⁰ confirming that Congress has a legitimate interest in res-

¹⁰ Social Security spousal survivor benefits, 42 U.S.C. § 7385s-3(d)(1), and joint tax filing status, 26 U.S.C. § 6013, for example, are not limited to spouses who have procreated. The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, recognizes that spouses care for one another during times of illness, whether they have children or not; similarly, the Federal Employee Compensation Act ("FECA"), 5 U.S.C. §§ 8101 *et seq.*, acknowledges the financial interdependence of spouses, regardless of

pecting state marriages as a means of fostering stability and security for spouses, as well as any children they may have. Section 3 clearly undermines this legitimate interest in marriage as a means of ensuring economic and health security for adults.

Section 3 also undermines legitimate child welfare interests by denying the children of married gay and lesbian couples “the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law.” *Gill*, 699 F. Supp. 2d at 389 (internal quotation marks omitted). Section 3 deprives these children of financial benefits that otherwise would accrue to their families, including, for example, more favorable tax treatment or the ability to include all family members on a family health insurance plan. *See No. Gill v. OPM*, 1:09-cv-10309, Dkts. 29-43, 45 (D. Mass., filed Nov. 17 & 19, 2009) (affidavits of various married same-sex couples detailing the hardships imposed by DOMA, including unfavorable tax treatment and exclusion from employment benefits such as health insurance, that have reduced family resources). Children also suffer from harmful social stigma when the government treats their families as illegitimate and undesirable. *See, e.g.,*

the presence of children of the marriage, and provides spousal survivorship benefits if a federal employee is killed on the job. And the bankruptcy code permits an individual debtor and “such individual’s spouse” to file a joint bankruptcy petition whether or not the couple has children. *See* 11 U.S.C. § 302(a).

Amicus Curiae Br. of Am. Psychoanalytic Ass'n et al., *Jackson v. D.C. Bd. of Elections & Ethics*, No. 10-CV-20, at 20 (D.C., filed Mar. 26, 2010).

Lesbians and gay men are raising children; DOMA cannot and does not prevent that.¹¹ Congress should maximize the stability and security of these children, just as it does for children of married different-sex couples, by recognizing and respecting their parents' lawful marriages.

C. DOMA undercuts Congress's legitimate interest in respecting state sovereignty.

In 1996, DOMA's supporters claimed that it would promote federalism by protecting state sovereignty. But by supplanting state authority and imposing a federally-dictated viewpoint on the States, Section 3 does precisely the opposite. As some dissenting Members noted at the time, DOMA's supporters "are not at all interested in giving citizens the effect of their democratic choices or even in respecting what are historically states' rights." H.R. Rep. 104-664 at 43. Rather, they "are using the Congressional process as a platform to express their moral objection to people of the same sex committing to each other . . . expressing love and mutual responsibility for each other, and agreeing to provide for each other." *Id.* at 43-44.

¹¹ The leading national associations of psychological, psychiatric, and marriage/family therapy professions confirm that "lesbian and gay parents are as fit and capable as heterosexual parents, and their children are as psychologically healthy and well-adjusted as children reared by heterosexual parents." Amicus Br. of Am. Psychological Ass'n et al. at 20, *Perry v. Brown*, 639 F.3d 1153 (9th Cir. 2011) (No. 10-16696), 2010 WL 462257.

Because no State had yet included gay and lesbian couples in its marriage laws, Congress in 1996 was not confronted with just how disruptive it would be for the federal government to override state marriage determinations. Now, however, six States—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont—and the District of Columbia allow same-sex couples to marry.¹² DOMA plainly interferes with the ability of these States to ensure equal treatment for all of their married citizens and to carry out their laws fully. *See Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 248 (D. Mass. 2010).

¹² The New York legislature voted in June 2011 to allow gay and lesbian couples to marry in that State. *See* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. Times, June 24, 2011, at A1. The District of Columbia, New Hampshire, and Vermont passed enabling legislation in 2009. *See* N.H. Rev. Stat. Ann. § 457:46 (2009); Vt. Stat. Ann. tit. 15, § 8 (2009); Wendy R. Ginsberg, Cong. Research Serv., *Federal Employee Benefits and Same-Sex Partnerships* 1 n.2 (2011). The state supreme courts in Connecticut, Iowa, and Massachusetts ruled that their constitutions require those states to marry gay and lesbian couples. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Connecticut legislature later codified that ruling (*see An Act Implementing The Guarantee of Equal Protection Under The Constitution of The State for Same Sex Couples*, S.B. 899, Jan. 2009 Leg. (Conn. 2009), available at <http://tinyurl.com/633h5ve>), and the Massachusetts legislature voted overwhelmingly to defeat a proposed constitutional amendment that would disallow marriage for same-sex couples (*see Pam Belluck, Mass. Rejects Bill to Eliminate Gay Marriage*, N.Y. Times, Sept. 15, 2005).

Having now witnessed DOMA's impact on state autonomy, many Members who supported DOMA in 1996 have changed their minds about the law's legitimacy. For example, DOMA's author, former Georgia Congressman Bob Barr, has since concluded that "DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA's language reflects one-way federalism: the heterosexual definition of marriage for purposes of federal laws—including, immigration, Social Security survivor rights and veteran's benefits—has become a de facto club used to limit, if not thwart, the ability of a state to choose to recognize same-sex unions." Bob Barr, *No Defending the Defense of Marriage Act*, LA Times, Jan. 5, 2009.

As Mr. Barr's statement acknowledges, DOMA's intrusion into a matter that Congress previously had left to the States contradicts core values of federalism by conditioning federal respect on a State's agreement with Congress. In this light, DOMA is more naturally explained by a desire to preclude marriage between same-sex couples than by any genuine interest in protecting state sovereignty.

D. Congress's interest in conserving resources—an interest likely undercut by DOMA—cannot come at the cost of equal protection.

"[P]reserving scarce government resources" was also advanced as justification for DOMA. H.R. Rep. No. 104-664, at 18. But "a concern for

the preservation of resources standing alone can hardly justify the classification used in allocating those resources.” *Plyler v. J. & R. Doe*, 457 U.S. 202, 227 (1982). Even apart from that, the government’s own analyses demonstrate that DOMA does *not* preserve governmental resources.

When considering the bill in 1996, Congress sought no information about DOMA’s actual effects on federal programs or the budget. Just one paragraph in the House Report is devoted to the topic, and it incorrectly presumes that providing federal benefits to same-sex spouses would “plainly cost the federal government money.” H.R. Rep. 104-664, at 18. In fact, it was not until nearly six months following DOMA’s enactment that the General Accounting Office even produced a list of the provisions affected by DOMA—identifying 1,049 laws. *See* U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16, at 2 (Jan. 31, 1997), *available at* <http://tinyurl.com/4rj2s>.¹³ A 2004 follow-up GAO report requested by Senate Majority Leader Bill Frist, revised that number upward, to a total of 1,138 federal laws. Letter from Dayna K. Shah, GAO Assoc. General

¹³ A footnote in the House Report referred to a “partial list of federal government programs that might be affected by state recognition of same-sex ‘marriage’” prepared by the Congressional Research Service at the request of Representative Tom DeLay, but noted that the Committee did not “undertake[] an exhaustive examination of those benefits.” H.R. Rep. No. 104-664, at 18 & n.60.

Counsel, to Hon. Bill Frist, Senate Majority Leader (Jan. 23, 2004), *available at* <http://tinyurl.com/2l5t6v>.

Had Congress elected to obtain this information before it passed DOMA, it might have recognized what the Congressional Budget Office has since made clear: that federal recognition of married gay and lesbian couples would not cost the federal government *any* money, and likely would *improve* the federal balance sheet. U.S. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, June 21, 2004, *available at* <http://tinyurl.com/5gfwbf>.¹⁴ Other studies project similar net-positive effects on state budgets.¹⁵

¹⁴ BLAG largely dismisses this report as “implausible,” BLAG Br. 44, n.12, but Congress, in law, by rule, and in practice, has long relied on CBO to prepare cost estimates of legislation and other economic and budgetary analyses. *See, e.g.*, 2 U.S.C. § 653 (requiring CBO cost estimates for bills); House Manual § 840, Rule XIII, cl. 3(c)(3) (112th Cong.) (requiring CBO estimates in committee reports).

¹⁵ One study found that allowing same-sex couples to marry in California would have a positive impact on the state budget. M.V. Lee Badgett & R. Bradley Sears, *Putting A Price on Equality? The Impact of Same-Sex Marriage on California’s Budget*, 16 Stan. L. & Pol’y Rev. 197 (2005). Another study concluded that Connecticut would save at least \$3 million, and perhaps as much as \$13 million, per year if same-sex couples could marry. M. V. Lee Badgett et al., *Counting on Couples: Fiscal Savings from Allowing Same-Sex Couples To Marry in Connecticut*, The Williams Institute (Mar. 2005), *available at* <http://tinyurl.com/3layzh9>. A third study found New Jersey could save over \$55 million each year if gay couples were permitted to marry. R. Bradley Sears & Suzanne Goldberg, *Supporting Families, Saving Funds: A Fiscal Analysis Of New Jersey’s Family Equality Act*, The Williams Institute (Nov. 2003), *available at* <http://tinyurl.com/3kutbuk>.

Even if one looks narrowly at a specific program where there might seem to be some financial cost to treating same-sex partners equally under federal law, those costs are minimal and far outweighed by other benefits. The Director of the U.S. Office of Personnel Management, for example, testified before Congress in favor of extending benefits to federal employees' same-sex partners. He explained that the cost of adding health insurance and survivor benefits for federal workers and federal retirees would be “negligible”—about \$56 million in 2010, or about 0.2% of the entire cost of federal employee health insurance. By contrast, the current policy “directly undermines the Federal Government’s ability to recruit and retain the nation’s best workers.” *See Berry Statement*.

Of course, the inability to include one’s legal spouse on family health insurance also creates the risk that a spouse will be uninsured or underinsured, which harms the physical and financial health of families and the Nation. *See Gill*, No. 1:09-cv-10309, Dkts. 29-43, 45.

E. The reasons invented in response to litigation also do not justify Section 3.

Going beyond the reasons cited in the official House report, BLAG contends that DOMA is justified by a federal interest in promoting “consistency” in eligibility for federal benefits. But disunity in state marriage laws and any corresponding inconsistency in the administration of federal

marriage-based benefits were not new phenomena in 1996, nor do they provide a credible or legitimate justification for Section 3.

Marriage eligibility rules have varied significantly from State-to-State over the years, with important differences—including age and consanguinity restrictions and the fact that some jurisdictions now allow same-sex couples to marry—continuing to this day. BLAG asserts that marriage of gay and lesbian couples poses new challenges because these couples may not be recognized as married in a State where they reside. But this is a prospect that has always existed by virtue of the fact that each State sets its own marriage rules. For example, during a time when some States imposed race-based restrictions in their marriage laws, the federal government used choice-of-law rules to accommodate differing state marriage policies and determine marital status for purposes of federal law. *See* 20 C.F.R. § 404.1101 (Supp. 1952). Congress has never before created a restrictive federal definition of marriage or weighed in on policy differences among the States. It is not credible to claim an interest in “consistency” in an effort justify doing so only when it comes to the treatment of lesbians and gay men.

The benefits at issue are marriage-based, making marital status—not the sexual orientation of spouses—the relevant distinguishing characteristic. *Gill*, 699 F. Supp. 2d at 394-95. BLAG’s rationale substitutes a de-

sire to treat all gay men and lesbians (whether married or not) alike and less favorably over Congress's obligation to treat similarly situated parties alike. Married same-sex and different-sex couples are similarly situated with regard to federal marriage-based benefits, and the Constitution requires Congress to treat them with equal regard.

CONCLUSION

Prior to DOMA, Congress achieved its legitimate federal interests in promoting the welfare of American families by working cooperatively with the States and respecting state marriage determinations. Congress's radical departure from that federalist practice was a mistake; because Section 3 violates the Fifth Amendment's equal protection guarantee, it is also unconstitutional. The decision below should be affirmed.

November 3, 2011

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amici* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,910 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Miriam R. Nemetz
Miriam R. Nemetz
November 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on the 3d day of November, 2011, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system, which will send electronic notice of such filing to all participants in the case.

/s/ Miriam R. Nemetz

Miriam R. Nemetz

November 3, 2011

The Members of the House of Representatives participating as *amici* include:

	Nancy Pelosi, <i>House Democratic Leader</i>	Steny H. Hoyer, <i>House Democratic Whip</i>	
James E. Clyburn <i>House Assistant Democratic Leader</i>	Jerrold Nadler <i>Ranking Member, Subcomm. on the Constitution</i>	John Conyers, Jr. <i>Ranking Member, Committee on the Judiciary</i>	
	Barney Frank, Tammy Baldwin, Jared Polis, David N. Cicilline <i>LGBT Equality Caucus Co-Chairs</i>		
Gary L. Ackerman	Janice Hahn	John W. Olver	
Robert E. Andrews	Colleen W. Hanabusa	William L. Owens	
Karen Bass	Alcee L. Hastings	Frank Pallone, Jr.	
Xavier Becerra	Martin Heinrich	Ed Pastor	
Shelley Berkley	Brian Higgins	Donald M. Payne	
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Timothy H. Bishop	Maurice D. Hinchey	Chellie Pingree	
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Robert A. Brady	Kathy Hochul	Mike Quigley	
Bruce L. Braley	Rush D. Holt	Charles B. Rangel	
Lois Capps	Michael M. Honda	Laura Richardson	
Michael E. Capuano	Jay Inslee	Steven R. Rothman	
André Carson	Steve Israel	Lucille Roybal-Allard	
Judy Chu	Jesse L. Jackson, Jr.	Bobby L. Rush	
Hansen Clarke	Sheila Jackson Lee	Tim Ryan	
Yvette D. Clarke	Eddie Bernice Johnson	Linda T. Sánchez	
Wm. Lacy Clay	Henry C. "Hank" Johnson, Jr.	Loretta Sanchez	
Emanuel Cleaver	William R. Keating	John P. Sarbanes	
Steve Cohen	Dennis J. Kucinich	Janice D. Schakowsky	
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Sam Farr	Gregory W. Meeks	Nydia M. Velázquez	
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Bob Filner	George Miller	Debbie Wasserman Schultz	
Marcia L. Fudge	Gwen Moore	Maxine Waters	
John Garamendi	James P. Moran	Henry A. Waxman	
Charles A. Gonzalez	Christopher S. Murphy	Peter Welch	
Raúl M. Grijalva	Grace F. Napolitano	Lynn C. Woolsey	
Luis V. Gutierrez	Richard E. Neal	John A. Yarmuth	
	Eleanor Holmes Norton		

United States Court of Appeals For the First Circuit

NOTICE OF APPEARANCE

No. 10-2204, 10-2207, 10-2214 **Short Title:** Commonwealth of Mass. v. U.S. Dep't of Health & Human Servs.

The Clerk will enter my appearance as counsel on behalf of *(please list names of all parties represented, using additional sheet(s) if necessary)*:

133 Members of the U.S. House of Representatives (see list attached) as the

appellant(s) appellee(s) amicus curiae

petitioner(s) respondent(s) intervenor(s)

/s/ Michael B. Kimberly 11/3/2011
Signature Date

Michael B. Kimberly
Name

Mayer Brown LLP (202) 263-3000
Firm Name (if applicable) Telephone Number

1999 K Street NW (202) 263-3300
Address Fax Number

Washington DC 20006 mkimberly@mayerbrown.com
City, State, Zip Code Email (required)

Court of Appeals Bar Number: 1148739

Has this case or any related case previously been on appeal?

No Yes Court of Appeals No. _____

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Attorneys for both appellant and appellee must file a notice of appearance within 14 days of case opening. New or additional counsel may enter an appearance outside the 14 day period; however, a notice of appearance may not be filed after the appellee/respondent brief has been filed without leave of court. 1st Cir. R. 12.0(a).

Counsel must complete and file this notice of appearance in order to file pleadings in this court. Counsel not yet admitted to practice before this court must submit an application for admission with this form. 1st Cir. R. 46.0(a)(2). Effective January 1, 2010, use of the Case Management/Electronic Case Files (CM/ECF) system is mandatory for all attorneys filing in this court. Counsel may register at <http://pacer.psc.uscourts.gov/>.

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