Nos. 12-13 & 12-15

IN THE
Supreme Court of the United States

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

v.

NANCY GILL, ET AL.,
Respondents.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

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

BRIEF IN RESPONSE OF NANCY GILL ET AL.

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act defines "marriage" for purposes of all federal statutes, regulations, and agency interpretations as the union of one man and one woman and defines "spouse" as a husband or wife of someone of the opposite sex. 1 U.S.C. § 7. As a result, with respect to more than 1,100 federal statutes, lawfully married same-sex couples are denied the benefits and responsibilities accorded to lawfully married opposite-sex couples.

The question presented is:

> Whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, violates the equal protection guarantee of the Fifth Amendment to the U.S. Constitution as applied to legally married same-sex couples.

PARTIES TO THE PROCEEDING

The Respondents are Nancy Gill and Marcelle Letourneau, Martin Koski and James Fitzgerald, Dean Hara, Mary Ritchie and Kathleen Bush, Melba Abreu and Beatrice Hernandez, Marlin Nabors and Jonathan Knight, Mary Bowe-Shulman and Dorene Bowe-Shulman, Jo Ann Whitehead and Bette Jo Green, Randall Lewis-Kendell, and Herbert Burtis.

The Bipartisan Legal Advisory Group of the U.S. House of Representatives was an intervenor in the court below and is a Petitioner here.

Separate Petitioners are the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of Health and Human Services; the United States Department of Veterans Affairs; Eric K. Shinseki, Secretary of Veterans Affairs; the Office of Personnel Management; the United States Postal Service; Patrick R. Donahoe, Postmaster General of the United States of America; Michael J. Astrue, Commissioner of Social Security; Eric H. Holder, Jr., Attorney General; and the United States of America.

The Commonwealth of Massachusetts was also an Appellee in the court below and is a Respondent in this Court.

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INTRODUCTION

Respondents Nancy Gill *et al.*, the individual plaintiffs in *Gill v. Office of Personnel Management*, submit this response to the petitions for certiorari filed by the Bipartisan Legal Advisory Group ("BLAG") (No. 12-13) and by the federal defendants (No. 12-15). Respondents agree that the issues presented are of great importance and require definitive resolution by this Court. However, the Court should not, in weighing whether to grant review, be persuaded by the distorted analysis of the merits of the case that BLAG presents in its petition. The First Circuit faithfully applied this Court's precedents concerning rational basis scrutiny in deciding that Section 3 of the Defense of Marriage Act violates the equal protection guarantee by selectively denying any federal recognition to legally valid marriages simply because the married couples are of the same sex. Moreover, unlike the First Circuit (which believed itself constrained by circuit-level precedent), this Court is free to recognize that such overt discrimination against a class defined by its members' sexual orientation requires heightened equal protection scrutiny. While the statute does not survive even rational basis review, application of heightened scrutiny will provide prospective clarity to lower courts.

STATEMENT

Nancy Gill and the other 16 Respondents are all lawfully married or widowed. They exercise all of the rights and discharge all of the responsibilities of married (or widowed) people in Massachusetts.

Their marriages, however, are excluded from any federal recognition by Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (1996), *codified at* 1 U.S.C. § 7 ("DOMA"). DOMA for the first and only time in history establishes a federal definition of "marriage" and "spouse." While Massachusetts treats the *Gill* Respondents and all other same-sex married couples identically to their opposite-sex married counterparts, DOMA takes the class of married persons and divides it in two: those who are married for federal purposes and those whose marriages do not exist for any federal purpose.

A. DOMA's Enactment.

From the founding of this country until DOMA's enactment in 1996, the states governed marriage. State laws have always differed as to eligibility, including the age of consent, permissibility of interracial marriages, permissible degrees of consanguinity, availability of divorce, and recognition of common law marriages. Such conflicts sometimes led to "explosive" debates among the States. *See, e.g.*, Nancy Cott, *Public Vows* 163 (2000).

The federal government never inserted itself into these debates by defining any dimension of marital eligibility for all federal purposes. Instead, it looked to the relevant state's definition of marriage: a couple that was married under the law of the state was married under federal law. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of a federal right is . . . a federal question, but that does not mean that its content is not to be determined by

state, rather than federal law . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."); Appendix to Petition for a Writ of Certiorari filed by U.S. Department of Health and Human Services, *et al.* ("DOJ App.") at 64a ("In 1996 . . . . the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law.") (emphasis in original).

The federal government maintained this deference to state law notwithstanding wide diversity in the benefits available to couples. As the Fourth Circuit explained in *Ensminger v. Comm'r*, 610 F.2d 189 (4th Cir. 1979), the diversity:

> produces some inequality in taxation, but it illustrates the deference Congress has demonstrated for state laws in this area and its attempts to insure that, in the application of federal tax laws, taxpayers will be treated in their intimate and personal relationships as the state in which they reside treats them.

Id. at 191, *accord* I.R.S. Priv. Ltr. Rul. 91-09-060 (Dec. 6, 1990).

In 1996, Congress disrupted this centuries-old status quo by passing DOMA in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which raised the possibility that same-sex couples could soon begin marrying. The House Judiciary Committee's Report on DOMA warned that "a redefinition of marriage in Hawaii to

include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." H.R. Rep. No. 104-664, at 10-11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914-15 ("House Report").

The House Report acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law," *id.*, at 3, *reprinted in* 1996 U.S.C.C.A.N. at 2907, but stated that the Committee was not "supportive of (or even indifferent to) the notion of same-sex 'marriage,'" *id.* at 12, *reprinted in* 1996 U.S.C.C.A.N. at 2916, and claimed Congressional interests in, *inter alia*, "defend[ing] the institution of traditional heterosexual marriage," "encouraging responsible procreation and child-rearing," conserving scarce resources, and reflecting Congress's "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." *Id.* at 12, 13, 16, *reprinted in* 1996 U.S.C.C.A.N. at 2916, 2917, 2920 (footnote omitted).

The remarks of Representative Hyde, then-Chairman of the House Judiciary Committee, were blunt but typical: "[M]ost people do not approve of homosexual conduct . . . and they express their disapprobation through the law . . . . It is . . . the only way possible to express this disapprobation." 142 Cong. Rec. 17,089 (1996). In the floor debate on DOMA, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion," and

"an attack on God's principles." *See id.* at 16,972 (statement of Rep. Coburn); *id.* at 17,074 (statement of Rep. Buyer); *id.* at 17,082 (statement of Rep. Smith). They argued that marriage by gay men and lesbians might be "the final blow to the American family." *Id.* at 16,799 (statement of Rep. Largent). Senator Helms stated:

> [Those opposed to DOMA] are demanding that homosexuality be considered as just another lifestyle – these are the people who seek to force their agenda upon the vast majority of Americans who reject the homosexual lifestyle . . . . Homosexuals and lesbians boast that they are close to realizing their goal – legitimizing their behavior . . . . At the heart of this debate is the moral and spiritual survival of this Nation.

Id. at 22,334.

Although DOMA amended the eligibility criteria for a vast number of benefits, rights, and privileges dependent upon marital status, the relevant Congressional committees did not engage in any meaningful examination of the scope or effect of the law. Neither chamber of Congress heard testimony from economists, historians, sociologists or specialists in child welfare. Congress did not solicit relevant agency heads or endeavor in any other way to understand the scope of the Act. Indeed, the House Report characterized Section 3 as a "narrow federal requirement." H.R. Rep. 104-664 at 30, *reprinted in* 1996 U.S.C.C.A.N. at 2935.

But DOMA neither was nor is "narrow." Since its passage, DOMA has implicated more than 1,100 federal statutory provisions, extending from Social Security to taxation and health care, from employee benefits to terrorism victim recovery. *See, e.g.*, U.S. General Accountability Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* (2004); U.S. General Accountability Office, GAO/OGC-97-16, *Defense of Marriage Act* (1997); *see also* 18 U.S.C. § 2333.

Not surprisingly, defining a term for the entirety of the United States Code is uncommon, and at the time of DOMA, no new definitions had been added to the Dictionary Act, and the existing definitions had not been amended, for nearly half a century. *See* Act of Oct. 31, 1951, ch. 655, § 1, 65 Stat. 710 (substituting "used" for "use" in fourth clause after opening clause of 1 U.S.C. § 1).

B. Respondents Suffer From Their Disparate Treatment Under DOMA.

DOMA compels all federal agencies to disregard the lawful marriages entered into by each of the Respondents, most of whom married after decades-long dedicated relationships. As a class-based enactment, DOMA is a federal declaration that the Respondents' marriages are not "real marriages" and merit no respect under any federal law. This "adds stress and confusion to everyday situations," "complicate[s] even ordinary transactions," is "upsetting and painful" on an individual level, makes the Respondents "feel like . . . fractured famil[ies]," "conveys disrespect for [their] marriage[s] to the

wider world," and signals "that others do not have to respect" the Respondents' marriages.[1]

For the seventeen Respondents in the *Gill* case, there is no dispute that DOMA, and only DOMA, denies them equal access to particular federal programs.[2] DOMA concretely and continuously harms them and their children. The record reveals the following harms:

Nancy Gill and Marcelle Letourneau: Nancy Gill, a long-serving employee of the U.S. Post Office, and Marcelle Letourneau, a nursing services administrator, have been a couple since 1980 and married since 2004. Nancy sought to add Marcelle to her federal health insurance coverage, vision benefit plan, and flexible spending account, as do other federal employees for their spouses, but she was denied these protections because of DOMA.[3] Although the couple's two children are covered under Nancy's Federal Employee Health Benefit Program (FEHB) plan, Marcelle has had to remain in the work force to maintain access to her own health

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[1] The quotations are taken from unrebutted Affidavits from the Individual Plaintiffs (now Respondents) in Support of their Motion for Summary Judgment. Further undisputed facts are drawn from the Second Amended Complaint.

[2] *See* nn. 3-7 *infra*.

[3] Nancy first sought FEHB coverage for her spouse in 2004, which was denied. When she attempted to re-apply for benefits in 2008, the Postal Ease system would not accept her entries, and agency staff confirmed that DOMA foreclosed her application.

insurance and has been unable to fulfill their family's dream of having her stay at home with their two children.

Martin Koski and James Fitzgerald: Martin "Al" Koski, a retired employee of the Social Security Administration, and James "Jim" Fitzgerald, a recovery aide at a treatment center, have been life partners since 1975 and married since 2007. In their nearly 40 years together, they have suffered through grave health problems and the illnesses and deaths of parents. Although Al is otherwise qualified, DOMA required OPM to deny Al's application to enroll his spouse in the FEHB plan.[4] As a result, Al and Jim have incurred additional insurance expenses, prescription costs and uninsured medical expenses.

Herbert Burtis: Herbert "Herb" Burtis and his late husband John Ferris were both musicians and music teachers who were together for 60 years and married in 2004. Herb cared for John during the 16-year period in which John suffered from Parkinson's Disease, serving as his principal advocate and caregiver. The Social Security Administration's treatment of Herb after John's death in August 2008—mandated by DOMA—only compounded Herb's grief by treating him differently and denying him both the "One Time Lump-Sum Death Benefit

[4] Al's application for benefits and request for reconsideration were both denied by OPM because of DOMA.

and the survivor benefit because DOMA required that his spouse be a woman and not a man.[5]

Randell Lewis-Kendell: For 30 years, Randell "Randy" Lewis-Kendell, a shop owner, was partnered with his now-deceased husband, Robert Lewis-Kendell, whom he married in 2004. In 1993, they moved to Cape Cod and opened a small gift shop. In 2002, Robert was diagnosed with cancer. When Robert passed away in 2007, Randy repeatedly contacted the company holding his deceased husband's mortgage but the company refused to speak with him because it did not understand his marriage. The federal government's rejection of Randy's legal marriage pursuant to DOMA under which Randy has been denied the Lump-Sum Death Benefit reinforced this general lack of understanding.

Dean T. Hara: Dean Hara, a financial planner, is the surviving spouse of Gerry Studds, a former Member of the United States Congress who retired from federal service in January 1997. Dean and Gerry became a couple in 1991 and married in 2004. When Gerry died unexpectedly in 2006, Dean, too,

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[5] All of the Respondents with Social Security-based claims applied for and were denied benefits. Herb was denied both the "One-Time Lump-Sum Death Benefit" and the Social Security survivor benefit. Herb, as well as Randell Lewis-Kendell and Jo Ann Whitehead, all contested the denial of the benefits for which they applied within the Social Security Administration. The agency has stipulated that the sole issue precluding benefits is DOMA, the statute whose constitutionality is questioned.

was denied the Lump-Sum Death Benefit from Social Security due to DOMA. Dean was also denied both FEHB health insurance and the annuity normally available to surviving spouses. As a result, he has been forced to incur significant costs, not incurred by other widowed spouses of Members of Congress, to purchase his own insurance.[6]

Bette Jo Green and Jo Ann Whitehead: Bette Jo Green and Jo Ann Whitehead have been together since 1981, were married in 2004, and have seen each other through their own illnesses with cancer and the deaths of family members. As a retired labor and delivery nurse, Bette Jo's income has exceeded that of Jo Ann, a garden educator. Both receive primary insurance benefits from Social Security based on their own work records, but because of DOMA, Jo Ann has been denied the "spousal benefit" otherwise available to a lower-earning spouse. Unlike other married couples, both women are also extremely concerned about Jo Ann's likely financial circumstances should Bette Jo, a two-time cancer survivor, predecease her and Jo Ann be denied the Social Security spousal survivor benefit because of DOMA.

Melba Abreu and Beatrice Hernandez: Melba Abreu, the chief financial officer of a Boston-area nonprofit organization, and Beatrice Hernandez, a

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[6] The constitutionality of DOMA, as applied to Dean's claims for a spousal annuity and health insurance, has been the subject of administrative proceedings. An appeal from those proceedings is pending but stayed in the Federal Circuit. *Hara v. Office of Pers. Mgmt.*, No. 2009-3134 (Fed. Cir. Oct. 15, 2010).

writer developing a web design business, have been a committed couple since 1987. Since marrying in 2004, they have filed their state income tax returns with the Commonwealth of Massachusetts as Married Filing Jointly, but unlike other married couples, they are forbidden by DOMA from doing so for their federal income tax returns. Because they filed their federal returns as "single," they have borne a higher aggregate tax burden and been compelled to misrepresent their marital status.

Mary Ritchie and Kathleen Bush: Mary Ritchie, a longtime Massachusetts State Trooper and now State Police Lieutenant, and Kathleen Bush, a former sales and marketing worker at a medical journal, have been a committed couple since 1990 and were married in 2004. Kathleen temporarily set aside her career once they had children because of the demands of Mary's job. She currently stays home with their children and volunteers in their school and community. Because of DOMA, Mary has been unable to contribute to a "spousal IRA" for Kathleen, who is currently earning no income. The couple has also incurred additional federal income tax for every year since their marriage due to both their inability to file jointly and Mary's inability to contribute to Kathleen's IRA.

Mary and Dorene Bowe-Shulman: Mary Bowe-Shulman, an attorney employed by the Commonwealth of Massachusetts, and Dorene Bowe-Shulman, a self-employed acupuncturist, have been together since 1996 and have two daughters. In 2004, they were legally married. As a married

couple, they receive health insurance provided through Mary's employment with the Commonwealth, but because of DOMA, the couple has been forced to pay federal income taxes on Dorene's benefits. Mary's co-workers who are married to spouses of the opposite sex do not pay this tax penalty. Mary and Dorene have also been unable to file jointly. Both circumstances have resulted in their paying higher taxes than other similarly situated married families with children.

Marlin Nabors and Jonathan Knight: Marlin Nabors, a college administrator, and Jonathan Knight, a university finance administrator, have been a couple since 2004. In 2006, they "reached a point in [their] relationship when [they] knew that [they] would be together for life, no matter what," and so they "solidif[ied their] commitment through marriage." They, too, have been required by DOMA to file their federal income tax returns as "single" and have paid higher federal income taxes for several years than if they had filed as "married filing jointly." Like all of the plaintiffs, they simply want their marriage "to be treated like any other" and if, down the road, they "would owe more money as a married couple, then [they] would want to pay that amount. [They] want to pay [their] fair share."

C. Procedural Background And The Opinions Below.

Respondents filed their Complaint in the District Court of Massachusetts on March 3, 2009, alleging that DOMA's discrimination among married couples violates the equal protection guarantee of the Fifth

Amendment to the Constitution. *Gill v. Office of Personnel Management, et al.*, 1:09-cv-10309, Dkt. No. 1. The Office of Personnel Management and other Defendants moved to dismiss and Respondents (Gill, *et al.*) moved for summary judgment. *See* DOJ App. at 44a n. 68.

The district court issued its decision on July 8, 2010, granting the motion for summary judgment, denying the government's motion to dismiss, and holding that DOMA violates the Fifth Amendment. *Id.* at 29a, 72a. The court held that "'there exists no fairly conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective." *Id.* at 51a (quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)). An appeal was filed to the U.S. Court of Appeals for the First Circuit.

In early 2011, the President and Attorney General notified Congress of their conclusion that DOMA violates the equal protection guarantee of the Fifth Amendment. *See* App. E to BLAG Petition for Writ of Certiorari. The Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") subsequently moved to intervene, which the First Circuit permitted. *See* DOJ App. at 6a. Following briefing and extensive *amicus* participation, the First Circuit on May 31, 2012, affirmed the district court's holding. *See id.* at 26a.

Writing for a unanimous panel, Judge Boudin concluded that "[u]nder current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts

has not been adequately supported by any permissible federal interest." *Id.* at 24a. The Court stated that the burdens suffered by the 17 Respondents were akin to those suffered by the plaintiffs in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). DOJ App. at 14a. Applying rational basis review as the Court did in those cases, the First Circuit held that DOMA did not survive such review. *Id.* at 22a-23a.

The First Circuit also noted that DOMA intruded upon an area of governance typically reserved for the states: "Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns." *Id.* at 17a-18a (relying upon, *inter alia*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)). The court held that DOMA did not survive this closer rational basis examination.

The First Circuit held that neither the reasons offered in the House Report nor any subsequently offered justifications were sufficient to justify DOMA. *Id.* As to the "moral disapproval of homosexuality," the First Circuit held that "*Lawrence* and *Romer* have undercut this basis."

DOJ App. 21a-22a (citing, *inter alia*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

As to preserving government resources, the court held that saving money by targeting one particular and historically disadvantaged class of people actually undermines rather than bolsters a legitimate justification under this Court's precedents. *See* DOJ App. at 19a-20a (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *Romer*, 517 U.S. at 635).

And as to the proposed justifications related to child-rearing and heterosexual marriage, the First Circuit held that: (1) DOMA cannot prevent same-sex couples in Massachusetts from adopting or "prevent a woman partner from giving birth to a child to be raised by both partners"; (2) DOMA does not increase benefits to opposite-sex married couples; (3) DOMA does not explain how "denying benefits to same-sex couples will reinforce heterosexual marriage"; and (4) "[c]ertainly the denial [of such benefits] will not affect the gender choices of those seeking marriage." DOJ App. at 20a-21a. Accordingly, the court held:

> This is not merely a matter of poor fit of remedy to perceived problem . . . but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.

Id. at 21a (citations omitted).

The First Circuit noted Petitioner's argument that Congress, "faced with a prospective change in state marriage laws" in 1996, was "entitled to 'freeze' the situation and reflect," *id.* at 22a, but held that the statute was "not framed as a temporary time-out," and the House Report's "own arguments – moral, prudential and fiscal – make clear that DOMA was not framed as a temporary measure," *id.*

At both the district court and appellate levels, Respondents argued that legislation that discriminated against gay men and lesbians should be afforded heightened scrutiny. Neither court addressed whether gays and lesbians met the criteria meriting such heightened scrutiny. *See e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973). The district court determined it need not address these arguments because it concluded that "DOMA fails to pass constitutional muster even under the highly deferential rational basis test." DOJ App. at 51a. The First Circuit believed that it was bound by prior Circuit precedent, *see id.* (interpreting *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008)), and resolved the case on rational basis review.

REASON FOR GRANTING THE WRIT

I. There Is No Dispute That This Case Raises Questions Of National Importance That Are Ripe For Review.

As both BLAG and the government argue, BLAG Pet. 17-22; DOJ Pet. 22-23, this case raises questions of national importance. The denial of federal recognition of marriages mandated by Section 3 of DOMA sweeps across an "unprecedented number of

statutes," BLAG Pet. 19; *see* DOJ Pet. 22, affecting a great number of people. As the First Circuit noted, more than 100,000 existing married same-sex couples are disadvantaged in myriad ways, DOJ App. 4a, and the statute makes federal rights and benefits unavailable to countless others who may marry and form families in the future.[7] Furthermore, as Petitioners note, this Court has long recognized the importance of review where decisions strike down federal statutes. BLAG Pet. 17-18; DOJ Pet 13-14.

For these reasons, the arguments for a grant of review in this case are strong. In weighing them, however, the Court should not be swayed by the arguments on the merits that BLAG chose to present in its petition. As discussed in the following section, there is no validity to the claim that the First Circuit somehow distorted equal protection jurisprudence in concluding that DOMA fails rational basis scrutiny.

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[7] While BLAG agrees that this case presents important questions, it argues that the constitutionality of DOMA is already decided by *Baker v. Nelson*, 409 U.S. 810 (1972). BLAG Pet. 24. Leaving aside the question of whether *Baker* still retains any precedential value (a proposition Respondents dispute), *Baker* is irrelevant here. *Baker* hinged on whether there is a constitutional right to marry. DOJ App 2a. That question is not at issue in this case, which asks instead whether the federal government can discriminate against a class of people who are *already* married. These questions do not require the same, or even similar, analyses because the federal government has no interest in licensing marriages. The fact that affected couples, including Respondents, are (or were) *already* married alters the constitutional analysis. The court below distinguished *Baker* on precisely these grounds. DOJ App 7a-8a.

To the contrary, as multiple courts have recently recognized, there are compelling arguments that Congress violated the equal protection guarantee when it decided for the first time to deny all recognition to a single class of state-sanctioned marriages.

II. The First Circuit Faithfully Applied This Court's Rational Basis Precedents To Invalidate Section 3 Of DOMA.

BLAG devotes much of its Petition to arguing the merits of the case, contending that the First Circuit erred by "inventing and applying to [DOMA] . . . a previously unknown standard of equal protection review." BLAG Pet. i (Question Presented No. 2); *see id.* at 28-34. This does not accurately characterize the First Circuit's holding or analysis. The court of appeals did not "invent" a new standard of review but rather applied this Court's rational basis holdings in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1985), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996). The First Circuit's unanimous decision that DOMA cannot withstand application of those precedents is faithful to this Court's jurisprudence and should be affirmed.

A. The First Circuit Correctly Recognized The Importance Of Context In Rational Basis Analysis.

In *Moreno*, *Cleburne*, and *Romer*, the First Circuit noted, the Court has not afforded the "extreme deference accorded to ordinary economic legislation." DOJ App. 14a. Although those

decisions "did *not* adopt some new category of suspect classification," they analyzed, in applying the rational basis test, "the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered." DOJ App. 12a (emphasis added). As discussed in Part II.C *infra*, the First Circuit correctly analyzed DOMA, and the justifications advanced on its behalf, using precisely such an analysis.

Based on the First Circuit's recognition that this Court's precedents do not apply some one-size-fits-all rational basis review but rather apply rational basis review with sensitivity to the context in which the cases arise, BLAG accuses the First Circuit of "deviat[ing] from settled law," BLAG Pet. 18 and "inventing" a new form of equal protection review. *Id.* at 26. Not so.

At the outset, BLAG overstates the extent to which the First Circuit differentiated between the approach in *Moreno*, *Cleburne*, and *Romer* and the "extreme deference accorded to ordinary economic legislation." DOJ App. 14a. It did so only with respect to one claimed interest – the Congressional goal of preserving fiscal resources and the means for accomplishing said goal – noting that courts are normally highly deferential to such objectives, yet this Court's rational basis cases insist that there be a rational connection between a statute and cost cutting where an unpopular group bears the burden. The fact that *Moreno* involved federal funds, for instance, did not automatically warrant complete deference to the decision to deny those funds to

group households. When it comes to cutting costs, the government must justify its choice of a *particular group* to bear the burden of cuts. *See Plyler v. Doe*, 457 U.S. 202, 227 (1987).

The First Circuit's acknowledgment of this principle does not represent a departure from "traditional" or "conventional" rational basis review, BLAG Pet. at 30, but simply a recognition that the application of rational basis review is context-dependent. While BLAG objects, *Moreno*, *Cleburne*, and *Romer* do in fact illustrate that where unpopular groups or historically disadvantaged minorities are concerned, the Court has, in fact, been careful to scrutinize claims of "fit" between a policy and its stated objectives (*Moreno*); found alleged legislative interests unconvincing (*Cleburne*); and not hesitated to find a lack of a relationship between a status-based enactment and legitimate interests (*Romer*). Regardless of its word choice – e.g., "intensified scrutiny," "greater rigor," or "closer examination," DOJ. App. 11a, 13a, 15a – the First Circuit accurately captured the nuances of rational basis review as requiring an examination of whether a law's justifications are simply pretexts for discrimination against a disfavored group.

B. The First Circuit Correctly Identified Federalism Considerations As Further Meriting Careful Review.

BLAG further errs by arguing that the First Circuit's decision adopted a "new standard of review as a fusion of federalism and equal protection concerns." BLAG Pet. 15. At the outset, this is not

an accurate description of the First Circuit's holding: the Court identified both the "disparate impact on minority interests" and "federalism concerns" as *each* independently meriting "somewhat more in this case than automatic deference to Congress' will." DOJ App. 22-23a.

The First Circuit was in any event correct that this Court's "precedent[s] relating to federalism-based challenges to federal laws *reinforce* the need for closer than usual scrutiny of DOMA's justifications." *Id.* at 14a-15a (emphasis added). As the First Circuit noted, this Court has scrutinized with special care federal statutes that intrude on areas customarily within state control. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 612-613 (2000) (closely scrutinizing federal interests in statute imposing upon police powers); *United States v. Lopez*, 514 U.S. 549 (1995) (same); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (state election processes). Because DOMA represents an unprecedented attempt to create a federal standard with respect to a marital feature, the First Circuit rightly considered DOMA's departure from federalist tradition as similarly meriting careful consideration of the statute's constitutionality. *See* DOJ. App. 14a-18a.

While BLAG questions the First Circuit's reliance on federalism to inform its equal protection analysis because "the Constitution's equal protection guarantees exist to constrain government action, not to protect the states," BLAG Pet. 32-33, this Court has repeatedly recognized that federalism also

protects individuals, *see, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2363-64 (2011) (an "individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines"), and "secures to citizens the liberties that derive from the diffusion of sovereign power," *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). *See also id.* ("[F]ederalism protects the liberty of the individual from arbitrary power.") (quoting *Bond*, 131 S. Ct. at 2364)); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring) ("[T]he Equal Protection Clause, among its other roles, operates to maintain this principle of federalism . . . . [and] as an instrument of federalism.").

The First Circuit's consideration of federalism to inform the equal protection analysis therefore flows logically from this Court's precedents. The enactment of DOMA as a federal marriage standard is a historical anomaly, given the states' traditional role in regulating marital relationships, and as this Court noted in *Romer*, "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). *See also Sebelius*, 132 S. Ct. at 2586 ("Sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action.") (internal quotation marks omitted; alterations in original).

The First Circuit did not, therefore, invent some novel equal protection standard as BLAG charges, but rather faithfully analyzed this Court's precedents and properly identified DOMA's historically anomalous nature as meriting careful application of the rational basis standard.

C. The First Circuit's Application Of Rational Basis Review Followed Well-Established Principles.

The rational basis analysis the First Circuit actually applied to consider and ultimately reject each of the proffered government interests for DOMA further belies BLAG's assertion that it invented some "new" form of review. The First Circuit evaluated each of the four contemporaneous rationales for DOMA articulated in the House Report: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-government; and (4) preserving scarce government resources," H.R. Rep. 104-664, at 12, *reprinted in* 1996 U.S.C.C.A.N. at 2916 (1996), as well as additional *post hoc* rationales posited by BLAG, such as "to support child-rearing in the context of stable marriage," "reinforc[ing] heterosexual marriage," and reacting to a "prospective change in state marriage laws." DOJ App. at 22a. The First Circuit's analysis and rejection of each rationale tracks this Court's approach.

Notwithstanding BLAG's incorrect assertion that the First Circuit "recognized expressly that DOMA

passes the rational basis test," BLAG Pet. 14, the *only* rationale where the First Circuit indicated that "the extreme deference accorded to ordinary economic legislation" would otherwise suffice to sustain DOMA is the "public fisc" rationale. *See* DOJ App. at 9a. Both the First Circuit and the district court below rejected the "public fisc" rationale, DOJ App. 19a-20a; 57a-58a, and rightly so. This Court has made clear that a mere desire to conserve resources cannot explain a distinction drawn against a historically disadvantaged group. *See Plyler*, 457 U.S. at 219-21, 227; *Romer*, 517 U.S. at 635.[8] The First Circuit correctly recognized that saving money is not enough – rational basis review *also* requires a justification for choosing a *particular* unpopular group or minority to bear the burden of cost cutting. *See* DOJ App. at 19a-20a.

Congress's family-law-based justifications (as augmented by BLAG's *post hoc* arguments, which the First Circuit considered as well) fare no better. BLAG argued below that DOMA is a way to support child-rearing in the context of heterosexual

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[8] Recent analysis also shows that DOMA costs rather than saves money. DOJ App. at 19a-20a. Irrespective of what a hypothetical Congress might have thought at the time, such facts negate the "public fisc" rationale. *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *Nashville, Chattanooga & St. Louis Ry. v. Walters,* 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied.").

marriage. But there is no rational contention that discriminating against same-sex married couples supports parenting by opposite-sex couples: federal rights and benefits that support childbearing do so whether or not the government discriminates against same-sex couples.

Moreover, DOMA is *not* focused on childbearing. The laws DOMA rewrote apply to, benefit, and burden married couples without regard to whether they have, intend to have, or are capable of having children. These laws simply bear no relationship to encouraging marriage by unwed future parents.

The First Circuit (and the district court) thus correctly rejected Congress's family-law-based justifications. As the First Circuit panel explained, DOMA does not increase benefits to opposite-sex couples—"whose marriages may in any event be childless, unstable, or both." DOJ App. 21a. Nor can anyone "explain how discriminating against same-sex couples will reinforce heterosexual marriage." *Id.* Certainly there is no reason to believe that DOMA will affect one's marital or procreative choices. As such, "[t]his is not merely a matter of poor fit of remedy to a perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Id.* (internal citations omitted) (citing *Lee Optical*, 348 U.S. at 487-88 and *Cleburne*, 473 U.S. at 446-50); *see also* DOJ Pet. 55a-56a (explaining that Congress's "asserted interest in defending and nurturing heterosexual marriage is

not grounded in sufficient factual context . . . to ascertain some relation between it and the classification DOMA effects") (internal quotation marks omitted) (quoting *Romer*, 517 U.S. at 632-33)). Again, the First Circuit's analysis tracks neatly this Court's longstanding doctrine that laws "so far removed from" their justifications that it is "impossible to credit them" cannot survive rational basis scrutiny. *Romer*, 517 U.S. at 635.

The First Circuit likewise correctly recognized that under this Court's precedent, Congress's next proffered rationale, moral disapproval of homosexuality, is equally flawed. That rationale, as both the First Circuit and the district court below recognized, has been foreclosed by this Court's decisions in *Lawrence* and *Romer*, which counsel that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1996) (Stevens, J., dissenting)); *see also* DOJ App. 21a-22a; 57a; *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Equally unavailing is BLAG's argument, also asserted below, that DOMA furthers a federal interest in "national uniformity" in the substantive definition of marriage. Again, this rationale bears no recognizable relationship to the statute: DOMA does *not* create uniform eligibility for federal benefits. As the district court below noted, every variation of state marriage laws remains incorporated in federal

law for heterosexual couples; it is *only* same-sex couples who are affected by DOMA. DOJ App. 60a-61a. Platitudes like "uniformity" do not explain the legitimacy of this choice to separate out gay men and lesbians for differential treatment.

At best, DOMA treats identically situated *married* couples (same-sex and opposite-sex) differently in order to treat *all same-sex* couples (married and unmarried) the same. But that purpose is hardly legitimate. This Court's equal protection jurisprudence requires that similarly situated persons receive the same treatment. *Cleburne*, 473 U.S. at 439. Treating legally married same-sex couples differently from identically situated, legally married opposite-sex couples solely to equalize the treatment of married and unmarried same-sex couples turns that principle on its head.

BLAG failed below to offer any legitimate argument why the federal government has any policy interest in equalizing the federal legal status of all same-sex couples *irrespective of their actual marital status*. The need to administer federal programs certainly cannot provide it. As the district court aptly noted, "distribut[ing] federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses . . . . does not become more administratively complex simply because some of those couples are of the same sex." DOJ Pet. App. 68a. Nor is the fact that some same-sex married couples might move to other states a reasonable rationale for discriminating against them when they have *not* done so: federal agencies must

often address complicated differences among the domestic relations laws of the states in determining opposite-sex couples' eligibility for federal benefits,[9] including the challenging task of determining the validity of common-law marriages,[10] and they routinely apply residency determinations in administering federal programs.[11] Any suggestion that federal agencies would be unable to make comparable determinations for married same-sex couples is not believable, and a refusal to undertake the same administrative processing for same-sex couples that the federal government frequently undertakes for opposite-sex couples in similar circumstances is not legitimate. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (measure will fail rational basis review where "purported justifications . . . made no sense in light of how the city treated other groups similarly situated in relevant respects"). The First Circuit's and

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[9] *See, e.g.*, Social Security Ruling ("SSR") 84-18: Validity of Marriage - Estoppel – Ohio (applying law of claimant's state of residence to determine marital status, where law of state where marriage was performed would have yielded contrary result); SSR 63-20 - Validity of Marriage Between First Cousins (same).

[10] *See, e.g.*, 5 C.F.R. §§ 831.613(e)(1)(v), 842.605(e)(1)(v), 1651.5(b); 20 C.F.R. §§ 10.415, 219.32, 222.13, 404.726; 28 C.F.R. § 32.3 (definition of "spouse").

[11] *See, e.g.*, 29 C.F.R. § 825.113 (marriage for FMLA purposes turns on law of state in which employee resides); 20 C.F.R. § 404.345 (marriage for Social Security benefit eligibility turns on location of permanent home at time of benefits application); 38 C.F.R. § 3.1(j) (veterans' benefits); 20 C.F.R. § 222.11 (Railroad Retirement Act).

district court's refusal to entertain this rationale, therefore, again faithfully applies this Court's precedents.[12]

D. DOMA Can Be Explained Only By Impermissible Disapproval And Exclusion Of Gay Men And Lesbians.

The First Circuit declined to opine as to Congress's objective in enacting DOMA, determining that the statute was unconstitutionally irrational without attributing impermissible motives to the Congress who enacted it. However, the lack of any rational explanation for the statute leads to the conclusion that Congress intended DOMA to do exactly what Congress *said* it intended to do – to reflect "moral disapproval of homosexuality." H.R. Rep. 104-664 at 15-16, *reprinted in* 1996 U.S.C.C.A.N. at 2919-20.

This purpose is clear on the face of the House Report. *Id.* It also pervades the Congressional Record, which was uniquely filled with open hostility to gay men and lesbians (the sheer volume of those statements belying BLAG's attempt to dismiss them as isolated or incidental). And it is also the only explanation for DOMA that makes any sense because, as discussed *supra*, none of the other

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[12] Equally unassailable is the First Circuit's dismissal of any interest in reacting to a "prospective change in state marriage laws" by temporarily preserving the status quo so that Congress could "reflect." DOJ. App. at 22a. The court rightly noted the lack of any rational connection between this supposed rationale and the *permanent* ban on recognition of marriages among same-sex couples effected by DOMA. *Id.*

reasons for the statute, whether stated or invented after-the-fact, is plausible.

This does not mean, as BLAG simplistically characterized Respondents' position below, that all of DOMA's supporters harbored animosity towards gay men and lesbians – although, as the Congressional Record shows, quite a few obviously did. As Justices Kennedy and O'Connor noted in *Garrett*, impermissible prejudice is not limited to "malice or hostile animus alone," but also includes more subtle, yet still harmful "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

Whether animated by "moral disapproval" toward gay men and lesbians, open hostility, "insensitivity" to the lives of the people against whom they were discriminating, or simply a reaction against people who "appear[ed] to be different," Congress enacted a statute whose object was to subject gay men and lesbians to different, and less-favorable, treatment. *Cf. U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."). This Congress may not do. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534;

Cleburne, 473 U.S. at 448. Similarly, "[m]oral disapproval of this group, 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 (citing *Moreno* 413 U.S. at 534; *Romer*, 517 U.S. at 634-35). Congress's stated desire to condemn gays and lesbians cannot provide a legally sufficient basis for DOMA.

III. This Court Should Decide Whether Heightened Scrutiny Applies To Discrimination On The Basis Of Sexual Orientation.

As detailed above, the First Circuit correctly held, as have several other lower courts, that DOMA cannot be sustained under rational basis review, and its holding can be affirmed on that basis. If the Court grants review, it should also consider whether heightened scrutiny applies to laws that discriminate based on sexual orientation. As the government argues, DOJ Pet. 16-22, DOMA effects a classification requiring, and failing, heightened scrutiny under the factors this Court has identified in cases involving other classifications.[13]

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[13] Just this week, the court in *Pedersen v. Office of Personnel Management*, No. 3:10-cv-1750 (D. Conn. July 31, 2012), exhaustively considered whether heightened scrutiny should apply to a classification based on sexual orientation in a challenge to DOMA, including BLAG's contentions to the contrary, and concluded that it should.

This Court has been able to resolve past cases involving discrimination against gay men and lesbians without needing to decide the level of scrutiny that applies to such laws. *See Lawrence*; *Romer.* In the absence of such guidance from this Court, several lower courts have addressed the question, in many cases concluding that heightened scrutiny is not warranted as a result of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by*, *Lawrence v. Texas*, 539 U.S. 558 (2003). *See, e.g.*, *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class'."); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("[H]omosexual conduct is not a fundamental right.") (citing *Bowers*); *see also Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (en banc) (citing cases from several Circuits all decided in 1997 or earlier). While this Court overruled *Bowers*, *Lawrence*, 539 U.S. at 578, and the premise underlying these cases is now void, this Court's silence on the standard of review has allowed many lower courts to continue to apply outdated Circuit precedent that sexual orientation discrimination is subject to only rational basis review, thus leaving gay men and lesbians vulnerable to intentional discrimination. Because DOMA imposes indisputable *de jure* discrimination on the basis of sexual orientation, this case presents an ideal vehicle for this Court to clarify how courts should scrutinize such laws going forward, and to

ensure that lower courts afford gay men and lesbians the constitutional protections to which they are entitled under a proper application of the Equal Protection Clause.[14]

This Court has made clear that a classification triggers heightened scrutiny where (1) a group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to contribute to society. *See Cleburne*, 473 U.S. at 440-41; *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). While these two factors are essential, this Court has also sometimes considered (3) the group's minority status or relative lack of political power, *see*

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[14] As Respondents will demonstrate if the Court grants review, DOMA also independently warrants heightened scrutiny because it burdens the right of familial integrity for married same-sex couples and their families. The right to maintain family relationships free from undue government interference is a long-established and fundamental liberty interest. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (acknowledging "freedom of personal choice in matters of marriage and family life"); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Lawrence*, 539 U.S. at 574 (confirming that "persons in a homosexual relationship may [also] seek autonomy" for "personal decisions relating to marriage, procreation, ... family relationships, child rearing, and education"). DOMA infringes this liberty interest. First, by its sweeping reclassification of Respondents as "single" for any and all federal purposes, DOMA erases their marriages under federal law. Second, by throwing Respondents' marriages into a confusing legal status in which they "count" for some purposes but not others, DOMA erases much of the meaning their marriages would otherwise have – in both public and private settings – and relegates them to second-class status.

Plyler, 457 U.S. at 216 n.14; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("minority *or* politically powerless") (emphasis added), and (4) whether group members have "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

DOJ offers compelling arguments, supported by the undisputed record evidence set forth in the district court, that discrimination based on sexual orientation satisfies these criteria. DOJ Pet. 18-21. The First Circuit, while noting "[s]ome similarity" between sexual orientation and gender discrimination which receives heightened scrutiny, believed itself foreclosed by Circuit precedent from extending heightened scrutiny to sexual orientation. DOJ App. 10a. This Court faces no similar constraint and can and should take that step.

A. The Two Essential Factors (Historical Discrimination And Contribution To Society) Are Easily Satisfied.

There can be no dispute that gay men and lesbians have historically been subject to discrimination. *Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). There also can be no legitimate dispute that they participate fully in society. Respondents in this case, and millions of other gay men and lesbians, are woven into the fabric of everyday life in America, leading productive lives as spouses, parents, family members, friends, neighbors, coworkers, and

citizens. For these reasons alone, laws that discriminate on the basis of sexual orientation merit heightened scrutiny.

B. Gay Men And Lesbians Are A Minority And Face Significant Obstacles To Winning Political Protections Democratically.

As noted, the Court has sometimes also considered whether a group is a minority or lacks political power.[15] Both criteria are satisfied here.

First, there is no dispute that gay men and lesbians are a minority. Second, gay men and lesbians remain politically vulnerable to the majoritarian political process. Below, Respondents submitted unrebutted evidence showing that the modest political successes won by gay men and lesbians (which BLAG highlights while ignoring the extensive contrary evidentiary record developed in this case) do not change the fact that they still lack sufficient political power to end discrimination targeting them. For example, while hate crime legislation has been enacted, and "Don't Ask, Don't Tell" has been repealed, basic civil rights for gay men and lesbians have proved impossible to achieve despite decades of effort and despite popular support: there is no national law prohibiting discrimination in employment, housing, or public accommodation on

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[15] This Court has applied heightened scrutiny absent this factor. *See. e.g.*, *Frontiero*, 411 U.S. at 686 n.17 (heightened protection for sex-based classifications despite acknowledgment that "women do not constitute a small and powerless minority").

the basis of sexual orientation. *See generally Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008). Gay men and lesbians remain underrepresented in elected office. *Id.* at 446-47. And legislative and judicial decisions to expand civil rights for gay men and lesbians are disproportionately reversed by ballot initiatives, including marriage in California and foster care rights in Arkansas. Non-discrimination protections are also subject to repeal (e.g., in Anchorage, Alaska in 2012) and many states are attempting to emulate Tennessee's law forbidding local governments from enacting non-discrimination measures that protect characteristics not enumerated in state anti-discrimination laws. Finally, anti-equality groups are powerful, numerous, and well funded. *Id.* at 445-46.

DOMA itself is emblematic of the limited political power exercised by gay men and lesbians and illustrates the setbacks that typically accompany any gains. After the President and Attorney General of the United States concluded that DOMA was unconstitutional, powerful political interests still rushed to defend it.

In short, gay men and lesbians are ordinarily unable to win political protections through the democratic process, especially on the national level. Contrary to BLAG's contention, BLAG Pet. 29 n.9, the limited successes achieved so far do not evidence substantial political power, any more than women's limited political gains obviated the need for heightened scrutiny of gender-based classifications

in the 1970s. *See Frontiero*, 411 U.S. at 687-88 (acknowledging Civil Rights Act prohibiting employment discrimination based on sex, Equal Pay Act, and Congressional passage of Equal Rights Amendment).

C. Sexual Orientation Is An Enduring And Defining Characteristic.

Although not necessary to trigger heightened scrutiny, *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are suspect class notwithstanding ability to opt out of class voluntarily), the Court has also been particularly suspicious of laws that discriminate based on "obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group." *Bowen*, 483 U.S. at 602. This stems from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686 (quotation marks omitted). A law therefore warrants heightened scrutiny where it imposes a disability based on a characteristic that persons cannot, or should not be asked to, change.

While some would incorrectly characterize the status defining gay men and lesbians as one of behavior only and therefore mutable, this Court has "declined to distinguish between status and conduct in this context." *Christian Legal Society of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010). Moreover, *Lawrence* recognized that individual decisions by consenting adults concerning the intimacies of their physical relationships represent

"an integral part of human freedom," 539 U.S. at 576-77, and are entitled to constitutional protection, *see id.* at 578. Given that (1) the purpose of the immutability inquiry is to assess whether a person can reasonably change a characteristic to avoid discrimination, and (2) the acknowledged centrality of sexual orientation to a person's identity, it would be unjust to ask gay men and lesbians to choose between their identity and the civil rights available to heterosexuals. *See, e.g.*, *Kerrigan*, 957 A.2d at 438 (this prong of inquiry satisfied where "it would be abhorrent for government to penalize a person for refusing to change" trait) (quotation marks omitted).

Moreover, there is an increasingly broad scientific consensus that sexual orientation is, in fact, immutable, as evidenced by affidavits submitted below. *See Kerrigan*, 957 A.2d at 436-37; *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation.").

CONCLUSION

The Court should grant review and affirm.

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