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

In the United States Court of Appeals
for the First Circuit

Commonwealth of Massachusetts, plaintiff-appellee,
vs.
United States Dep't of Health & Human Services, *et al.*, defendants-appellants.
&
Nancy Gill, *et al.*, plaintiffs-appellees,
vs.
Office of Personnel Management, *et al.*, defendants-appellants.
&
Dean Hara, plaintiff-appellee, cross-appellant,
vs.
Office of Personnel Management, *et al.*, defendants-appellants, cross-appellees.

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

BRIEF OF *AMICUS CURIAE*, THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL IN NO. 10-2207

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the Family Research Council, is not a corporation that issues stock or has a parent corporation that issues stock.

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Interest of the *Amicus*

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through books, pamphlets, media appearances, public events, debates and testimony, FRC's team of policy experts review data and analyze Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected through the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the seedbed of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian worldview as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families in America.

FRC actively supported the Defense of Marriage Act, the constitutionality of which is the subject of this appeal. FRC, therefore, has a particular interest in the outcome of this case. Requiring the Government to recognize the validity of same-sex marriages would not promote any of the interests on the basis of which marriage is a protected social institution. And, for the reasons set forth herein, nothing in the Constitution, properly understood, compels such recognition.

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I.

SECTION 3 OF THE DEFENSE OF MARRIAGE ACT IS SUBJECT TO RATIONAL BASIS, NOT STRICT SCRUTINY, JUDICIAL REVIEW.

Section 3 of the Defense of Marriage Act (DOMA) provides:

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

1 U.S.C. § 7.

In the district court, plaintiffs argued that § 3 should be reviewed under the strict scrutiny standard because, first, "DOMA marks a stark and anomalous departure from the respect and recognition that the federal government has historically afforded to state marital status determinations,"[1] second, "DOMA

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[1] This argument ignores several facts. First, historically, the federal government required several States to ban polygamy in their constitutions as a condition of joining the Union. *Arizona*: Enabling Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569; *New Mexico*: Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558; *Oklahoma*: Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269; *Utah*: Enabling Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108. Second, federal, not state, law determines the validity of marriages for purposes of immigration if state law "offends federal public policy." *Adams v. Howerton*, 486 F.Supp. 1119, 1123 (C.D. Cal. 1980) (even assuming that Colorado would recognize a same-sex marriage, "as a matter of federal law, [Congress] did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036. 1039 (9th

burdens Plaintiffs' fundamental right to maintain the integrity of their existing family relationships," and, third,"[t]he law should consider homosexuals, the class of persons targeted by DOMA, to be a suspect class."[2] Memorandum at 20-21

Cir. 1981) ("the intent of Congress governs the conferral of spouse status under section 201(b) [of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1151(b)], and a valid marriage is determinative *only if Congress so intends*") (emphasis added). Similarly, although several States and the District of Columbia appear to recognize "proxy" marriages, in which one party to the marriage ceremony is not physically present at the time of the marriage, *see In re Valente's Will*, 188 N.Y.S.2d 732, 736 (Surr. Ct. 1959) (citing Anno. *Proxy marriages*, 170 ALR 947 (1947), and *Ferraro v. Ferraro*, 192 Misc. 484, 77 N.Y.S.2d 246 (Fam. Ct. 1948), *aff'd sub nom. Fernandes v. Fernandes*, 275 AD. 777, 87 N.Y.S.2d 707 (1949) (interpreting DC law)), federal immigration law does not recognize such marriages for purposes of the "spouse" preference, at least when the marriage has not been consummated. 8 U.S.C. § 1101(a)(35). Third, federal, not state, law determines the validity of marriages for purposes of federal bankruptcy law. *In re Kandu*, 315 B.R. 123, 132 (W.D. Wash. 2004) (DOMA does not "overstep[] the boundary between federal and state authority" in the definition of marriage because "DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty"). Given the foregoing examples, the district court's belief that "the federal government . . . recogniz[es] as valid for federal purposes *any* heterosexual marriage which has been declared valid pursuant to state law," Memorandum at 29 (emphasis added), is simply mistaken. The court's assertion that "DOMA drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status," *id.* at 5, is belied by the historical record. When DOMA was enacted in 1996, no State authorized same-sex marriage. DOMA thus did not "amend," much less "*drastically* amend," any eligibility criteria regarding who may enter into a marriage, but merely confirmed the then existing state of law that marriage is an institution that can exist only between a man and a woman.

[2] Assuming, without conceding, that DOMA discriminates against homosexuals, strict scrutiny would not be the appropriate standard of judicial review. Classifications based on sexual orientation are subject to rational basis, not strict scrutiny, review. *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008).

(summarizing arguments). The district court found it unnecessary to address any of these arguments because "DOMA fails to pass constitutional muster even under the highly deferential rational basis test." *Id*. at 21. Accordingly, the court declared § 3 of DOMA unconstitutional on the basis of the equal protection component of the Due Process Clause. *Id*. at 21-38. *Amicus* addresses the court's rational basis holding in the next argument. Here, *amicus* addresses plaintiffs' argument that strict scrutiny review is required because DOMA burdens their "fundamental right to maintain the integrity of their existing family relationships"

In considering their "fundamental right's" argument, it is important to note that plaintiffs do not challenge the authority of Congress to use marital status as the basis for eligibility for the benefits that are at issue here. Plaintiffs make no claim that the benefits accorded to married persons by federal law must be extended to persons who are in "family relationships" *other* than marriage. Rather, they argue that any benefits Congress chooses to provide to married persons must be made available to *all* persons who are lawfully married, whether they are in a same-sex or opposite-sex marriage. Not to do so burdens their right to "maintain the integrity of their existing family relationships."[3] Those "family

[3] DOMA was enacted in 1996, before any same-sex marriages were lawfully performed in the United States. Thus, it is imprecise to say that § 3 burdens *existing* family relationships. Those relationships could not have been formalized in marriage until 2004, and it is the benefits of *marriage* that are at stake here.

relationships" are not entitled to the benefits federal law provides to married couples, however, unless they have been formalized in a marriage that federal law recognizes *or is constitutionally required to recognize*. Section 3 of DOMA, of course, does not recognize same-sex marriages. Thus, plaintiffs' argument that strict scrutiny review must be applied to § 3 (because of its impact on their "family relationships") necessarily presupposes that there is a fundamental right, under the Due Process Clause of the Fifth Amendment, to enter into a same-sex marriage, a presupposition plaintiffs have expressly *disavowed* in their pleadings.[4] But nothing in the Due Process Clause requires the United States to recognize same-sex marriage. Accordingly, the United States is not required to extend the benefits accorded to opposite-sex marriage to those who have entered into a lawful same-sex marriage in Massachusetts (or any other State).

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Due Process Clauses of the Fifth and Fourteenth Amendments (infringement of

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[4] *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment (MSJ) at 20 n. 13 (noting that "[t]his case does not involve giving 'formal recognition to any relationship that homosexual persons seek to enter,' *Lawrence* [*v. Texas*], 539 U.S. 558,] 578 [2003], and Plaintiffs are not seeking a 'right to marry'"). Those concessions should be fatal to plaintiffs' argument that strict scrutiny review is required because of the impact of § 3 of DOMA on their "family relationships."

which would call for strict scrutiny review), the Supreme Court applies a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted).[5] Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id.* at 710.[6]

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[5] *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to 'freedom from physical restraint," "a right to come and go at will" or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a government employer's duty "to provide its employees with a safe working environment"). Recently, the Supreme Court, relying upon the analysis set forth in *Glucksberg*, *Reno* and *Collins* for evaluating substantive due process claims, held that a convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial. *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2322-23 (2009).

[6] Nothing in the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), changes the analysis for evaluating whether a right should be deemed "fundamental" under the liberty language of the Due Process Clauses. First, in striking down the state sodomy statute, "the *Lawrence* Court did not apply strict scrutiny," *Witt v. Dep't of the Air Force*, 527 F.3d 806, 818 n. 6 (9th Cir. 2008), *see also Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (same), which would have been the appropriate standard of review if a fundamental right been implicated. Second, the Court never modified or even mentioned the many cases in which it has emphasized the need to define carefully an asserted liberty interest in determining whether that

In *Glucksberg*, the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death" or "[a] liberty to shape death." *Id*. at 722-23 (citations and internal quotation marks omitted).

Glucksberg emphasized that, unless "a challenged state action implicate[s] a fundamental right," there is no need for "complex balancing of competing interests in every case." 521 U.S. at 722. All that is necessary is that the state action bear a "reasonable relationship to a legitimate state interest . . . ." *Id*. Apart from the subject-area-specific standards that govern the regulation of abortion, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the forcible administration of anti-psychotic drugs to mentally ill defendants, *see Sell v. United States,* 539 U.S. 166 (2003), there is no "intermediate" standard of review that applies to substantive

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interest is "fundamental." Those cases should not be regarded as having been overruled *sub silentio*. *See Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) ("We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis"). Third, *Lawrence* dealt with the authority of the State to criminalize noncommercial sexual conduct between consenting adults in private, not whether "the government must give formal recognition to any relationship that homosexuals persons seek to enter," 539 U.S. at 578, as plaintiffs conceded below, MSJ at 20 n. 13, which is precisely the issue presented here.

due process claims. *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1272-75 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing *en banc*). Accordingly, unless there is a "fundamental right" to enter into a same-sex marriage (which plaintiffs do not claim), the reservation of marriage (or the benefits thereof, as provided by § 3 of DOMA) to opposite-sex couples is subject to rational basis review.[7]

For purposes of substantive due process analysis, the issue is not *who* may marry, but *what* marriage is. The principal defining characteristic of marriage is the union of a man and a woman.[8] Properly framed, therefore, the issue before this Court is not whether there is a fundamental right to enter into a marriage with the person of one's choice, but whether there is a right to enter into a same-sex

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[7] Language in both this Court's opinion in *Cook v. Gates*, 528 F.3d at 48-60, and the Ninth Circuit opinion in *Witt v. Dep't of the Air Force*, 527 F.3d at 813-21, suggests that *Lawrence* requires something more than traditional rational basis review of statutes that infringe upon private adult consensual sexual behavior. But neither opinion addressed *Glucksberg's* holding that, except when fundamental rights are implicated, due process analysis requires only rational basis review, a holding that was reaffirmed by the Court after *Cook* and *Witt* were decided. *Osborne*, 129 S.Ct. at 2322. In any event, unlike *Cook* and *Witt*, this case involves the *public* benefits of marriage, not the regulation of *private* sexual conduct.

[8] "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and State. . . would, to a certain extent, extract some of the deep roots that support its elevation to a fundamental right." *Samuels v. New York State Dep't of Health*, 29 A.D.3d 9, 15, 811 N.Y.S.2d 136, 141 (2006) (citation and internal quotation marks omitted), *aff'd*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006).

marriage.[9] There is no such right.

The Supreme Court has recognized a substantive due process right to marry. *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite*-sex, not *same*-sex, couples. *Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97. That the right to marry

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[9] *See Lewis v. Harris*, 188 N.J. 415, 434, 908 A.2d 196, 206 (2006) (defining issue as "whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental"). In rejecting a state privacy challenge to the state law reserving marriage to opposite-sex couples, the Hawaii Supreme Court stated that "the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, *we are being asked to recognize a new fundamental right*." *Baehr v. Lewin*, 74 Haw. 530, 555, 852 P.2d 44, 56-57 (1993) (second emphasis added). *See also Hernandez v. Robles*, 26 A.D.3d 98, 103, 805 N.Y.S.2d 354, 359 (2005) (observing that plaintiffs seek "an alteration in the definition of marriage") (citations and internal quotation marks omitted), *aff'd*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006); *Standhardt v. Superior Court*, 206 Ariz. 276, 283, 77 P.3d 451, 458 (Ct. App. 2003) ("recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'"); *Samuels*, 29 A.D.3d at 14, 811 N.Y.S.2d at 141 ("this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, *a redefinition of marriage*") (emphasis added). In requiring the Commonwealth to recognize same-sex marriages, the Massachusetts Supreme Judicial Court readily acknowledged that "our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 337, 798 N.E.2d 941, 965 (2003).

is limited to opposite-sex couples is clearly implied in a series of Supreme Court cases relating marriage to procreation and childrearing. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing the institution of marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").

The Supreme Court has never stated or even implied that the federal right to marry extends to same-sex couples. And no court has ever held that marriage, *traditionally understood*, extends to same-sex couples. In sharp contrast to the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," *Lawrence*, 539 U.S. at 572, which, in turn, was based upon an examination of "our laws and traditions in the past half century, *id*. at 571, "[t]he history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex." *Smelt v. County of Orange*, 374 F. Supp.2d 861, 878 (C.D. Cal. 2005), *aff'd in part*, *vacated in part and remanded with*

directions to dismiss for lack of standing, 447 F.3d 673 (9th Cir. 2006). If anything, the fact that twenty-nine States have amended their constitutions to reserve marriage to opposite-sex couples strongly suggests that there is no "emerging awareness" that the right to marry extends to same-sex couples. As in *Osborne*, there is no "long history" of a right to enter into a same-sex marriage and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." 129 S.Ct. at 2322 (citation and internal quotation marks omitted). "[S]ame-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty." *Standhardt*, 206 Ariz. at 284, 77 P.3d at 459. Accordingly, the Due Process Clause does not require the Government to recognize such marriages.

By operation of its terms, § 3 of DOMA restricts the benefits of marriage provided by federal law to persons who have entered into an opposite-sex, not a same-sex, marriage. But there is no federal due process right to enter into a same-sex marriage, which, as previously noted, plaintiffs do not dispute for purposes of this litigation. Because there is no such right, the purported "burden" that § 3 places on the "existing family relationships" of persons who have entered into same-sex marriages does not require application of the strict scrutiny standard of review. Section 3 of DOMA is subject to rational basis review.

II.

SECTION 3 OF THE DEFENSE OF MARRIAGE ACT IS REASONABLY RELATED TO LEGITIMATE GOVERNMENTAL INTERESTS AND, THEREFORE, SURVIVES RATIONAL BASIS REVIEW.

The district court held that the classification set forth in § 3 of the Defense of Marriage, reserving the federal benefits of marriage to opposite-sex couples, is arbitrary and irrational. Memorandum at 21-38. *Amicus* submits that the court's holding does not withstand analysis and should be reversed.

Where, as here, a statute neither burdens a fundamental right, nor classifies on the basis of a suspect (or quasi-suspect) personal characteristic, it is subject to the rational basis standard of review. *Heller v. Doe*, 509 U.S. 312, 319 (1996). Under this highly deferential standard of review, a statute "is accorded a strong presumption of validity," and must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id*. at 319, 320. To overcome this presumption, the challenger must negate "every conceivable basis which might support it." *Id*. at 320 (citation and internal quotation marks omitted). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Id*. at 324 (citation and internal quotation marks omitted). In determining that plaintiffs had met their burden, the district court erred.

The House Report identified four of the governmental interests Congress sought to advance through the enactment of DOMA: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce governmental resources." H.R. Rep. No. 104-664 at 12 (1996), *reprinted in* 1966 U.S.C.C.A.N. 2905. 2916 (hereinafter "House Report"). Because the Government has "disavowed Congress's stated justifications for the statute," Memorandum at 23, the district court addressed those justifications "only briefly" in its opinion. *Id*. at 23-27. Indeed, with respect to the governmental interest which is the subject of this argument (the first one), the court devoted all of *three* paragraphs out of an opinion of thirty-nine pages. *Id*. at 23-25. The district court's dismissive treatment of that interest fails to do justice to DOMA or to the Congress that enacted it.

The House Report stated that "civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Report at 13. For the reasons set forth below, in reserving the benefits of marriage to opposite-sex couples, DOMA is reasonably related to the Government's legitimate interest in "encouraging responsible procreation and child-rearing."

Responsible Procreation

The Indiana Court of Appeals has identified "the protection of *unintended* children resulting from heterosexual intercourse as one of the key interests in opposite-sex marriage." *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (emphasis in original). In contrast to "assisted reproduction and adoption," by which same-sex couples may have (or acquire) children, "procreation by 'natural' reproduction may occur without any thought for the future." *Id.* at 24. To address the consequences of such reproduction,

> [t]he State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from "casual" intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, "accidents" do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the "natural" procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a "change in plans."

Id. at 24-25 (footnotes omitted). In rejecting state constitutional challenges to their statutes reserving marriage to opposite-sex couples, the Maryland Court of Appeals, the New York Court of Appeals and the Washington Supreme Court have all agreed that "the ability or inability to procreate by 'natural' means"

provides a reasonable basis for distinguishing between opposite-sex and same-sex couples, allowing the former to marry, but not the latter.[10]

The district court did not dispute that the Government has a legitimate interest in responsible procreation. Rather, it took issue with whether reserving marriage (or the benefits thereof) to opposite-sex couples has any rational relationship to the promotion of that interest because "the ability to procreate is not now, nor has it ever been, a precondition to marriage in any [S]tate in this country." Memorandum at 24. "Indeed, 'the sterile and the elderly have never been denied the right to marry by any of the fifty [S]tates.'" *Id*. at 24–25 (quoting *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting)). But to make this point is to miss the point.

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[10] *Conaway v. Deane*, 401 Md. 219, 318, 932 A.2d 571, 630-31 (2007) ("[the] 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding"); *Hernandez v. Robles*, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (2006) (plurality) (the Legislature "could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable home than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more"); *Andersen v. King County*, 158 Wash.2d 1, 35-37, 138 P.3d 963, 982-83 (2006) (plurality) (same) (citing *Morrison* and *Hernandez*), *id*. at 75-76, 138 P.3d at 1002 (Johnson, J.M., J., concurring in judgment only) (same). *See also Goodridge v. Dep't of Public Health*, 440 Mass. 309, 382-83, 798 N.E.2d 941, 995-96 (2003) (Cordy, J., dissenting) (same).

> First, if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns. [Citations omitted]. Second, in light of medical advances affecting sterility, the ability to adopt, and the fact that intentionally childless couples may eventually choose to have a child or have an unplanned pregnancy, the State would have a difficult, if not impossible, task in identifying couples who will never bear and/or raise children. Third, because opposite-sex couples have a fundamental right to marry [citation omitted], excluding such couples from marriage could only be justified by a compelling state interest, narrowly tailored to achieve that interest [citation omitted], which is not readily apparent.

Standhardt v. Superior Court, 206 Ariz. 276, 287, 77 P.3d 451, 462 (Ct. App. 2003).[11]

Reserving marriage to opposite-sex couples "is based upon the [S]tate's recognition that our society as a whole views marriage as the appropriate and

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[11] *See also Conaway v. Deane*, 401 Md. at 322, 932 A.2d at 633 (apart from the fact that "any inquiry into the ability or willingness of a couple actually to bear a child during marriage would violate the fundamental right to marital right to privacy," the court explained that "the fundamental right to marriage and its ensuing benefits are conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the *possibility* of procreation") (emphasis in original); *Hernandez v. Robles*, 7 N.Y.3d at 365, 855 N.E.2d at 11-12 (plurality) ("[w]hile same-sex couples and opposite-sex couples are easily distinguished, limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (recognizing that government inquiry about couples' procreation plans or requiring sterility tests before issuing marriage licenses would "raise serious constitutional questions"), *aff'd*, 673 F.2d 1036 (9th Cir. 1981); *In re Kandu*, 315 B.R. 123, 147 (Bankr. W.D. Wash. 2004) (same).

desirable forum for procreation and the rearing of children," even though "married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married." *Singer v. Hara*, 11 Wash. App. 247, 259, 522 P.2d 1187, 1195 (1974).[12] "The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. Further, it is apparent that no same-sex couple offers the possibility of the birth of children by their union." *Id*. at 259-60, 522 P.2d at 1195. Thus, "[a]lthough . . . married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the union of one man and one woman." *Id*. at 264, 522 P.2d at 1197.

In rejecting a challenge to the Indiana statute reserving marriage to

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[12] "When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point. Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences–the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality to marriage." *Lewis v. Harris*, 378 N.J. Super. 168, 197, 875 A.2d 259, 276 (App. Div. 2005) (Parrillo, J., concurring), *modified*, 188 N.J. 415, 908 A.2d 196 (2006).

opposite-sex couples, the Indiana Court of Appeals concluded that "[t]here was a rational basis for the legislature to draw the line between opposite-sex couples, who as a generic group are biologically capable of reproducing, and same-sex couples, who are not. This is true, regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproduction." *Morrison v. Sadler*, 821 N.E.2d at 27.[13] Federal court decisions are in accord. *See*, *e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (reserving marriage to opposite-sex couples is rationally related to the interest the State has in "conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot"); *Smelt v. County of Orange*, 374 F. Supp.2d 861, 880 (C.D. Cal. 2005) ("[b]ecause procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest"), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006).

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[13] *See also Standhardt v. Superior Court*, 206 Ariz. at 287-88, 77 P.3d at 462-63 (same); *Conaway v. Deane*, 401 Md. at 317-19, 932 A.2d at 630-31 (same); *Baker v. Nelson*, 291 Minn. 310, 313-14, 191 N.W.2d 185, 187 (1971) (same), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972); *Hernandez v. Robles*, 7 N.Y.3d at 359, 365, 855 N.E.2d at 7, 11-12 (plurality) (same); *Andersen v. King County*, 158 Wash.2d at 37, 138 P.3d at 982-83 (plurality) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363-64 n. 5 (D.C. Ct. Ap. 1995) (following *Baker*).

"The recognition of same-sex marriage," the Indiana Court of Appeals explained, "would not further [the] interest in heterosexual 'responsible procreation,' Therefore, the legislative classification of extending marriage benefits to opposite-sex couples is reasonably related to a clearly identifiable, inherent characteristic that distinguishes the two classes: the ability or inability to procreate by 'natural' means." *Morrison*, 821 N.E.2d at 25. *See also Standhardt*, 206 Ariz. at 288, 77 P.3d at 463 ("[b]ecause same-sex couples cannot by themselves procreate, the State could . . . reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships"); *Conaway v. Deane*, 401 Md. at 315-24, 932 A.2d at 629-34 (same); *Andersen*, 158 Wash.2d 40-41, 138 P.3d at 984-85 (plurality) (same); *Citizens for Equal Protection*, 455 F.3d at 868 (recognizing same-sex marriages would not "encourage heterosexual couples to bear and raise children in committed marriage relationships"). By a parity of reasoning, because extending the federal benefits of marriage to same-sex couples would not promote the government's interest in "responsible procreation," the restriction of those benefits to opposite-sex couples is rational.

Child Rearing

Both state and federal courts have held that, in addition to encouraging

"responsible procreation," reserving marriage (and the benefits thereof) to opposite-sex couples is also reasonably related to the interest the States and the federal government have in promoting the benefits of dual-gender parenting of children so procreated. For example, in rejecting a challenge to their state Defense of Marriage Act, the Washington Supreme Court concluded that "limiting marriage to opposite-sex couples furthers the State's interests in procreation *and encouraging families with a mother and father and children biologically related to both*." *Andersen v. King County*, 158 Wash.2d at 42, 138 P.3d at 985 (plurality) (emphasis added). So, too, in upholding the Empire State's Domestic Relations Law which does not authorize same-sex marriage, the New York Court of Appeals held that the Legislature "could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 7 N.Y.3d at 359, 855 N.E.2d at 7 (plurality). Of course, "there are exceptions to this general rule–some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes–but the Legislature could find that the general rule will usually prevail." *Id*. at 359-60,

855 N.E.2d at 7.[14] Federal courts are in accord, including three district court opinions rejecting challenges to the federal Defense of Marriage Act. *Citizens for Equal Protection v. Bruning*, 455 F.3d at 867 (reserving marriage to opposite-sex couples is rationally related to the State's legitimate interest that "two committed heterosexuals are the optimal partnership for raising children") (upholding state constitutional amendment prohibiting same-sex marriage): *Wilson v. Ake*, 354 F. Supp.2d 1298, 1309 (M.D. Fla.2005) (recognizing authority that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest") (DOMA); *In re Kandu*, 315 B.R. at 146 (recognizing authority that "the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern") (DOMA); *Smelt v. County of Orange*, 374 F. Supp.2d at 880 (DOMA).

The district court dismissed the Congressional interest in dual-gender child-rearing in a single paragraph. First, the court stated that since DOMA was enacted, "a consensus has developed among the medical, psychological, and social

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[14] *See also Standhardt*, 206 Ariz. at 287-88, 77 P.3d at 462-63 (holding that the State has an interest in promoting child-rearing by opposite-sex couples"); *Singer v. Hara*, 11 Wash.App.2d at 264, 522 P.2d at 1197 (same); *Lewis v. Harris*, 378 N.J. Super. at 192, 875 A.2d at 273 (marriage, traditionally understood "as a union between a man and a woman," "plays a vital role in propagating the species *and provides the ideal setting for raising children*") (emphasis added).

welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." Memorandum at 23-24 (citations omitted). As a number of courts and judges have recognized, however, the studies on the basis of which this alleged "consensus" has developed are controversial and have been disputed by other studies indicating precisely the opposite. *See*, *e.g.*, *Andersen v. King County*, 158 Wash.2d at 38-39, 138 P.3d at 983-84 (plurality), *id*. at 81-84 & nn. 61-67, 138 P.3d at 1005-07 & nn. 42-48 (Johnson, J.M., J, concurring in judgment only)[15]; *Hernandez v. Robles*, 7 N.Y.3d at 360, 855 N.E.2d at 7-8 (plurality); *Morrison v. Sadler*, 821 N.E.2d at 26; *Goodridge*, 440 Mass. at 358-59, 798 N.E.2d at 979-80 (Sosman, J., dissenting), *id*. at 386-88 & nn. 22-28, 798 N.E.2d at 998-999 & nn. 22-28 (Cordy, J., dissenting).[16] Moreover, "until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing." *Hernandez*, 7 N.Y.3d at 360, 855 N.E.2d at 8 (plurality). *See*

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[15] In the official reports, footnotes are numbered continuously throughout all of the opinions; in the regional reporter, they are numbered discontinuously.

[16] Justice Cordy cited critiques of the methodologies of these studies, "cautioning that the sampling populations are not representative, that the observation periods are too limited in time, that the empirical data are unreliable, and that the hypotheses are too infused with political or agenda driven bias." *Goodridge*, 440 Mass. at 387-88, 798 N.E.2d at 999. *See also Lofton v. Secretary of Dep't of Children & Family Services*, 358 F.3d 804, 825 (11th Cir. 2004) (same).

also Morrison, 821 N.E.2d at 26 (noting the "relative novelty of the same-sex family structure"); *Goodridge*, 440 Mass. at 358, 798 N.E.2d at 979 (Sosman, J., dissenting) (same). Regardless of the relative merits of the competing studies on the impact of same-sex parenting on children, "[i]n the absence of *conclusive* scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and a father in the home." *Hernandez*, 7 N.Y.3d at 360, 855 N.E.2d at 8 (plurality) (emphasis added). No such evidence has been presented here. Accordingly, it was for Congress, not the courts, "to weigh the evidence." *Smelt v. County of Orange*, 374 F. Supp.2d at 880 (rejecting challenge to DOMA). DOMA is "rationally related" to the legitimate interest in "encouraging the raising of children in homes consisting of a married mother and father . . . ." *Wilson v. Ake*, 354 F. Supp.2d at 1309. *See also In re Kandu*, 315 B.R. at 145-46 (same).

Second, the district court stated that even if Congress believed, at the time it enacted DOMA, that "children had the best chance of success if raised jointly by their biological mothers and fathers, a desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages." Memorandum at 24. This, the court explained, is because "[s]uch denial does

nothing to promote stability in heterosexual parenting." *Id*. at 24. This "explanation" betrays a fundamental misunderstanding of the relevant constitutional analysis.

Contrary to the district court's understanding, the issue is not whether *denying* federal recognition of same-sex marriages "promote[s] stability in heterosexual parenting,"[17] but whether *granting* such recognition would promote that interest. Clearly, it would not. Under the rational basis standard of review, that is sufficient to sustain the constitutionality of § 3 of DOMA. *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not"). *See also Andersen v. King County*, 158 Wash.2d at 40, 138 P.3d at 984 (plurality) (question, on rational basis review, is "whether allowing opposite-sex couples the right to marry furthers governmental interests in procreation and raising children in a healthy environment," *not* "whether those interests are furthered by denying same-sex couples the right to marry"); *Standhardt v. Superior Court*, 206 Ariz. at 288, 77 P.3d at 463 (same); *Hernandez v. Robles*, 26 A.D.3d 98, 106, 805 N.Y.S.2d 354, 361 (2005) ("there is

[17] Or, more broadly stated, whether "denying marriage-based benefits to same-sex spouses . . . bears [a] reasonable relationship to any interest the government may have in making heterosexual marriages more secure." *Id*. at 25.

no requirement in rational basis equal protection analysis that the government interest be furthered by both those included in the statutory classification and by those excluded from it"), *aff'd*, 7 N.Y.3d 338, 855 N.E.2d 1 (2006). "The key question" under the rational basis standard of review, as the Indiana Court of Appeals observed, "is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does . . . . If it would not, then limiting the institution of marriage to opposite-sex couples is rational . . . ." *Morrison v. Sadler*, 821 N.E.2d at 23. Extending the federal benefits of marriage to same-sex couples would *not* "encourage heterosexual couples to bear and raise children in committed marriage relationships." *Citizens for Equal Protection v. Bruning*, 455 F.3d at 868. Accordingly, it was reasonable for Congress to reserve those benefits to same-sex couples

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Family Research Council, respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

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for the First Circuit
Case No. 10-2207

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