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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

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

BRIEF OF *AMICI CURIAE*, ROBERT P. GEORGE, SHERIF GIRGIS, AND RYAN T. ANDERSON, IN SUPPORT OF REVERSAL AND THE INTERVENING DEFENDANTS-APPELLANTS

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Interest of *Amici*

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I. INTRODUCTION

Opponents of the Defense of Marriage Act ("DOMA"),[1] including the plaintiffs, often assert that defining marriage as a union between a man and a

[1] 1 U.S.C. § 7 (2010).

woman relies on moral judgments in illegitimate and unconstitutional ways: first, that it rests on bare tradition, animus toward a class of citizens, or moral disapproval of homosexual acts or same-sex partnerships, thus depriving some citizens of the fundamental right to marry and equal protection; and second, that it violates the spirit, if not the letter, of *Lawrence v. Texas*, 539 U.S. 558 (2003). As we will show, a closer look at constitutional principles regulating the law's reliance on morality reveals that DOMA is consistent with all of them. Indeed, those constitutional principles themselves reflect moral and value judgments and distinctions, as would any policy that set parameters on which arrangements could be recognized as marriages. Far from unconstitutional, the law's reflection of such judgments is frequently desirable and, in any event, inevitable. The moral dimensions of marriage law are linked with and perhaps inextricable from the less controversial state interests that it is enacted to advance.

In this case, the Court is charged with judging not the *soundness* of any particular practical, moral, or value judgments about marriage, but only whether Congress may consistently with the Constitution of the United States pass laws to reflect them. Now any principle that would deny DOMA's legitimacy because of its reliance on morality would count equally against laws that recognize same-sex partnerships, and against many longstanding, important, and uncontested features of our law. The district court's decision should be overturned, and DOMA should

be upheld as a constitutionally valid exercise of policy-making authority by Congress.

II. ARGUMENT

A. Legitimately Related to Morality

Some assume it is illegitimate for legislation to reflect what are dismissively called "private moral or religious beliefs," *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 930 (N.D. Cal. 2010), and, that if marriage legislation does so, it denies some citizens the fundamental right to marry and equal protection of the laws. But as applied to DOMA, this charge artificially constrains the range of such a law's possible moral purposes, and erroneously elides the distinctions between moral norms, ideals, and judgments of value on the one hand, and sheer tradition, bias, animus, and disapproval of persons on the other. As described below, DOMA's accordance with moral or value judgments is inevitable for marriage law, as it is for law in most other areas, and for many rights protected by our Constitution. Clearly, then, it is constitutionally legitimate.

1. Moral vs. Other Purposes

The common contrast between "private moral or religious beliefs," (impermissible basis for legislation) and "secular purposes" (permissible bases for legislation), *Perry*, 704 F. Supp.2d at 930, implies either that moral goals cannot be ascertained apart from appeals to religious authority, or that they can but are not

legitimate state interests. But there is no evidence for either claim. In fact, there are secular public moral norms that apply to marriage law just as there are secular public moral norms that apply to many other aspects of our nation's law.

Some confusion to the contrary may be eliminated by considering that "private morality" is an ambiguous expression. It could mean "moral judgments about private conduct," or it could mean "private (i.e., personal) moral judgments about *public* morality"—i.e., those moral dimensions of public life that our law has always recognized as belonging (along with public health, safety and welfare) to the state's police powers. *See Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (plurality). Marriage is a "social relation subject to the State's police power." *Loving v. Virginia*, 388 U.S. 1, 7 (1967). So the law regarding marriage—a social institution, recognized and regulated for public purposes—involves the kinds of value judgments about the common good that can be found throughout our law (however "privately" such judgments begin in citizens', legislators', or reformers' minds) and that can be ascertained without appeal to religious authority.

For laws are instituted to preserve justice and secure the conditions under which individuals and communities can flourish. But questions about justice—a matter of rights and obligations—and about what serves or disserves human flourishing (what is inherently good or bad for people) are inescapably matters of morality and basic values. Yet we need not appeal to religious principles to

identify, understand, or prudently enforce people's rights to, say, privacy, religious freedom, life and safety, fair wages, and so on. Likewise, we need not rely on theological claims to reason about human goods like solidarity, education, art, sport, and family, or to work to promote them by creating public institutions—or publicly supporting and protecting private institutions—that serve them: peace agreements and humanitarian missions, schools and research grants, museums and art funding, sports associations, and civil marriages. The wise implementation of each of these requires considering the requirements of the common good: value judgment and moral reasoning.

Of course, religions have moral teachings, and many of these coincide with sound secular public morality. Many of the major world religions condemn racism, just as sound public morality does, and our nation correspondingly uses the law to fight, for example, racial injustice. Likewise, many religions have ceremonies for recognizing marriage and teach that it is the union of one man and one woman. And surely many people are motivated to support keeping civil marriage as a union of a man and a woman for reasons that include religious ones. But neither fact disqualifies this view of marriage from legal enshrinement, just as the fact that Rev. Martin Luther King, Jr., the Rev. Ralph Abernathy, Rabbi Abraham Joshua Heschel, and other great civil rights leaders were inspired and motivated by religious teachings did not disqualify their views from legal enshrinement.

In this respect, DOMA supporters are no different from many of its opponents. After all, some religious communities teach, and motivate people's advocacy of, the view that marriage is primarily an emotional or romantic union without any connection to sexual complementarity or procreation, and that the state should legally recognize same-sex partnerships as marriages. That a moral position is supported by a religious tradition, however, is not sufficient to disqualify it from consideration in policy debates or enshrinement in law and public policy. If the first view of marriage would be disqualified for this reason, so would the second.

Perhaps sensing this, some litigants resort to the charge that DOMA embodies an illegitimate *sort* of moral view. By this argument, they variously imply, conjecture, or assert that marriage enshrines or is motivated by:

(a) a belief that a relationship between a man and woman is inherently better than a relationship between two men or two women;
(b) moral disapproval of homosexuality;
(c) tradition alone;
(d) private biases;
(e) animus towards gays and lesbians;
(f) the purpose of disadvantaging a group;
(g) a "bare . . . desire to harm . . . a group".

Factor (c) is no independent reason for a law's continued existence. And factors (d) through (g) fail to rise even to the level of mistaken moral principles: they represent increasingly definite and egregious forms of purely *emotional* repugnance. They are not ideas (whether true or false) about moral rights and

wrongs; instead, they are or stem from irrational *reactions* to certain *people*. Perhaps some of these factors motivate some people's support for DOMA. But that is irrelevant to the constitutionality of DOMA unless these are the *only possible* policy motivations. Determining whether they are requires considering the alternatives.[2]

2. Legitimate Moral Purposes

Two questions must therefore be considered: Are (a) and (b) legitimate bases for legislation? And are there other, legitimate moral purposes served by DOMA? An affirmative answer to either question refutes the insistence that any moral considerations reflected in DOMA must be illegitimate. We believe the answer to the first question is very likely "yes." But this Court need not resolve that question, for the answer to the second question is undoubtedly "yes."

Three cases often cited against the legitimacy of (a) and (b) as bases of legislation— *Romer v. Evans*, 517 U.S. 620, 633 (1996), (*United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), and *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)—actually rule out factors (e), (f), and (c), respectively. But (a) and (b) are not reducible to the irrational emotional responses represented by the latter

[2] The House Judiciary Committee on DOMA discussed four legitimate state interests advanced by DOMA, two of which exemplify two types of purpose defended below: "defending the institution of traditional heterosexual marriage; [and] defending traditional notions of morality." H.R. Rep. No. 104-664, at 32 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2937.

three factors. Concluding that some types of relationships are better than others, or that some types of acts are morally wrong, need not involve any animus or bias against the people who participate in such relationships or acts. For example, someone can believe that personal friendships are inherently better (and worth celebrating more) than business partnerships—without harboring animus against, or a desire to harm or disadvantage, businesspeople. And someone can morally disapprove of, say, anti-Semitic art—and even work to prevent the government from encouraging it by public funding—without being motivated by sheer animus against its creators or intending to harm or disadvantage them, however central to their self-expression they may consider such art.

This case thus exemplifies an important distinction that we will revisit: the government may decline to sponsor, fund, or otherwise promote some activity (the production of anti-Semitic art), without criminalizing it or otherwise violating anyone's (in this case, First Amendment) right to engage in it. Likewise, the state could seek to promote a particular type of sexual relationship or family structure without *criminalizing* any behavior and without being motivated by any animus against anyone. Even *Lawrence*, which strikes down criminalization of certain intimate sexual conduct, does not rule out (a) or (b) as a basis for *all* forms of legislation. (*Infra* Section II, B).

Indeed, there are very close parallels in other areas of law, where the state refuses to encourage by positive legal structures and incentives that which it would be unconstitutional for it to criminalize. Thus, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court upheld the revocation of Bob Jones University's tax-exempt status, which had been motivated by the private university's refusal to admit students known to engage in interracial dating or marriage. Here the state was declared constitutionally entitled to *revoke support* of immoral practices that it was *not* constitutionally entitled to *criminalize*. This would seem to vindicate (a) and (b) as legitimate grounds for determining which unions to incentivize and recognize as marriages. In passing DOMA, as in revoking some of Bob Jones University's legal privileges, the legislature is entitled to act on its best judgment about the relevant moral principles—even where these same principles alone may not justify legal *prohibitions*.

3. Inevitable Moral Purposes

In any case, we can set aside the question of whether (a) and (b) are illegitimate purposes of legislation, for there are other moral or broadly normative (value-based) purposes to DOMA, and they parallel purposes that *any* marriage law would serve. There is no value-neutral marriage policy: the question is not whether marriage law will send moral messages, but which moral messages it will send. The question is not whether marriage law will be shaped by principles of

value, but which principles will shape it; not whether civil marriage will serve certain ends, but which it will serve. Unless the implementation of these moral messages, principles, and ends violates the Constitution, it falls to the legislature—not the judiciary—to settle which to implement.[3]

Harvard political theorist Michael Sandel, who supports as a matter of policy legally recognizing same-sex unions, eloquently explains why morally neutral marriage law is a fantasy:

> [T]hose who defend a right to same-sex marriage often try to rest their claim on neutral grounds […] on the ideas of nondiscrimination and freedom of choice. […] But autonomy and freedom of choice are insufficient to justify a right to same-sex marriage. If government were truly neutral on the moral worth of all voluntary intimate relationships, then the state would have no grounds for limiting marriage to two persons; consensual polygamous partnerships would also qualify. In fact, if the state really wanted to be neutral, and respect whatever choices individuals wished to make, it would have to […] get out of the business of conferring recognition on any marriages. […] The real issue […] is not freedom of choice but whether same-sex unions […] fulfill the purpose of the social institution […][4]

As Sandel argues, legally recognized marriage is a moral and social institution. But institutions are defined by their ends or purposes: the institution of

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[3] The House committee saw this clearly: "It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government's legitimate interests in protecting the traditional moral teaching reflected in heterosexual-only marriage laws." H.R. Rep. No. 104-664, at 32.

[4] Michael Sandel, *Justice: What's the Right Thing to Do?* 256-57 (Farrar, Straus & Giroux 2009).

parenthood, for example, is for children's development into maturity; and a university is constituted for the pursuit and dissemination of knowledge and understanding. Legal *recognition* and *regulation* of institutions involve setting apart, honoring, and encouraging certain activities and patterns of life in accordance with those institutions' purposes. This is true for any public institution: In establishing a public school system, for example, the state communicates the worthiness of *knowledge*; and in regulating its educational curriculum (by excluding discredited scientific theories or nationalistically revisionist histories), the state stakes a position on what really serves the human good of knowledge and what is a mere counterfeit of it.

Just so, legal recognition of certain relationships as *marriages* necessarily involves taking a position on at least two questions, *both inescapably normative*, having to do with morality or basic values: (1) the proper ends of marriage (whether as an independent human good that the state has reasons to recognize, protect, and regulate or as a policy whose public purposes must be settled before its contours can be determined), and (2) the moral worthiness of adherence to the norms of marriage so conceived—adherence which is, after all, *honored* and *encouraged* by state recognition.

Hence there are two corresponding ways in which moral or value-based concerns might motivate opposition to *changing* the legal structure of marriage.

One might object on the premise that expanded recognition honors and encourages what one regards as immoral sexual conduct. But there is another ground that corresponds to question (1): One might think that same-sex relationships, *whatever* their moral status, simply are not marriages, because they cannot fulfill the *ends* of marriage considered as a pre-legal human good for the law to track, or the *public purposes* served by marriage considered as a policy.[5] One might even think that, like ordinary friendships and business partnerships, same-sex relationships are morally valuable and good but *different*—incapable as such of realizing the specific purposes or ends of the institution of marriage. This would be a value judgment—a conclusion about the structure of a certain good—but it would state nothing about the morality of sexual conduct between same-sex partners.

Because any marriage law will imply a position on these two normative questions—the structure (or ends) of marriage and the morality of pursuing those (now state-endorsed) ends—those who support legally recognizing same-sex unions as marriages *make just as many implicit moral and value judgments as*

[5] Thus, for example, the committee members ask: "Is [the purpose of marriage law], as many advocates of same-sex marriage claim, to grant public recognition to the love between persons? We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified: 'There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.'" H.R. Rep. No. 104-664, at 12-13.

those who oppose doing so. Thus, if DOMA were struck down, the government would honor and privilege as marriages enduring and monogamous same-sex unions—but not, for example, (1) by-design temporary, (2) polygynous, (3) polyandrous, or (4) polyamorous unions. Even if the government recognized all of these, it would continue to distinguish non-romantic or non-sexual unions as incapable of realizing the purposes of marriage—by declining to recognize and endow with benefits cohabiting adult brothers or sisters, or a man caring for his elderly aunt.

Far from unjust, the fact that some arrangements are left out is a feature of *any* legal system that distinguishes marriages from other, non-marital forms of association (romantic or not). So before one can conclude that some marriage policy violates a fundamental right to marry or equal protection, or some other moral or constitutional principle, one must determine what, if anything, marriage independently *is* (i.e., its specific ends as a human good and an element of the common good)[6] and why it should be recognized legally in the first place. That will reveal which criteria (like kinship status) are relevant and which (like race) are irrelevant to a *policy* that aims to recognize *marriages*. It will tell us, in other

[6] Thus, the drafters of DOMA recognized that "the effort to redefine marriage to extend to homosexual couples is" not simply an expansion of marriage access but "a truly radical proposal that would fundamentally alter the institution of marriage." H.R. Rep. No. 104-664, at 12.

words, when, if ever, it is *marriage* (or a relationship serving the legitimate public purposes of marriage law) that is being denied legal recognition, in a violation of the fundamental right to marry and equal protection, and when what is excluded is something else entirely. But the task of making that controlling value judgment about the purposes or ends of marriage belongs to the people and their elected representatives, not the judiciary. *See Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."). Because that value judgment is logically prior to the question of whether the fundamental right to marry or equal protection has been denied, the Court cannot determine that DOMA violates the fundamental right to marry or the Equal Protection Clause without usurping the people's right to decide for themselves a substantive normative matter.

In other words, because any marriage policy would embody a view about which types of relationship we should honor and encourage, and about which of many possible honorable purposes are integral specifically to this institution (and hence, which are not), the question before the Court is simply this: Does the Constitution itself settle—and thus remove from the forums of democratic deliberation and decision—the *substantive value judgment* of what the ends or purposes of marriage are? Once the dust of extraneous arguments settles and this

question is brought clearly into focus, the answer is straightforward: The Constitution does *not* resolve this issue but leaves it to the people to deliberate and resolve. One can and should recognize the soundness of this answer quite irrespectively of one's own normative judgments about the nature of marriage or the best marriage policy.

Finally, it is worth emphasizing that the fact that there is no morally or value-neutral marriage law hardly sets marriage apart from other matters of public concern. Many other important policy issues engage controversial moral views and value judgments (including ones on which religions have different positions): for example, immigration, poverty relief, capital punishment, and torture. That does not mean that the state should not take a position on these issues. Indeed, many of the most fundamental features of our law—including the very right to privacy on which so much of our jurisprudence about these matters, *Lawrence* included, relies—presuppose, and are inexplicable apart from, certain moral commitments to the dignity of persons and the value of their autonomy and liberty within certain spheres; and to the special value in this regard of marriage itself. In this connection, it is worth recalling the inexorably value-laden—even quasi-religious—language of *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case foundational in this realm of the law:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

4. Inevitable Moral Purposes and Social Utility

Finally, although many would dismiss it as a "purely moral" matter, the state can reasonably claim a strong practical interest in preserving a sound public understanding of the ends of marriage as it sees them. For the effects of obscuring the public understanding of an institution's purposes or ends—even if the *revised* ends are not *immoral*—could in some cases do significant damage to the common good. Many supporters of DOMA make just this claim about marriage.

It is not the burden of this brief—or the task of this Court—to determine whether such claims are *correct*. But it is worth exploring their structure, to see how a law's moral purposes may be regarded as so continuous with its other, *uncontroversially* legitimate goals as to put it beyond constitutional challenge on rational-basis grounds, and squarely within the purview of the people's elected representatives.

Advocates for DOMA argue that there is a tight connection between what the law communicates about the ends of marriage, and the wellbeing of children

and society more generally.[7] On this basis, they argue that obscuring the purposes of marriage would appreciably harm the common good, independently of the moral status of homosexual conduct.

The first premise in such an argument is that social science has shown that children fare best on virtually every indicator of health and wellbeing when reared by their married biological parents; that men and women on average bring different gifts to the parenting enterprise; that boys and girls tend to need and benefit from fathers and mothers in correspondingly different ways. *See Lofton v. Sect'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 825 (11th Cir. 2004).[8]

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[7] Thus, the committee report; "At bottom, 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. Simply put, government has an interest in marriage because it has an interest in children." H.R. Rep. No. 104-664, at 13.

[8] For relevant findings and studies, *see also* The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (August 2008), http:/www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf; Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* Child Trends Research Brief (June 2002), http://www.childtrends.org/files/marriagerb602.pdf; Sara McLanahan et al., *Introducing the Issue*, 15 The Future of Children (Fall 2005), http://futureofchildren.org/futureofchildren/publications/docs/15_02_01.pdf; Mary Parke, *Are Married Parents Really Better for Children?: What Research Says About the Effects of Family Structure on Child Well-Being*, Center for Law and Social Policy (May 2003), http://www.clasp.org/admin/site/publications_archive/files/0128.pdf; Wilcox *et al*., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences* (Institute for American Values 2nd ed. 2005),

The second premise is this: marriage is the kind of relationship in which it is (as a rule) morally and socially most appropriate for people to bear and rear children together. So by extending marital recognition to same-sex partners, the state would convey one or both of two messages:

(a) Marriage does not intrinsically have anything to do with bearing and rearing children; and/or

(b) A household of two women or two men is, as a rule, *just as appropriate* a context for childrearing, so that it does not matter (even as a rule) whether children are reared by both their mother and their father (or by a parent of each sex at all).

But the currency of these views, DOMA's supporters have argued,[9] would significantly weaken the extent to which the social institution of marriage provided social pressures and incentives for husbands to remain with their wives and children. And to the extent that children were not reared by both biological parents, they would suffer in the ways identified by social science: physically, psychologically, socially, educationally, etc.

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http://virginiafathers.org/Documents/Why%20Marriage%20Matters%20Univ%20of%20VA.pdf.

[9] *See* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. St. Thomas L.J. 33 (2004).

It has also been argued that legally redefining marriage would undermine people's adherence to marital norms more broadly. For many supporters[10] of DOMA hold that (a) opposite-sex couples are capable of real bodily union (in mating, whether or not conception can or does occur); that (b) this makes it possible for such couples—and only such couples—to form and consummate the *kind* of relationship intrinsically oriented to procreation and childrearing; and that (c) only if marriage inherently involves bodily union and its corresponding orientation to children can one fully make sense of the other marital norms of permanence, exclusivity and monogamy,[11] annulability for non-consummation, etc.

On this view, then, legally redefining marriage would convey that marriage is fundamentally about adults' emotional unions—not bodily union or children, with which marital norms are tightly intertwined. Since emotions can be inconstant, viewing marriage essentially as an emotional union would be likely to increase marital instability—and it would blur the value of friendship, which *is* a union of hearts and minds. More importantly for the common good, since there is

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[10] *See* Patrick Lee and Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* ch. 6 (Cambridge University Press 2008).

[11] Thus, DOMA's legislative history reports that "[i]n 1972[…] the National Coalition of Gay Organizations called for the '[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or numbers.'" H.R. Rep. No. 104-664, at 3(internal citation omitted).

no reason that primarily emotional unions like ordinary friendships should be permanent, exclusive, or limited to two, these marital norms would make less and less sense. (*See Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998, at *8 (Ind. Super. Ct. May 7, 2003) (unpublished opinion)("There is no inherent reason why their theories, including the encouragement of long-term, stable relationships, the sharing of economic lives, the enhancement of the emotional well-being of the participants, and encouraging participants to be concerned about others, could not equally be applied to groups of three or more.")). Less able to see the point of such norms, people would be likely to feel less bound to live by them, especially as time wore on and the original understanding of marriage grew more remote. The less stable a society's households are, the deeper are its social, educational, physical, psychological and other ills. *See* Moore et al., *supra* note 8, at 6.

According to both lines of argument, a mistaken marriage policy would tend to distort people's understanding of the kind of relationship that spouses are to form and sustain: their understanding, that is, of the *ends* or *purposes* of marriage—a normative or *value* judgment that is prior to the moral judgment of whether homosexual conduct is morally acceptable. More precisely, it would weaken the links between marriage and procreation, and thus between children and their need for care from their married biological parents, and thus between

marriage and the norms (permanence, exclusivity, and monogamy) whose rationale is deepened and extended in light of children's needs. This in turn would likely erode people's adherence to marital norms that are essential to the common good, especially to the successful formation of children as productive, responsible members of society.[12]

Nor on this view would the costs be limited to the families in question, for as absentee fatherhood and out-of-wedlock births become common, the need and extent of governmental policing and social services grows. According to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture and the resulting exacerbation of social ills: teen pregnancy, poverty, crime, drug abuse, and health problems.[13] Sociologists David Popenoe and Alan Wolfe have conducted research

[12] Thus, it misses the point to object, as the committee members opposed to DOMA did, that "the attraction that a man and a woman feel for each other […] obviously could not be threatened in any way, shape or form by the love that two other people feel for each other, whether they be people of the same sex or opposite sexes." H.R. Rep. No. 104-664, at 41. It is not that one couple's feelings might be affected by another couple's feelings, but that changes in the public understanding of marriage might undermine people's grasp on the *reasons* for permanence and exclusivity despite oscillations in feeling.

[13] Isabel V. Sawhill, *Families at Risk*, *in* Setting National Priorities: the 2000 Election and Beyond (H. Aaron & R. Reischauer, eds., 1999).

on Scandinavian countries supporting the conclusion that as marriage culture declines, state spending rises.[14]

Again, however, whether these claims about the effects of changing marriage policy are *accurate*—a determination which requires consulting complex and still largely inconclusive social-scientific evidence, not the Constitution—is relevant to the *wisdom* of DOMA, not to its constitutionality. Our point is that there is no easy and sharp distinction between "purely moral" purposes (*however* sound) for supporting DOMA, and purposes (*however* sound) that are more typically classified as serving "social utility." So it is error to not only reduce considerations of morality and value to more or less concentrated forms of emotional repugnance, but also to distinguish so sharply between the enactment of what is tendentiously called "private moral beliefs," on the one hand, and what are called "secular purposes," on the other hand (*see supra* Section II.A.1). For the goods at stake in such a public institution as marriage have to do with public morality and welfare both, and are themselves secular purposes.

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[14] David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* (Aldine De Gruyter 1988); Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* (University of California Press 1989).

B. Consistent with *Lawrence*

Having considered some features of the general relationship between law and morality, and of the particular one between marriage law and morality, we turn now to the constitutional jurisprudence most relevant to the relationship between DOMA and moral beliefs. For the other concerns that we have examined matter here only insofar as they inform the central determination of whether DOMA runs afoul of prevailing principles of constitutional jurisprudence.

The plaintiffs compare DOMA to the Texas law criminalizing homosexual sodomy that was struck down in *Lawrence v. Texas*.

But DOMA is *not* relevantly similar to the Texas anti-sodomy law; the considerations cited in *Lawrence* against that law do *not* apply to DOMA; the majority and concurring opinions in *Lawrence* expressly *deny* any analogy between the two; and the quotation cited here prohibits the application of moral judgments by the *judiciary*, not by duly enacted legislation.

1. Majority Opinion and Concurrence

Lawrence held that a Texas statute making homosexual sodomy a crime violated the Due Process Clause. Writing for the majority, Justice Kennedy denied that citizens "may use the power of the State to enforce [moral disapproval of sodomy] on the whole society through operation of the criminal law." 539 U.S. at 571. *But DOMA leaves the criminal law untouched*. It merely provides that only

unions of one man and one woman may be deemed marriages by the federal government. It criminalizes nothing, including same-sex marriages. Individuals are left free to form same-sex unions, and religious and other institutions are left free to recognize those unions as marriages. But the federal government has chosen not to treat them as such.

But does *Lawrence* exclude DOMA by *analogy*? Is criminalizing the conduct characteristic of certain relationships analogous to not legally recognizing them as marriages? No, it is not; certainly not in the ways that *Lawrence* cites as evidence of the illegitimacy of anti-sodomy laws.

The majority opinion cites the American Law Institute's 1955 Model Penal Code, which discourages bans on private consensual sexual activity on the grounds that such provisions: "undermine[] respect for the law by" outlawing widespread practices, criminalize what is harmless, and are "arbitrarily enforced." *Id*. at 572. None of these considerations is relevant to the non-recognition of same-sex partnerships, which shows no signs of undermining adherence to or respect for the law, criminalizes nothing, and is from the passage of DOMA uniformly enforced.

The majority opinion also points to "[t]he stigma this [Texas anti-sodomy] criminal statute imposes […] with all that imports for the dignity of the persons charged," and decries the fact that "[t]he petitioners will bear on their record the history of their criminal convictions." *Id*. at 575. Such statutes "demean

[homosexual persons'] existence or control their destiny *by making their private sexual conduct a crime*." *Id*. at 578 (emphasis added). Not being in a union federally recognized as a marriage implies none of these things. DOMA does not stigmatize same-sex attracted Americans, impugn their character, or blemish their permanent criminal record any more than any marriage law so harms those for whom marriage is not in prospect (whether because of failure to find a mate, absorbing work responsibilities, or any other reason).

Likewise, DOMA does not involve (as *Lawrence* held that anti-sodomy laws do) the slightest "intrusion into the personal and private life" of anyone. *Id*. at 578. Thus, *Lawrence*'s identification of a constitutionally protected "realm of *personal* liberty which the government *may not enter*," *id.* (emphasis added), leaves intact DOMA—which concerns a *public* institution, and *limits* the State's interference in the personal sphere by constricting the scope of legally regulated relationships. Again, DOMA does not touch private behavior or dictate how private institutions should regard same-sex unions: people are left free to form same-sex partnerships, and states, religious communities, businesses, and other institutions are left free to treat them as marriages. The only thing that DOMA does is to decide which arrangements the federal government may recognize as *marital* unions. It is not susceptible of the criticisms leveled against the Texas anti-sodomy law by the *Lawrence* Court.

The same is true of the rationale of Justice O'Connor's *Lawrence* concurrence. She fixes on the fact that conviction under the Texas anti-sodomy law "would disqualify [petitioners] from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design," *id*. at 581, but such are the implications of criminal conviction, not of legal singlehood. Moreover, since (again) DOMA leaves it up to states to decide their own policy in regard to which arrangements can constitute civil marriages, it cannot even be said to "legally sanctio[n] discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," as O'Connor laments that the Texas anti-sodomy law does. *Id*. at 582.

Indeed, the majority opinion explicitly disavows any implications for the marriage issue, saying that the petitioners' case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id*. at 578, and suggesting that one of the few reasons for which the state *may* "define the meaning of [a] relationship or . . . set its boundaries" is to prevent "abuse of an institution the law protects." *Id*. at 567. Justice O'Connor's concurrence goes even farther by expressly affirming that "preserving the traditional institution of marriage" is a "legitimate state interest" and that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id*. at 585.

2. Dissent

Dissenting in *Lawrence*, Justice Scalia warned that, notwithstanding Justice Kennedy's insistence to the contrary, the logic of *Lawrence* undermines the restriction of civil marriage to unions of sexually complementary spouses. For, Justice Scalia argues, *if* "preserving the traditional institution of marriage" is a legitimate state interest, then so is "preserving the traditional sexual mores of our society." *Id*. at 601 (Scalia, J., dissenting). But *Lawrence* declares unconstitutional only a certain *means* of preserving the traditional sexual mores of our society—i.e., *criminalization*—whereas DOMA, as we have noted, criminalizes *nothing*. There is no logical contradiction in holding that while the state may introduce legal structures to encourage adherence to certain moral norms or ideals (or even, without reference to morality, to promote ways of life that in its value judgment serve the welfare of children and the more vulnerable parent), it may not use the heavy hand of criminal law—with its deprivations of *liberty* or *property*—in service of the same goals. Indeed, the majority opinion and O'Connor concurrence in *Lawrence* offer several reasons for maintaining just this distinction.

Justice Scalia also points to the Court's statement that with respect to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . [p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons

do." *Id*. at 574. But to read this remark as Justice Scalia suggests would be to teeter on the edge of imputing bad faith to the majority, especially in view of the latter's clear, direct, and forceful assurance that the holding and reasoning in *Lawrence* are not meant to load the dice in favor of a future decision redefining marriage to accommodate same-sex partnerships. By "these purposes," rather, Justice Kennedy and those joining his *Lawrence* opinion are plainly referring only to the general *cluster* of rights listed several lines before, not equally or in the same way to each—especially since some of the rights (e.g., contraception) have no application to same-sex partners. So in keeping with the Court's own refrain throughout, it is most plausible (and charitable) to read "autonomy" as referring to freedom from state interference in private intimate conduct, not to entitlement to formal recognition of any intimate relationship. After all, the state restricts formal recognition of *opposite*-sex unions in many ways; and by applying a rational-basis test to the Texas anti-sodomy law, *Lawrence* did not hold that sexual conduct between same-sex partners is a fundamental right, which it would seem to be if same-sex marriage were a fundamental right. *See Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 456 (Ariz. Ct. App. 2003).

Moreover, there is no reason to suppose that traditional marriage law can be justified if at all only on the same ground as anti-sodomy laws. In fact, the state's promotion of marriage as a union of husband and wife entails nothing about the

morality of non-marital sexual acts. The state can remain agnostic about the moral permissibility of non-marital sexual activity while insisting on the social value of the institution of marriage for establishing as a norm and ideal, and to some extent ensuring, that men and women unite as husbands and wives and thus remain committed fathers and mothers to any children their union may produce (*see supra*, Section II.A.4).

III. CONCLUSION

There are no constitutional problems with the ways in which DOMA relates to morality. Support for it need not involve a desire to harm or disadvantage, reliance on bare tradition or animus, or even moral disapproval of homosexual conduct. The irreducibly normative content of DOMA is the same as the irreducibly normative content of *any* marriage law at all: a claim about the purposes or ends of marriage, and an endorsement and encouragement of adherence to those ends as worthwhile and consistent with the state's interests. Because these are substantive moral and value questions unsettled by the Constitution and logically prior to any determination that some marriage law violates the fundamental right to marry or equal protection, DOMA cannot be ruled unconstitutional on such grounds without usurping the people's freedom to resolve such questions for themselves. Moreover, many features of our law—including features of our marriage and privacy jurisprudence—also rely on irreducibly

normative (moral and value) judgments. And in the case of marriage law, it is difficult (and unnecessary) to disentangle such moral dimensions from its wider and less controversial goals. Finally, DOMA is consistent with the letter and spirit of *Lawrence*, which forbids only the criminalization of certain kinds of intimate sexual conduct, and this because of considerations that apply only to criminal prohibitions in service of moral objectives. For these reasons, DOMA's reflection of moral and value judgments is philosophically and constitutionally defensible—and in some ways unavoidable and indeed desirable. Thus, *amici curiae* urge this Court to reverse the district court's judgment.

RESPECTFULLY SUBMITTED this 27th day of January, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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