NOS. 10-2204/10-2207/10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLEE,
V.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
DEFENDANTS-APPELLANTS.

DEAN HARA,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,
NANCY GILL, ET AL.,
PLAINTIFFS-APPELLEES,
V.
OFFICE OF PERSONNEL MANAGEMENT, ET AL.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFFS-APPELLEES NANCY GILL, ET AL. AND PLAINTIFF-APPELLEE/CROSS-APPELLANT DEAN HARA

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly ruled that Congress lacked any legitimate and rational justification for excluding, for the first time in history, couples married by their home states from all forms of federal recognition and respect for their marriages.
2. Whether section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which discriminates on the basis of sexual orientation, severely burdens the integrity of Plaintiffs' families, and imposes substantial federalism costs, is therefore subject to intermediate or strict scrutiny when challenged as violating the Fifth Amendment's Equal Protection guarantee.

INTRODUCTION

The Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") fails to advance any viable justification for DOMA's sweeping denial of federal recognition of the Gill Plaintiffs' marriages. Indeed, BLAG does not argue that it could prevail if the Court were to apply any form of heightened scrutiny to this law, which intentionally imposes substantial burdens on one group of married couples based solely on their sexual orientation. But heightened scrutiny is clearly required and, in any event, the proffered justifications are so weak and illogical that DOMA fails even rational basis scrutiny.

The central flaw in BLAG's arguments is a failure to understand what

DOMA does. Again and again, BLAG sounds as if it were defending a state's decision to exclude same-sex couples from marrying. It relies, for example, on *Baker v. Nelson*, which involved a state's refusal to marry a same-sex couple, and it makes countless arguments about why letting same-sex couples join in marriage is a bad idea. But that is not the issue. The issue is whether *Congress* was constitutionally justified in refusing to treat *already married same-sex couples* as married, in *any* context.

As the District Court properly held, the difficulty of mounting a defense of DOMA begins with the principle that, in our constitutional system, it is the states that decide which couples may marry. BLAG's main arguments amount to contentions that Congress could have "rationally" disfavored letting same-sex couples marry. But Congress does not get to make that judgment. And even if there were a basis for Congress to implement its own preferences about marriage policy, BLAG papers over an additional problem with its attempted justifications: Plaintiffs are *already* married. The question thus becomes what federal interest is served by denying federal recognition to marriages that states have already sanctioned and are continuing to sanction – *not* what justifications might exist for Congress's abstract preference that same-sex couples not marry in the first place. The denial of federal recognition harms Plaintiffs and their families. And even if one were to credit BLAG's implausible notion that the marriages of same-sex

couples somehow adversely affect the behavior of opposite-sex couples, it is impossible to see how such an effect is ameliorated by having same-sex couples remain married under state law and then mistreating them under federal law. The decision below should be affirmed.

COUNTERSTATEMENT OF THE CASE

Plaintiffs are 17 lawfully married or widowed men and women whose marriages the United States government has chosen to nullify for federal purposes. Plaintiffs exercise all of the rights and discharge all of the responsibilities of married people in Massachusetts and were lawfully married under state law. But because Plaintiffs married someone of the same sex, DOMA excludes their lawful marriages from all federal recognition.[1] DOMA takes the unitary class of married couples in Massachusetts and divides it in two: those who are "married" under federal law, and those whose marriages do not exist for any federal purpose. That is the classification BLAG must defend.

A. Proceedings Below and in this Court.

Plaintiffs brought suit alleging that DOMA's discrimination between married couples violates the Equal Protection guarantee of the Fifth Amendment. On July 8, 2010, upon cross-motions to dismiss (by the government) and for

[1] Section 2 of the Defense of Marriage Act authorizes States to disregard marriages of same-sex couples performed by other States. 28 U.S.C. § 1738C. Appellees have not challenged Section 2 in this lawsuit. The shorthand "DOMA" in this brief refers exclusively to Section 3.

summary judgment (by Plaintiffs),[2] the District Court granted summary judgment for Plaintiffs,[3] holding that DOMA violates core constitutional principles of equal protection because "'there exists no fairly conceivable set of facts that could ground a rational relationship' between DOMA and a legitimate government objective." Joint Appendix ("JA") 1388 (quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)).

On August 12, 2010, the District Court entered its judgment, declaring DOMA unconstitutional as applied to Plaintiffs and enjoining its application to them. JA1407. On August 17, the District Court entered an amended final judgment and a stay pending appeal. JA1419, 1425. On October 12, 2010, the government timely appealed. JA1426.

On February 23, 2011, the President and Attorney General notified Congress of their determination that DOMA is an unconstitutional violation of equal protection. *See* Letter from Eric Holder, Attorney General, to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), Document No.

[2] Plaintiffs' Motion was backed by Plaintiffs' affidavits, JA861-951, and by extensive expert testimony. *See* Affidavits of George Chauncey, Ph.D. (history of discrimination), JA1098-1149; Gregory Herek, Ph.D. (immutability of sexual orientation, benefits of marriage and harm of structural stigma), JA1308-48; Gary Segura, Ph.D. (political powerlessness), JA1051-97; Michael Lamb, Ph.D. (childrearing), JA958-1050; *see also* Affidavit of Nancy Cott, Ph.D. (history of marital institution in America), JA420-58.

[3] The District Court dismissed for lack of standing one claim of Plaintiff Dean Hara regarding enrollment in the FEHB Program as a surviving spouse. JA1384. This dismissal is the subject of Mr. Hara's cross-appeal, briefed below.

00116176101, at 3-8. On May 20, 2011, BLAG moved to intervene. Intervention was allowed, and BLAG filed its brief on September 22, 2011 ("BLAG Br."). The government filed a superseding brief the same day ("Gov. Sup. Br.").

B. Statutory Scheme

Section 3 provides:

> Definition of "marriage" and "spouse"
>
> 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 as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

COUNTERSTATEMENT OF FACTS

A. DOMA Was Passed to Codify Congress's Condemnation of Marriage By Same-Sex Couples.

DOMA was an abrupt departure from 200 years of deference to the States – a federal law barring all federal recognition of marriages of a specific class of people. Entitled "[a] bill to define and protect the institution of marriage," DOMA was passed in response to a decision of the Hawaii Supreme Court indicating that same-sex couples might be entitled to marry under that State's constitution, *Baehr v. Lewin*, 852 P.2d 44, 59-67 (Haw. 1993). *See* JA1262. The House Judiciary Committee's Report on DOMA claimed that *Baehr* was part of an "orchestrated legal assault being waged against traditional heterosexual marriage," and only in

the context of that broad "assault" could "the Committee's concerns that motivated H.R. 3396 be fully explained and understood." JA1262-63.

The House Report further explained Congress's motivation for enacting DOMA: "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." JA1275-76.

The remarks of Representative Hyde, then-Chairman of the House Judiciary Committee, were blunt but typical: "Most people do not approve of homosexual conduct …. and they express their disapprobation through the law…. It is … the only way possible to express this disapprobation." 142 Cong. Rec. 17089 (1996). In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral," "depraved," "unnatural," "based on perversion," and "an attack upon God's principles." *Id*. at 16972 (statement of Rep. Coburn); *id*. at 17074 (statement of Rep. Buyer); *id*. at 17082-83 (statement of Rep. Smith). Senator Helms explained,

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

Id. at 22334 (1996).

Congress identified four specific governmental interests purportedly advanced by 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 government resources." JA1272. The House Report acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law. That has always been the rule." Nevertheless Congress decided to intercede:

> Of course, the foregoing discussion would hardly support – much less necessitate – congressional action if the Committee were supportive of (or even indifferent to) the notion of same-sex "marriage." But the Committee does not believe that passivity is an appropriate response or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process. [DOMA] is a modest effort to combat that strategy.

JA1272.[4]

Congress did not hear testimony from historians, economists, sociologists, or specialists in child welfare. Nor did it solicit the views of agency heads regarding

[4] The House Report also repudiated the then-recent Supreme Court decision, *Romer v. Evans,* 517 U.S. 620 (1996). "It is difficult to fathom how … the Court majority concluded that [Colorado's constitutional] Amendment 2 is unconstitutional." JA1292.

the likely impact of DOMA. Remarkably, the House Report characterized the law as a "narrow federal requirement." JA1291.

The vast reach of DOMA became clear in January 1997, after DOMA had already gone into effect, when the General Accounting Office reported that DOMA implicated 1,049 federal laws (now 1,138 different right or rules). JA1153-54, 1229, 1403. These included the right under federal law to invoke the marital confidences and spousal testimonial privileges in federal court, *see* Fed. R. Evid. 501; conflict-of-interest rules governing federal employment and participation in federally funded programs, *e.g.*, 5 U.S.C. § 3110; rules affecting bankruptcy proceedings, 11 U.S.C. § 302; copyright law, 17 U.S.C. § 304; benefit and health insurance programs for federal employees; and treatment under the Internal Revenue Code, among many others.

B. DOMA Nullifies Plaintiffs' Marriages for All Federal Purposes.

Same-sex couples in Massachusetts have been able to marry since 2004.[5] There are no distinctions drawn in Massachusetts among married couples: all who comply with the state marriage requirements may marry, and all married couples are treated the same with respect to marriage and its attendant rights and responsibilities. JA848.

[5] Five other States (Connecticut, Iowa, New Hampshire, New York, and Vermont) and the District of Columbia now permit the marriage of same-sex couples.

Each Plaintiff in this case is married to, or a surviving spouse of, a person of the same sex. DOMA has harmed each of them by requiring the government to deny them the federal rights and responsibilities incident to marriage.

Several Plaintiffs seek spousal benefits based on employment with the United States government. Plaintiffs Nancy Gill and Marcelle Letourneau have been together for 31 years and married in 2004, shortly after Massachusetts began permitting same-sex couples to marry. Gill is a 23-year employee of the U.S. Postal Service but has been unable to add Letourneau to her health insurance coverage, vision benefit plan, or flexible spending account because of DOMA. JA833-34. As a consequence, Letourneau has had to remain in the work force to secure health insurance rather than stay at home with their two children. Their family also has incurred increased medical expenses due to DOMA. JA833-34; JA861-62, 867. Plaintiff Martin Koski, a retiree who worked for the Social Security Administration for 21 years, has similarly been denied the right to add his spouse, James Fitzgerald, to his health coverage. JA835.

Other Plaintiffs have suffered adverse consequences from being treated as single for tax purposes. Plaintiffs Melba Abreu and Beatrice Hernandez, respectively the CFO of a non-profit and a writer, have been together for more than 23 years and married for seven. Because of DOMA, they have been forced to file federal income tax returns as "single," even though they file their state income tax

returns as married, and have paid thousands of dollars more in federal income tax as a result. JA839. Plaintiff Mary Ritchie has been a Massachusetts State Trooper for over 20 years. Her spouse, Kathleen Bush, is a stay-at-home mom to their two children and a volunteer in their school and community. They have been together for more than 20 years and married for more than six. They have incurred additional income tax due to their inability to file jointly and Ritchie's inability to contribute to Bush's IRA. JA837-38, 911-12. Plaintiffs Marlin Nabors and Jonathan Knight, a college administrator and university finance associate respectively, have similarly faced higher income taxes because of their inability to file jointly. JA839, 926. Plaintiffs Mary and Dorene Bowe-Shulman – one an attorney employed by the Commonwealth of Massachusetts and the other a self-employed cancer survivor – have been together for more than 15 years and married for seven. They receive health insurance through Mary's employment, JA840, 934, but DOMA has forced them to pay federal income taxes on Dorene's benefits, in addition to barring them from filing taxes jointly, both of which have resulted in their paying higher taxes than other similarly situated married couples. JA840.

Another category of harm caused by DOMA involves Social Security. Three Plaintiffs are widowers who have been denied benefits to which they would have been entitled if their deceased spouses had been wives rather than husbands. Plaintiff Randell Lewis-Kendell, a shop owner, was partnered with and then

married to his late husband for 30 years. JA946-49. Plaintiff Herbert Burtis, who is 81, and his late husband were both musicians and music teachers who were together for 60 years and married for four. JA952-54, 956. Plaintiff Dean Hara and the late Congressman Gerry Studds had been together for 15 years and married for almost three before the latter's death. JA876-78. Each widower applied for and was denied the Social Security "One-Time Lump-Sum Death Benefit" normally available upon the death of a spouse. JA836, 842, 843. Plaintiff Herbert Burtis also was denied the survivor benefit normally available to a widower whose deceased spouse had a higher earnings record. This benefit would have totaled about $700 per month since his spouse's death in August 2008. JA843; JA956. Plaintiff Hara has also been denied the health insurance coverage normally available to the surviving spouse of a member of Congress. JA836-37.

Plaintiffs Jo Ann Whitehead and Bette Jo Green, together nearly 30 years and married for seven, are both current Social Security recipients. As a labor and delivery nurse for many years, Green always earned more than Whitehead, a garden educator. Because of DOMA, Whitehead was denied the "spousal benefit" normally available to the lower-earning spouse. JA841; JA940-42. The couple worries about Whitehead's financial circumstances if Green, a two-time cancer survivor, predeceases Whitehead, and Whitehead is unable to receive the Social Security spousal survivor benefit. JA841-42.

Apart from these concrete injuries, Plaintiffs have endured additional harm from the relegation of their marriages to second-class status. DOMA has confused and complicated everyday transactions. Plaintiffs must explain to people that they are indeed married, even though the federal government (which in some cases is also their employer) does not treat them as such. *See, e.g.*, JA851, 852, 873-74, 913, 923-24, 938, 951 (DOMA-imposed stigma).

C. The District Court Carefully Evaluated and Rejected Each Proffered Rationale for DOMA.

On July 8, 2010, the District Court granted Plaintiffs' motion for summary judgment and held that DOMA violates the Constitution's guarantee of Equal Protection. The court held that DOMA's discrimination could not be justified by reference to any legitimate or rational interest. JA1388. Thus, the court saw no need to decide whether heightened scrutiny was required. JA1388.

The court began with an explanation of "rational basis review," emphasizing that it "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and that a "'classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity … [and] courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.'" JA1388 (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). The court further acknowledged that under rational basis scrutiny, it was not limited to evaluating

those motivations proffered by Congress, but rather could "go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest sufficient to justify the challenged provision." JA1388.

The court nevertheless noted that this standard is not "toothless," and that the law cannot draw classifications "'for the purpose of disadvantaging the group burdened by the law.'" JA1389 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). "[A] law must fail rational basis review where the 'purported justifications … [make] no sense in light of how the [government] treated other groups similarly situated in relevant respects.'" *Id*. (quoting *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001)).

Applying these principles, the District Court turned first to the objectives identified by Congress when passing DOMA. The court held that DOMA is not rationally related to the goal of encouraging responsible procreation and child rearing, since denying federal recognition to marriages of same-sex couples "does nothing to promote stability in heterosexual parenting." JA1391. Instead, such a denial "prevents children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure." JA1391 (internal quotation marks omitted).

The District Court held that DOMA likewise bears no relation to the purported goal of defending and nurturing heterosexual marriage, since denying marriage-based federal benefits would neither encourage gay men and lesbians to marry members of the opposite sex nor make heterosexual marriages more secure. JA1392. The court hypothesized that Congress might have sought to make different-sex marriages appear more valuable by punishing same-sex couples that exercise their rights under state law, but held that this would not be a valid interest, as "the Constitution will not abide such 'a bare congressional desire to harm a politically unpopular group.'" JA1392-93 (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Finally, while the court acknowledged that preserving government resources can be a legitimate government interest, it "discern[ed] no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage." JA1393-94.

The District Court next turned to the rationales proffered by the government: that DOMA was enacted to preserve the "status quo," that it was an incremental response to a "new social problem," and that it ensured consistent distribution of benefits across states. JA1394. The court recognized several fundamental flaws with these rationales.

First, it recognized that the "status quo" for federal purposes was to recognize and respect state law concerning marriage. Thus, the court noted that a substantive definition of marriage as one man and one woman "was indeed the status quo *at the state level*" in 1996, but "the status quo *at the federal level* was to recognize, for federal purposes, marriages declared valid according to state law." JA1399 (emphases in original). Thus, "Congress' enactment of a provision denying federal recognition to a particular category of valid state-sanctioned marriages was, in fact, a significant *departure* from the status quo at the federal level." JA1399 (emphasis in original).

Moreover, the court found that, even assuming DOMA preserved some sort of federal status quo, which the District Court held it did not, "[s]taying the course is not an end in and of itself" but rather must be a means to a legitimate government end. JA1399-1400. Preserving the status quo "does nothing more than describe what DOMA does. It does not provide a justification for doing it." JA1400.

As to the purported interest in allowing states to debate before deciding on a federal course of action, the court observed that throughout history, Congress had never before deemed it necessary to respond to changing definitions of marriage among the states. Before DOMA, the federal government "fully embraced … variations and inconsistencies in state marriage laws by recognizing as valid for

federal purposes any heterosexual marriage which has been declared valid pursuant to state law." JA1396.[6] "[T]he passage of DOMA marks the *first* time that the federal government has ever attempted" to legislate marriage at the federal level – "or any other core concept of domestic relations, for that matter. This is so, notwithstanding the occurrence of other similarly politically-charged, protracted, and fluid debates at the state level as to who should be permitted to marry." JA1397-98 (emphasis in original).[7] Although the court acknowledged that the novelty of Congress's action was not dispositive of its constitutionality, it nevertheless found that the "absence of precedent for the legislative classification at issue here is equally instructive, for 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [Constitution[] ….'" JA1398 (quoting *Romer*, 517 U.S. at 633).

The District Court also rejected the Defendants' proffered rationale that DOMA ensures that federal benefits are distributed consistently. "DOMA does not provide for nationwide consistency in the distribution of federal benefits among

[6] The court also noted that the argument that Congress could "wait" for the states to debate marriage rights for same-sex couples "begs the more pertinent question: whether the federal government had any proper role to play in formulating such policy in the first instance." The court determined that it did not. JA1395.

[7] The court rejected the government's "unsupported assertion" that no other issue of who should be allowed to marry "had become a topic of great debate in numerous states with such fluidity," citing the "lengthy and contentious state-by-state debate that took place over the propriety of interracial marriage not so very long ago." JA1397.

married couples. Rather, it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy." JA1401. The court found that the federal government recognizes heterosexual marriages from some states that would not be sanctioned in other states, thus belying the "consistency" rationale. *Id*.

Nor, the court found, does DOMA ease any purported administrative burden on federal agencies' distribution of benefits on the basis of marital status. The court found that federal agencies do not implement state laws, but rather distribute marriage-based federal benefits to those couples that have obtained state-sanctioned marriage licenses or are in common law marriages. JA1402. Agencies' tasks do not become more burdensome simply because some couples applying for benefits on the basis of a valid state marriage license (or a common law marriage) are of the same sex. *Id*. In fact, rather than easing the administrative burden, the court held, DOMA injects "complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not." *Id*.

Finally, the District Court held that even if there were a legitimate interest in consistency in the provision of marriage-based federal benefits, there is no rational relationship between that proffered justification and DOMA's "comprehensive sweep across the entire body of federal law." JA1403. Recognizing that DOMA

affects non-pecuniary as well as pecuniary federal benefits, privileges, and responsibilities, the District Court held that "[i]t strains credulity to suggest that Congress might have created such a sweeping status-based enactment, touching every single federal provision that includes the word marriage or spouse, simply in order to further the discrete goal of consistency in the distribution of marriage-based pecuniary benefits." JA1404.

SUMMARY OF ARGUMENT

1. Although the discrimination at issue here – based on Plaintiffs' sexual orientation – plainly warrants heightened equal protection scrutiny under the applicable principles, the District Court was correct that such heightened scrutiny is not needed to invalidate DOMA. Rational basis scrutiny is not the same thing as withholding scrutiny altogether. There needs to be a rational justification. And none of the purported justifications offered by BLAG come close to explaining why the federal government has a legitimate and rational reason to refuse to recognize the fact that Plaintiffs are (or were) married.

Much of BLAG's argument assumes that Congress has a legitimate basis for adopting its own preferred views on marriage policy and attempting to impose them on the States or their residents. *Infra* Part I.C. But marital eligibility is a matter of state concern in our constitutional scheme, which is why, before DOMA, the federal government had always deferred to state determinations of marital

status.

That principle, among other things, is why BLAG is so unpersuasive in justifying DOMA as a rational response to the (claimed) uncertainty created by the extension of marriage rights to gay and lesbian couples, or as a measure that avoids a (hypothesized) devaluation of marriage and encourages heterosexuals to continue to link marriage with procreation. *Infra* Parts I.C.2-4. These kinds of speculative arguments are matters of state law not within Congress's purview. Nor do they make sense given that Plaintiffs and thousands like them have already joined in marriage. Given that Congress cannot change that reality, it is difficult to fathom what BLAG thinks is accomplished by relegating married same-sex couples to a permanent second-class status.

As for BLAG's purported non-family-law justifications – maintaining "uniformity" in federal programs and saving money – they are no more rational than the others. *Infra* Part I.D. Regarding uniformity, BLAG fails to explain what rational purpose is served by introducing *inconsistency* into the federal treatment of married couples in order to assure that all same-sex couples – married and unmarried – continue to be treated "uniformly" as second-class citizens. The fiscal rationale – which never explains why gay men and lesbians should bear the burdens of the supposed cost-cutting – also fails. Congress deliberately chose not to study whether non-recognition of same-sex married couples would cost or save

money, and when the Congressional Budget Office later did such a study, it concluded that DOMA imposes a substantial net *cost*.

BLAG's plea to allow democratic institutions to address these issues also falls flat. *Infra* Part IV. Plaintiffs' home state has already exercised its constitutional prerogative of deciding that same-sex couples should have equal marriage rights. As BLAG effectively acknowledges, the purpose of DOMA is to overrule that decision by penalizing same-sex married couples in the broadest possible manner available to the federal government. The question in this case is not whether democracy will prevail. It is whether, in our constitutional scheme, Congress had a rational, legitimate, and federally cognizable basis for taking such an action.

2. Moreover, the President and Department of Justice are correct in arguing that heightened equal protection scrutiny is required. DOMA discriminates on the basis of sexual orientation. Under the factors that the Supreme Court uses to determine when heightened scrutiny is warranted, sexual orientation easily qualifies. *Infra* Part II.A. There is a long and sorry history of discrimination against gay and lesbian Americans, even though sexual orientation bears no relation whatsoever to a person's ability to contribute to society. That is enough, but there is more. Sexual orientation is a core characteristic of all persons – gay or straight – that they should not be asked to hide or suppress in order to be treated

equally. And gay men and lesbians, who make up a small minority of the population, are not able to protect their own interests reliably in the political process, which has denied them basic protections and has responded to actual or anticipated successes with massive backlashes (including DOMA itself). DOMA also merits heightened scrutiny because it impermissibly burdens Plaintiffs' fundamental interest in the integrity of their families and represents an unprecedented federal intrusion into matters of state concern. *Infra* Parts II.C-D.

3. Finally, BLAG cannot avoid the merits by claiming that this case is controlled by *Baker v. Nelson*, 409 U.S. 810 (1972). *Infra* Part III. The principal issue presented in that summary decision of the Supreme Court was whether it constituted unconstitutional gender discrimination for a state to refuse to marry two men. The issue here is completely different – whether it constitutes unconstitutional discrimination on the basis of sexual orientation for the federal government to refuse to recognize the already-existing marriages of same-sex couples. Those issues are far too different for *Baker* to control. In any event, *Baker* is no longer good law in light of subsequent Supreme Court decisions, including *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DOMA FAILS RATIONAL BASIS REVIEW.

The District Court correctly held that DOMA violates the fundamental equal protection guarantee that the government may not discriminate among its citizens without a valid reason, or for the sake of disadvantaging unpopular people. JA1405. While the court could have properly reached the same result by applying heightened scrutiny, *see* Part II *infra*, its holding rests on firm ground and should be affirmed.

A. Rational-Basis Review Is Meaningful, Not Toothless.

The District Court was right that rational basis review is not "toothless." *Mathews v. de Castro*, 429 U.S. 181, 185 (1976). It contains meaningful requirements ensuring that laws are not enacted for arbitrary or improper purposes. First, a law's purpose must be legitimate, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985), which means it must be "properly cognizable" by the government asserting it and "relevant to interests" it "has the authority to implement." *Garrett*, 531 U.S. at 366 (quoting *Cleburne*, 473 U.S. at 441). Second, a law must bear a logical relationship to the purpose it advances. *Romer*, 517 U.S. at 632-33. Third, a law's justification may not rely on factual assumptions that exceed the bounds of rational speculation. *See Lewis v. Thompson*, 252 F.3d 567, 590 (2d Cir. 2001) (citing *Heller*, 509 U.S. at 320

(speculation, while permissible, must be "rational")).

BLAG insists that DOMA is entitled to heightened deference because regulatory and benefits schemes, where Congress must engage in "line-drawing exercises," are necessarily imprecise and therefore permissible unless "patently arbitrary or irrational." BLAG Br. at 35 (citing *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)).[8] Such line-drawing cases, however, are unhelpful in informing the application of rational basis review here.

First, DOMA does not establish eligibility criteria so much as it declares an entire class of people – gay men and lesbians – ineligible for recognition of their marriages across the board. This type of discrimination is different from the types of discrete policy judgments to which courts generally defer. Second, DOMA involves different asserted interests from the policy judgments typically at issue in "line-drawing" cases. Congress has leeway to decide how best to further its

[8] BLAG notes that federal statutes are rarely struck down as irrational, BLAG Br. at 33, but federal laws rarely single out groups of unpopular citizens for invidious treatment as DOMA does. When that has happened, the Supreme Court has not hesitated to enforce the Constitution. *See Moreno*, 413 U.S. 534. There as here, Congress sought to deny benefits to a group of people for reasons entirely unrelated to the purposes of the relevant program, but instead because the group ("communal families") was unpopular. *Id*. at 543 (Douglas, J., concurring). The view of the *Moreno* dissent, that Congress was entitled to use the "blunt instrument" of limiting eligibility to "the family as we know it," even if such a rule was "imprecise," *id*. at 546 (Rehnquist, J., dissenting), bears striking resemblance to BLAG's argument here.

programs, such as cable television franchising or Medicare and Medicaid funding allocation (at issue in *Beach Communications* and *Matthews*). But neither the scope of DOMA nor the interests asserted on its behalf fit this mold. DOMA sweeps across *every* federal right and program without any connection to the policies advanced by the one-thousand-plus laws it amends. BLAG does not contend, for instance, that there is any real tax reason to exclude same-sex couples from joint filing, or any Social Security policy achieved by excluding widowed gay and lesbian elders from benefits. The rationales asserted for DOMA are sweeping arguments about family law policy in general – where the federal government's role in our constitutional scheme does *not* entitle it to deference. *See* Part I.C.1 & II.C *infra*.

Third, Congress did not have to draw a line. Before DOMA, marriage for federal purposes meant what it meant under state law. DOMA *created* a *new* distinction (among marriages) where none had existed before.[9] BLAG must justify the affirmative decision to create that specific disparity.

B. The District Court Correctly Applied Rational Basis Review.

The District Court applied rational basis review correctly. To begin with, the legislative record makes clear that Congress passed DOMA in order to express

[9] BLAG's distinction between "opposite-sex" and "same-sex" marriage as separate institutions is misleading. Massachusetts has not created a separate institution called "same-sex marriage." It simply extended marriage – as it already existed – to couples of the same sex. JA848.

"moral disapproval of homosexuality." JA1275-76. Unlike in many cases, there are no hidden illicit motives to ferret out: Congress wore its purpose on its sleeve.[10]

Rational basis review may permit the government to articulate after-the-fact rationales for a law in addition to those reflected in its legislative history. But Congress's actual words – combined with what everyone knows was *actually* going on – inform the plausibility of the pretexts BLAG now asserts.

BLAG complains that the District Court focused improperly on whether the discrimination effected by DOMA "affirmatively benefited the opposite-sex couples included within the definition [of marriage]." BLAG Br. at 36. This mischaracterizes the court's reasoning. It rejected the notion that DOMA helped make "heterosexual marriages more secure," or did anything "to promote stability in heterosexual parenting," because those were specific arguments being made on DOMA's behalf, including in the official Committee Report. JA1390-92. Empty political rhetoric in support of DOMA – reflected in the *name of the statute itself* – rests on a claim that marriage needs to be "defended" against gay men and lesbians who will otherwise ruin it. BLAG itself repeats those claims. *See* BLAG Br. at 39 ("undeniable social benefits" of marriage could be "lost" if same-sex couples could

[10] BLAG does not attempt to defend Congress's stated interest in defending "traditional notions of morality." JA1272. Appellees stand on the District Court's analysis. JA1393.

marry), at 53 (marriage by same-sex couples "could lead to an increase in the number of children raised outside marriage"). The District Court had every reason to point out that those arguments do not make sense. And as discussed *infra*, the court also properly considered, and rejected, *other* interests articulated in support of DOMA.

C. BLAG's Family Law Justifications Are Improper as Federal Objectives and DOMA Does Not Further Them.

BLAG's arguments in support of DOMA are pretexts – and transparent ones at that. Most of them have nothing to with DOMA at all but instead are arguments about why BLAG thinks that letting same-sex couples marry in the first place is a bad idea. Such arguments suffer from two flaws. First, so long as states comply with the Constitution, whether or not same-sex couples can join in marriage is a state issue, not a federal one. Second, even on their face, BLAG's arguments make no sense. They are, at heart, claims that discrimination against married same-sex couples advances particular family law policies by influencing the behavior of *heterosexual* couples. Even assuming that marrying same-sex couples could have such indirectly harmful effects on the heterosexual majority (a highly dubious proposition), married same-sex couples are still married when DOMA discriminates against them – so BLAG has no plausible explanation for how such discrimination advances its goals.

1. Marital Status Is a Matter of State, Not Federal, Concern.

As the District Court explained, a separate federal "definition" of marriage distinct from state law is unprecedented and contrary to the traditional division of power between the states and the federal government. JA1395-99; Part II.C, *infra*. "The whole subject of domestic relations … belongs to the laws of the States and not to the laws of the United States." *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id*. at 716 (Blackmun, J., concurring) ("declarations of status, *e.g.* marriage, annulment, divorce, custody, and paternity" lie at the "core" of domestic relations law reserved to States). It follows that justifications that amount to Congress's simply disagreeing with state marriage laws are not "properly cognizable" by Congress or "relevant to interests" it has the "authority to implement." *Cleburne*, 473 U.S. at 441, 448; *Garrett*, 531 U.S. at 366-67.

BLAG sets up a straw man, arguing that "states do not have the constitutional power to dictate to Congress the meaning of terms in federal statutes." *See, e.g.*, BLAG Br. at 22-23 n.6. That is not the issue. Plaintiffs do not claim and the District Court did not hold that the federal government must always give all marriage-based federal benefits to all married couples. In the contexts of particular policies and programs, it may be rational to use criteria other than, or in

addition to, marital status (such as age, income, cohabitation, or length of marriage) to determine particular federal rights and benefits. What the federal government may not do, however, is discriminate broadly against a class of married people, and then invoke as its "legitimate" objective its belief that the state made a mistake in marrying them in the first place.

2. Favoring Heterosexual Procreation.

BLAG argues Congress rationally could have favored heterosexual marriages because they produce the most offspring, BLAG Br. at 51,[11] and lead to homes for children with both a mother and a father, *id.* at 55-58. But there can be no rational contention that discriminating against same-sex married couples does anything to support parenting by different-sex couples: to the extent that *some* federal rights and benefits support childrearing, they have that effect whether the government discriminates against same-sex couples or not.

Moreover, accepting this rationale would require ignoring that countless federal marital rights and benefits are *not* conditioned upon childrearing. The laws DOMA rewrote apply to, benefit, and burden married couples without regard to whether they have, intend to have, or are capable of having children. And they

[11] BLAG implies that the number of children raised by married same-sex couples is miniscule, BLAG Br. at 51, but census data show otherwise. Several Plaintiffs, and nearly one third of married same-sex couples, are raising children – a rate quite similar to the roughly two-fifths of different-sex couples doing so. *See* JA861, 910, 932; Williams Institute, United States Census Snapshot: 2010, at 3.

include, to name just a few examples, obviously non-child-centered policies such as ethics rulings governing spouses of government employees, JA1164-65, and eligibility requirements for loan and grant programs (in which spousal income generally counts *against* the applicant), JA1164-67. The notion that the purpose of *every* one of these laws is to encourage marriage by unwed future parents does more than "approach[]" "the limits of rational speculation," it exceeds them by leaps and bounds. *Lewis*, 252 F.3d at 590 (internal quotation marks omitted).

At its heart, this argument is another way of saying that Congress wanted to *discourage* married same-sex couples from raising children. But this purpose directly subjects the law to heightened scrutiny because it implicates the decision of whether to "bear or beget a child" – a fundamental right. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942). Denying federal recognition to all marriages of same-sex couples to discourage them from having children subjects this right to a disparate burden. As the record contains no *evidence* for the hypothesis that gay men and lesbians make bad parents, this rationale fails such heightened scrutiny.

It also fails rational basis review. Even if a legitimate debate still could be had about the suitability of gay and lesbian parents – which it cannot, as Plaintiffs explain *infra* – the Court need not take sides to recognize this justification as invalid. Congress's bare desire to countermand state family law and discourage

same-sex married couples from becoming parents cannot give rise to any cognizable *federal* interest. *See* Parts I.C.1, *supra* & II.C, *infra*. And there is no reason to believe that such discrimination would accomplish anything: Plaintiffs are already married and already have, or legally can have, children. BLAG concedes that children benefit from the marriage of their parents, BLAG Br. at 52; and DOMA, as the District Court found, merely penalizes the children of same-sex couples by depriving their parents of the protections to which they are legally entitled as married people. JA1391.

In any event, BLAG's suggestion that Congress could have reasonably believed that same-sex couples make worse parents is, in fact, wrongheaded. BLAG Br. at 57-58. As the District Court and the Justice Department both recognized, this suggestion flies in the face of the consensus of the medical, psychological, and social welfare communities. JA958-75, 1308, 1314-15, 1390-91. BLAG cannot save irrational stereotypes about gay and lesbian parents by nitpicking at that consensus[12] or by arguing that Congress could have been justifiably ignorant about same-sex parenting at the time of DOMA's passage. *See* BLAG Br. at 56-57. Even assuming Congress was ignorant of the true facts at the time, ignorance and improper stereotyping of a disfavored minority do not become

[12] The American Academy of Pediatrics is the professional organization of the nation's pediatricians. The Court should not be misled by the American College of Pediatricians – a tiny splinter group formed specifically to advocate anti-gay political causes.

rational simply because they were more accepted at the time of a law's passage, and BLAG must justify continuing such discrimination *today* in the face of facts to the contrary.

3. Affecting the Behavior of Heterosexuals.

BLAG also tries to argue that DOMA produces more responsible procreative behavior by heterosexuals. One theory is that the point of marriage is to offer an "incentive for opposite-sex couples facing an unplanned pregnancy to raise the child in a stable two-parent environment," and since same-sex couples can only have planned offspring, it is "rational not to extend the institution" to them. BLAG Br. at 49-50. Another is that Congress was concerned more generally that too many people were making the decision to have children outside marriage. *Id.* at 53-55. Put differently, BLAG argues that Congress could have believed that federal discrimination against married same-sex couples would cause *different-sex* couples to marry, either after an accidental pregnancy or before an intended one. Merely paraphrasing these arguments exposes their irrationality.

First, while it might be rational to think that marital rights and benefits might play *some* role in encouraging different-sex couples to marry, it does not follow that DOMA advances or even has anything to do with this goal. There can be no rational argument that depriving same-sex couples of equal marriage rights somehow makes other couples more likely to marry. And even if there were, it

makes even *less* sense to think that heterosexual couples deciding whether to marry would be affected by whether same-sex couples already married receive federal benefits and rights associated with *their* marriages.

Then there is the fact that DOMA imposes disadvantages upon the children of married same-sex couples that are visited upon no other children whose parents required "expense or planning" to conceive or adopt them – such as the millions of adopted children or children of infertile different-sex couples. *See* BLAG Br. at 51-52. And, of course, DOMA does nothing to interfere with federal recognition for the marriages of millions of couples who are childless – by choice or otherwise. Where a law is "so riddled with exceptions," the stated rationale "cannot reasonably be regarded as its aim." *Eisenstadt*, 405 U.S. at 449.

Accepting these behavioral justifications, moreover, would again require accepting that the purpose of every single right, benefit, and burden of marriage under federal law is to encourage expecting parents to marry. But "[t]he breadth of the [measure] is so far removed from th[is] particular justification[]" that it is "impossible to credit" it. *Romer*, 517 U.S at 635; Part I.C.2, *supra*.

The *mechanism* by which DOMA purportedly furthers these aims is also lacking. If the idea truly were that same-sex couples serve as examples after whom heterosexuals model their behavior, one would logically want them raising their children within, not outside of, legally sanctioned relationships. BLAG seizes on

claims[13] about Scandinavian nations and the Netherlands to argue, implausibly, that legal recognition of same-sex couples' relationships "would accelerate [the] alarming trend" of nonmarital births in America. BLAG Br. at 53. The implausibility of this argument aside, its factual predicate is also wrong. Nonmarital births in Scandinavia and the Netherlands increased *before* they extended recognition to same-sex couples, not after: they stabilized in Scandinavia post-recognition,[14] and Holland's rise is commensurate with European countries that do *not* allow same-sex couples to marry.[15] Rational-basis review may be deferential, but it is not a license to invent facts or take patently false claims at face value.

As the District Court found, the "social understanding" of marriage as a legal institution is not "inextricably bound" to having and rearing children. The "ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country." JA1391 (quoting *Lawrence*, 539 U.S. at 605 (Scalia, J.,

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[13] Stanley Kurtz, *The End of Marriage in Scandinavia*, Weekly Standard (Feb. 2, 2004), *available at* http://www.catholiceducation.org/articles/homosexuality/ho0079.html.

[14] *See* William N. Eskridge, Jr. & Darren R. Spedale, *Gay Marriage: For Better or For Worse? What We've Learned from the Evidence*, 190-94 (2006).

[15] *See* European Commission – Eurostat – Live Births Outside Marriage – data for Hungary, Luxembourg and Slovakia, *available at* http://eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=0&language=en&pcode=tps00018; *see also* M.V. Lee Badgett, *When Gay People Get Married* 76, 77 (2009) (comparing similar data for 1990s).

dissenting)). To the contrary, married couples have long had a constitutional right *not* to have children. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating law banning use of contraceptives by married couples).

DOMA does nothing to change this reality. It denies federal rights and benefits to many married couples with children, even as it extends those same rights and benefits to countless couples who have none (by choice or otherwise). It also sweeps across a vast array of federal laws and programs having nothing to do with children at all. *See* Part II.C.2, *supra*. Yet again, DOMA is "at once too narrow and too broad" for there to be any plausible connection to this rationale. *Romer*, 517 U.S. at 633.

4. Avoiding Undefined "Unknown Consequences" of Marriage by Same-Sex Couples.

Lacking any *actual* reason to discriminate against married same-sex couples, BLAG falls back on the nebulous claim that Congress could have rationally wanted to "act[] cautiously in facing the unknown consequences" of permitting same-sex couples to join in marriage. BLAG Br. at 39. This justification cannot survive rational-basis review.

At the outset, this is not even a real description of what DOMA does. First, if "caution" had been DOMA's purpose, one would have expected Congress to study the effect of marriages among same-sex couples, not to permanently enshrine discrimination into federal law. Second, the federal government does not issue

marriage licenses. If the social institution of marriage undergoes changes as a result of changes to family law in the states, that is because determinations of family status in our federalist system have "long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); Parts I.C.1, *supra* & II.C, *infra*. Even supposing that the federal government had an interest in stopping states from allowing same-sex couples to obtain marriage licenses – which it does not, *see id.* – DOMA would do nothing to accomplish this.

This "caution" rationale suffers from a more fundamental flaw. In the face of the inability to actually identify a plausible, legitimate purpose served by the statute, BLAG cannot fall back on a catch-all invocation of other "unknown consequences," or a Chicken-Little claim that the "undeniable social benefits" of marriage could be "lost" if same-sex couples started joining in marriage, BLAG Br. at 39, without any effort to explain what those consequences might involve or why Congress had any plausible interest in discriminating against gay men and lesbians to avoid them.[16] As the District Court wisely noted, to characterize DOMA as a "cautious" response "requires a predicate assumption that there indeed

[16] In a *non sequitur* whose intended connection to this argument is unclear, BLAG repeats its unfounded and counterfactual speculation that same-sex couples might make bad parents. *See* BLAG Br. at 41-42. But DOMA has nothing to do with whether same-sex couples may raise children. *See* Part I.C, *supra*.

exists a 'problem' with which Congress must grapple." JA1400.[17]

Stripped of empty platitudes about tradition and speculative harm, this "caution" rationale is nothing more than an argument that Congress could have rationally started to exclude same-sex couples from federal rights and benefits because state law had rendered them ineligible in the past. But federal practice before DOMA had been to follow state law, as the District Court noted. JA1399. And even with respect to the state-law exclusions that DOMA recreated in federal law, historic discriminatory classifications must serve some "independent and legitimate legislative end," *Romer*, 517 U.S. at 633, and the antiquity of a practice does not insulate it from constitutional attack. *Williams v. Illinois*, 399 U.S. 235, 239-40 (1970). In the end, this is the exact same "status quo" rationale properly rejected by the District Court, because "[s]taying the course is not an end in and of itself, but rather a means to an end." JA1399-1400.

D. BLAG's Two Asserted Interests Actually Related to Federal Objectives Do Not Support DOMA Either.

1. Saving Money.

Deficit reduction is in vogue today, just as it was in 1996 when DOMA was enacted. So one can forgive congressional leaders of both eras for trying to spin anything and everything as a way to reduce government spending. But as a

[17] BLAG's assertion that Congress had to choose among available "options" to respond to same-sex couples joining in marriage, BLAG Br. at 40, presupposes that there was a "situation" even requiring a Congressional response to begin with.

justification for DOMA, BLAG Br. at 42, this is too much. Indeed, it would be unimaginable for Congress to raise fiscal concerns if more heterosexuals were marrying. And as the District Court noted (while not alone dispositive), this was clearly not the *real* reason for DOMA: the House specifically voted to *reject* a proposed amendment to DOMA that would have required the General Accounting Office to analyze its budgetary impact. JA1393.

The "public fisc" rationale is thoroughly discontinuous with the breadth of the statute. DOMA sweeps in *all* marriage-related federal statutes, non-pecuniary as well as pecuniary, and those imposing *burdens* as well as benefits. It is absurd, for instance, to claim that depriving same-sex couples of the right to invoke the spousal privilege in federal court, or exempting same-sex couples from conflict-of-interest rules involving their spouses, or requiring private pension funds (through ERISA) to discriminate against same-sex married couples, or any of the countless other laws and regulations amended by DOMA, saves federal money. And even where DOMA amends programs with a fiscal component, it does so haphazardly, both costing and saving money in arbitrary ways. *See, e.g.*, Tara Bernard, *For Children of Same-Sex Couples, a Student Aid Maze*, N.Y. Times, Oct. 14, 2011 (documenting how DOMA prevents appropriate assessment of financial aid

eligibility for children of married same-sex couples).[18] Where a law's "sheer breadth is so discontinuous with the reasons offered for it," the presumption of constitutionality gives way. *Romer*, 517 U.S. at 632.

Even if a reasonable Congress could have thought that it could save money by discriminating against same-sex couples, that would not constitute a "principled reason to cut government expenditures at the particular expense of Plaintiffs." JA1393-94. *Any* denial of benefits to *any* group will always save resources, so there must be a rational basis for choosing a particular group to bear the burdens of cost-cutting.[19] It might also save money to exclude from federal recognition every twentieth marriage or every marriage celebrated in Montana, but more would be required to explain why such an exclusion is rational.

A later report by the Congressional Budget Office confirms that DOMA *costs* money, which is unsurprising: DOMA's federal erasure of marriages of same-sex couples disrupts means-testing and allows some couples to avoid the

[18] The record shows that Plaintiffs would gladly pay more in taxes if that was the legal consequence of their marriages. JA923, 927. While BLAG touts that Plaintiffs would benefit financially absent DOMA, *see* BLAG Br. at 44, some would actually pay more in taxes – which is why they lack standing to, and do not state, a tax claim here. JA866, 874.

[19] Because the thousand-plus laws amended by DOMA advance policies entirely unrelated to encouraging unexpectedly pregnant couples to marry and are available to all heterosexual couples irrespective of pregnancy, *see* Parts I.C.2 and I.C.3, *supra*, the mere desire to subsidize expecting parents to the exclusion of all others cannot supply this basis.

higher income brackets that accompany joint tax filings. JA1250, 1252, 1257-59.[20] While BLAG protests that reasonable legislators *could have believed at the time* that DOMA would save money – even if that belief later turned out to be false – that argument holds no force where Congress made a deliberate choice *not* to consider the financial impact of the law. JA1393. Further, now that subsequent developments have negated the "public fisc" rationale, BLAG can no longer rely on it. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied."); *Jones v. Brown*, 461 F.3d 353, 362-63 (3d Cir. 2006).

The best answer BLAG can muster is that it was rational to save money by discriminating against same-sex couples because same-sex couples had not been

[20] BLAG's attempt to undermine this report (whose lead author was the principal economic advisor to the 2008 Republican presidential campaign) is insulting: BLAG hypothesizes that the report fails to account for the possibility that gay and lesbian couples would commit fraud *en masse* by misrepresenting their marital status to the federal government (a criminal offense, *see* 18 U.S.C. § 1001) to save money. There is no basis to assert that gay and lesbian citizens are more likely to defraud the federal government than anyone else. Rather, it is DOMA that forces Plaintiffs and other married same-sex couples to declare under oath that they are not married, much to their distress. JA879-80, 913, 921, 935.

receiving marriage-based federal financial and tax benefits at the time of DOMA's passage. *See* BLAG Br. at 45. But given the ups and downs of marriage rates among the overall population, the hypothesis that previous Congresses had relied upon the absence of marriages by same-sex couples to project the total number of married people, and thus the cost of marriage-based federal laws (and that the modest number of married same-sex couples would disrupt those projections) is nonsense. Moreover, DOMA did not decline to expand eligibility for federal programs; it affirmatively excluded persons who otherwise would have become eligible under then-current law. If the real reason for DOMA had been that the federal government needed to better understand the costs of adding additional couples to the marriage pool, it could have engaged in precisely such an inquiry. Congress refused to engage in that inquiry and instead enacted permanent discrimination against married same-sex couples. That is not a rational means of protecting the public fisc.[21]

2. Preventing Married Same-Sex Couples from Obtaining Rights and Benefits Inaccessible to Unmarried Same-Sex Couples.

BLAG also claims that DOMA furthers the federal interest in "national uniformity in the substantive definition of marriage." BLAG Br. at 48. But

[21] BLAG's suggestion that discrimination for the purpose of saving money is unreviewable under rational basis review, *see* BLAG Br. at 43 n.11, is clearly incorrect. *See Moreno*, 413 U.S. 528; *In re Levenson*, 560 F.3d 1145, 1150-51 (9th Cir. 2009).

DOMA does *not* create "uniform eligibility for federal benefits." BLAG Br. at 47. As the District Court noted, every variation of state marriage laws remains incorporated in federal law for heterosexual couples; it is same-sex couples *only* who are affected by DOMA. JA1396; JA425-37. Throwing around platitudes like "uniformity" does not explain the legitimacy of this choice to separate out gay men and lesbians for differential treatment.

Moreover, treating identically situated *married* couples (same-sex and different-sex) differently in order to treat all *same-sex* couples (married and unmarried) the same is not a legitimate purpose. Equal protection requires that similarly situated persons be treated the same. *See In re Subpoena to Michael Witzel*, 531 F.3d 113, 118 (1st Cir. 2008) (Equal Protection "guarantees that those who are similarly situated will be treated alike") (citing *Cleburne*, 473 U.S. at 439). Legally married same-sex couples are situated identically to married different-sex couples in the same states. They are not similarly situated to unmarried same-sex couples. There is no identifiable or legitimate congressional interest in treating Plaintiffs like the latter group rather than the former.

BLAG responds by attacking a straw man, claiming that Congress has a "long history of overriding state definitions of marriage for purposes of federal statutes." BLAG Br. at 48. But the laws it points to are nothing more than instances where Congress has made marriage a necessary, but not sufficient,

condition for receiving certain federal rights and benefits.[22] Laws like these do not help BLAG's case. First, as noted above, each of those statutes establishes rules that apply to everybody – unlike DOMA, which leaves state-law variations in marriage undisturbed for heterosexual couples and applies *only* to gay men and lesbians. Second, each of those statutes limits specific federal marital benefits to a defined subset of married couples in order to advance a particular purpose of the program in question (such as preventing couples from fraudulently marrying for immigration purposes, or limiting joint filing to couples that cohabit and therefore actually share income and expenses). BLAG's straw man notwithstanding, Plaintiffs do not contend, and the District Court did not hold, that there is anything *inherently* improper about using criteria other than (or in addition to) marriage to determine federal rights and benefits. But the federal government must use criteria rationally connected to legitimate goals when it does so, and DOMA does not.

At bottom, BLAG offers only a single argument for why uniformity among same-sex couples is a legitimate interest: administrative efficiency. BLAG argues that it could be "confusing" to the federal government if married same-sex couples move to states where their marriages are not recognized. The District Court

[22] *See* 26 U.S.C. § 7703(b) (allowing certain married persons to file as "single" to avoid hardship of married-filing-separately filing); 42 U.S.C. § 416 (excluding recently-married spouses from Social Security benefits unless the couple has children); 5 U.S.C. §§ 8101(6)-(11), 8341(a)(1)(A)-(a)(2)(A) (employee benefits statutes); 8 U.S.C. § 1186a(b)(1) (no green card eligibility for marriages entered into for purposes of obtaining green card).

properly refused to credit this rationale. JA1402 ("[D]istribut[ing] federal marriage-based benefits to those couples that have already obtained state-sanctioned marriage licenses …. does not become more administratively complex simply because some of those couples are of the same sex."). Federal agencies must often address far more complicated differences among the domestic relations laws of the states in determining different-sex couples' eligibility for federal benefits,[23] including the challenging task of determining the validity of common-law marriages,[24] and they routinely apply residency determinations in administering federal programs.[25] The suggestion that they would be unable to do the same thing for married same-sex couples – identify the state whose law governs the couple's marital status under the relevant federal statute, and then check whether that state recognizes the marriage – defies belief.

BLAG's real argument seems to be that it would be *unfair* if some same-sex couples have access to rights and benefits that other same-sex couples do not. *See*

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

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

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

BLAG Br. at 46 (citing statements from Congressional Record); *see also* Initial DOJ Br. at 45. But depriving married same-sex couples of rights and benefits does not cure this injustice, and there is no reason to subject gay and lesbian persons to this type of "consistency" when identically situated married heterosexual couples are treated differently. *See Garrett*, 531 U.S. at 366 n.4 (measure will fail rational basis review where "purported justifications … made no sense in light of how the city treated other groups similarly situated in relevant respects"); *see also* nn. 23-25, *supra*.

E. DOMA Can Be Explained Only by Impermissible Animus Against Gay Men and Lesbians.

The lack of any rational explanation for DOMA leads to the conclusion that Congress intended DOMA to do exactly what Congress *said* it intended to do – to reflect "moral disapproval of homosexuality." JA1275-76 (citing H. Rep. No. 104-664 at 15-16). This purpose is clear on the face of the House Report and the Congressional Record. It is also the only explanation for DOMA that makes any sense. Condemning a group of people is not a valid purpose for a law, but it is the only explanation that fits. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 448. A "punitive discrimination based on status" is "impermissible under the

Equal Protection Clause." *Plyler v. Doe*, 457 U.S. 202, 240 (1982) (Powell, J. concurring).

BLAG bridles at the suggestion that the members of Congress who voted for DOMA were "bigoted and irrational," BLAG Br. at 8, 59-60, but that is not the standard. As Justices Kennedy and O'Connor noted in *Garrett*, impermissible prejudice "rises not from malice or hostile animus alone" but also from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). Whether the politicians of 1996 were motivated by "hostile animus" towards gay men and lesbians (as many openly touted), by "insensitivity" to the lives of the people against whom they were discriminating, or simply by a reaction against people who "appear[ed] to be different," Congress enacted a law whose only credible explanation – and what everybody knows is also its *real* explanation – is one that is also improper.

II. DOMA IS SUBJECT TO, AND FAILS, HEIGHTENED SCRUTINY.

Because DOMA fails rational basis review, the Court can end its inquiry and affirm. It also should affirm on the alternate basis that DOMA effects a classification requiring, and failing, heightened scrutiny. DOMA (1) discriminates on the basis of sexual orientation, (2) disparately burdens Plaintiffs' fundamental

interests in the integrity of their family relationships, and (3) represents an unprecedented intrusion by the federal government into matters of purely state concern.[26] Because DOMA cannot withstand even rational basis review, it necessarily fails heightened scrutiny.

A. DOMA Discriminates on the Basis of Sexual Orientation.

The Equal Protection guarantee "is essentially a direction that all persons similarly situated should be treated alike," *Cleburne*, 473 U.S. at 439, and when laws draw distinctions based on "some unpopular trait or affiliation…[that would] reflect any special likelihood of bias [against them] on the part of the ruling majority," *Mills v. Maine*, 118 F.3d 37, 47 (1st Cir. 1997) (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979)), the presumption of constitutional validity "gives way." *Cleburne*, 473 U.S. at 440. Because those characteristics "are so seldom relevant to the achievement of any legitimate state interest[,] laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.* at 440. "Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each

[26] Plaintiffs have not argued and the District Court did not hold that DOMA infringes the fundamental right to marry or discriminates on the basis of sex. BLAG's arguments on those theories, BLAG Br. at 26-33, are beside the point.

person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. at 216 n.14.

As set forth below, DOMA should be subjected to heightened review, as the Justice Department argues, Gov. Sup. Br. at 24-45, and as other courts increasingly recognize. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *In re Balas*, 449 B.R. 567 (C.D. Cal. Bankr. 2011); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 431-32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008).[27]

1. *Cook v. Gates* Does Not Control.

BLAG devotes only a footnote to the merits of applying heightened scrutiny, BLAG Br. at 26 n.7, relying instead on its argument that the issue is decided in this Circuit by *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008). It is not.

[27] BLAG points to other Circuits that have found that such discrimination does not trigger heightened scrutiny, but virtually all did so before *Lawrence* and in many cases before *Romer*. *See, e.g., Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("[I]f the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("[H]omosexual conduct is not a fundamental right.") (citing *Bowers v Hardwick*, 478 U.S. 186, 194 (1986)); *see also Lofton v. Sec'y of Dep't of Children and & Family Services*, 358 F.3d 804, 818 n.16 (11th Cir. 2004) (en banc) (citing cases from several Circuits all decided in 1997 or earlier). In *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006), as in *Cook*, discussed *infra*, the court was neither presented with nor considered the factors relevant to heightened review.

The *Cook* court stated only that the Supreme Court's rulings in *Romer* and *Lawrence* did not "mandate" heightened review. 528 F.3d at 61. It was not asked to and did not consider the factors that identify suspect classifications. Nor did *Cook* bar such an inquiry going forward or on a different record. Whether a classification merits heightened scrutiny is a fact-intensive inquiry. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (providing over thirty pages of analysis to show heightened scrutiny is warranted); *Kerrigan*, 957 A.2d at 431-61 (similar; more than seven pages of analysis).

The *Cook* Court did not consider whether sexual orientation is a suspect or quasi-suspect classification. Rather, the Court was called upon to consider whether the District Court should have applied the more "robust and realistic rational basis review" that the *Cook* plaintiffs argued the Supreme Court applied in *Romer*. *See* Br. of Plaintiffs-Appellants, *Cook v. Rumsfeld*, Nos. 06-2313, 2381 (Nov. 14, 2006), at 31-35. The issue that BLAG claims *Cook* resolved was not even litigated – and where parties do not litigate an issue, a court's discussion of the issue in passing "does not constitute a precedent to be followed" in a different case on a different record. *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993); *cf. also Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 103 (1937) ("[G]eneral expressions [in a judicial opinion] are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may

be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.") (quotation marks omitted).[28]

Furthermore, the brief discussion in *Cook* on which BLAG relies is *dicta* not "essential to the result reached in the case." *Rossiter v. Potter*, 357 F.3d 26, 31 (1st Cir. 2004). The Court's *holding* was that the "Don't Ask, Don't Tell" policy was constitutional even though it *was* subject to heightened scrutiny for due process purposes. *See* 528 F.3d at 60. Whether or not heightened equal protection scrutiny applied as well, therefore, was irrelevant to the outcome.

Moreover, *Cook* limited its own reach. The Court stated that it would not read *Romer* and *Lawrence* to warrant heightened scrutiny "[a]bsent additional guidance from the Supreme Court." 528 F.3d at 56. The Supreme Court has since provided that guidance. *Cook* had read *Lawrence* as protecting a narrow right to engage in "private, consensual sexual intimacy," rather than a broader protection against laws that discriminate based on sexual orientation. *Id.* at 52. The Supreme Court has since rejected this reading, emphasizing that its "decisions have declined to distinguish between status and conduct in this context." *Christian Legal Society of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010). That is, the Constitution offers protection to gay men and lesbians as such, not only to intimate activity.

[28] *Cook* plaintiff Pietrangelo, *pro se*, called sexual orientation a suspect class in his brief, but did not argue the point.

2. All Factors Indicate Sexual Orientation Discrimination Requires Heightened Scrutiny.

A classification triggers heightened scrutiny where (1) a group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to contribute to society. *See Cleburne*, 473 U.S. at 440-41; *United States v. Virginia*¸ 518 U.S. 515, 531-32 (1996). While these two factors are essential, courts also have sometimes considered (3) the group's minority status and/or relative lack of political power, *see Plyler*, 457 U.S. at 216 n.14; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("minority *or* politically powerless") (emphasis added), and (4) whether group members have "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

The Justice Department offers compelling arguments that discrimination based on sexual orientation requires heightened scrutiny. BLAG offers no substantial argument to the contrary. Plaintiffs join the government's arguments and add the following points.

a) *The Two Essential Factors (Historical Discrimination and Contribution to Society) are Easily Satisfied.*

There can be no dispute that gay men and lesbians have been subject to discrimination historically. *Lawrence,* 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); JA852-53

(Nos. 23-25); *see also* JA1098-1135 (¶¶4-79). There also can be no legitimate dispute that they participate fully in society. Plaintiffs and millions of other gay men and lesbians are woven into the fabric of everyday life in America, leading productive lives as spouses, parents, family members, friends, neighbors, coworkers, and citizens. JA854-55 (Nos. 28-32); JA1308-17 (¶¶7, 13-16); JA958, 969-74 (¶¶27-39). For these reasons alone, laws that discriminate on the basis of sexual orientation merit heightened scrutiny.

b) *Gay Men And Lesbians Are a Minority and Face Significant Obstacles to Winning Political Protections Democratically*.

As noted, the Supreme Court has sometimes also considered whether a group is a minority or lacks political power.[29] That factor is satisfied here for both reasons.

First, gay men and lesbians are indisputably a minority. JA856 **(**No. 39); *see* JA1308, 1311-12, 1316-17, 1326-27 (¶¶7, 16, 34-35). Second, gay men and lesbians remain politically vulnerable to the majoritarian political process. Plaintiffs' unrebutted affidavit of Gary Segura, Ph.D., details the modest political successes gay men and lesbians have won and how they still lack the political

[29] The Supreme Court has applied heightened scrutiny absent this factor. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (all racial classifications are inherently suspect even though many racial groups exercise substantial political power); *Frontiero*, 411 U.S. at 686 n.17 (heightened protection for sex-based classifications despite acknowledgment that "women do not constitute a small and powerless minority").

power to bring an end to the discrimination against them. As he explains, one must consider not only political successes, but also the frequency with which legislative gains have been repealed, turned back by voters, or forgone altogether, as well as the political strength of the opposition. JA1051-76.[30] For example, while hate crime legislation has been enacted, and "Don't Ask, Don't Tell" has recently been repealed, basic civil rights for gay men and lesbians have proved impossible to achieve despite decades of effort and despite popular support: there is no national law prohibiting discrimination in employment, housing, or public accommodation on the basis of sexual orientation. *Id.* Gay men and lesbians remain underrepresented in elected office. And legislative and judicial decisions to expand civil rights for gay men and lesbians are disproportionately reversed by ballot initiatives, including recently in California and Maine. JA1057-63. Finally, anti-equality groups are powerful, numerous, and well-funded. JA1073.

DOMA itself is emblematic of the limited political power exercised by gay men and lesbians, JA at 1057, 1060 (¶¶ 17, 24). Even this litigation illustrates the

[30] Only one amicus, Concerned Women for America, addresses this issue. That brief catalogs political successes of the gay and lesbian community but fails to acknowledge the defeats or relative political power of gay men and lesbians or the opposition. The decision in *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d at 571, suffers from the same defects, failing to even acknowledge the vast evidence of political obstacles and setbacks, and finding political power based on any purported ability to "attract the attention of lawmakers," *id.*, sometimes, on some issues, in some places.

setbacks that typically accompany any gains. After the President and Attorney General of the United States concluded that DOMA was unconstitutional, powerful political interests still rushed to defend it.

In short, gay men and lesbians are ordinarily unable to win political protections through the democratic process, especially on the national level. The limited successes achieved so far do not show that, as BLAG puts it, "gays are far from politically powerless," any more than women's limited political gains obviated the need for heightened scrutiny of gender-based classifications in the 1970s. *See Frontiero*, 411 U.S. at 687-88 (acknowledging Civil Rights Act prohibiting employment discrimination based on sex, Equal Pay Act, and Congressional passage of Equal Rights Amendment).

c) *Sexual Orientation Is an Enduring and Defining Characteristic.*

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

scrutiny where it imposes a disability based on a characteristic that persons cannot, or should not be asked to, change.

Because "the protected right" recognized in *Lawrence* represents "an integral part of human freedom," *Lawrence*, 539 U.S. at 576-77, individual decisions by consenting adults concerning the intimacies of their physical relationships are entitled to constitutional protection, *see id.* at 578. Given (1) that the purpose of the immutability inquiry is to assess whether a person can reasonably change the characteristic to avoid discrimination, and (2) the acknowledged centrality of sexual orientation to a person's identity, it would be unjust to ask gay men and lesbians to choose between their identity and the civil rights already available to heterosexuals. *See, e.g.*, *Kerrigan*, 957 A.2d at 438 (this prong of inquiry satisfied where "it would be abhorrent for government to penalize a person for refusing to change" trait) (quotation marks omitted); *Varnum*¸ 763 N.W.2d at 893; *see also Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (because sexual orientation "is the basis for inclusion in a particular social group," alien's exclusion from work in home country based on his sexual orientation could provide basis for persecution claim).

Moreover, there is an increasingly broad scientific consensus that sexual orientation is, in fact, immutable. JA854, 1308, 1317-19 (¶¶17-20);[31] *see Kerrigan*, 957 A.2d at 436-37; *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing their sexual orientation.").

B. Plaintiffs' Fundamental Interest in Maintaining the Integrity of Their Existing Families and Marriages Demands Heightened Scrutiny.

Heightened scrutiny is also warranted on a separate, independent ground. Plaintiffs are (or were until widowed) legally married. DOMA burdens the integrity of those most intimate family relationships. First, by its sweeping reclassification of Plaintiffs as "single" for any and all federal purposes, DOMA erases their marriages under federal law. Second, by throwing Plaintiffs' marriages into a confusing legal status in which their marriages "count" for some purposes but not others, DOMA erases much of the meaning their marriages would

[31] Only one amicus addressed this point, and that brief is self-defeating. The National Association for Research & Therapy ("NARTH") concedes that sexual orientation is "deeply ingrained," and its own analysis of the small number of available studies shows that of the limited self-selected group who seek to change their sexual orientation, only a minority can do so, *id*. at 25, and even then, "there is a substantial therapeutic failure rate," and reversion is "fairly common." *Id.* at 31-32. No major mental health professional organization has sanctioned efforts to change sexual orientation and virtually all caution against it. JA1320.

otherwise have – in both public and private settings – and relegates them to second-class status.

DOMA should thus face heightened scrutiny for the additional reason that it burdens Plaintiffs' constitutionally protected interest in the integrity of their families. Classifications that disparately burden fundamental rights – such as family integrity – demand heightened scrutiny regardless of whether those disadvantaged constitute a class that would otherwise trigger heightened review. *See, e.g., Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (discrimination among veterans depending on whether they entered service from New York requires strict scrutiny due to effect on right to travel); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 672 (1966) (poll tax subject to strict scrutiny due to effect on right to vote).

The right to maintain family relationships free from undue government interference is a long-established and fundamental liberty interest. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (acknowledging "freedom of personal choice in matters of marriage and family life" (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974))); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *id*. at 658 (denying non-marital father an opportunity to resume custody on mother's death results in "dismemberment of his family"); *Lawrence*, 539 U.S. at 574 (confirming that "persons in a homosexual

relationship may [also] seek autonomy" for "personal decisions relating to marriage, procreation, … family relationships, child rearing, and education").

Indeed, even interests that fall short of "fundamental" inform the level of review when they are of great importance. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 126-27 (1996) (even though there is no fundamental right to appeal State judicial determinations, barriers to appeal in parental termination proceeding violated the Equal Protection Clause); *Plyler*, 457 U.S. at 219-21 (even though illegal aliens are not a suspect class and public education is not a fundamental right, importance of the interest in education warrants striking down measure restricting access to public school).

Plaintiffs' family relationships are burdened by the wholesale refusal to afford their marriages any legal recognition; they are left unable to enjoy many of the benefits of marriage that "constitute ordinary civic life in a free society" and are taken for granted by other married couples. *Romer*, 517 U.S. at 631. For example, DOMA has denied Plaintiffs access to a multitude of federal benefits, rights, and responsibilities, imposed additional financial costs, JA866, 913, 924, prevented spouses from staying home with children or retiring, JA867, 943, and relegated Plaintiffs to second-class status by denying them much of the public and private validation, social recognition, respect, and support that accompany civil marriage, JA867, 874, 880, 924. DOMA sweeps so broadly and indiscriminately

as to effect a change of their legal status, converting them from "married" to "single" for all federal purposes. Indeed, Section 3 even conscripts Plaintiffs into denying the existence of their own marriages through civil and criminal statutes that prohibit them from acknowledging those marriages in dealings with the federal government, such as on federal forms. JA879-80, 913, 921, 935. This enforced reclassification of Plaintiffs' closest and most intimate family relationships by the federal government interferes with Plaintiffs' relationships beyond the federal programs specifically at issue by signaling that their marriages lack full legal effect. JA873-74, 916, 924, 944, 951, 956-57, 1321-28. Heightened scrutiny is thus required.

C. DOMA's Intrusion Into the Realm of Marital Status Warrants Close Scrutiny.

A final reason for heightened scrutiny is that DOMA represents an unprecedented attempt to override state family status determinations, which lie at the very core of state sovereignty. *See* Part I.C.1, *supra*; *Elk Grove*, 542 U.S. at 12; *Ankenbrandt*, 504 U.S. at 703, 716.

By setting up for the first time a competing, national definition of marital status, DOMA marks a "federal intrusion into sensitive areas of state and local policymaking [that] imposes substantial federalism costs." *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504, 2511 (2009)

(quotation marks omitted).[32] Such an intrusion must be "closely examined to ensure that its encroachment … in this area is limited" to the necessary reach of a federal power. *Id.* at 2520 (Thomas, J., concurring and dissenting); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring) ("[T]he 'Equal Protection Clause, among its other roles, operates to maintain this principle of federalism …. [and] as an instrument of federalism.'"), *cited with approval for related point in Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985).

D. DOMA Fails Heightened Scrutiny.

For a classification to survive heightened scrutiny (whether "strict" or "intermediate"), it must be "tailored to serve a compelling state interest," or at least be "substantially related" to an "important governmental interest." *Cleburne*, 473 U.S. at 441. The Court must undertake a "searching analysis," and uphold the challenged classification only on the basis of an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. at 534, 536 (quotation marks

[32] This is not to say that Congress intrudes upon state authority whenever its statutes touch upon domestic relations, as federal law sometimes does. However, DOMA is the only time Congress has enacted an omnibus definition of marriage to disrespect entirely a marital status conferred by the sovereign states. *Contrast United States v. Lewko*, 269 F.3d 64, 69 (1st Cir. 2001) (challenge to convictions under the Child Support Recovery Act and the Deadbeat Parents Punishment Act; the federal law had "[n]either the purpose or effect of establishing a national, uniform 'family law,'" but instead merely "protect[ed] the integrity of state court judgments").

omitted); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Classifications based on "overbroad generalizations" will not be upheld. *Virginia*, 518 U.S. at 532-33. Finally, any objective proffered by the government must be contemporaneous, as it "must be genuine, not hypothesized or invented post hoc in response to litigation." *Id*. at 533.

DOMA does not even come close. As explained above, none of the justifications that Congress offered at the time it enacted DOMA satisfy even rational basis review. They are certainly not sufficient to withstand the "searching analysis" required for heightened scrutiny. Furthermore, the post-hoc justifications offered during litigation plainly have nothing to do with the "actual purpose" for which DOMA was enacted, and so are insufficient to uphold the statute. *See Virginia*, 518 U.S. at 535-36.

III. *BAKER v. NELSON* DOES NOT CONTROL THIS CASE.

Finally, BLAG argues that the Supreme Court's summary dismissal of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), resolved any equal protection issues raised by DOMA. BLAG Br. at 19-24. It did not.

In *Baker*, the Supreme Court summarily dismissed an appeal from a Minnesota Supreme Court decision holding that the state did not unconstitutionally discriminate on the basis of sex or violate the plaintiffs' due process and privacy rights by declining to license the marriage of a same-sex couple. *Baker v. Nelson*,

191 N.W.2d 185 (Minn. 1971). The question presented in *Baker* was different from the question presented here, and *Baker* has been superseded by subsequent doctrinal developments.[33]

A. *Baker* Presented Different Claims.

Summary rulings by the Supreme Court are narrowly construed. They (1) "have considerably less precedential value than a[] [full] opinion on the merits," *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); (2) extend no farther than 'the precise issues presented and necessarily decided by those actions,'" *id.* at 182 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)); and (3) "affirm the judgment but not necessarily the reasoning by which it was reached," *Mandel*, 432 U.S. at 176 (quotation marks omitted). Accordingly, they are "a rather slender reed on which to rest future decisions." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 203 n.21 (1996) (internal quotation marks omitted).

Baker rejected an argument that a state engages in impermissible *sex* discrimination (or violates privacy and due process rights) by declining to issue marriage licenses to same-sex couples. 191 N.W.2d at 186-87. The claims on which Appellees prevailed below are not "the[se] precise issues," *Illinois State*

[33] Moreover, since a party-appellant cannot argue a new issue on appeal, an intervenor certainly cannot. *See United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, [it] may not unveil it in the court of appeals.").

Board of Elections, 440 U.S. at 182 (quotation marks omitted); they are not even similar. Plaintiffs allege impermissible discrimination (1) by the *federal* government, (2) against couples that are *already married*, and (3) on the basis of *sexual orientation*. *Baker* presented none of these issues.[34] First, since Plaintiffs are *already married*, the challenged classification is different in kind from a classification denying marriage licenses in the first instance. *See* Part I.C, *supra*. Second, this case involves the federal government, not a state, so the cognizable governmental interests in regulating the marital relationship – as well as the relationship of those interests to the denial of marital recognition – are far more attenuated. *See* Parts I.C & II.C, *supra*. And third, *Baker* centered around a different legal theory (sex discrimination) than Plaintiffs rely upon here.

BLAG's argument to the contrary rests on a false equivalency – that since the Equal Protection guarantees of the Fifth and Fourteenth Amendments are coterminous, the constitutionality of DOMA rises and falls with the constitutionality of state laws that restrict marital eligibility to different-sex couples. But these are both logically and legally distinct questions.[35] *See Smelt v.*

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[34] BLAG's citation to the three state courts that have held *Baker* controlling *with respect to whether a state must grant same-sex couples marriage licenses*, therefore, is inapposite. *See* BLAG Br. at 22. And even state courts considering this latter question have recognized that *Baker* is no longer controlling. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006).

[35] Cases where same-sex couples sought and were denied federal marital benefits in the absence of a legally valid marriage, therefore, are not relevant. *See* BLAG

Cnty. of Orange, 374 F. Supp. 2d 861, 874 (C.D. Cal. 2005) (the "issue of allocating benefits is different from the issue of sanctifying a relationship presented in *Baker*'s jurisdictional statement"), *aff'd in part and vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006). It is no surprise, therefore, that other courts have held that *Baker* does not control or inform the outcome of equal protection challenges to DOMA. *See id.* at 873-74; *In re Kandu*, 315 B.R. 123, 137-38 (Bankr. W.D. Wash. 2004) (same).[36] This Court should follow suit.

B. *Baker* Is No Longer Good Law.

Further, *Baker* has been undermined by later cases. Any general presumption that the Supreme Court's resolution governs lower courts does not apply "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quotation marks omitted).[37] In the four decades since *Baker*, equal protection jurisprudence has developed dramatically, including the

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Br. at 22 (citing *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976); and *Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982)).

[36] Insofar as *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005), thought that *Baker* "addressed the same issues," it was wrongly decided for the reasons stated.

[37] BLAG's suggestion that *lower* courts cannot depart from summary precedents on the basis of subsequent doctrinal developments, *see* BLAG Br. at 23, is not accurate. *See Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993) ("The Supreme Court's summary disposition of an appeal to it is an adjudication on the merits that must be followed by lower courts, *subject, of course, to any later developments that alter or erode its authority*.") (emphasis added) (citing *Hicks*, 422 U.S. at 343-45).

recognition that sexual orientation discrimination can be impermissible – a dramatic change from the pre-*Lawrence* days when same-sex intimacy remained criminalized. *See Romer*, 517 U.S. at 632; *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring in the judgment). The Court should follow the law as it is today.

IV. THE DEMOCRATIC PROCESS HAS ALREADY SETTLED PLAINTIFFS' MARITAL STATUS.

BLAG's brief ends with a plea to let the "democratic process" decide Plaintiffs' marital status. BLAG Br. at 8, 58-60. This is not a real constitutional argument – every unconstitutional law was implemented by a democratic process at some point, and it "is emphatically the province and duty of the Judicial Department to say what the law is" and declare laws invalid when the Constitution so requires. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

But in this case, BLAG's argument is particularly inapt. By an overwhelming 77% supermajority of its state legislature, Massachusetts democratically rejected any effort to undo the rights of same-sex couples to join in marriage. *See* Uncorrected Proof of the Journal of the Senate, June 14, 2007, *available at* http://www.mass.gov/legis/journal/185/jsj061407.htm. What BLAG calls the "marriage debate," BLAG Br. at 59, was resolved for Plaintiffs, and for Massachusetts, years ago. BLAG's argument that the Court should let the "marriage debate continue[]," BLAG Br. at 59, is therefore disingenuous. DOMA

undoes the democratic process by taking what has always been a quintessentially state issue "tailored to local conditions," BLAG Br. at 8 – whether or not someone is married – and elevating it into a federal one because Congress did not like how the democratic process in the states might play out.

DOMA is not the first time that a majority – seeking to undo the advances of an unpopular minority group – has tried to selectively elevate democratic decisions to higher levels of government in order to dilute the disfavored minority's ability to influence the political process in its favor. The courts historically frown upon such obvious selective and outcome-driven manipulation of the political process to disadvantage unpopular groups. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *aff'd on other grounds*, *Romer v. Evans*, 517 U.S. 620 (1996). This Court should do the same.

BRIEF OF PLAINTIFF/CROSS-APPELLANT, DEAN HARA

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 5 U.S.C. § 8912 and 28 U.S.C. § 1331. Following the notice of appeal of the United States on October 12, 2010, JA1426, Dean Hara ("Hara") filed a timely cross appeal on October 13, 2010, JA1428. This Court has jurisdiction of the cross appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court erred in dismissing Hara's claim for enrollment in the Federal Employee Health Insurance Benefit ("FEHB") program on standing grounds.

STATEMENT OF THE CASE

Hara adopts the Statement of the Case above at pp. 3-5 and adds the following. Defendant OPM moved to dismiss Hara's FEHB claim in Count III (¶¶457-472) on the ground that the claim was not redressable in the District Court. *See* JA1381-1382. The court agreed, and judgment entered accordingly. JA1381-1384, 1424.

STATEMENT OF FACTS

As the surviving spouse of a retired federal employee receiving a federal pension (former Congressman Gerry Studds), Hara seeks to enroll for health insurance under the FEHB program. The parties agree that Hara's eligibility for FEHB required Hara to also be eligible for a survivor annuity under federal retirement laws. It is also undisputed that Hara applied for the requisite survivor annuity which was ultimately denied by OPM on two grounds: (1) the retiree's, Gerry Studds, asserted failure to elect the survivor annuity for his spouse, Hara; and (2) DOMA. JA884. Hara appealed that denial to the Merit Systems Protection Board ("MSPB"), which found, on December 17, 2008, that Hara was eligible in

all factual respects for the survivor annuity but that, nonetheless, DOMA barred receipt of that otherwise available survivor annuity. JA883-906.

Since the MSPB could not address the constitutionality of DOMA, Hara appealed to the Federal Circuit, which granted an unopposed motion to stay consideration of Hara's appeal because, among other reasons, this action has a broader impact upon both Hara and a range of programs administered by OPM. JA744.

Following the MSPB decision, in January 2009, Hara made his request to enroll in the FEHB program. JA744, 1361. He received an initial decision from OPM denying his request on two grounds: (1) his former spouse had not been enrolled in family coverage at the time of his death; and (2) he was not eligible for a survivor annuity. JA1361. Hara sought reconsideration challenging the validity of both asserted grounds. JA1363-1364. OPM responded with a final decision relying on a single ground, *i.e.*, "because Mr. Studds was not enrolled in a FEHBP family plan at the time of his death …." JA908-909.

ARGUMENT

Hara has asserted two claims in this action – one relating to the denial of the Social Security lump sum death benefit, and the other relating to the denial of enrollment in the FEHB program as the surviving spouse of a retired federal employee. The District Court ruled in Hara's favor on the former claim but

granted Defendant OPM's motion to dismiss the latter claim on redressability grounds. JA1424. That dismissal was error.

There is no dispute that the court properly had jurisdiction over claims seeking enrollment in the FEHB program, including those by Plaintiffs Gill and Letourneau. The only question is whether the court was divested of jurisdiction over Hara's FEHB claim because it required the determination of a particular factual predicate, *i.e.*, whether Hara is eligible for a survivor annuity.

It was not. Hara's *factual* eligibility for a survivor annuity was resolved in his favor at the MSPB and OPM did not appeal this issue to the Federal Circuit. JA883-906. The District Court agreed, stating "[b]ased on [its] reading of the [MSPB's] decision, Plaintiffs are correct that Mr. Hara will be rendered eligible for a survivor annuity if the question of DOMA's constitutionality is resolved in his favor." JA1384.[38]

[38] OPM abandoned the "lack of annuitant eligibility" defense upon Hara's request for reconsideration, which laid out why eligibility was fully and finally adjudicated. *See* JA1363-1364 (Hara's letter seeking reconsideration); *compare* JA1361 (OPM's initial decision) *with* JA908-909 (OPM's final decision). Therefore, as a matter of law, OPM has removed this question from the litigation. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (a reviewing court must judge an agency's action "solely on the grounds invoked by the agency"); *see FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972) (court must look to agency's "opinion, not to the arguments of its counsel, for the underpinnings of its order"); *Kurzon v. U.S. Postal Serv.*, 539 F.2d 788, 792-93 (1st Cir. 1976) (applying *Chenery* and *Sperry & Hutchinson Co.*).

As a result, there is nothing within the exclusive jurisdiction of the Federal Circuit that bars the District Court from fully resolving Hara's FEHB claim and granting him effective relief. *Cf. Fornaro v. James*, 416 F.3d 63, 68-69 (D.C. Cir. 2005) (Roberts, J.) (noting the distinction between questions within the scope of a mandated, exclusive administrative process – and thus barred in the District Court – and procedural and constitutional questions that would not be precluded in the District Court).

Nonetheless, the District Court reasoned that the Federal Circuit must be allowed the exclusive purview of the question of the constitutionality of DOMA within the context of Hara's FEHB claim. JA1384. However, there is nothing that compels that result. Indeed, the Federal Circuit stayed Hara's appeal with the understanding that this litigation would decide the constitutionality of DOMA in a broader context but also as to Hara in particular. And, once resolved, that determination would be binding as between Hara and OPM and carry with it a resolution of Hara's survivor annuity claim – all without invading any matters properly within the exclusive jurisdiction of the Federal Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed with respect to Appellees' claims, and the District Court's dismissal of Hara's FEHB claim should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 16,467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

On October 27, 2011, I filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit, using the appellate CM/ECF system, the foregoing Brief of Plaintiffs-Appellees Nancy Gill et al. and Plaintiff-Appellee/Cross-Appellant Dean Hara. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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