No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DOVID Z. SCHWARTZ AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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INTEREST OF *AMICUS CURIAE*

This brief is submitted to the Court to present new information not raised by the parties related to an additional legitimate interest of the government rationally related to the enactment of the Defense of Marriage Act, and new information that provides an important interest of the government in upholding the Defense of Marriage Act. As an officer of the Court, the author of this brief is troubled by what may appear to be a less-than-robust development of the record and argument in this case, and the neglect of compelling bases of support for this law.[1]

This brief is submitted with consent of the parties.

ARGUMENT

I. DOMA WITHSTANDS BOTH RATIONAL BASIS AND INTERMEDIATE SCRUTINY REVIEW

This matter comes to the Court on review of the decision of the Second Circuit Court of Appeals, that Respondent Windsor was improperly denied a spousal deduction for federal estate taxes under 26 U.S.C. § 2056(A) due to the enforcement of the Section 3 of the Defense of Marriage Act 8 ("DOMA"), 1 U.S.C. § 7, that defined marriage, for Federal purposes, as the union of a man and a woman. The text of § 3 is as follows:

---

[1] No counsel for a party authored this brief in whole or in part. No counsel or a party made any monetary contribution intended to fund the preparation or submission of the brief. Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court.

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

1 U.S.C. § 7. As a part of its analysis, the Court of Appeals found that Section 3 of DOMA is subject to intermediate scrutiny, ruling that homosexuals as a group qualify as a quasi-suspect class.

The Court's charter to defend the liberty of its citizens does not empower it to act as the final arbiter of existential truth. As the Court observed in *Lawrence v. Texas*, 539 U.S. 558 (2003) at 588, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Nevertheless, with the Federal definition of marriage, this Court is not asked simply to decline to endorse a certain worldview that represents the traditional view of marriage. Striking down the Defense of Marriage Act will actively affirm and elevate another, competing value system in its place.

This brief is submitted to call attention to the Court additional information not raised by the parties. The decision of the Court of Appeals should be reversed based on the Defense of Marriage Act's rational relationship of its limitation of marriage to a man and a woman to the legitimate government interest of embodying the moral standard that defines the human species, and the important state

interest of preserving the health and safety of the American people.

I respectfully submit that the laws of the majority voters in the majority of states that define marriage as a man and a woman are undergirded by the foundation of the Abrahamic religions, and can never be legitimately characterized as untenable bias. Furthermore, the health and well-being of the U.S. population is intimately connected to its intellectual and emotional integrity measured in part by its adherence to certain baseline of sexual conduct.

A. DOMA Section Three Is Rationally Related To The Legitimate Government Interest Of Upholding A Sound Public Policy Based On The Widely-Held Morality Of Its Citizens

This is not a mere appeal to history or tradition for its own sake, or a preference for continuity in the face of an uncertain future. Rather the moral laws recorded in the Torah are the headwaters from which flow a deep and abiding faith for countless millions of Americans. This knowledge may have taken on a variety of expressions based on the particular circumstances of the various peoples who adopted it. But the central moral values of the Torah form a vast uniting understanding of the true purpose and mission of mankind, and it continues to be an animating force to a large number of the body of the nation today.

No other institution greater embodies the idea of purpose, destiny and the future of the nation than marriage. Thus the Court's responsibility to act as stewards of this nation, upholding the public policy enacted by Congress is monumental.

I urge the Court to look outside the framework of the constitutional analysis as a closed system, and see the context of marriage in society. The definition of marriage currently held by major world religions with vast representation in the United States is based on Torah law which holds the conduct of homosexual relations to be antithetical to the well-being of individuals and society.

B. DOMA Section Three Is Tailored To Uphold The Public Policy Rooted In Strong Foundations Of The Torah That Traditional Marriage Protects The Health And Well-Being Of The Country

Many people see a moral responsibility to stand up, protect and vindicate the rights of any group of people who have been marginalized by society.

The compassion displayed by advocates for gay men and lesbians is commendable. But the position of supporters of traditional marriage have often been rejected as unenlightened bigotry. To supplement the record, I submit that the bases of the conception of traditional marriage, rooted in the Torah, reflect the ideal form of human relationships, and the promotion of that ideal is in keeping with the natural strengths and potentials of the human being. Section Three of DOMA, then, is precisely tailored to meet the important government interest of preserving the intellectual, emotional and physical health of the American people.

1. The Sources Of The Public Policy Of Traditional Marriage In The Torah

The human being is composed of two conflicting natures. Each person has a physical body that drives

him or her to seek satisfaction of material needs. In this respect, the human being is similar to the animals. A human being also has a spiritual component, known as the soul, which allows her or him to rationally examine and understand the depths of the world. See Rabbi Moses Chaim Luzzato (Ramchal), *Derech Hashem* (*"The Way of G-d"*), Rabbi Aryeh Kaplan, trans., Part I, chapter 3, para. 2. (Feldheim Publishers)

> When an individual is born, he is almost completely physical, with the mind having only a very small influence. As he matures, his mind continues to gain influence, depending on the individual's nature. However, the physical does not automatically relinquish its influence and stop inclining the individual toward its way. The only means by which one can overcome the physical is by growing in wisdom, becoming versed in it and living by it. *Derech Hashem*, Part I, chapter 4, para. 2.

Every person has been created with the challenge to overcome the compulsion of the physical nature and conform his or her behavior to the spiritual standards by which the human race is judged. Implicit in the ethos of the Torah is the conviction that each and every person is created with a unique mission, purpose and challenges to face in this world.

There is a universal set of principles that define the nature of a human being. These laws outline the ideal conditions to develop the upper reaches of human potential, as well as the baseline standards by which people's lives are judged. These laws explain a code of conduct that preserves the intellectual and emotional fitness of human beings, just as

anatomy and physiology define the physical blueprint of the entire human race.

The Seven Laws of the Children of Noah are a distinct body of legislation apart from the 613 commandments that are incumbent on the Jewish people. To that extent, the Torah is distinguished from other religious systems in that it does not expect the gentile world to become Jews. G-d Almighty taught these laws to the first human beings, and again instructed the prophet Noah who set out to rebuild the world after the Great Flood. The patriarchs of the Jewish people, Abraham, Isaac and Jacob attended the ancient academies of learning in the land of Canaan, and were personally taught this knowledge by Noah, Noah's son, Shem, and Shem's great-grandson Eyver (the progenitor of the "Hebrew" people). During the Egyptian bondage, the tribe of Levi safeguarded this knowledge of the mysteries of the world. Moses received the authority over Torah law on behalf of the Jewish people from G-d Almighty, Who formed them as a nation at Mount Sinai. The Code known as the Seven Laws of the Children of Noah, which represent the bedrock of civilization, were included in the canon of Torah law given over to the safekeeping of the Jewish people.

While there might appear to be logically sound ideas for these principles, observance of its guidelines is premised on a person's desire to serve the Creator, through the authority of the Torah given to Moses. Included among these guidelines are prohibitions against murder, theft and cruelty to animals. See *Babylonian Talmud, Tractate Sanhedrin* trans. by Rabbi Michael Weiner p. 56a5, Schottenstein Edition Artscroll/Mesorah Publications, (Brooklyn 1994).

In the narration of the life of the first people, the Torah records the prohibition of certain intimate relationships for all mankind. "Therefore a man should leave his mother and father and cling to his wife, and become one flesh." Torah, *Braishis* (book of *Genesis*), translated by Rabbi Nosson Scherman, *The Chumash: The Stone Edition*, page 15, chapter 2, verse 24 (Mesorah Publications, Brooklyn 1994). The Talmud explains each phrase of this statement to refer to a class of prohibited unions. See *Babylonian Talmud, Tractate Sanhedrin*, page 58a3. The expression, "and cling," the Talmud explains, implies that a man should not lie with a man. Rabbi Shlomo ben Yitzchok, the medieval scholar whose explanations are universally accepted as definitive, published within the pages of Talmud itself, explains the connection, "and not with a man, for there's no clinging. On account of the fact that the one who is lying doesn't benefit, he doesn't become attached to him." *Id*. See also Rabbi Moshe ben Maimon (the Rambam, also known as Maimonides) in his codification of Torah law, *Mishneh Torah*, Sefer Shoftim (Book of Judges), "Chapter 9: Hilchos Melachim U'Milchomotehem (Laws of Kings and Their Wars)", Rabbi Eliyhau Touger, p. 180-183 trans., (Moznaim Publishers, New York 1987) halacha (law) 5.

From these brief words, the Torah reveals the essence of the human personality. The underlying logic tells us that only that relationships where intercourse can involve both parties benefiting from the same act forms a "clinging" between them. This is not the case with homosexual acts, which cannot be experienced as mutual benefit, but rather only the partners servicing each other through turn-taking.

Based upon the natural affinity for male-female unions to result in stable, devoted relationships, marriage is rationally related to the legitimate state interest of fostering stable relationships to ensure the continuity of society. Conversely, an important state interest (meriting the ability to withstand heightened scrutiny) arises from the avoidance or minimization of those things that result from unstable relationships, including the increase of venereal disease (see below), to protect the physical, emotional and intellectual well-being of the American people.

Discussing the obligations incumbent upon all mankind, the Talmud (*Babylonian Talmud, Tractate Chullin*, vol. II p. 92a4-92b trans., Rabbi Mendy Wachsman, Mesorah Publications (Brooklyn, 2003)) indicates that one of the few remaining merits of the gentile world is that they don't recognize same-sex marriage (called *kesuba l'zecharim*, a "marriage contract for males"), as well as they don't weigh out human meat in the marketplaces. Rabbi Shlomo ben Yitzchok (Rashi) explains the meaning of the text, that although people may be suspected of engaging in homosexual relations, and acquire men for themselves for this purpose, they don't conduct themselves with such reckless disregard of this prohibition to write them a marriage contract. *Id*.

2. This Court's Determination Of The National Policy For Marriage Will Define The Nation's Vision Of The Human Soul

The Court in *Loving v. Virginia*, 388 U.S. 1 (1967) struck down anti-miscegenation laws on the grounds of Due Process and Equal Protection. But it is a farce to compare this racially-based law invoking dubious

religious authority, to the natural and intrinsic differences between men and women reflected in the traditional marriage definition rooted in the Torah.

The essential differences between men and women make their marriage a union of opposite, a combination that allows startling novelty in the form of new life to emerge from their differing perspectives, this cannot be said of homosexual relationships.

"Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving*, 388 U.S. at 11. Laws that draw distinctions based on race are, for the most part, superficial, while the differences between men and women go far beyond external features.

This Court decided *Lawrence v. Texas* there is no legal basis in this country for the government to intrude with criminal penalties over two adults choosing how they wish to express their affection for each other. But the official recognition, by the apparatus of national recognition of same-sex marriages, is quite a different matter.

Justice O'Connor wrote in her concurrence to *Lawrence v. Texas*, 539 U.S. at 582, that moral disapproval of a group alone is never a legitimate state interest. But extolling one particular relationship, the monogamous union of a man and a woman, as the preferred ideal relationship, does more than simply foster disapproval of homosexuals. The positive message of traditional marriage also excludes countless other arrangements, most notably promiscuous relationships with third parties of either sex. It is a fallacious caricature to portray the proponents of

traditional marriage of being singularly focused on demonizing gay men and lesbians.

Gay men and lesbians claim that their desires identify who they really are; supporters of traditional marriage say there is a standard to which everyone needs to aspire. This court is not charged with adjudicating theology, but the consequences of the determination of this case can have very real practical effects on defining this country's vision of the human soul.

For instance, a report published in England recently commended the work of kindergarten programs that encouraged "gender free" environments. Boys were encouraged to act, speak and dress like girls, and vice versa. The putative goal of this type of program was to remove any social stigma for "transgender children," that is, a person who is "intrinsically" one sex but whose soul (for lack of a better term) was born in the body of the opposite sex. See "Primary Schools Praised for Labelling Four-Year-Olds 'Transgender'", Hannah Furness, *The Telegraph*, January 19, 2012, http://www.telegraph.co.uk/education/primaryeducation/9340632/Primary-schools-praised-for-labelling-four-year-olds-transgender.html.

The Court might also note the reports of children being encouraged by their parents to undertake "gender reassignment" (sex-change) surgery. A recent news item may demonstrate how the unqualified acceptance of homosexuality eerily transforms into a sort of mysticism defining the human soul. At the age of three, Thomas Lobel told his parents that he was a girl. In an effort to be supportive of the child's "true nature" the parents enrolled the boy in a battery of medications that would halt the onset of

puberty, making it easier for his body to adjust to gender-reassignment surgery. "The little boy who started a sex change aged eight because he (and his lesbian parents) knew he always wanted to be a girl," *The Daily Mail*, September 30, 2011, http://www.dailymail.co.uk/news/article-2043345/The-California-boy-11-undergoing-hormone-blocking-treatment.html#ixzz1Za9Z49LQ

I will leave to the Court to evaluate the prudence of the parents' choice to "support" their child in this way. But overturning the Defense of Marriage Act will not merely undermine the moral foundations of this country that are shared by millions of people of a diverse range of communities. The elevation of gay men and lesbians to protected class status, or the striking down of DOMA as being not rationally related to legitimate government interest, would act to uproot widely held common principles of morality, grounded in the foundations of the Torah, to establish a new theology in its place.

As discussed more fully below, the spread of disease and the proliferation of unstable relationships should not be encouraged by government recognition. The important government interest of protecting the intellectual, emotional and physical well-being of the nation warrants the exclusion of gay men and lesbians from the definition of marriage.

II. NEW YORK STATE DID NOT RECOGNIZE SAME-SEX MARRIAGES IN 2009, THE DATE DETERMINATIVE FOR PLAINTIFF'S STANDING

Windsor brought her claim based on an IRS assessment that she pay taxes on the transfer of assets that she would have been exempt from, under the marital

estate tax exemption, if the Federal Government recognized her marriage to Ms. Spyer. No one contends that New York was not the correct jurisdiction for the probate of Ms. Spyer's estate. However, Ms. Spyer died in 2009, two years before the state of New York recognized marriages between two women.

The Second Circuit Court of Appeals predicted that the New York Court of Appeals would have recognized out-of-state same-sex marriages in 2009, but this ruling warrants this Court's review. Ms. Windsor cites a consensus of Appellate Division rulings that superficially suggest that New York recognized out-of-state same-sex marriages in 2009 short of the actual legalization of same sex marriage in 2011. But the legislative history of same-sex marriage in New York is far from clear as to what an authoritative ruling on the out-of-state recognition would have been in 2009. Further, a closer examination of the policies underlying comity to out-of-state marriages is crucial to evaluating the merit and impact of Ms. Windsor's case on a national policy level as well.

In 2008, Governor David Paterson directed his counsel, David Nocenti, to issue an executive order to all state agencies, ordering them to revise all protocols and procedures to make the language gender-neutral, and to accordingly give legal force to all same-sex marriages performed out-of-state. He based this order on the Fourth Department Appellate Division ruling in *Martinez v. County of Monroe*, 2008 NY Slip Op 909 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), which held that an employer was required to extend spousal health care benefits to the same-sex married spouse that an employee had married in Canada. The stated rationale of the order was to avoid lawsuits.

As a procedural matter in this case, I will demonstrate, the Second Circuit Court of Appeals erred in predicting that the state of New York would have recognized the Canadian same-sex marriage of Ms. Windsor and Ms. Spyer in 2009. As BLAG points out in its brief to the Second Circuit, the New York State Court of Appeals had the issue of whether to extend recognition to out-of-state same sex marriages squarely before it in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009) but the court explicitly chose to issue a narrow ruling in that case, deferring to the legislature.

> Because we can decide the cases before us on narrower grounds, we find it unnecessary to reach defendants' argument that New York's common-law marriage recognition rule is a proper basis for the challenged recognition of out-of-state same-sex marriages. We end by repeating what we said in *Hernandez v. Robles*, expressing our hope that the Legislature will address this controversy; that it 'will listen and decide as wisely as it can; and that those unhappy with the result – as many undoubtedly will be – will respect it as people in a democratic state should respect choices democratically made.'" *Godfrey v. Spano*, 13 N.Y.3d 358 (2009).

This exercise of judicial restraint by the New York Court of Appeals in *Godfrey v. Spano* proved prescient, as in December of that same year, 2009, the New York Senate voted on a bill to legalize same-sex marriage in New York, and rejected it by a lopsided 38-24 margin.

A. The Marriage Recognition Rule of New York Furthers a Policy of Avoiding the Repercussions of Bastardizing Children

The public policy behind comity recognizing out-of-state marriages that would have been prohibited under New York law is to prevent branding the children of such out-of-state marriages with the social stigma and harsh legal consequences of having their births deemed illegitimate. This public policy is plainly stated in the case law. Discussing a case where a couple was married in a foreign state, the court held "the doctrine in favor of marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages." [citation and parentheses omitted]. *Elias W. Van Voorhis, Executors v. Sarah A. Brintnall, Ella Thiers*, 86 N.Y. 18, 1881 WL 12957 (N.Y.) (1881).

In addition, for many years New York law imposed criminal charges for violations of the state's marriage laws. Thus the court in the *Van Voorhis* case went further, explaining that absent an explicit grant of authority from the Legislature, the Court lacked authority to refuse enforcement to any out-of-state marriage, even if it could not be legally consummated in New York, because refusal to recognize a foreign marriage could result in "a man [being] punished by fine and imprisonment, or by the disgrace of himself and the woman he married—the bastardy of his children… the severer punishment is in the last alternative." *In re May's Estate, Greenberg v. May*, 280 A.D. 647, 117 N.Y.S.2d 345, (3rd Dept. 1952), *quoting Van Voorhis*.

The rationale of preventing bastardization of children is emphatically not present in any case involving same-sex marriages, even where the care of children is concerned. There is virtually none of the original criminal penalties, legal barriers and social stigma in New York today for a child being born from two parents who are not married to each other. Can someone today credibly claim that in any area, legally or socially, children who are not biologically related to their parents are somehow less "legitimate" than their neighbors?

Further, with respect to same-sex marriage in particular, it is a virtual certainty that any child raised by two men or two women could not possibly be the offspring of both same-sex spouses together at the time of their being married. The partners would unquestionably have required a third party to have contributed to the conception of any children they might raise. Therefore extending recognition to out-of-state same-sex marriages of same-sex partners does nothing to advance New York's public policy of protecting children from the brand of illegitimacy.

B. Public Policy of New York Disfavored Same-Sex Marriage in 2009

Whatever a sister state memorializes as a marriage is not automatically granted deference by New York state. The principle of comity is not a rule of law. *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926), *rehearing denied*, 243 NY 541, 154 N.E. 597 (1926). "Forum states need not give effect to foreign laws which are contrary to their public policy." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 27 N.Y.2d 220, 371 N.Y.S.2d 892, 334 N.E.2d 168 (1975); *Perutz v.*

Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 110 N.E.2d 6 (1953); *Dougherty v. Equitable Life Assurance Society of U.S.*, 266 N.Y. 71, 193 N.E. 897 (1934). In evaluating whether to enforce a foreign determination, on public policy grounds, the issue is whether the enforcement of the arrangement would represent an affront to the public policy of the forum. *Haag v. Barnes*, 9 N.Y.2d 554, 216 N.Y.S.2d 65 (1961).

As the Court of Appeals stated regarding comity in *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574 (1980)

> [I]n New York the determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict. In search of the public policy of the State, courts of course are not free to indulge in mere individual notions of expediency and fairness but must look to the law as expressed in statute and judicial decision and to the prevailing attitudes of the community. [citations omitted].

Generally, out-of-state marriages are given legal recognition in New York even if they could not be legally entered there, based on the principle that "a contract entered into in another State or country, if valid according to the law of that place, is valid everywhere." *Van Voorhis,* 86 N.Y at 24. Exceptions were made for marriages that the state had a public policy not to recognize, based on two considerations. Either the relationship itself is the subject of positive legislation (e.g., if the legislature had passed a law specifically denying recognition of the marriage in question), or 2) the relationship is contrary to the prohibitions of natural law. *Davidson v. Ream*, 97 Misc. 89, 161 N.Y.S. 73 (Sup.Ct. Saratoga County

1916), *affirmed*, 178 App. Div. 362, 164 NYS 1037, 178 AD 362 (1917).

While the exact boundaries of such "natural law" are not elucidated, it is definitional that natural law encompasses a body of moral legislation independent of the vagaries of shifting social mores. The term "natural law" was employed to invoke the collective understanding of Western civilization for millennia which often appeared to be self-evident. Natural law cannot be synonymous with social mores.

But the Appellate Division did go further on at least one occasion to identify some of the bases of recognizing "natural law," with reasoning upheld by the Court of Appeals. Evaluating a marriage formed in Rhode Island that could not be entered in New York law (a man and his niece) the Third Department determined that such a relationship "was not interdicted by Levitical or Talmudical law and is presently sanctioned by the Jewish faith and doctrine." On that basis, the Appellate Division found that this case did not come "within the inhibitions of natural law as it is recognized by countries adhering to the concepts of Christian culture and its antecedents." *In re: May's Estate, Greenberg v. May*, 280 A.D. 647, 117 N.Y.S.2d 345, 347 (1952).

If New York courts gave express recognition to Torah law, as codified in the Pentateuch and explained in the Talmud, as a system comporting with the demands of "natural law," then there is no way that such a "natural law" system could also include the recognition of same-sex marriages. The black-letter Torah law, and the received traditions of other religious communities that incorporate Torah law by reference, specifically prohibits homosexual conduct. Therefore a marriage of a homosexual couple could

not be considered within the inhibitions of natural law.

Recognition of the authority of moral values rooted in religious traditions is not foreign to New York law. To give an example, the New York State Constitution opens with a Preamble that states in no uncertain terms that the legislative intent is to conform with the will of G-d Almighty. "We the people of New York," the Preamble declares, "grateful to Almighty G-d for the gift of Liberty and in order to secure its blessings, do establish this Constitution."

This general statement invoking the will of G-d does not raise problems with the Establishment Clause because no single religious system has been granted authority to be the official "Church of the state of New York." The Preamble does, however, invoke a collective base, and counsel deference to those shared moral principles rooted in the authority of religious laws, values and understandings. While there may be a large number of New Yorkers today who might disagree with the idea that the purpose of the laws of the state is to conform to the will of G-d Almighty, New Yorkers are free to democratically elect legislators to amend the constitution and its Preamble. Until that time, this preamble may be read as a canon of construction directing interpretation of the laws of the state in the light of the values consistent with received religious traditions.

Conversely, in its seminal decision finding no constitutional right to same-sex marriage, the Court of Appeals in *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006) plainly stated that there was an extremely high evidentiary burden to challenge the presumptions underpinning the public policy that prohibits same-sex marriages. The level

of proof based on "social-science literature reporting studies of same-sex parents and their children" similar to the type submitted by Plaintiffs in that case, would need "to establish beyond a doubt that children fare equally well in same-sex and opposite-sex households." *Hernandez* at 360. Simply stated, the authority of religious values rooted in the Torah should be given no less weight than Ms. Windsor's expert testimony of psychologists, sociologists and academics.

More specifically to this case, however, the Court of Appeals stated in *Hernandez*, "Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only peoples of different sexes may marry each other, but that was the universal understanding when Articles 2 and 3 were adopted in 1909…New York's statutory law clearly limits marriage to opposite-sex couples." *Hernandez* at 357.

With *Hernandez* the Court of Appeals ruled that not only did the constitution not grant a right to same-sex marriage, but more importantly that the state was not barred, and, in fact, the current state of the law at that time was, to prohibit same-sex marriage in its borders altogether. Multiple times in the *Hernandez* opinion the Court stressed that what the Legislature had in fact done was to limit marriage to opposite-sex couples. *See Hernandez* at 359 ("We conclude… that there are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted."); at 361 ("Our conclusion that there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses") and 363 ("In *Lawrence*, by contrast, the court found the distinction

between homosexual sodomy and intimate relations generally to be essentially arbitrary. Here, there are, as we have explained, rational grounds for limiting the definition of marriage to opposite-sex couples.")

It is indisputable from the words, "New York's statutory law clearly limits marriage to opposite-sex couples" (*Hernandez*) *Id*. that the Court of Appeals fully contemplated the impact of their determination that the Legislature had rationally chosen to prohibit same-sex marriage from any recognition in New York.

To analogize, insisting that comity compels New York to accept a moral standard of her sister states that was not recognized under the New York state laws is tantamount to restating the rationale of The Fugitive Slave Act of 1850, 9 Stat. 462 that forced residents of free-state New York to collaborate and assist their slave-state neighbors to return slaves who had escaped back to slavery.

The Second Circuit Court of Appeals erred by predicting that the New York State Court of Appeals would have recognized foreign same-sex marriages in 2009. It is not a foregone conclusion that same-sex marriage was definitely not against the public policy of New York in 2009. Governor Paterson's abysmal public approval ratings forced him to chose to not seek re-election. Following the 2011 passage of same-sex marriage legislation, by a vote of 33-29, at least five Senators who had been elected on their promise to uphold traditional marriage, but changed their votes (Sen. James Alesi, Sen. Shirley Huntley, Sen. Carl Kruger, Sen. Roy McDonald and Sen. Steven Saland) lost their seats in the 2012 election.

As citizens of a diverse state with a bustling exchange of ideas, our social instincts might counsel us to employ a more gracious terminology, but whether expressed as such or not, the view of same-sex marriage to many, if not the majority, of New Yorkers may very well be called abhorrent. As explained above, the source of this belief is many times not simply ignorance or xenophobia, but on a principled perspective reflecting a moral code rooted in the Torah which holds that homosexual relations are destructive to its participants and destructive to society. As the Court of Appeals stated in *Hernandez*, "It is true that there has been serious injustice in the treatment of homosexuals… But the traditional definition of marriage is not merely a by-product of historical injustice… A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Hernandez* at 361.

BLAG's rational basis for DOMA of "steering naturally procreative relationships into stable commitments" does not paint the full picture of this government's responsibility to buttress traditional marriage by special recognition in the law. There is a government interest, legitimate, and also important, to defer to the moral judgment of its citizens, when those views are traceable not just to irrational bias and xenophobia, but the well-established and clearly defined code of conduct, technically known as the Seven Laws of the Children of Noah, incorporated and shared currently by at least three major world religions with multiple denominations in the United States.

III. THE COURT OF APPEALS IMPROPERLY APPLIED HEIGHTENED SCRUTINY TO THIS CASE

The Court of Appeals found that DOMA is subject to heightened scrutiny under the factors enumerated in *City of Cleburne v. Cleburne Living Center*, 473 US 432, 105 S.Ct. 3249. Alternatively, the Court noted that the District Court had employed a "more careful assessment" under a rational basis analysis that varies by context, following 833 F.Supp.2d at 402, citing the 1st Circuit 682 F.3d 10-11, but acknowledged that the Supreme Court "has not expressly sanctioned such modulation in the level of rational basis review… (Ct App. 2d Cir at 180). Therefore the Court of Appeals held that "no permutation of rational basis review is needed if heightened scrutiny is available… We conclude that the review of Section 3 of DOMA requires heightened scrutiny." Ct. App. 2d Cir at 181.

The factors that the Court of Appeals found were present in this case which triggered a heightened standard of review included: A) whether the class has been historically 'subjected to discrimination' [*Bowen v. Gilliard*, 483 US 587 (1987); B) whether the class has a defining characteristic that 'frequently bears [a] relation to ability to perform or contribute to society' [*Cleburne*, 473 US at 440-41]; C) whether the class exhibits 'obvious, immutable or distinguishing characteristics that define them as a discrete group' [*Bowen*, 483 US at 602]; and D) whether the class is 'a minority or politically powerless.' *Id.*

A. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Lacks A Coherent, Objectively Verifiable "Immutable" Feature

The Second District Court of Appeals erred in applying "heightened scrutiny" to this case because the class that Ms. Windsor purports to represent, is not only not "immutable," but it is virtually impossible to define in any objective fashion. According to Ms. Windsor's expert, Ms. Lisa M. Diamond, associate professor of developmental psychology, the single defining and uniting characteristic of gay men and lesbians as a group is "the capacity for same-sex attractions." (see *Supplemental Declaration of Lisa M. Diamond*, Sept. 12, 2011, para. 8) There appears to be no way to verify that a party is indeed a member of this class. Ms. Windsor has argued that colloquially, "everybody knows what it means to be gay" but this statement is conclusory.

Unlike sex, illegitimacy or national origin, which arose out of a historical fact completely outside a person's control, and forever unalterable, the status of "gay man" or "lesbian" is vague in that it includes whoever wishes to declare him or herself a member at whatever time. The only method of determining whether a person is in the class of gay men or lesbians, from an outside, objective perspective, aside from observing him or her engaging in homosexual conduct, would be based on a verbal or social declaration of the person him or herself, the "coming out" event much celebrated by journalists.

The unfairness inherent in the former "suspect classes" comes from the fact that a person has no or

little ability to remove the historical fact giving rise to the classification. The decision to "merely keep the status private" does not eliminate the category itself which stands on a historical fact. But identification as a gay man or lesbian effectively ceases, for public purposes, with one's discontinuing to identify that way.

B. The Court Of Appeals Erred In Categorizing Gay Men And Lesbians As A "Suspect Class" Warranting Heightened Scrutiny Because The Group Does Lack The Ability To Contribute A Certain Quality To Society

The Court of Appeals erred in dismissing out of hand the fact that there qualification for "suspect class" intermediate scrutiny requires that the class not have any feature that makes them unable to contribute to society. Viewed solely through the lens of material output, the Court noted that gay men and lesbians are routinely found amongst professionals such as doctors, attorneys and other professions.

But "contribution to society" does not only mean "the ability to earn a professional degree." Not only are there also moral standards for judging "contribution" to society, in general, but an analysis of the terms and meaning of marriage itself demands considering those standards. For the countless Americans in 41 states who view marriage as a declaration of a personal morality regarding the proper ordering of intimate relationships, any union of two men or two women is fundamentally incapable in contributing to society in terms of upholding the moral declaration that traditional marriage implicates.

IV. THE ACT OF ENTERING INTO AND MAINTAINING A MARRIAGE INVOLVES A PUBLIC DECLARATION WITH SPECIFIC MEANING AND IS THUS TRADITIONAL MARRIAGE IS PROTECTED AS FREE SPEECH UNDER THE FIRST AMENDMENT

There can be no question that marriage implicates free speech. Married couples enjoy far more than a basket of rights and benefits that accrue to them by virtue of state and Federal law. A married couple enjoys the unique status of sending a message to the world that they are now one unit.

The passion which is displayed on both sides of the controversy surrounding marriage turns on the role of marriage as speech, that is, what is the "message" of getting married. Gay men and lesbians insist that they're just the same as their heterosexual neighbors, and stress that marriage is really about two people in a loving relationship who make a life-long commitment to each other. Traditional marriage supporters say, "that's not all that marriage is about."

This positive declaration of marriage often entails an exclusion of its opposite. That is, marriage itself suggests a disavowal of cohabitation with other parties outside the marriage, the concept known as fidelity. The Hebrew term for marriage is "*kiddushin*", which signifies setting apart one's spouse from the rest of the world and implies designation for a special purpose. In English, as well, marriages are referred to as "sanctification," a term which also implies a "setting aside." The speech aspects of marriage are reinforced by the customs associated with it, including verbal declaration of oaths, a public reception memorializing the event, and the wearing of "wed-

ding rings" to broadcast unmistakably to the world: this person is married and therefore not available.

While people may often fail to uphold a commitment of fidelity with their spouses, the ideal of fidelity as a cornerstone of marriage is not eroded by the practical incidence of failures in individual cases. While they might not all be able to achieve it, many married people will tell you that they recognize that fidelity is the ideal form of marriage.

This assumption about the public declaration of fidelity through marriage between a man and a woman, cannot likewise be assumed with couples of two men or two women. Despite continuous attempts to portray the idea through news media, literature and entertainment that gay men and lesbians are no different whatsoever from married heterosexual couples, social science surveys have documented that the actual relationships between two men in a "committed, long-term relationship" very often do not include an expectation of fidelity. Nearly half of long-term relationships between two men admit to staying open, with lovers on the side. This has been documented by the rise of new HIV infections among homosexual men in steady relationships. "Many Gay Couples Negotiate Open Relationships," by Meredith May, *San Francisco Chronicle*, sfgate.com, July 16, 2010, reporting on a study by Colleen Hoff of The Center for Research on Gender & Sexuality at San Francisco State University. See also a study of the rise of HIV in male couples in Amsterdam, by Maria Xiridoua, Ronald Geskusa, John deWita, Roel Coutinhoa, and Mirjam Kretzschmard, in the journal AIDS, 2003 May 2;17(7):1029-38 The status of a "long-term commitment", these studies suggest, reflects more of a preference of a "partner of choice." Thus,

with the recognition of same-sex marriages, the very terms of the premises behind marriage, like fidelity, is altered as well.

Marriage, then, is an act of speech, a continual broadcasting to the world of the intimate and exclusive relationship between man and wife. Through marriage, which is a private contract given public force, a man and wife form an association that engages in expressive activity entitled to protection of the First Amendment. See *Boy Scouts of America v. Dale*, 530 US 640 (2000) at 654. The use of state power to force inclusion of same-sex couples alongside traditional married couples, under the single term of marriage, "violates the fundamental protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557 (1995).

Marriage is essentially an act of association, if not the paragon of association itself. The role of government to act as the dispensary of rights and benefits and the enforcer of obligations between married couples does not empower the state to fundamentally alter the terms of that association. Even in the public mind, the inability of government to impart moral legitimacy in its own right is vividly demonstrated by the fact that many gay men and lesbians (including the parties before this Court in *Hollingsworth v. Perry*) insist that even if they were granted all the attendant rights, benefits and responsibilities of marriage from the state through use of a different term, like "civil unions," they still lack the credibility that comes with the title "marriage." Precisely to the point, "marriage" is special because of the linguistic associations and meanings of the term, which owes

its potency as a cultural symbol precisely from its derivation and continuing link to the institutions of religious authority.

The most troubling aspect of this controversy as it relates to First Amendment protection is the fact that many states require all married couples, regardless of their chosen officiant, to obtain civil marriage licenses. This requirement essentially leaves no viable alternative to traditional married couples to avoid being associated with all other married couples. "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, it intends to express. Thus, freedom of association… plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) [quotation marks omitted].

This case differs from *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010). The *Christian Legal* case involved a University enforcing a policy of non-discrimination that applied to all student affairs and campus activity. A student club that wished to be recognized as an official University organization invoked their religious beliefs to request an exemption from the viewpoint-neutral school policy that requires all official clubs to be open to anyone who wishes to join. There, the Court held that the University was permitted to make official recognition contingent on an "all-comers" policy. But no one compelled the students to participate in the club, and the club may have convened without receiving official school recognition.

In this case, the states that enacted same-sex marriage compel association, by the very fact that the government regulates the process of marriage by requiring marriage licenses and other procedures.

Every married couple – and a marriage is an association par excellence – is being compelled by the order of the state to have the meaning of their association shaped by the presence of others who share vastly different views about the defining terms of an institution founded as a moral commitment.

In fact, Justice Kennedy notes in his concurrence, the student group in *Christian Legal* "would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views." *Christian Legal Society* at 3000. The use of same-sex marriage recognition as a means to stifle the views of traditional marriage couples is precisely what has taken place in at least three major U.S. cities recently. The Court may be aware of that a fast food restaurant chain, Chick-Fil-A, that is owned and operated by religious Christians, found itself the target of a coordinated effort by the leaders of three major U.S. cities to intimidate the company simply because it supported traditional marriage causes. The mayors of the cities of Boston and Chicago, and the City Council Speaker of New York, threatened to erect barriers to entry for Chik-Fil-A in their cities, branding the company out-of-step with their cities' tolerant and non-discriminatory public attitudes.

The message of marriage, as speech, according to many couples holding beliefs grounded in Torah values, turns precisely on excluding all other types of sexual conduct like homosexuality, that are antithetical to the established meaning of marriage. This Court has held that an association that seeks to transmit a set of values engages in expressive activity. *Boy Scouts of America v. Dale*, 530 U.S. 640,

650 (2000). In order to be entitled to First Amendment protection, an association must merely engage in expressive activity that could be impaired. *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000).

If marriage is an institution with an avowedly moral purpose or dimension, "transmitting a set of values," the Court may well be advised to review what has been, and currently is the substance of that morality. Civil marriage was created to provide a legal registry to memorialize the rights and obligations of its citizenry. But the institution of marriage predates possibly every secular state government in operation to this day, and the character of marriage has remained for the most part largely the same. The jurisdictions that enacted same-sex marriage, however, have done more than just include an additional class of people for benefits and protections. By changing the very terms of marriage, jurisdictions that enacted same-sex marriage changed the message of what it means to be married.

"Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. [T]he state… may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). [W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control. *Id.* at 575.

Whatever the ultimate level of scrutiny, a review under the Speech Clause requires that a challenged restriction on speech serve a compelling, or at least

an important, governmental object. *Hurley* at 577. Infringements on the right to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of America v. Dale*, 530 U.S. 640, 680 (2000) [*Justice Stevens dissenting*]. The real question that is raised by DOMA, and the decision of the Second Circuit Court of Appeals in this case, may in fact be to review that handful of states which enacted same-sex marriage, and ask, "is there a compelling state interest to infringe on the freedom of association of traditionally married couples in those states?" That is, does the inclusion of gay men and lesbians serve an important government interest to justify the burden on the free speech of married couples who wish to send the message that a monogamous relationship between a man and a woman is the ideal form of human relationships?

It has been speciously argued by proponents of same-sex marriage that the governing test is whether the granting of same-sex marriages will result in discouraging heterosexual marriages. But that simplification entirely misses the declarative, and hence, the free speech aspects of marriage. To that end, inclusion of gay men and lesbians under the single term "marriage" will very likely adversely impact the ability of traditionally married couples to use their own homes as a model for fostering belief in a certain ethos of personal morality. The dilution of the term "marriage," in fact, serves to recast the relationship as one simply focused on the personal love shared between the spouses.

As a case in point, BLAG has noted in the record the skyrocketing incidence of cohabitation without marriage in countries that enacted same-sex marriage. Simply put, with the voiding of the moral dimension of marriage in the public sphere, the institution becomes virtually meaningless. Thus the state action of imposing same-sex marriages to be equated with traditional marriages seriously undermines the ability of traditionally married couples to effectively broadcast their message about the ideal form of personal relationships.

As the Court stated in *Hurley*, "the law is free to promote all sorts of conduct in place of harmful behavior, [but] it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley* at 579.

At the very least, it was clearly in the intent of the New York State Legislature to contemplate the invalidation of all same-sex marriages performed in the state under the Marriage Equality Act of 2011 (Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)). The law contains an inseverability provision which holds that if any aspect of the law is held to be unconstitutional, then the entire law will become null and void. The Court is urged to overturn the Marriage Equality Act of New York, as a violation of the First Amendment Rights of traditionally married couples.

Therefore the Court is urged, in the interest of protecting the First Amendment freedom of speech and association of married couples in traditional

marriages, to strike down the marriage laws of the states that have enacted same-sex marriage.

V. OVERTURNING DOMA WOULD IMPLY AN OVERRULING OF ALL STATE STATUTES DEFINING MARRIAGE AS A MAN AND A WOMAN

Lastly, the Court of Appeals noted that "the Constitution delegated no authority of the United States on the subject of marriage and divorce." DOMA was therefore an unprecedented intrusion "into an area of traditional state regulation."

The Court of Appeals has proved too much by this limitation of Federal power. If this Court were to strike down DOMA as discrimination against the suspect class of same-sex couples, what prevents the very next logical inference that would cause all the state constitutional amendments and statutes defining marriage as the union of a man and woman to be invalidated as well? After all, if DOMA is found discriminatory, every single one of those state laws would appear to be discrimination per se.

Further, even if the Court were to overturn DOMA based on the "rational basis" review, the failure of this Court to find a legitimate government interest in the traditional definition of marriage would strongly imply a corresponding lack in state interest over that definition. Therefore invalidating DOMA, in the name of "limiting the Federal power over divorce and marriage" would result in perhaps the greatest upheavals of State authority over marriage in this nation's history.

CONCLUSION

Therefore, for the legitimate government interest of reflecting the moral policy of its citizens, grounded in the ethos of Torah law, and further, to uphold the important government interest of preserving the intellectual and emotional health and well being of the nation, and based on Petitioner's lack of standing due to New York's public policy of limiting marriage to opposite-sex couples in 2009, I respectfully request the Court to overturn the decision of the Second District Court of Appeals in this case. I further implore the Court to take plenary review of the state statutes that enacted same-sex marriage, as a violation of the First Amendment freedom of speech and association of traditionally-married couples, and strike down those state statutes as well.

Respectfully submitted,

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