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, *et al*.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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QUESTIONS PRESENTED

1. Whether Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

3. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws; promoting a return to the historic and original interpretation of the United States Constitution; and educating citizens and government officials about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has filed *amicus* briefs in cases concerning the right of counseling students to disapprove of homosexuality, public display of the Ten Commandments, the recitation of the Pledge of Allegiance and prayer, partial-birth abortion and others.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, this *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

views of the American people as a whole from the beginning of American history through the present, have held that homosexual conduct has always been and continues to be immoral and should not be protected or sanctioned by law.

SUMMARY OF ARGUMENT

The district court below struck down the portion of the Defense of Marriage Act (DOMA) that defined marriage, for federal laws and regulations, as the union of one man and one woman. Not only did the court dismiss several interests asserted by Congress when DOMA was passed in 1996, but the court ignored the plain text of the Fifth Amendment that it purported to apply. This Court exercises its judicial authority under the United States Constitution, and it should do so based on the text of the document from which that authority is derived. A court has a solemn duty to decide a constitutional case based upon the Constitution's text. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The court below erred in its application of the Fifth Amendment because there is simply no "equal protection" component in the due process clause of the Amendment. In fact, were the court to expand *Bolling v. Sharpe* to same-sex marriage, such a ruling would imply that the equal protection clause that is in the *Fourteenth* Amendment was unnecessary because that Amendment already had a due process clause. Such a result would violate basic rules of constitutional interpretation and should be rejected.

From Biblical law and other ancient law, through English and American common law and organic law, to recent times, homosexual conduct has been abhorred and opposed; the idea of a "marriage" based on such conduct never even entered the legal mind until very recent times. Congress's passage of the federal definition of marriage in DOMA had the force of that history behind it and several present-day interests that were asserted when DOMA was enacted in 1996, such as an interest in defending marriage and an interest in defending traditional notions of morality. DOMA easily bears a rational relationship to Congress's support of traditional marriage as it began to come under attack through the courts in 1993.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE DEFENSE OF MARRIAGE ACT SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

At issue in the instant appeal is the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. §7, which provides:

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

The district court below held in two companion cases that, by denying same-sex couples certain federal marriage-based benefits, § 3 of DOMA "violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution," *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010), and "induces the Commonwealth [of Massachusetts] to violate the equal protection rights of its citizens" as a condition to receiving federal funds, in violation of the Fourteenth Amendment's Equal Protection Clause, *Massachusetts v. United States Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234, 248 (D. Mass. 2010). The Second Circuit majority opinion upheld the district court's decision.

The district court and the Second Circuit below made two fundamental errors in its holdings that will be addressed herein: first, the court disregarded the words of the Constitution, the "supreme law of the land"; and second, the court improperly dismissed Congress's legitimate and reasonable reasons for enacting the Defense of Marriage Act and protecting the traditional definition of marriage, reasons that the Department of Justice fails to defend in this case.

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id*. The Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart

from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superflu-

ous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

Moreover, if the Constitution as written is not a fixed legal standard, then it is no constitution at all. By adhering to court-created tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood;

> if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The constitutional text should be the basis for the judicial analysis in this and all other cases.

II. THE DEFENSE OF MARRIAGE ACT DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT BECAUSE THE FIFTH AMENDMENT CONTAINS NO SUCH COMPONENT.

Plaintiffs' argument that § 3 of DOMA violates the "equal protection component" of the Fifth Amendment fails for the simple reason that there is no equal protection component in the words of the Fifth Amendment,[2] either in the Due Process Clause or

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[2] The Fifth Amendment provides, in its entirety, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

elsewhere. Besides proving a negative by examining the words of the Fifth Amendment, one need look no further for support than in the very Supreme Court case that purported to discover such an elusively penumbral component, *Bolling v. Sharpe*:

> The Fifth Amendment, which is applicable in the District of Columbia, *does not contain an equal protection clause*, as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (emphasis added). The *Bolling* Court recognized that not only did the Fifth Amendment lack an equal protection clause, but that such a clause is a different and "more explicit safeguard" than the phrase "due process of law," which *does* appear in the Fifth Amendment. The Framers of the Bill of Rights declined to include an equal protection clause, and the Framers of the Fourteenth Amendment expressly limited its Equal Protection Clause to the states. Nevertheless, the undeterred *Bolling* Court held:

> In view of our decision [in *Brown v. Board of Education*, 347 U.S. 483 (1954),] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be

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deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

Id. at 500. But what the Court found "unthinkable" is exactly what the language of the Fifth and Fourteenth Amendments says: the duty of the states to assure "equal protection of the laws" in the Fourteenth Amendment is simply not found in the Fifth Amendment's limitations upon the powers of the federal government. Indeed, to rule, as the Court did in *Bolling*—that "due process of law" contains within it an "equal protection" component—is to render the true equal protection clause of the Fourteenth Amendment superfluous. If equal protection is implied in the wording of the Fifth Amendment Due Process, then it would also be implied in the almost identical wording of the Fourteenth Amendment Clause, the only material difference being that the Fourteenth Amendment Due Process Clause expressly applies to the states. This contradicts the rule of constitutional interpretation that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that *no word was unnecessarily used, or needlessly added*." *Holmes*, 39 U.S. (14 Peters) at 570-71 (emphasis added). James Madison, in an essay in the *National Gazette* (January 19, 1792), declared that "Every word of [the Constitution] decides a question between power and liberty."

Why, then, did the *Bolling* Court read equal protection into the Fifth Amendment? The answer is obvious: the Court was caught in a constitutional

quandry. The plain language of the Fifth and Fourteenth Amendments applies the equal protection requirement to the states but not to the federal government. On the same day the Court had just held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the Fourteenth Amendment prohibited the states from segregating their public schools. It would be, in the Court's words, "unthinkable" to require the states to desegregate their schools but allow the federal government to maintain segregated schools in the District of Columbia. Such a result would have been roundly condemned as the height of hypocrisy and would have generated all sorts of opposition and resistance. But the "unthinkable" is in fact what the Constitution says. Perhaps the Framers of the Fourteenth Amendment should have applied the Equal Protection Clause to the federal government as well as the states. Perhaps the Fifth Amendment should have been or should now be amended to include an equal protection clause. But Article V of the Constitution commits the amendment process to Congress and the states, not to the judiciary.

Arguably, the Court had no alternative at that explosive time but to create this constitutional fiction. But the solution is not to expand that constitutional fiction to cover other situations, but rather to amend the Constitution to apply an equal protection clause to the federal government.

But instead, the Second Circuit has gone to the other extreme. The Second Circuit says the nonexistent equal protection clause of the Fifth Amendment requires the federal government to recognize same-sex marriages, even though the Supreme Court has never said the actual Equal Protection Clause of

the Fourteenth Amendment requires that the states recognize same-sex marriages. How can it be, that the non-existent equal protection clause of the Fifth Amendment is stronger than the actual Equal Protection Clause of the Fourteenth? This anomaly demonstrates the danger and folly of allowing the federal judiciary to depart from the plain language of the Constitution and the intent of its Framers, and to wander aimlessly in the trackless fields of their own imaginations.

To put it another way, let the district court speak for itself: "A basic tenet of statutory construction teaches that 'where the plain language of a statute is clear, it governs.' Under the circumstances presented here, this basic tenet readily resolves the issue of interpretation before this court." *Gill*, 699 F. Supp. 2d at 385 (citation omitted). The district court below made this statement in the context of applying a statute regarding the Federal Employee Health Benefits program, 5 U.S.C. § 8901(5), but it should have heeded this advice in interpreting the Fifth Amendment, too: the plain language of the Fifth Amendment clearly does not contain an equal protection clause and no judicial opinion of any court can alter that. DOMA cannot violate a provision that does not appear in the Constitution, the "supreme Law of the Land."

Reading the majority opinion of the Second Circuit by itself, one would gain no indication that the Second Circuit majority was even aware that the Fifth Amendment contains no equal protection clause. The opinion uses such phrases as "violated the equal protection" (176), "equal protection review" (178), "equal protection challenge" (180), and "The district court ruled that DOMA violated the Equal

Protection Clause for want of a rational basis" (180). But nowhere does the majority mention that the Fifth Amendment contains no equal protection clause, nor does the majority make any mention of *Bolling* or the extraordinary circumstances that dictated the *Bolling* decision.

The opinion of Judge Straub, concurring in part and dissenting in part, at least explains the case law by which the Court has read equal protection into the Fifth Amendment: *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Able v. United States*, 155 F.3d 628 (2nd Cir. 1998), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Judge Straub contended that *Adarand* requires the same analysis of equal protection under the Fifth Amendment as under the Fourteenth (193), although arguably that holding in *Adarand* is limited to race-based classifications and any language applying it to other classifications is only dicta. But even Judge Straub ignored the plain language of *Bolling*:

> . . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

Bolling at 499.

Amicus does not argue that *Bolling* should be overturned. Rather, *Amicus* argues that the Court should recognize that *Bolling* arose in a very difficult and volitile situation, being decided the same day as *Brown*. The Court should recognize that the Fifth Amendment equal protection doctrine rests on very

shaky ground, and the Court should therefore be very hesitant about expanding it to other areas. The role of the Court is to *expound* the Constitution, not to *expand* the Constitution.

III. THE DEFENSE OF MARRIAGE ACT IS RATIONALLY SUPPORTED BY MANY LEGITIMATE REASONS AND IMPORTANT CONSIDERATIONS, INCLUDING THE "LAW OF NATURE AND OF NATURE'S GOD" AND THOSE INTERESTS ADVANCED BY CONGRESS WHEN IT PASSED THE STATUTE.

The district court below held that there is no "government interest" or rational justification for defining marriage under federal laws and regulations as "a legal union between one man and one woman as husband and wife." The Second Circuit majority held that the case must receive "intermediate scrutiny" and that DOMA is not substantially related to an important government interest. *Amicus* will not address which standard applies, others will address this issue, and because *Amicus* believes marriage is an institution at least as old and fundamental as the state and therefore not subject to such court-created tests. However, regardless of which standard is used, both courts erred as a matter of nature, law, and history.

A. "All men are created equal" and as either male or female.

An analysis of "equal protection" should at least start with the foundation of the American concept of created equality. The "birth certificate" of the United States and the first document in our organic law asserts the self-evident truth that "all men are created equal, [and] that they are endowed by their

Creator with certain unalienable rights." *Declaration of Independence* (1776). These rights were recognized by the Declaration, but they did not originate with it: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted*, February 23, 1775 (emphasis added). Such rights are natural, unalienable, and are defined by God:

> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.

1 William Blackstone, *Commentaries on the Laws of England* 54 (1765).

Although we are "created equal," we are not created all the same, *i.e.*, with the same talents, skills, strength, beauty, personalities, wealth, etc. Rather, this equality speaks to our standing before the law as equal bearers of rights. But He Who created us with such rights defines the limits of those rights. We are told in Genesis that "God created man in His own image, in the image of God He created him; male and female He created them. . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." Genesis 1:27, 2:24 (King James Version).

The law of the Old Testament enforced this distinction between the sexes by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." Leviticus 20:13 (KJV). At creation, therefore, the sexes were established as "male and female" and *"[f]or this reason*," marriage was defined at its inception as a union between a man and his wife. Genesis 2:18-25. Only the male-female marriage is inherent in the same created order that gives us our legal equality before the law, as recognized in the Declaration of Independence. The Bible has been considered the authoritative source of morality and worldview for Western civilizations for nearly two millennia (three millennia for the Tanakh or Old Testament), including the time period in which the institutions of American law and government were established.

B. Homosexual conduct was, at least until recently, strongly disapproved in most cultures and in Anglo-American law.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).[3] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX.9.31). In the Middle Ages, St. Thomas

[3] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

Aquinas, a preeminent disciple of natural-law theory, called homosexuality "contrary to right reason" and "contrary to the natural order." St. Thomas Aquinas, 4 *Summa Theologica, Secunda Secundae*, Quest. 154, Art. 11 (Benziger Bros. Press 1947).

The English common law maintained similar provisions. Sodomy was codified by statute as a serious crime early in England. "The earliest English secular legislation on the subject dates from 1533, when Parliament under Henry VIII classified buggery (by now a euphemism for same-sex activity, bestiality, and anal intercourse) as a felony. Penalties included death, losses of goods, and loss of lands." Vern L. Bullough, *Homosexuality: A History* 34 (New American Library 1979). Sir Edward Coke, the "Dean of English Law," called homosexuality "a detestable, and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." "At common law 'sodomy' and the phrase 'infamous crime against nature' were often used interchangeably." Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 Creighton L. Rev. 67 (1998).

Sir William Blackstone—of whose *Commentaries on the Laws of England* (1765) Justice James Iredell said in 1799 that "[F]or near 30 years [it] has been the manual of almost every student of law in the United States"[4]—wrote in his *Commentaries* concerning homosexual conduct:

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[4] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor*, April 11, 1799 (Philadelphia) 3; *Docu-*

> IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.
>
> I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei*." ["Where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future

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mentary History of the Supreme Court of the United States, 1789-1800, at 347 (Maeva Marcus, ed., Columbus University Press 1990).

> be guilty of it, may undergo the most severe punishments."] Which leads me to add a word concerning its punishment.

4 Blackstone, *Commentaries on the Laws of England* Ch. 4. Blackstone next explained the punishment under the common law for this "crime not fit to be named":

> THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment. . . .

Such consistent and universal condemnation of sodomy was carried over into American law as attested by Perkins and Boyce, who stated in their hornbook *Criminal Law*, "Homosexual conduct was made a felony by an English statute so early that it was a common-law offense in this Country, and statutes expressly making it a felony were widely adopted." Rollin M. Perkins & Ronald N. Boyce, *Criminal La*w 465 (3d ed. 1982).

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. *Id*. at 192-3. Although the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558,

570 (2003), claimed that many statutes specifically aimed at homosexual conduct are of relatively recent origin, the more general statutes and the common law prohibitions have been in effect since time immemorial.

C. Same-sex "marriage" was inconceivable in Anglo-American common law.

Defenders of marriage who seek to review ancient and common-law texts for support of their position do not easily find written sources stating "two men or two women cannot marry" because it was, to those early writers, as unnecessary and obvious as saying that men cannot bear children. Rather, the common law assumes the only definition of marriage is a union between one man and one woman. In Blackstone's *Commentaries*, Chapter 15 of Volume I ("Of the Rights of Persons") is simply titled "Of Husband and Wife," in which is discussed the "second private relations of persons . . . that of marriage, which includes the reciprocal duties of *husband and wife*. . . ." 1 *Commentaries* 421 (emphasis added). Blackstone notes that some legal disabilities prohibit a marriage as "void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all." *Id*. at 423-4. The first of these legal disabilities is "having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: *polygamy being condemned both by the law of the new testament, and the policy of all prudent states*." *Id*. at 424 (emphasis added). If the aforementioned prohibition on polygamous marriages was rooted in the New Testament of the Bible and in international law, then especially considering the

strong condemnation of homosexual activity, *a fortiori*, a "marriage" between two men or two women would be void *ab initio* at common law.

Almost 60 years after the publication of Blackstone's *Commentaries*, Noah Webster's *American Dictionary of the English Language* (1828) defined marriage as follows:

> MAR'RIAGE, n. [L. mas, maris.] The act of uniting a man and woman for life; wedlock; the *legal union of a man and woman for life*. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. . . .

Noah Webster, American Dictionary of the English Language (Foundation for American Christian Educ. 2002) (1828).[5] Marriage at common law was only defined as between one man and one woman because there was and is no other definition of marriage.

D. Congress offered legitimate reasons when it enacted the Defense of Marriage Act.

The common law and its Biblical roots, Anglo-American criminal law, and, more recently, the passage of 41 state "defense of marriage" acts (either as statutes or as state constitutional amendments

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[5] Noah Webster was a close associate of many of the Convention delegates, frequently dined with some of them in the evenings after sessions of the Convention, and at their request wrote an essay urging ratification of the Constitution. Harlow Giles Unger, *Noah Webster: The Life and Times of an American Patriot* (John Wiley & Sons 1998). Thus we can fairly conclude that his concept of marriage would have been widely shared by the framers.

ratified overwhelmingly by the voters of the various states),[6] clearly demonstrate that homosexual acts meet with widespread disapproval in our laws and in our social values. At least until very recently, disapproval of homosexual acts was almost universal; at the very least it is still widespread.

When the House of Representatives Committee on the Judiciary recommended the passage of DOMA in 1996, the report asserted four governmental interests advanced by the legislation:

> (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.

H. R. Rep. No. 104-664 at 12 (1996). The appellants in this case abandoned all of these interests, apparently because of the Administration's political stance, even though the Department of Justice has a duty to defend laws enacted by the people. It is therefore left to other parties to do the job the Department of Justice will not do. *Amicus* will address below the first two interests asserted by Congress.

1. Congress and the federal government have an interest in defending and nurturing the institution of marriage.

In House Report No. 104-664, Congress begins its defense of traditional marriage with this quote from the United States Supreme Court:

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[6] *See* Br. U.S. Dept. of Health & Human Servs. at 35 n.19.

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (emphasis added) (quoted in H. R. Rep. No. 104-664 at 12 n.41). Webster's 1828 definition of marriage also included similar societal concerns: "Marriage was instituted by God himself for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children." Webster, *American Dictionary*. If the family is the "building block" of society, then the union of a husband and a wife is the "sure foundation" of that building block and not only *may* but *should* enjoy support from Congress and other government branches.

It is important to note at this juncture that neither the Supreme Court in *Murphy* nor the Congress in 1996 were *determining* the definition of marriage—rather these federal branches were *describing* the pre-existing definition of marriage that this Country has always known. Section 3 of DOMA clarified the definition of marriage for purposes of federal laws and regulations, admittedly in response to the concerns that Hawaii might introduce same-sex

"marriage" in the wake of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). But DOMA was more than an effort to prevent one class of persons (same-sex couples) from entering into an otherwise lawful legal arrangement (same-sex "marriage")—it was a defensive reaction to an effort through the judiciary "to *redefine* 'marriage' to extend to homosexual couples . . . a truly radical proposal that would *fundamentally alter* the institution of marriage." H. R. Rep. No. 104-664 at 12 (emphasis added). Any redefinition of marriage from its definition of one-man-and-one-woman was excluded from federal law, be it same-sex couples, polygamous relationships, human-animal pairings, or whatever else may be dreamed up and falsely labeled "marriage." To allow *any* alternative relationship to enjoy the status of marriage would not simply add another class of persons who can be "married"—rather, it would undermine any basis for having a settled definition of marriage at all, especially the idea that marriage was "instituted by God" and the law of nature.

Congress asked why society recognizes the institution of marriage in the first place. H. R. Rep. No. 104-664 at 12. The answer: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." The report referenced "'the irreplaceable role that marriage plays in childrearing and in generational continuity,'" and that marriage is the relationship "within which the community socially approves and encourages sexual intercourse and the birth of children." *Id*. at 14. The congressional report concluded:

> That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

Id. at 14. The report, therefore, focused primarily upon the concern that children ought to be raised in a heterosexual union.

The district court and the Second Circuit majority below reject the notion that the government may promote traditional marriage to encourage responsible procreation, arguing that same-sex couples can raise well-adjusted children (according to some social scientists) and that the ability to procreate has never been a precondition to marriage in any state. These arguments try to prove too much. At issue in this case is the disbursement of federal benefits to couples in a marriage and what relationships will be given that label. The decision of whether heterosexual marriages provide a better context for childrearing than same-sex relationships is a policy determination for legislative bodies, not the courts, to decide. Moreover, by defining marriage as it did in DOMA, Congress was not forbidding the raising of children in same-sex couples' homes—a power reserved to the states—but deciding that federal policy would support only the traditional, time-honored marriages that have formed the basis of our society.

Finally, as to the notion that procreation is not a "precondition" to marriage, the simple answer is that

actual fertility of any given couple is not the issue—rather, the traditional definition of marriage in DOMA recognizes the biological fact that the only combination of people who can naturally procreate is one man with one woman. Likewise, no combination of same-sex couples will procreate a child with one another. Procreation or fertility ought not to be a legal prerequisite to marriage, but Congress is free to support the social, moral, and Biblical preference that *marriage* be the prerequisite for *procreation*.

Noah Webster's definition of marriage provides two more purposes to marriage in addition to childrearing and generational continuity. One is "preventing the promiscuous intercourse of the sexes," as found in the Biblical principle that sexual intimacy is reserved only for a man and a woman within the bounds of marriage. *See* Exodus 20:14 ("You shall not commit adultery") (NKJV); 1 Corinthians 6:9-10 ("Do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived. Neither fornicators, nor idolaters, nor adulterers, nor homosexuals, nor sodomites, nor thieves, nor covetous, nor drunkards, nor revilers, nor extortioners will inherit the kingdom of God.") (NKJV). The second additional purpose for marriage is termed "promoting domestic felicity," or the happiness and pleasure to be found when the "two shall become one" within marriage and then make together their home. "Therefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh." Genesis 2:24 (NKJV). Though not proffered by Congress, these reasons provide additional interests that bear at least a rational relation to DOMA.

As further evidence of a rational basis, *Amicus* invites the Court's attention to the monumental

study of J.D. Unwin, *Sex and Culture* (Oxford University Press 1934). After surveying numerous cultures, ancient and modern, Dr. Unwin concluded that the most successful societies were those which confined sexual urges to monogamous marriage.

2. Congress and the federal government have an interest in defending traditional notions of morality.

According to the House Report, "[c]ivil 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." H. R. Rep. 104-664 at 15-16. American history, law, and traditional morality speak with a clear voice that homosexuality is to be opposed and any formal government recognition of a homosexual relationship is to be rejected. Nevertheless, the district court sweeps this interest aside by simply referring to *Lawrence v. Texas* and quoting the Supreme Court as saying that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law." *Gill*, 699 F. Supp. 2d at 389-90 (quoting *Lawrence*, 539 U.S. at 577 (quotation omitted)).

But DOMA is not simply *Lawrence* revisited. *Lawrence* expanded the right to liberty under the Due Process Clause of the Fourteenth Amendment to hold that government could not "justify its intrusion into the personal and private life of the individual" by criminalizing homosexual activity. 539 U.S. at 578. In fact, *Lawrence* explicitly limited its holding to consensual activity by adults in private, stating,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. *It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter*.

Id. (emphasis added). Additionally, the district court below, in quoting Lawrence, left off salient words at the end of the quoted phrase: the phrase should have said, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law *prohibiting the practice*." *Lawrence*, 539 U.S. at 577 (emphasis added). Here, of course, DOMA does not prohibit a particular practice or even the recognition by the states of same-sex "marriage." It simply defines for the federal government what marriage will be on the federal level and what it will not be.

Marriage is more than a private act; it is a civil and religious institution that involves child welfare, child-rearing, income tax status (individual, joint, or separate tax returns; deductions; credits) estate and inheritance tax considerations, testamentary rights, privileged communications (husband-wife privilege), Social Security and Medicare benefits, military housing allowances, and a host of other matters. Even if we were to agree with *Lawrence*, which *Amicus* does not, that private sexual conduct is an aspect of a person's right to define one's own existence, that is far from saying that the person has a right to require that the federal government echo a state's "formal recognition" of same-sex "marriage" and convey upon it all the benefits and recognitions

that usually follow. Not even *Lawrence* requires such a leap.

CONCLUSION

Justice Frankfurter once wisely wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). As in any case, the proper solution here is for this Honorable Court to fall back to the supreme law of the land, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the decision of the Second Circuit below should be reversed and that § 3 of the Defense of Marriage Act be upheld.

Respectfully submitted,

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