No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR
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 ON THE MERITS FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellant and appellee in the court of appeals.

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* The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

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JURISDICTION

The district court's judgment was entered on June 7, 2012. App. 23a. The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") filed a notice of appeal on June 8, 2012. App. 27a-29a. The United States filed its own notice of appeal on June 14, 2012. App. 25a-26a. On September 11, 2011, while the case was pending in the court of appeals, the United States filed a petition for certiorari before judgment, invoking this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e). The court of appeals rendered its judgment on October 18, 2012. Supp. App. 1a. On December 7, 2012, this Court granted the United States' petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Fifth Amendment to the Constitution and Sections 2 and 3 of the Defense of Marriage Act are reproduced in the Appendix to this brief at 1a.

STATEMENT OF THE CASE

A. The Defense of Marriage Act

For more than two centuries after our Nation's Founding, every state and the federal government defined marriage as the legal union of a woman and a man. Indeed, "[u]ntil a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

By 1996, however, a Hawaii Supreme Court decision had called that uniform approach into question. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (indicating that same-sex marriage licenses may have been required by Hawaii's constitution). The *Baehr* decision raised the novel question of whether one state's redefinition of marriage should automatically extend to other states via full faith and credit principles or to the federal government when it came to federal programs linked to marriage.

Congress addressed this question by passing the Defense of Marriage Act of 1996 ("DOMA"), which "was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton." *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 6 (1st Cir. 2012), *petitions for cert. pending*, Nos. 12-13 & 12-15. DOMA passed in the House of Representatives by a vote of 342-67, *see* 142 Cong. Rec. 17094-95 (1996), and in the Senate by a vote of 85-14, *see id.* at 22467. In the Senate supporters included then-Senator Biden; then-Minority Leader

Daschle; current Majority Leader Reid; and current Judiciary Committee Chairman Leahy. In the House, Rep. Hoyer, the Current Minority Whip, supported DOMA.

DOMA reflected Congress' determination that each sovereign should be able to determine for itself how to define marriage for purposes of its own law. DOMA does not override or invalidate any sovereign's decision to modify the definition of marriage, but it does preserve that prerogative for each sovereign. Section 2 of DOMA allows each state to decide for itself whether to retain the traditional definition without having another jurisdiction's decision imposed upon it via full faith and credit principles. And Section 3 preserves the federal government's ability to use the traditional definition of marriage for purposes of federal law and programs. It does so not by singling out any category of relationships for specific exclusion, but rather by clarifying what marriage *means* for purposes of federal law: It clarifies that, for purposes of federal law, "marriage" means the legal union of one man and one woman, and "spouse" means a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7.

DOMA does not "preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006). Thus, some federal statutes provide benefits for "families," *see, e.g.,* 22 U.S.C. § 4081 (extending certain financial benefits to Foreign Service members "and their families"), and the President has interpreted that

term, which is not defined by DOMA, to include same-sex couples. *See* Presidential Mem., *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, 75 Fed. Reg. 32,247 (June 2, 2010) (directing the Office of Personnel Management to "clarify that, for purposes of employee assistance programs, same-sex domestic partners and their children qualify as 'family members'").

DOMA's definitions apply for federal-law purposes only: DOMA does not bar or invalidate any state-law marriage, but leaves states free to decide whether they will recognize same-sex marriages. DOMA simply asserts the federal government's right as a separate sovereign to provide its own definition for purposes of its own federal programs and funding.

Historically, the federal government often has found it convenient to accept the marital determinations made by the several states (which for the most part have varied only in the particulars) for purposes of federal law—just as the states typically recognize marriages licensed by other states for purposes of their own law. But Congress also has a long history, when it sees fit, of supplying its own definitions of marriage for various federal purposes. These longstanding federal definitions sometimes provide marital benefits to couples who a state may not recognize as married,[1] and sometimes decline to extend federal regulation or benefits to couples

[1] *See, e.g.*, 42 U.S.C. § 1382c(d)(2) (recognizing common-law marriage for purposes of social security benefits without regard to state recognition).

despite a state-issued marriage certificate.[2]

Similarly, even before DOMA was enacted, federal-law references to marriage employed the traditional definition, as Congress, the Executive Branch, and the courts have recognized. *See*, *e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* 26 U.S.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); 38 U.S.C. § 101(31) (for purposes of veterans' benefits, "'spouse' means a person of the opposite sex"); U.S. Dep't of Labor, Final Rule, *The Family and Medical Leave Act of 1993*, 60 Fed. Reg. 2,180, 2,190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's 1901 marriage statute, intended "that

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[2] *See, e.g.*, 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)-(a)(2)(A) (federal employee-benefits statutes defining "widow" and "widower" restrictively); 8 U.S.C. § 1186a(b)(1) (denying recognition to some state-law marriages in immigration law context); 26 U.S.C. § 2(b)(2) (tax law provision deeming persons unmarried who are separated from their spouse or whose spouse is a nonresident alien); 26 U.S.C. § 7703(b) (excluding some couples "living apart" from federal marriage definition for tax purposes); 42 U.S.C. § 416 (defining "spouse," "wife," "husband," "widow," "widower," and "divorce," for social-security purposes).

'marriage' is limited to opposite-sex couples").

Congress explained that, in defining the terms "marriage" and "spouse," Section 3 of DOMA "merely restates the current understanding of what those terms mean for purposes of federal law." H.R. Rep. No. 104-664, at 30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."); *see also id.* at 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *id.* at 22446 (Sen. Byrd) ("[A]ll this bill does is reaffirm for purposes of Federal law what is already understood by everyone.").

Congress emphasized that "[t]he most important aspect of Section 3 is that it applies to federal law only" and does not "have any effect whatsoever on the manner in which any State might choose to define these words." House Rep. 30 (parenthetical omitted). Section 3 defines "these two words only insofar as they are used in federal law." *Id.* Congress thus reaffirmed the federal government's ability to make its own decision regarding whether to recognize same-sex relationships as marriages, without having its hand forced by a minority of the states or forcing any state to follow the federal definition for purposes of its own state law.

In addition, Congress wanted to preserve the right of each state—like the federal government—to define marriage within its own sphere. DOMA Section 2 prevents a decision by one state to re-define marriage from trumping the decisions of other states

via full faith and credit principles. Section 3 similarly prevents such a state re-definition from being automatically picked up for federal-law purposes. *See* 142 Cong. Rec. 17079 (1996) (Rep. Bryant) ("Certainly we should not allow one State, whether it be Hawaii or any other State, to, in effect, establish what the Federal law will be in regards to what a marriage is."); *id.* at 17089 (Rep. Hyde) ("[A]s to defining marriage in the Federal code, who else should define it except this Congress, the Federal legislature."); *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. at 2 (1996) ("Senate Hrg.") (Sen. Hatch) (DOMA "ensures that each State can define for itself the concept of marriage and not be bound by decisions made by other States. [DOMA] also makes clear that no Federal law should be read to treat a same-sex union as a 'marriage.'"); *id.* at 41 (statement of Prof. Lynn Wardle) ("Section 3 protects Congress' authority to control federal laws, programs and agencies. It prevents the imposition of same-sex marriage upon federal law without the approval of Congress. That, too, protects our federalism."); 142 Cong. Rec. 22438 (1996) (Sen. Lott) (DOMA "will ensure that each State can reach its own decision about this extremely controversial matter: The legal status of same-sex unions. [DOMA], likewise, ensures that for the purposes of Federal programs, marriages will be defined by Federal law."); *id.* at 22440 (Sen. Nickles) (Without DOMA, "if Hawaii, or any other State, gives new meaning to the words 'marriage' and 'spouse,' reverberations may be felt throughout the Federal Code."); *id.* at 22452 (Sen. Mikulski) ("[This bill] puts in the Federal law books

what has always been the definition of a marriage" and "allows each State to determine for itself what is considered a marriage under that State's laws."); *id.* at 22453 (Sen. Hatfield) ("The bill would restrict the effect of any state law that allows same-sex marriage to that state only."); *id.* (Sen. Murkowski) ("By defining the term marriage, Congress is protecting the sovereignty of each State" and avoiding "the ramifications of the absence of a definition of marriage in Federal law.").

Members of Congress also stressed that conflicting state definitions of marriage should not be permitted to create geographical disparities in the eligibility for *federal* benefits. As Senator Ashcroft stated, having a uniform federal definition of marriage "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently … [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996). Federal benefits, he observed, "should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State." *Id.* It would be "irrational and inconsistent," he said, if "citizens of one State [were given] higher benefits or different benefits than citizens of another State." *Id.* "[I]t is entirely appropriate for us, as a Congress, to say that we want a Federal benefits structure that follows a uniform definition of 'marriage.'" *Id.; see also id.* at 22453 (Sen. Murkowski) (DOMA establishes "uniformity in federal benefits, rights and privileges

for married persons."); *id.* at 22448 (Sen. Byrd) ("Without a Federal definition … every department and every agency of the Federal Government that administers public benefit programs would be left in the lurch.").

Congress additionally noted that DOMA helped to preserve the public fisc and avoid the unpredictable effects of changing traditional federal definitions that governed eligibility for federal benefits and taxes. "Government currently provides an array of material and other benefits to married couples," and those benefits "impose certain fiscal obligations on the federal government." House Rep. 18. Congress believed that DOMA would "preserve scarce government resources, surely a legitimate government purpose." *Id.* As Senator Gramm observed, without DOMA, state recognition of same-sex marriage will create

> a whole group of new beneficiaries—no one knows what the number would be—tens of thousands, hundreds of thousands, potentially more—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans.... [I]t will impose … a whole new set of benefits and expenses which have not been planned or budgeted for under current law.

142 Cong. Rec. 22443 (1996). If the federal government were forced to recognize same-sex marriages, Sen. Byrd noted, "it is [not] inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions … of Federal taxpayer dollars." *Id.* at 22448;

see also id. at 22454 (Sen. Burns) ("Given the budget difficulties we are currently facing, it would be an understatement to say that this [federal recognition of same-sex marriages] could have an enormous financial impact on our country.").

In retaining the traditional definition for federal-law purposes, Congress also emphasized "'[t]he enormous importance of [traditional] marriage for civilized society.'" House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from this Court's decision in *Murphy v. Ramsey*, which referred to "*the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization." House Rep. 12 (quoting 114 U.S. 15, 45 (1885)) (emphasis in House Rep.). Congress recognized that the institution of marriage has traditionally been defined in American law as the union of one man and one woman, and was cognizant of the need for caution in changing such an important institution. *See* House Rep. 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); 142 Cong. Rec. 22463 (1996) (Sen. Bradley) ("[W]hen we contemplate giving state sanction to same-sex marriages, we need to proceed cautiously.").

Congress further explained that the institution of marriage is a response to the unique social concerns surrounding the inherently procreative nature of heterosexual relationships—specifically, that "society recognizes the institution of marriage and grants married persons preferred legal status"

because it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 12, 13. Congress recognized the basic biological fact that only a man and a woman can beget a child together without advance planning, which means that opposite-sex couples have a unique tendency to produce unplanned and unintended offspring. Congress sought to encourage the raising of such children by both their biological parents in a stable family structure. *See* 142 Cong. Rec. 22446 (Sen. Byrd); *id.* at 22262 (Sen. Lieberman) (DOMA "affirms another basic American mainstream value, … marriage as an institution between a man and a woman, the best institution to raise children in our society.").

While Congress was considering DOMA, it requested the opinion of the Department of Justice on the bill's constitutionality, and the Department three times reassured Congress that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* House Rep. 34; to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in* Senate Hrg. 2. Congress also received and considered other expert advice and concluded that DOMA was "plainly constitutional." House Rep. 33; *see also* Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Wardle); *id.* at 44 n.1 (statement of Professor Cass Sunstein) (opining that DOMA Section 3 would be upheld as constitutional); *id.* at 56-59 (letter from Professor Michael McConnell).

B. The Justice Department Stops Defending DOMA and Starts Attacking It

Following DOMA's enactment, the Department of Justice discharged its constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and successfully defended Section 3 of DOMA against several constitutional challenges, prevailing in every case to reach final judgment.[3] The Department continued to defend DOMA during the first two years of the current Administration.

In February 2011, however, the Administration abruptly reversed course and abdicated its duty to defend DOMA's constitutionality. *See* Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011) ("Holder Letter"), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Attorney General Holder announced that he and President Obama were now of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id.*

The Attorney General acknowledged that, in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be

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[3] *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

made in their defense." *Id.* He did not, however, apply that standard to DOMA. On the contrary, he conceded that every federal court of appeals to have considered the issue by that point in time (eleven of the thirteen circuits) had applied rational basis review to sexual orientation classifications and that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." *Id.* [4]

Although the Holder Letter had said only that the Department would "cease defense" of DOMA Section 3, the Department did not merely bow out of DOMA litigation. Instead, it affirmatively assailed DOMA in court—arguing that Section 3 violates equal protection and urging courts to render judgment in favor of plaintiffs challenging the law even in Circuits in which rational basis was binding circuit law. The Department even went so far as to accuse the Congress that enacted DOMA—many of whose Members still serve—of being motivated by "animus." Br. for United States 25, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120.

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[4] *See, e.g., Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

In response to the Department's remarkable "about face" on DOMA, *Massachusetts*, 682 F.3d at 7, the House intervened as a party-defendant in more than a dozen cases (fifteen to date), around the country, in which one or more plaintiffs challenged the constitutionality of DOMA Section 3; the House did so to ensure that a duly-enacted federal statute would have an adequate constitutional defense. No court denied intervention.

C. Ms. Windsor's Challenge to DOMA

Respondent Edith Schlain Windsor and another woman, Thea Clara Spyer, obtained a certificate of marriage from the province of Ontario, Canada in 2007. At that time, their home state of New York did not issue marriage licenses to same-sex couples.

Ms. Spyer died in 2009, naming Ms. Windsor the executor and sole beneficiary of her estate. Nine months after Ms. Spyer's passing, the New York Court of Appeals expressly reserved the question of whether New York law recognized foreign, same-sex marriage certificates. *See Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009). New York did not itself begin issuing marriage licenses to same-sex couples until 2011.

After paying more than $363,000 in federal estate taxes, Ms. Windsor, as executor, sought a refund on the theory that the estate was entitled to the marital deduction, even though both Ms. Windsor and Ms. Spyer continued to file individual income tax returns after obtaining an Ontario marriage certificate in 2007. Recognizing that federal law offers this deduction only when the beneficiary of the estate is a "spouse" within the meaning of federal tax law and

DOMA, Ms. Windsor claimed that the failure to extend this favorable treatment to her violated her equal protection rights. The IRS denied the refund, and Ms. Windsor filed this suit in her capacity as executor of the estate. Ms. Windsor's constitutional challenge is premised on the notion that New York would have recognized the 2007 Canadian marriage certificate, even though New York did not issue marriage certificates to same-sex couples until after Ms. Spyer's death.

After the Justice Department abandoned DOMA's defense in early 2011, the district court *sua sponte* invited Congress to intervene in the litigation, and the House did so. The district court followed the First Circuit's lead and invalidated DOMA under a variant of rational basis it labeled "intensified scrutiny." 682 F.3d at 10.

On appeal, the Second Circuit first found that the Department had appellate standing and then addressed Ms. Windsor's standing. It recognized that, "[a]t the time of Spyer's death in 2009, New York did not yet license same-sex marriage itself" and therefore "decisive for standing in this case" is "whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions." Supp. App. 5a. The Second Circuit declined to certify this sensitive question of state law, reasoning that the New York Court of Appeals had "signaled its disinclination to decide this very question" in *Godfrey*. Supp. App. 6a. Instead, the panel "'predict[ed]'" that "Windsor's marriage would have been recognized under New York law at the time of Spyer's death," based on three New York lower court rulings, two of which pre-dated *Godfrey*. App. 6a-7a.

On the merits, the panel majority recognized that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection." Supp. App. 3a. Yet the panel majority concluded that "*Baker* does not control equal protection review of DOMA" because DOMA is a federal law and there had been "doctrinal changes" in equal protection law since 1971. Supp. App. 8a, 10a.

In its equal protection analysis, the panel majority explained that "a party urging the absence of any rational basis takes up a heavy load" and "[t]hat would seem to be true in this case—the law was passed by overwhelming bipartisan majorities in both houses of Congress" and "the definition of marriage it affirms has been long-supported and encouraged." Supp. App. 12a-13a. Indeed, the panel majority did not dispute Judge Straub's conclusion that DOMA survives rational basis review. *See* Supp. App. 14a. It also declined to apply "rational basis plus" review, because this Court "has not expressly sanctioned such modulation in the level of rational basis review." Supp. App. 13a.

The panel majority ultimately determined—in conflict with eleven other circuits—that heightened scrutiny applies to classifications based on sexual orientation. Supp. App. 15a. The panel majority acknowledged that homosexuals "clearly have" attained "political successes over the years," but deemed that they cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public." Supp. App. 21a-23a.

Finally, the panel majority concluded that Section

3 of DOMA could not survive heightened scrutiny. The Court recognized Congress' concern with ensuring "uniform eligibility for federal marital benefits," but found it "suspicious" that Congress would attempt to define the word "marriage" when it had traditionally deferred to the states. Supp. App. 24a-25a. It also recognized the budgetary concerns motivating DOMA, but held them insufficient to satisfy intermediate scrutiny. Supp. App. 26a-28a. The panel majority "agree[d] that promotion of procreation can be an important government objective," but held that DOMA does not further that objective because it affected only federal benefits. Supp. App. 30a. Thus, although it acknowledged "that same-sex marriage is unknown to history and tradition," the panel majority nonetheless invalidated DOMA. Supp. App. 29a-31a.

Judge Straub dissented on the merits, noting that DOMA reflects "the understanding of marriage … throughout our nation's history," and that, "[i]f this understanding is to be changed,… it is for the American people to do so." Supp. App. 31a-32a. Judge Straub found that this Court's decision in *Baker* resolved "the essentially identical challenge we have here," because although *Baker* involved a state law, "the equal protection component of the Fifth Amendment is identical to and coextensive with the Fourteenth Amendment guarantee." Supp. App. 32a, 45a.

Even apart from *Baker*, Judge Straub concluded that "routine respect for extant precedent" requires the application of rational-basis review to sexual-orientation classifications. Supp. App. 81a. He observed that this Court has warned the lower

courts "to be wary of" creating new suspect or quasi-suspect classifications, that it has not itself recognized any such classifications "in decades," and that this Court applied rational-basis review in *Romer* "despite having the opportunity to apply heightened review." Supp. App. 33a, 78a, 81a.

Applying rational basis review, Judge Straub found that "DOMA centers on legitimate state interests that go beyond mere moral disapproval of an excluded group." Supp. App. 33a. He noted that DOMA promotes uniformity in *federal* marital benefits "and does nothing to strip the status that states confer on couples they marry." Supp. App. 63a-64a. He concluded that it is rational for Congress to "limit the national impact of state-level policy development" and to "take an approach that attempts to create uniformity across the states" in matters governed by federal law. Supp. App. 67a-68a, 69a.

Judge Straub also noted that this Court "has continued to view the biological link of parents to children as deserving of special recognition and protection." Supp. App. 71a. He therefore concluded that DOMA furthers the legitimate government interest in encouraging heterosexual relationships, with their unique tendency to produce unintended offspring, to be channeled into an institution designed to facilitate the raising of such offspring. Supp. App. 55a-62a.

Judge Straub therefore concluded that "[w]hether connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue is … an issue for the American people and their elected

representatives to settle through the democratic process." Supp. App. 83a. He noted the "robust political debate" on this topic and expressed regret that striking down DOMA "poisons the political well" by "interven[ing] in this robust debate only to cut it short." *Id.*

SUMMARY OF THE ARGUMENT

Although the passions that surround the issue of same-sex marriage undoubtedly run high, the issue before this Court is quite narrow. Assuming that states remain free either to recognize same-sex marriages or retain the traditional definition, the question here is whether the federal government retains the same latitude to choose a definition for federal-law purposes, or whether instead it must borrow state-law definitions as its own, recognizing same-sex marriages of U.S. citizens residing in Massachusetts (because Massachusetts does) but not same-sex relationships of U.S. citizens residing in Virginia (because Virginia does not). Bedrock principles of federalism make clear that the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes and has a unique interest in treating citizens across the nation the same.

To be sure, the federal government also has the option of borrowing state-law definitions, as it did during the long period when the states uniformly employed the traditional definition. But in 1996 when it appeared that states soon would begin experimenting with changing the traditional definition, the federal government was under no obligation to follow suit. Congress could, and did, rationally decide to retain the traditional definition

as the uniform rule for federal-law purposes. Congress could, and someday may, adopt a different approach and either incorporate varying state approaches or uniformly extend rights to same-sex couples even in states that retain the traditional definition. But under our system of government those decisions are wisely left to Congress and the democratic process.

In considering DOMA's constitutionality, the Court should apply rational basis review as it previously has done when considering classifications on the basis of sexual orientation. And under that deferential standard, there is little question that DOMA rationally furthers multiple legitimate government interests. In 1996, Congress confronted an unprecedented dynamic with at least one state on the verge of experimenting with a fundamental change to the traditional definition of marriage. In DOMA, Congress acted to ensure that no one state's decision to adopt a new definition would dictate the result for other sovereigns either via full faith and credit principles or by federal law borrowing state definitions. In our federal system, there is certainly nothing irrational about allowing each sovereign—including the federal government—to make this important decision for itself. Indeed, the justly celebrated ability of states to act as "laboratories of democracy" necessarily assumes the ability of each sovereign to run its own experiments.

And it was certainly rational for the federal government to retain the traditional definition as the governing definition for federal-law purposes. The federal government has a unique interest in ensuring that federal benefits and tax burdens are

distributed equally such that a same-sex couple in Virginia is treated no differently for federal-law purposes from one in Massachusetts. And if the federal government can rationally favor a uniform rule, it was eminently rational to choose the traditional definition, which was the uniform state-law rule in 1996 and remains the majority approach today. That decision also was rational because it accurately reflected the intent of the prior Congresses that created the multitude of programs that tie benefits and burdens to the institution of marriage as traditionally understood. It also avoided the uncertain and unpredictable fiscal impact of expanding the class of federal beneficiaries in unintended ways.

And wholly apart from these unique federal interests that fully justify DOMA, Congress could rationally decide to retain the traditional definition for the same basic reasons that states adopted the traditional definition in the first place and that many continue to retain it: There is a unique relationship between marriage and procreation that stems from marriage's origins as a means to address the tendency of opposite-sex relationships to produce unintended and unplanned offspring. There is nothing irrational about declining to extend marriage to same-sex relationships that, whatever their other similarities to opposite-sex relationships, simply do not share that same tendency. Congress likewise could rationally decide to foster relationships in which children are raised by both of their biological parents.

Finally, the Second Circuit erred when it became the first court of appeals to treat sexual orientation

as a quasi-suspect class. Creating new suspect classes takes issues away from the democratic process, and this Court has wisely refrained from recognizing new suspect classes over the last four decades. Homosexuality would be a particularly anomalous place to eschew that reluctance, as gays and lesbians have substantial political power, which has grown exponentially with each election cycle. Nor do the other factors this Court has looked to support recognizing a new suspect class here. To the contrary, with an issue as divisive and fast-moving as same-sex marriage, the correct answer is to leave this issue to the democratic process. In that process, there is a premium on persuading opponents, rather than labeling them as bigots motivated by animus. And the democratic process allows compromise and way-stations, whereas constitutionalizing an issue yields a one-size-fits-all-solution that tends to harden the views of those who lose out at the courthouse, rather than the ballot box. In the final analysis, the democratic process is at work on this issue; there is no sound reason to constitutionalize it.

ARGUMENT

As a statute duly enacted by Congress and signed by the President, DOMA is entitled to a strong presumption of validity. "Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quotation marks omitted). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S.

57, 64 (1981). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Therefore, "[t]his Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is" constitutional. *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). And "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64*; see supra* at 11.

The deference owed to the coordinate branches of government is at its zenith when it comes to rational basis review. It is one thing to conclude that a coordinate branch has crossed one of the sometimes murky lines that delineate the protections of the Bill of Rights, but it is quite another thing for this Court to declare that the two coordinate branches of the national government have acted not just imprudently, but wholly without rational basis. For that reason, it is perhaps no surprise that this Court has on only one occasion (at most two) invalidated an Act of Congress while applying rational basis review. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[5] And even then, this Court invalidated only

[5] *Moreno* is readily distinguishable. The classification there could not further the interests identified by the government because the vast majority of individuals excluded could easily rearrange their affairs to become eligible, while only the

a single obscure amendment added in conference. *Id.* at 534 n.6. Striking down as irrational a statute like DOMA that was debated in both chambers, viewed as constitutional by the Justice Department, passed by large bipartisan majorities and then signed into law by the President would be wholly unprecedented.[6]

I. Rational Basis Review Applies To DOMA.

Ms. Windsor and the Justice Department contend that Section 3 of DOMA classifies based on sexual orientation and that therefore heightened scrutiny applies. But this Court has never classified sexual

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neediest people could not. *See Moreno*, 413 U.S. at 538. There are no analogous difficulties with DOMA. The only other even arguable example is *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in which the Court found a classification based on illegitimacy invalid under any standard of review when the Court was in the process of recognizing illegitimacy as a quasi-suspect classification.

[6] Before it can consider DOMA's constitutionality, this Court must resolve a threshold issue of Article III standing. New York law did not recognize same-sex marriage until after Ms. Spyer's passing. Thus, Ms. Windsor only has standing to challenge DOMA and the denial of a marital exemption from the estate tax if New York would have recognized her 2007 Ontario marriage certificate at a time when New York did not itself issue marriage certificates to same-sex couples. *See* Supp. App. 5a (recognizing that this question is "decisive for standing in this case"). That question is not free from doubt; the New York Court of Appeals expressly reserved that state-law question in its 2009 *Godfrey* decision, nine months *after* Ms. Spyer's passing. *See Godfrey*, 920 N.E.2d at 337. Both courts below predicted that New York would have recognized the Ontario marriage certificate, which presumably does not obviate the need for this Court to assure itself of its Article III jurisdiction.

orientation as a suspect or quasi-suspect class, and indeed has gone out of its way to apply rational basis review. This Court should do the same here and apply rational basis review to DOMA.[7]

Under this Court's equal protection cases, there are only three levels of scrutiny. Strict scrutiny is reserved for laws that classify based on "race, alienage, or national origin." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Classifications based on "sex or illegitimacy" are quasi-suspect and receive "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications trigger only rational basis review. This Court has never considered sexual orientation to be a suspect or quasi-suspect classification and instead has repeatedly applied rational basis review to such classifications.

This Court considered a classification similar to DOMA in *Baker v. Nelson*, 409 U.S. 810 (1972). The *Baker* Court rejected "for want of a substantial federal question" an equal protection challenge to Minnesota's statute defining marriage as a union between persons of the opposite sex. *Baker*, 409 U.S. at 810. Although the Court's summary disposition

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[7] By its terms, DOMA does not classify based on a married couple's sexual orientation. Rather, DOMA classifies based on whether a marriage is (i) a legal union (ii) between two persons (iii) of the opposite sex. A marriage between a man and a woman would fall within DOMA's definition even if one or both spouses were homosexual. Similarly, the marriage of two men would fall outside the definition even if both were heterosexual. There is no question, however, that DOMA has a disproportionate impact on individuals with a homosexual orientation.

did not specify the level of scrutiny it applied, subsequent decisions, discussed in the paragraphs immediately below, make clear that the Court applied only rational basis review to the Minnesota statute's limitation of marriage to opposite-sex couples. Such a summary dismissal is, of course, a decision on the merits and, while it does not have the same force before this Court as a decision reached after plenary review, it carries precedential effect. "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *see also Massachusetts*, 682 F.3d at 8 (*Baker* is "precedent binding" on lower courts and thus forecloses arguments that "presume or rest on a constitutional right to same-sex marriage").

This Court subsequently considered an equal protection challenge to a sexual orientation classification on plenary review and applied rational basis review. *See Romer v. Evans*, 517 U.S. 620 (1996). *Romer* involved a voter-enacted referendum in Colorado known as Amendment 2, which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class" of "homosexual persons or gays and lesbians." *Id.* at 624. The Colorado Supreme Court applied strict scrutiny to invalidate Amendment 2. *Id.* at 625.

Despite the Colorado Supreme Court's application of strict scrutiny, this Court reviewed Amendment 2 under the rational basis test, which applies when a law "neither burdens a fundamental right nor targets a suspect class." *Id.* at 631. Under that test,

legislation is upheld "so long as it bears a rational relation to some legitimate end." *Id.* This Court held that Amendment 2 "fails, indeed defies, even this *conventional inquiry*." *Id.* at 632 (emphasis added). *See also id.* at 635 (concluding that "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not." (citation omitted)). Thus, even in the face of the protestations of the dissent that it was applying something other than rational basis review, *see id.* at 651 (Scalia, J., dissenting), the Court made clear that it was applying conventional rational basis review, not any form of heightened scrutiny, to the sexual orientation classification before it in *Romer*.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court once again declined to apply heightened scrutiny. *Lawrence* struck down a Texas statute that criminalized intimate sexual conduct between two persons of the same sex, while not reaching opposite-sex couples engaging in the same conduct. Rather than addressing that differential treatment under the Equal Protection Clause, the Court decided the case under the Due Process Clause and invalidated the Texas statute and overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986). The *Lawrence* Court emphasized the limited nature of that due process holding and specified that it was not holding that "the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578.

Justice O'Connor preferred to decide the case under the Equal Protection Clause and, consistent with *Romer*, applied rational basis review. She explained that her analysis of the Texas law "does

not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as … *preserving the traditional institution of marriage*." *Id.* at 585 (O'Connor, J., concurring in the judgment) (emphasis added).

Although the court of appeals here applied heightened scrutiny to DOMA, the traditional factors this Court looks to in ascertaining the appropriate level of equal protection scrutiny do not support that conclusion. *See* Part III, *infra*. Rather, the proper result under this Court's precedents and the law of every other Circuit to consider the question is that rational basis review applies. As shown next, multiple rational bases support Congress' decision to employ the traditional definition of marriage for federal-law purposes.

II. Multiple Rational Bases Support DOMA And Its Decision To Retain The Traditional Definition Of Marriage For Federal-Law Purposes.

Rational basis review "is a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The judicial role is modest precisely because rational basis is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*,

490 U.S. 19, 26 (1989). The statute enjoys "a strong presumption of validity," and the challenger bears "the burden 'to negative every conceivable basis which might support it'" without regard to "whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach*, 508 U.S. at 314-15 (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))*; see also Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012).

As noted, deference is particularly strong when it comes to reviewing the work of the two coordinate political branches of the federal government. And deference is at its zenith when it comes to statutory definitions and other line-drawing exercises such as DOMA Section 3. This Court has recognized that in formulating definitions or establishing categories of beneficiaries, "Congress had to draw the line somewhere," *Beach*, 508 U.S. at 316, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker v. Wilson*, 450 U.S. 221, 238 (1981) (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle" (footnote omitted)). The Court has applied this deferential approach not just to economic legislation, but also to benefits legislation, *e.g.*, *Schweiker*, and even to government determinations of who or what constitutes a family, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding on rational basis review zoning regulation defining unmarried couples

as "families" permitted to live together, but prohibiting cohabitation by larger groups). In such cases, Congress' decision where to draw the line is "virtually unreviewable." *Beach*, 508 U.S. at 316.

Applying this deferential review to DOMA, it is clear that Congress, when confronting the unprecedented phenomenon of states beginning to experiment with the traditional definition of marriage, had and maintains multiple rational bases to retain the traditional definition as the operative definition for purposes of federal law.

A. DOMA Rationally Preserves Each Sovereign's Ability to Define Marriage for Itself at a Time When States Are Beginning to Experiment with the Traditional Definition.

When Congress enacted DOMA in 1996, it confronted a unique phenomenon. Up until that point, every state in the nation defined marriage in traditional terms as a union between a man and a woman. There was little doubt that when Congress used terms like "marriage," "married," and "spouse" in federal statutes, it too had the traditional definition in mind. But Congress did not even need to consider whether it preferred a uniform federal definition of marriage or instead preferred to defer to the states, because every state adopted the same, traditional approach. Only as that began to change did Congress consider DOMA.

The Hawaii Supreme Court's decision in *Baehr* raised the prospect that some states would begin to experiment with the traditional definition and expand it to include same-sex couples. At least in

Hawaii, the impetus for this change came not from the democratic process, but from the state courts' interpretation of the state constitution. And in our federalist system, the prospect that one state would alter the traditional definition raised the distinct prospect that one state could effectively change the law for other states via full faith and credit principles—and for the federal government to the extent federal law simply borrowed the state's definition.

DOMA's two operative provisions responded to this unprecedented dynamic in a manner that preserved each sovereign's ability to define marriage for itself. Section 2 preserved each state's ability to define marriage as it preferred by ensuring that any one state's definition would not trump another state's judgment by operation of full faith and credit principles. In a similar fashion, Section 3 ensured that federal law would not simply borrow whatever definition or redefinition a state chose to adopt, but instead that the federal government would distinctively define marriage for federal-law purposes only and would retain the traditional definition.

Congress' approach in DOMA was a balanced one that fully reflects and respects our federalist system. Congress did not attempt to override any state's decision to experiment with the definition of marriage or deem any particular redefinition of marriage irrational. But at the same time Congress recognized that states could rationally decide to expand the traditional definition of marriage to include same-sex couples, it also recognized that other jurisdictions, including the federal government

for uniquely federal purposes, could rationally decide to retain the traditional definition. DOMA permitted states to perform their role as "laboratories of democracy," while at the same time ensuring that no one state's experiment would be imposed on other states or on the federal government.

DOMA thus reflects an interest in ensuring that, at a time of unprecedented reconsideration of the traditional definition of marriage, each sovereign in our federal system may decide this important issue for itself. That surely is a rational—–indeed an important and vital—basis for action in our system of dual federalism.

And the federal government's decision to retain the traditional definition as its own also surely was a rational one. As shown in more detail below, at the time of DOMA's enactment every state retained the traditional definition and that remains the approach of the majority of the states. It plainly was rational for Congress to adopt the majority definition as its own, especially when that traditional definition was the underlying assumption of countless past federal legislative decisions, and when altering that definition would have unpredictable fiscal effects and would undermine uniquely federal interests in the uniformity of federal benefits and burdens. Further, Congress could rationally retain the traditional definition for all the reasons a state could rationally retain the traditional definition. While the federal definition of marriage does not have the same direct impact on the institution as a state decision, it has some effect. Assuming that states continue to have the flexibility to retain the

traditional definition, there is no reason why the federal government does not have the same latitude.

B. DOMA Ensures National Uniformity in Eligibility for Federal Benefits and Programs Based on Marital Status.

As long as all the states retained the traditional definition of marriage, there was no need for the Congress to choose between having a uniform federal definition for federal benefits and burdens and simply borrowing the state definition of marriage. But when Hawaii was on the verge of becoming the first state to experiment with altering the traditional definition, Congress had to choose between retaining a uniform federal rule or continuing simply to borrow state definitions in a manner that would create the possibility of disparities in federal benefits across jurisdictions. Congress chose the former, and that decision was eminently rational.

In a nation where some states would recognize same-sex marriage and other states would not, Congress rationally could desire to maintain uniformity in the federal approach to this question, rather than adopting a patchwork of disparate state-law rules. DOMA Section 3 accomplishes exactly that, ensuring that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside. The uniform federal rule reaffirmed by DOMA also avoids a confusing situation in which same-sex couples would lose (or gain) federal marital status simply by moving between states with different policies on recognition of same-sex marriages. *See*, *e.g.*, 142 Cong. Rec. 10468 (1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal

benefits"); *id.* at 22459 (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits"). Likewise, a uniform federal rule also avoids the prospect that a federal employee—military or civilian—would resist moving from one jurisdiction to another for fear it would affect his or her federal benefits or tax status.

The adoption of a uniform federal rule also serves the government's rational interest in easing administrative burdens. While it may seem a simple matter to determine which jurisdictions have recognized same-sex marriage, this case illustrates that the issue is far more complicated. Ms. Windsor's claim to a marital exemption from the estate tax does not turn on New York's very public adoption of laws permitting same-sex marriage in 2011 but, rather, on obscure, and as-yet not definitively settled, choice-of-law principles concerning New York's recognition of foreign marriage certificates in 2009. Ms. Windsor filed her claim here before New York recognized same-sex marriage, and her success depends on whether New York courts would have recognized a Canadian marriage certificate issued to a same-sex couple at a time when New York would not issue such a certificate itself. If her claim is successful, the federal government would have to confront similar choice-of-law questions in all the jurisdictions that retain the traditional definition. It was certainly rational for the federal government to prefer a uniform federal rule to the vagaries and difficulties of undertaking a multitude of such complex choice-of-law determinations.

When Hawaii threatened to break up the uniformity of the states' definition of marriage, Congress essentially had two decisions to make. First, it had to decide between adopting a uniform federal rule or borrowing state definitions in a way that would produce a disparity in federal benefits. It was clearly rational for Congress, with its unique concern for treating citizens in Oklahoma the same as citizens in Hawaii, to choose the former. Second, once Congress decided to adopt a uniform rule, it had to decide whether to retain the traditional definition and the approach of all 50 states at the time, or to alter the traditional definition to include same-sex couples. While either choice would have been rational, adopting the overwhelming majority approach surely was a permissible option. By the same token, if at some future point all but a handful of jurisdictions recognize same-sex marriages, it would be entirely rational for Congress to change the law and adopt that majority approach as the uniform rule. In short, the rationality of the federal government interest in uniformity is independent of the rule adopted.

Despite the rationality of preferring a uniform federal rule and adopting the majority approach as the federal rule, the courts below regarded Congress' interest in a uniform federal-law definition of marriage as at best "suspicious," Supp. App. 24a, and at worst an illegitimate "intrusion" into state authority over marriage, Supp. App. 25a-26a. But such suspicions ignore both the unprecedented situation Congress confronted and basic tenets of federalism. Suspicion of Congress' adoption of a uniform definition seems to stem from Congress'

traditional willingness to borrow state law definitions. But when state definitions of marriage vary only in the details, it is understandable and commendable for federal law to borrow those definitions. On the other hand, when a state is on the verge of making a fundamental change to the definition, that creates a need for Congress to choose between uniformity and borrowing (a need that simply did not exist before), and as demonstrated above, it is certainly rational to choose the former.

The suggestion that states somehow have special constitutional authority to define what the words "marriage" and "spouse" mean for purposes of *federal* law runs entirely counter to our basic constitutional structure. Indeed, the presumption is the opposite. It is well established that, unless Congress plainly manifests an "intent to incorporate diverse state laws into a federal statute, the meaning of [a] federal statute should *not* be dependent on state law." *United States v. Turley*, 352 U.S. 407, 411 (1957); *see also Helvering v. Davis*, 301 U.S. 619, 645 (1937) ("When money is spent to promote the general welfare, the concept of welfare … is shaped by Congress, not the states."); s*ee also Massachusetts*, 682 F.3d at 12 ("Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes … and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so.").

The "genius" of the framers was in "establishing two orders of government, each with its own direct

relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Thus, when it comes to defining marriage for purposes of *state* law, the states may well enjoy constitutional power to make such determinations without federal interference. But DOMA does not interfere with or override state law, and Section 2 affirmatively promotes each state's interest in deciding this important issue for itself. At the same time, nothing in "our federalism" prevents the federal sovereign from exercising its authority to independently determine the meaning of words in *its own* law. To be sure, Congress may choose to borrow state-law definitions as a matter of cooperative federalism—and it historically has done so in many, but far from all, contexts with respect to marriage definitions. *See supra* at 4-6. But the notion that Congress is somehow constitutionally *required* to do so—that state law can "reverse preempt" contrary federal statutes in this area, and eliminate what otherwise would be the legitimate federal interest in uniform federal legal rules of nationwide applicability—is wholly unprecedented and foreign to our constitutional tradition.

C. DOMA Preserves Past Legislative Judgments, Conserves Financial Resources, and Avoids Uncertain and Unpredictable Effects on the Federal Fisc.

Congress' decision to retain the traditional federal definition as the uniform federal rule in 1996 was supported by a number of other rational bases that are uniquely federal in nature. First, retaining the

traditional definition preserved the legislative judgments of earlier Congresses. Congress recognized that whatever the future held for the definition of marriage, the multitude of federal statutes already on the books that used the terms "marriage" or "spouse" intended to incorporate the traditional definition of marriage. In some cases, that intent was explicit as statutes included references to "husband and wife" or other terms clearly incorporating the traditional definition. In other cases, the legislative judgment reflected the traditional definition implicitly, because the definition was uniformly applied. *See, e.g.*, *Adams*, 486 F. Supp. at 1122 ("The term 'marriage' … necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes. That is the way the term 'marriage' is defined in every legal source that I have examined, starting with Black's Law Dictionary."). But in every case, the Congress that enacted DOMA in 1996 knew that each of the existing references to marriage in the United States Code, many of which were the product of legislative compromise, reflected the traditional definition. Against that backdrop, it certainly was rational for Congress to preserve those past legislative judgments and expressly adopt the traditional definition as an accurate reflection of past Congresses' intent when they used the defined terms in federal law.

Congress' retention of the traditional definition of marriage also rationally avoided uncertain and unpredictable (but presumed negative) effects on the federal fisc. In enacting DOMA, Congress recognized that a great many financial benefits from

the government turn on whether one is "married" for purposes of federal law. *See* House Rep. 18. In DOMA, Congress made the conscious decision not to expand the category of beneficiaries just because a state chose to expand its definition of marriage. *See id*. (stating that DOMA will "preserve scarce government resources, surely a legitimate government purpose"); 142 Cong. Rec. 22443 (1996) (Sen. Gramm) (DOMA prevents a "new set of benefits and expenses which have not been planned or budgeted for under current law").

Congress operated on the assumption that expanding the definition of marriage would have a substantial net negative effect on the federal fisc. *See id*. at 22448 (Sen. Byrd) (changing definition of marriage could cost federal government "hundreds of millions of dollars, if not billions"); *see also supra* at 9-10. The exact net effect is uncertain because although some benefits are extended exclusively to married couples, other laws operate as a "marriage penalty" or save the federal government funds if a marriage makes individuals ineligible for means-tested programs based on joint income. But Congress could rationally conclude that the net effect would be negative (if for no other reason than couples with a financial disincentive to do so might be less inclined to officially tie the knot), and in all events Congress could rationally decide to avoid a potentially large and uncertain effect that would have radically different impacts across federal agencies. *See Massachusetts*, 682 F.3d at 9 (explaining that under "rational basis standard," challenge to DOMA "cannot prevail" because "Congress could rationally have believed that DOMA

would reduce costs").[8] Since DOMA would preserve the status quo ante of providing federal benefits only to couples married under the traditional definition, Section 3 would avoid this uncertain and unpredictable effect.[9] This Court has recognized

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[8] Ms. Windsor disputes DOMA's cost savings, pointing to a Congressional Budget Office report published in 2004 (eight years after DOMA's enactment). *See* Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf. But the Second Circuit correctly concluded that it was Congress' "prerogative" to find that DOMA "will achieve a net benefit to the Treasury." App. 27a. The First Circuit likewise concluded that avoiding an uncertain impact on the federal fisc provides a rational basis for DOMA despite the CBO report. *See Massachusetts*, 682 F.3d at 9. Furthermore, the cursory ten-page CBO report—which acknowledged that its "estimates are highly uncertain" (at 3)—appears to make a critical analytical error: In claiming that many same-sex couples would become ineligible for federal means-tested benefits after their incomes were combined (as marriage would require), the report seemingly neglects to consider that many couples likely would avoid this financial hit simply by not marrying. *Cf. id.* ("how many same-sex partners would marry if allowed is unknown").

[9] The Second Circuit viewed DOMA not as preserving the status quo, but as "a benefit withdrawal" because "it functionally eliminated longstanding federal recognition of all marriages that are properly ratified under state law." Supp. App. 27a. But that plainly is wrong because it ignores the state of the world in which Congress acted in 1996 in which the federal government had never extended a federal marital benefit to a same-sex couple. It also largely begs the question (and ignores Congress' bipartisan judgment in DOMA) by assuming that Congress' dominant intent had always been to borrow state law whatever its content rather than employ the traditional definition, notwithstanding the numerous federal statutes that by their terms apply only to opposite-sex couples, *see supra* at 4-6.

that when Congress declines to extend benefits to those not previously eligible—as it did in DOMA—such actions are supported by the government's rational interest in proceeding "cautiously" and protecting the fisc. *Bowen v. Owens*, 476 U.S. 340, 348 (1986).

"[T]he Constitution does not empower this Court to second-guess … officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). And here, there is no denying that a redefinition of marriage by a substantial number of states would have a significant, if not entirely predictable, effect on the federal budget. Thus, it is not surprising that the First Circuit recognized that DOMA satisfies traditional rational basis review because "Congress could rationally have believed that DOMA would reduce costs." *Massachusetts*, 682 F.3d at 9.

D. Congress Rationally Proceeded with Caution When Faced with the Unknown Consequences of an Unprecedented Redefinition of Marriage, a Foundational Social Institution, by a Minority of States.

In enacting DOMA and adopting the traditional definition as the uniform federal rule, Congress recognized that the institution of marriage as between a man and a woman is, to borrow this Court's words from another context, "deeply embedded in the history and tradition of this country" and "has become part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). Congress rationally could have regarded any significant change in the definition of this bedrock

institution as having potentially significant consequences. Congress thus rationally could have concluded that any experimentation with such a longstanding institution should proceed first at the state level, while the federal government retains the traditional definition for its own purposes. *See* House Rep. 15.

Virtually no society anywhere has had even a single generation's worth of experience with treating same-sex relationships as marriages. There thus is ample room for a wide range of rational predictions about the likely effects of such recognition—on the institution of marriage, on society as a whole, and on distinctly federal interests. As two supporters of same-sex marriage put it, "whether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question …. There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them." William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 Future of Children 97, 110 (2005), http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf (endorsing "limited, localized experiment" at state level). One of the great benefits of federalism is that it allows states to adopt "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting). In light of the uncertainty about the consequences of changing such a long-established institution, it certainly was rational for Congress to decide to allow states to act as laboratories of democracy, while the federal government awaited the results of such state

experiments.

E. The Federal Government Could Rationally Retain the Traditional Definition for the Same Reasons States Can Rationally Retain that Definition.

Given its role in our federalist system, the federal government has unique interests in adopting the traditional definition as the uniform national rule for federal-law purposes. The national government has a distinct interest in treating citizens in different states similarly for federal-law purposes, without regard to the vagaries of states' treatment of foreign judgments, and has a distinct interest in making a federal employee indifferent between working in Maryland or Virginia. But in addition to such uniquely national interests, Congress has the same reasons for retaining the traditional definition as the substantial majority of states that have done so. Although the federal government does not have the same direct effect on the institution of marriage as the sovereigns that directly issue marriage certificates, federal law and federal definitions can still effect such institutions at the margin. *See Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[T]he Federal Government [has] considerable influence even in areas where it cannot directly regulate."). Thus, the federal government can retain the traditional definition based on a rational belief that doing so will rationally further the institution of marriage in the long run. Indeed, the burden on the challengers to DOMA is to explain why, if states can rationally choose either to expand the traditional definition to include same-sex couples or retain the traditional definition, the federal

government cannot rationally make the same choice.

1. Providing a Stable Structure to Raise Unintended and Unplanned Offspring

Many states have chosen to retain the traditional definition because of the intrinsic connection between marriage and children. In enacting DOMA, Congress recognized that, "[s]imply put, government has an interest in marriage because it has an interest in children." House Rep. 13. Similarly, this Court has repeatedly recognized that marriage's importance is derived from its intrinsic connection to procreation. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[A] decision to marry and raise the child in a traditional family setting must receive [constitutional] protection.").

The link between procreation and marriage itself reflects a unique social difficulty with opposite-sex couples that is not present with same-sex couples—namely, the undeniable and distinct tendency of opposite-sex relationships to produce unplanned and unintended pregnancies. Government from time immemorial has had an interest in having such unintended and unplanned offspring raised in a stable structure that improves their chances of success in life and avoids having them become a burden on society. *See Yarborough v. Yarborough*, 290 U.S. 202, 221 (1933) ("In order that children may not become public charges, the duty of maintenance is one imposed primarily upon the parents"); *King v. Smith*, 392 U.S. 309, 330 (1968) (biological parents have legal duties of support that government fills when abdicated). Particularly in an earlier era when employment opportunities for women were at best limited, the prospect that

unintended children produced by opposite-sex relationships and raised out-of-wedlock would pose a burden on society was a substantial government concern. Thus, the core purpose and defining characteristic of the institution of marriage always has been the creation of a social structure to deal with the inherently procreative nature of the male-female relationship. Specifically, the institution of marriage represents society's and government's attempt to encourage current and potential mothers and fathers to establish and maintain close, interdependent, and permanent relationships, for the sake of their children, as well as society at large. It is no exaggeration to say that the institution of marriage was a direct response to the unique tendency of opposite-sex relationships to produce unplanned and unintended offspring.

Although much has changed over the years, the biological fact that opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring has not. While medical advances, and the amendment of adoption laws through the democratic process, have made it possible for same-sex couples to raise children, substantial advance planning is required. Only opposite-sex relationships have the tendency to produce children without such advance planning (indeed, *especially* without advance planning). Thus, the traditional definition of marriage remains society's rational response to this unique tendency of opposite-sex relationships. And in light of that understanding of marriage, it is perfectly rational not to define as marriage, or extend the benefits of marriage to, other relationships that, whatever their

other similarities, simply do not have the same tendency to produce unplanned and potentially unwanted children. Indeed, Congress recognized as much. *See* House Rep. 14 ("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.").

Court decisions upholding traditional marriage laws on the state level have employed similar reasoning. *See, e.g.*, *Hernandez*, 855 N.E.2d at 7 ([The Legislature] could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who [marry]. The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples."); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (upholding Nebraska's marriage law based a "government interest in 'steering procreation into marriage'"; noting that the statute "confer[s] the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot"); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007).

DOMA's definition of marriage as between a woman and a man is rational—and constitutional—because it is tailored to fit the social issue that the institution of marriage addresses. The equal protection guarantee "is essentially a direction that

all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. Opposite-sex couples and same-sex couples, whatever their other similarities, are not similarly situated with regard to their propensity to result in unplanned pregnancies. "Principles of equal protection do not require Congress to ignore this reality." *Nguyen v. INS*, 533 U.S. 53, 66 (2001).

2. Encouraging the Rearing of Children by Their Biological Parents

One of the strongest presumptions known to our culture and law is that a child's biological mother and father are the child's natural and most suitable guardians and caregivers, and that this family relationship should be encouraged. *See Santosky v. Kramer*, 455 U.S. 745, 760 n.11, 766 (1982); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843-47 (1977); Supp. App. 72a-73a & n.11. To be sure, our tradition offers the same protections for an adoptive parent-child relationship, once it is formed. But nonetheless when both biological parents want to raise their child, the law has long recognized a distinct preference for the child to be raised by those biological parents. *Cf. Smith*, 431 U.S. 816 at 823. And this bedrock assumption is grounded in common sense and human experience: Biological parents have a genetic stake in the success of their children that no one else does. *See* Kristin Anderson Moore *et al.*, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, Child Trends Research Brief 1-2 (2002), http://www.childtrends.org/files/marriagerb602.pdf.

Of course, only relationships between opposite-sex

couples can result in children being raised by both of their biological parents. Therefore, when government offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children, it rationally furthers its legitimate interest in promoting this type of family structure in a way that extending similar regulation to other relationships would not.

3. Promoting Childrearing by Both a Mother and a Father

Finally, biological differentiation in the roles of mothers and fathers makes it rational to encourage situations in which children have one of each. As this Court has recognized, "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). Men and women are different. So are mothers and fathers. Common sense, and the experience of countless parents, informs us that children relate and often react differently to mothers and fathers. It is thus rational for governments to offer special encouragement for family structures in which these differing parental roles can complement each other. Moreover, the different challenges faced by boys and girls as they grow to adulthood make it at least rational to think that children benefit from having parental role models of both sexes.

* * *

The court of appeals concluded that reserving a special set of federal marital regulations and

incentives for opposite-sex couples has nothing to do with the government interests in procreation and childrearing, because extending the same regime to same-sex couples would not change the availability of benefits to opposite-sex couples. Supp. App. 29a-30a. But that is not obviously correct in a world of limited resources and, in any event, is not the proper inquiry under rational basis review. In an equal protection challenge, a classification is rational if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Even if extending the definition of marriage to same-sex couples would not harm opposite-sex couples in the least, the question remains whether it was rational for Congress to draw the line where it did. And because the institution of marriage arose in large measure in response to a unique social difficulty that opposite-sex couples, but not same-sex couples, posed, it was rational for Congress to draw the line where it did.

III. The Longstanding List Of Suspect And Quasi-Suspect Classes Should Not Be Expanded To Include Sexual Orientation.

While rational basis review is "a paradigm of judicial restraint," *Beach*, 508 U.S. at 314, the recognition of quasi-suspect and suspect classes has the opposite effect. It extracts certain issues from the normal democratic process and limits the ability of states and the federal government to address those issues through their political branches. Accordingly, this Court has cautioned that the judiciary must be "very reluctant" to establish new suspect (or quasi-suspect) classes given "our federal

system and … our respect for the separation of powers." *Cleburne*, 473 U.S. at 441. In keeping with that admonition, this Court has not added to the short list of suspect or quasi-suspect classes in the last forty years, and indeed has rejected every proposed such class during that span, including mental disability, *id.* at 442-47, kinship, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

This Court has had opportunities to declare sexual orientation a suspect class and has declined to do so. *See Massachusetts*, 682 F.3d at 9 (noting that this Court "conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche"); App. 31a. The Second Circuit's holding in this case that sexual orientation classifications are quasi-suspect is truly an outlier—it is contrary to the thrust of this Court's decisions and directly conflicts with the decisions of eleven other circuits holding that such classifications are not subject to any heightened scrutiny. *See supra* at 13 n.4.

This Court has identified four relevant factors in determining whether a class is suited for suspect or quasi-suspect treatment. None of these factors adequately supports adding sexual orientation to the list, and perhaps the most important—the political power to participate in the democratic process—tips decisively against making sexual orientation the first new suspect or quasi-suspect class in forty years.

A. Gays and Lesbians Are Far from Politically Powerless.

More than twenty years ago, the Seventh and Ninth Circuits recognized that "homosexuals … are not without growing political power," and that "[a] political approach is open to them" to pursue their objectives. *Ben-Shalom*, 881 F.2d at 466; *accord High Tech Gays*, 895 F.2d at 574. Whatever the limits of that conclusion two decades ago, there can be no serious doubt that the political power of gays and lesbians has increased exponentially since then.

Today, same-sex marriage is supported by President Obama (who has called for DOMA's repeal), Vice President Biden (who voted for DOMA as a Senator in 1996 but has since changed his view), and the Senate majority leader, the House minority leader, and the Democratic Party's 2012 platform. One-third of the Members of the U.S. House of Representatives filed a brief in the court below attacking both the wisdom and constitutionality of DOMA.

Polling indicates that by 2011, the proportion of Americans supporting same-sex marriage had increased from 27% to 53% in a span of only 16 years. *See* Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, Gallup.com (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx. The November 2012 elections witnessed "a record number of openly gay candidates" for Congress, and the election of the first openly gay U.S. Senator. Charles Mahtesian, *A Record Number of Gay Candidates*, POLITICO.com (Oct. 2, 2012), http://www.politico.com/blogs/charlie-

mahtesian/2012/10/a-record-number-of-gay-candidates-137289.html. In that same election cycle, voters in Maine, Maryland, and Washington state passed measures allowing same-sex marriage, and Minnesota voters defeated a proposed traditional marriage amendment to the state constitution. The Maine result demonstrates the capacity for the give and take of the political process to change voters' minds, as the Maine referendum effectively reversed the result of a 2009 referendum. *See* Michael Falcone, *Maine Vote Repeals Gay Marriage Law*, POLITICO.com (Nov. 4, 2009), http://www.politico.com/news/stories/1109/29119.html. In all, nine states and the District of Columbia now permit same-sex marriage. Although the initial process of recognizing same-sex marriage was prompted by judicial decisions interpreting state constitutions (as Congress foresaw in 1996), more recent gains have come via legislatures and at the polls through referenda.

Nor have the successes been limited to the marriage issue, as dramatically illustrated by the repeal of the military's Don't Ask Don't Tell policy. *See* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 10 U.S.C. § 654 note. Even more broadly, the Human Rights Campaign, one of the nation's leading gay-rights organizations, has been "ranked the second most successful political organization in the entire country by National Journal." *Human Rights Campaign Lauds 2008 Election Results*, HRC.org (Nov. 4, 2008), http://www.hrc.org/press-releases/entry/human-rights-campaign-lauds-2008-election-results (citing Bara Vaida and Neil Munro, *Interest Groups* -

Reversal of Fortunes, Nat'l J., Nov. 11, 2006). And gays and lesbians represent nearly 20% of President Obama's top fundraisers. Michelle Garcia & Andrew Harmon, *Obama's Power Gays*, Advocate.com (Oct. 24, 2011), http://www.advocate.com/news/daily-news/2011/10/24/obamas-power-gays; Dan Eggen, *The Influence Industry: Same-Sex Marriage Issue Shows Importance of Gay Fundraisers*, Wash. Post (May 9, 2012), http://www.washingtonpost.com/politics/same-sex-marriage-debate-many-of-obamas-top-fundraisers-are-gay/2012/05/09/gIQASJYSDU_story.html.

Last but not least, the decision of the President and Attorney General to stop defending and start attacking DOMA itself demonstrates the remarkable political clout of the same-sex marriage movement. As the Chief Judge of the Second Circuit remarked to the Department's representative at oral argument, "your presence here is like an argument against your argument." Appendix to Response in Support of Writ of Certiorari Before Judgment, No. 12-307, 37a (Oct. 10, 2012).

In short, gays and lesbians are one of the most influential, best-connected, best-funded, and best-organized interest groups in modern politics, and have attained more legislative victories, political power, and popular favor in less time than virtually any other group in American history. Characterizing such a group as politically powerless would be wholly inconsistent with this Court's admonition that a class should not be regarded as suspect when the group has some "ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. Gays and lesbians not only have the

attention of lawmakers, they are winning many legislative battles. And the importance of this factor in the analysis cannot be gainsaid. This Court has never definitively determined which of the four factors is necessary or sufficient, but given that the ultimate inquiry focuses on whether a group needs the special intervention of the courts or whether issues should be left for the democratic process, the political strength of gays and lesbians in the political process should be outcome determinative here.

B. Whether a Married Couple Is of the Opposite Sex Is Relevant to the Government's Interests in Recognizing Marriage.

This Court has also looked to the question whether a group has "distinguishing characteristics" relevant to the distinctions actually drawn. Whatever the relevance of homosexuality in any other context, the relevant distinguishing characteristic of same-sex couples is their propensity to engage in relationships that do not produce unplanned and unintended offspring. *Citizens for Equal Prot.*, 455 F.3d at 866-67 (quoting *Cleburne*, 445 U.S. at 441). And, as explained *supra*, the evolution of marriage as a response to the unique social concerns of the unintended and unplanned offspring of opposite-sex relationships makes this distinguishing characteristic of same-sex relationships highly relevant. *Id*. at 867*; see supra* at 44-47.

C. Sexual Orientation Is Not an "Immutable" Characteristic.

Sexual orientation differs in multiple dimensions from any previously recognized suspect or quasi-

suspect class. It is defined by a propensity to engage in a certain kind of conduct; the cause of that propensity is not well understood by science; sexual orientation is not determinable at birth; for at least some, sexual orientation is a fluid characteristic capable of changing over a person's lifetime; and the proposed class is difficult to define.

As courts have recognized, homosexuality "differs fundamentally from those [characteristics] defining any of the recognized suspect or quasi-suspect classes …. The conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups." *Woodward*, 871 F.2d at 1076; *Ben-Shalom*, 881 F.2d at 464; *accord High Tech Gays*, 895 F.2d at 573-74. There is no precedent for creating a suspect class that is based on the class' propensity to engage in a certain kind of conduct.

Not only is sexual orientation different from every recognized suspect class in that it is based on a propensity to engage in certain conduct, the cause of that propensity is not well understood. According to Ms. Windsor's own expert, Dr. Letitia Peplau:

> Currently, the factors that cause an individual to become heterosexual, homosexual, or bisexual are not well understood. Many theories have been proposed but no single theory has gained prominence or is definitively established by scientific research. Today, most social and behavioral scientists view sexual orientation as resulting from the interplay of biological, psychological, and social factors.

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Thus, while "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality), the same cannot be said of sexual orientation. For some persons, sexual orientation is fluid. And, as Dr. Peplau admits, a person's sexual orientation often cannot "be readily categorized as heterosexual, homosexual, or perhaps bisexual. In fact, human experience often defies such clear-cut categories." Linda D. Garnets & Letitia Anne Peplau, *A New Paradigm for Women's Sexual Orientation: Implications for Therapy*, 24 Women & Therapy 111, 113 (2001). Instead, according to the American Psychological Association, sexual orientations form a "continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex." Am. Psychological Ass'n, *Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality*, http://www.apa.org/topics/sexuality/orientation.aspx/. Finally, when considering homosexuality as a potential suspect class, "the complexities involved merely in defining the term … would prohibit a determination of suspect classification." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (declining to recognize transsexuals as a suspect class).

D. The Histories of Discrimination Based on Race, Ethnicity, Sex, and Legitimacy Are Different.

Finally, each of the recognized suspect and quasi-suspect classes—racial minorities, aliens, women, and those born out of wedlock—have suffered

discrimination for longer than history has been recorded. In contrast, as this Court noted in *Lawrence*, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." 539 U.S. at 568. Indeed, "the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Id*. As Ms. Windsor's own expert, Dr. George Chauncey, has written, although "antigay discrimination is popularly thought to have ancient roots, in fact it is a unique and relatively short-lived product of the twentieth century." George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* 14 (2004). According to Dr. Chauncey, "[m]ost of the [discrimination] was put in place between the 1920s and 1950s, and most was dismantled between the 1960s and the 1990s." Owen Keehnen, *The Case for Gay Marriage: Talking with* Why Marriage? *Author George Chauncey*, GLBTQ.com (2004), http://www.glbtq.com/sfeatures/interviewgchauncey.html.

More important, unlike racial minorities and women, homosexuals as a class have never been politically disenfranchised—the kind of pervasive official discrimination that most clearly supports suspect class treatment by the courts. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).[10]

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[10] Although heightened scrutiny is clearly inappropriate, DOMA could survive even under that more demanding standard. In our federalist system, it is surely an important interest for each sovereign to be able to address an issue as divisive and fast-moving as same-sex marriage for itself.

* * *

In sum, the traditional factors this Court has assessed in determining whether to recognize a new quasi-suspect or suspect class are absent when it comes to gays and lesbians. Perhaps most critically, gays and lesbians have substantial political power, and that power is growing. Victories at the ballot box that would have been unthinkable a decade ago have become routine. To be sure, those victories have not been uniform and have come first in "blue" states rather than "red" ones, but that is the nature of the political process. There is absolutely no reason to think that gays and lesbians are shut out of the political process to a degree that would justify judicial intervention on an issue as divisive and fast-moving as same-sex marriage. As Judge Straub observed, the definition of marriage is "an issue for the American people and their elected representatives to settle through the democratic process." Supp. App. 83a.

Indeed, the democratic process has substantial advantages over constitutionalizing this issue. Same-sex marriage is being actively debated in legislatures, in the press, and at every level of government and society across the country. That is how it should be. These fora require participants on both sides to persuade those who disagree, rather than labeling them irrational or bigoted.

By contrast, courts "can intervene in this robust debate only to cut it short," Supp. App. 83a, and only

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DOMA is narrowly tailored to accomplish this important government interest by preventing one state's decision from dictating the result for other states or the federal government.

by denouncing the positions of hundreds of Members of Congress who voted for DOMA, of the President who signed it, and of a vast swath of the American people as not just mistaken or antiquated, but as wholly irrational. That conclusion is plainly unwarranted as a matter of constitutional law, and judicially constitutionalizing the issue of same-sex marriage is unwarranted as a matter of sound social and political policy while the American people are so actively engaged in working through this issue for themselves. This Court should "permit[] this debate to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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