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 OF 172 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 40 U.S. SENATORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR, URGING AFFIRMANCE ON THE MERITS

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INTEREST OF THE *AMICI CURIAE*[*]

Amici are 172 Members of the U.S. House of Representatives and 40 U.S. Senators.[1] Some of us voted against the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996); others voted for it; still others were not yet in Congress when it was enacted. But we all agree that Section 3 of DOMA—which divides married couples into two classes and denies all federal responsibilities and rights to one of them—lacks a rational connection to any legitimate federal purpose, and is therefore unconstitutional.[2]

Members of Congress are bound by oath to support and defend the Constitution. Thus, this Court's interpretation of the Fifth Amendment's equal-protection guarantee directly affects how Congress drafts, considers, and enacts laws. We urge the Court to clarify that legislative classifications based on sexual orientation do not enjoy the presumption of validity appropriately afforded to most legislative acts. That guidance will help ensure that legislative classifications receive sufficient reflection. We also want to explain why, in this rare case, the Court should find an Act of Congress unconstitutional.

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[*] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

[1] A complete list of the Members of Congress participating as *amici* appears in an appendix to this brief.

[2] We refer collectively to DOMA as enacted and Section 3 of DOMA as "DOMA." Section 2 of DOMA, 28 U.S.C. § 1738C, is not before the Court.

Although we support legislative standing to defend legislation in appropriate cases, we disagree with the arguments made by the Bipartisan Legal Advisory Group in DOMA's defense. Having repeatedly urged Congress (including the Speaker of the House) to revisit DOMA legislatively, we believe it important to dispel the notion that BLAG speaks for the entire Congress on the merits. It does not. In fact, many Members believe that Section 3 of DOMA is a violation of the Fifth Amendment's equal-protection guarantee and should be struck down.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress enacted DOMA, gay and lesbian couples could not marry anywhere in the world. Some States still criminalized same-sex relationships, inviting further discrimination against gay men and lesbians in employment, family relations, and housing.[3] Gay men and lesbians were still often portrayed as mentally unstable, sexually promiscuous, and morally deficient.[4] In short, it was a different world for gay men and lesbians, and many were understandably reluctant to speak openly about themselves or their families. A number of Members, like the constituents we serve, did not personally know many (if any) people who were openly gay, and majority attitudes toward that minority group were often viscerally fearful and negative.

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[3] The House Judiciary Committee relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), as support for DOMA. See H.R. Rep. No. 104-664 at 16 n.54 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2920 n.54 ("House Report").

[4] See Affidavit of George Chauncey, Ph.D. (JA338).

As a result, when the question of same-sex marriage arose in 1996, reflexive beliefs and discomfort about same-sex relationships dominated congressional debate. From our perspective—including those of us who voted for DOMA—debate and passage of the law did not necessarily arise "from malice or hostile animus," but instead from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). While fear and distrust of families different from our own may explain why DOMA passed by comfortable majorities in 1996, it does not obviate the need for a constitutionally permissible justification for the law.

We agree that heightened review is appropriate here, and that DOMA must be struck down under that standard. We offer our unique perspective on why gay men and lesbians lack the meaningful political power that some (including BLAG) have argued might justify denying heightened judicial scrutiny.

We also believe that DOMA must fail even if it does not trigger heightened review. Virtually every aspect of DOMA and its legislative history—the lack of objective, rational fact-finding to connect the exclusion of married same-sex couples to a legitimate federal interest; the sweeping exclusion of gay men and lesbians based on a single identifiable trait; and the open desire of some to express disapproval of that minority group—distinguishes it from routine Acts of Congress. None of the arguments advanced in its defense is sufficient. DOMA lacks the required rational connection to a legitimate federal interest: "It is a status-based enactment divorced from any fac-

tual context from which [the Court] could discern a relationship to legitimate [federal] interests." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996).

Although the unsupported claims that were asserted to justify DOMA in 1996 went unchecked by reality then, gay and lesbian couples can now marry in nine states and the District of Columbia, and 18,000 such couples remain legally married in California as well. See *Strauss* v. *Horton*, 207 P.3d 48 (Cal. 2009). The harm that DOMA causes those couples, their families, and their States is very real today. As a result—and as more Americans have come to realize that they have a lesbian or gay relative, friend, or colleague—attitudes have shifted.

We are part of the communities we represent, and our understanding reflects the same arc of experience, making clear what should have been apparent in 1996. Put simply, DOMA is one of those laws that was enacted when "times * * * blind[ed] us to certain truths," but that "later generations can see * * * in fact serve only to oppress." *Lawrence* v. *Texas*, 539 U.S. 558, 579 (2003). It must be struck down.

ARGUMENT

I. Gay men and lesbians lack meaningful political power.

We agree with the Solicitor General and Ms. Windsor that laws that single out lesbians and gay men should be reviewed under heightened scrutiny. Congress has come to recognize that sexual orientation is not a characteristic that bears on one's "ability to perform or contribute to society." *Cleburne* v. *Cle-*

burne Living Ctr., 473 U.S. 432, 441 (1985).[5] Nevertheless, gay men and lesbians have been unable to obtain basic protections routinely afforded to others, or to prevent hostile legislation on matters that significantly affect their lives.

A. Just as heightened review applies to sex-based classifications, it should apply here.

BLAG suggests (at 50-54) that gay men and lesbians have "political strength," and that their "power to participate in the democratic process" alone is enough to deny heightened review of laws that harm them. But BLAG exaggerates the importance of political power as both a legal and a factual matter, as this Court's treatment of sex-based classifications makes clear. When this Court ruled that sex-based classifications should be subject to heightened review, "the position of women in America [had already] improved markedly." *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). Women made up over 50% of the electorate in each presidential election between 1964 and 1972. See http://tinyurl.com/doma01 (census data on voter participation). Congress had passed Title VII and the Equal Pay Act and had voted to propose the Equal Rights Amendment to the

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[5] Testimony concerning legislation to extend employment-discrimination protection to gay and lesbian Americans confirms that sexual orientation has no relation to ability in the workplace. *Employment Non-Discrimination: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 111th Cong. (2009) (testimony of Helen Norton). Congress's debate over the repeal of "Don't Ask, Don't Tell" confirmed that sexual orientation does not predict one's ability to serve. See generally *Testimony Relating to the "Don't Ask, Don't Tell" Policy*: *Hearing Before S. Comm. on Armed Services*, 111th Cong. (2010).

States for ratification. *Frontiero*, 411 U.S. at 687 & nn. 19-20.

Yet this Court remained troubled by sex-based classifications because they often reflect lingering "paternalistic attitude[s]" or "gross, stereotyped" notions about women. *Frontiero,* 411 U.S. at 684-689. Because such views too often replace rational reflection, this Court appropriately concluded that sex-based classifications must be viewed with skepticism, and did not view women's increasing political power as any reason to conclude otherwise. *Id.* (citing *Bradwell* v. *State*, 83 U.S. (16 Wall.) 130, 141 (1873)).

That same conclusion is warranted here. Unlike women, gay men and lesbians represent only a small percentage of the electorate. They have enjoyed nothing close to the degree of favorable legislative attention that women had received by the time this Court held that sex-based classifications warrant heightened scrutiny. And legislative treatment of gay men and lesbians has frequently been driven by fear, stereotypes, and reflexive adherence to traditional beliefs. Indeed, DOMA itself confirms the need for heightened review of laws that disfavor gay men and lesbians.

B. Gay men and lesbians could not prevent DOMA, and their marriages remain the subject of unfavorable congressional attention.

Gay men and lesbians were unable to prevent enactment of DOMA—a rare contemporary example of *de jure* discrimination that is remarkable in its sweeping exclusion of a historically disfavored minority group.

Nor have gay men and lesbians fared better in their efforts to have DOMA repealed. In 1996, the statute's proponents made no effort to analyze its far-ranging effects either on federal programs or on families. See, *e.g.*, *Mass.* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 980 (N.D. Cal. 2012); *Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 299 (D. Conn. 2012). Yet the House majority leadership still refuses to permit reexamination of the law, despite repeated calls from Members to do so. See *Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Rep. Nadler).[6]

At the same time, Congress has devoted considerable time and resources to prohibiting same-sex marriage altogether. Since 1996, Congress has held at least nine hearings dedicated to exploring ways to prevent States from marrying gay and lesbian

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[6] BLAG suggests (at 51) that the submission of an *amicus* brief by members of Congress evidences meaningful political power. That is wrong. Not only has the House Majority steadfastly refused to reexamine DOMA, but the House has voted repeatedly to reaffirm it. H.R. 1540, 112th Cong. § 534 (2011) ("Congress reaffirms the policy of section 3 of the Defense of Marriage Act") (provision offered by Rep. Vicky Hartzler (R-Mo.) and adopted in Armed Services Committee markup by vote of 39-22); H.R. 5326, 112th Cong. § 561 (2011) (provision adopted on vote of 245-171 as an amendment offered by Rep. Tim Huelskamp (R-Kan.)). And, in the resolution adopting the House Rules for the 113th Congress, the House voted to defend DOMA in court. H.R. Res. 5, 113th Cong. § 4(a)(1) (2013).

couples.[7] Joint Resolutions to amend the Constitution to prohibit any State from marrying same-sex couples were introduced in *every* Congress between 2002 and 2012. As recently as 2006, the proposed constitutional amendment was the subject of floor votes in the House and Senate; it garnered a 236-vote majority in the House (see H.R.J. Res. 88, 109th Cong. (2006)), and the Senate failed to invoke cloture on the motion to proceed by a vote of 49-48 (see S.J. Res. 1, 109th Cong. (2006)).

Still, BLAG asserts (at 58) that "[s]ame-sex marriage is being actively debated" at "every level of government and society across the country," suggesting that the issue should be resolved by "persua[sion]," outside the courts. That misses the point. Gay men and lesbians have been participating in the public debate, and public opinion has started to shift to some degree. But for a range of complex political and

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[7] Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 109th Cong. (Oct. 20, 2005); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (June 24, 2004); Hearing Before S. Comm. on the Judiciary, 108th Cong. (June 22, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (May 13, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (Apr. 22, 2004); Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary, 108th Cong. (Mar. 30, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Mar. 3, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Jan. 27, 2004); Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Sept. 4, 2003).

sociological reasons, increased public support cannot be equated with real political power and does not guarantee meaningful legislative change. As Stanford political-science professor Gary Segura testified in this case, "gay men and lesbians are powerless to secure basic rights within the normal political processes" for a range of reasons, including vulnerability to harmful ballot initiatives, underrepresentation in office, geographic dispersion, and entrenched opposition to their political advancement. JA393-436.

Thus, although gay men and lesbians have achieved limited recent success at the ballot box in some parts of the country, *thirty-nine* States have enacted constitutional amendments or statutes prohibiting same-sex marriage (Gov't Merits Br. 33-34), with 68 percent of voters in North Carolina enacting one such constitutional amendment in 2012. Those stark facts further undermine BLAG's claim concerning political power, including at the federal level. Gay men, lesbians, and their allies will unquestionably continue their work to bring objective facts to the fore in legislative debate. But that is a separate matter. It is the role of the courts to ensure that the government affords all citizens equal protection of the law, regardless of public opinion.

As the Second Circuit observed below, gay men and lesbians simply lack "the strength to politically protect themselves from wrongful discrimination." *Windsor* v. *United States*, 699 F.3d 169, 184 (2d Cir. 2012). As legislators who for years have supported bills both to repeal laws that disfavor gay men and lesbians and to provide them with basic protections against discrimination, we know first hand the obstacles they face in the legislative process.

C. Lesbians and gay men have yet to obtain basic civil-rights protections.

Gay men and lesbians have also been unable to secure legislative protections against discrimination in housing, employment, public accommodation, public education, or federally funded programs. Efforts to pass such legislation began in 1977, with the introduction of a bill to amend the Civil Rights Act of 1964 and the Fair Housing Act. See H.R. 8269, 95th Cong. (1977). That bill was reintroduced in every Congress over the next two decades, but it never gained sufficient traction.

After failing to make progress in securing those protections, gay men and lesbians focused more narrowly on protection from discrimination in employment. The Employment Non-Discrimination Act (ENDA) has been introduced in nine of the last ten Congresses. See, *e.g.*, H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011). Gay men and lesbians have shown a continued willingness to accept compromises and limitations that are not included in other civil-rights laws, but still have been unable to secure the bill's enactment. In fact, in the nearly twenty years since it was first introduced, ENDA passed only *once* in the House and *never* in the Senate. That gay men and lesbians have been unable to achieve even the modest goal of obtaining basic protection against employment discrimination—despite the fact that 89 percent of the American people supports such protection (see *Gay and Lesbian Rights*, Gallup, 2008, http://tinyurl.com/doma03)—shows that BLAG is flat wrong in contending that gay men and lesbians enjoy "remarkable political clout."

BLAG's citation (at 52) to the repeal of "Don't Ask, Don't Tell" provides no basis for concluding otherwise. DADT resulted in the discharge of more than 13,000 members of the armed forces. See Dep't of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* at 23 (Nov. 30, 2010), http://tinyurl.com/-doma06. It squandered between $190.5 and $363.8 million in recruiting and training costs. See USA Today, *Report: 'Don't Ask, Don't Tell' costs $363M* (Feb. 14, 2006), http://tinyurl.com/doma05. Yet Congress authorized the policy's repeal only in a lame-duck session, and only after two federal courts had already declared it unconstitutional. See *Witt* v. *Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010); *Log Cabin Republicans* v. *United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), vacated on mootness grounds, 658 F.3d 1162 (9th Cir. 2011) (per curiam). Elimination of a costly, discriminatory policy that resulted in the discharge of valuable servicemembers during wartime hardly illustrates political power.[8]

We urge the Court to hold that sexual orientation is not a presumptively valid ground on which to legislate. The pervasive history of discrimination against gay men and lesbians, based on a trait that bears no relation to their ability to contribute to

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[8] A Department of Defense report on the effect of DADT's repeal confirms that the rationales justifying the law's enactment in 1993 were not, in fact, furthered by the policy. As Secretary of Defense Leon Panetta said in announcing the results of the study: "It's not impacting on morale. It's not impacting on unit cohesion. It is not impacting on readiness." Karen Parrish, *Report Shows Success of "Don't Ask, Don't Tell" Repeal*, Am. Forces Press Serv. (May 10, 2012), http://tinyurl.com/doma07.

society, calls for heightened review of laws that target them for harm. Far from warranting a *denial* of such review, that identifiable minority's relative lack of political power underscores the *need* for it.

II. DOMA Section 3 is unconstitutional.

Justice Harlan famously said in his dissent in *Plessy* v. *Ferguson* that "the Constitution 'neither knows nor tolerates classes among citizens.'" 163 U.S. 537, 559 (1896) (Harlan, J. dissenting). That unassailable principle, which lies at the very heart of this Nation's character, dictates the outcome here: DOMA is constitutionally impermissible "class legislation" (*Romer*, 517 U.S. at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883))), plain and simple.

Virtually every feature of DOMA distinguishes it from routine "statutory definitions and other line-drawing exercises." BLAG Br. 29. It was enacted without any genuine effort to discern a connection to a legitimate federal interest. It singles out married same-sex couples by one trait alone and denies them protection across the board. And a purpose for its enactment, clearly stated in the House Report and during floor debates, was moral disapproval of the minority group that it burdens. None of the arguments advanced in DOMA's defense comes remotely close to justifying it. Thus, even if the Court does not apply heightened review, DOMA must be struck down. "It is not within our constitutional tradition to enact laws of this sort." *Romer,* 517 U.S. at 633.

A. DOMA is not the rational result of impartial lawmaking.

In its consideration of DOMA, Congress failed to engage in the type of impartial, fact-based reflection that serves as a bulwark against unconstitutional

discrimination. In fact, Congress deliberately chose to forgo any examination of how DOMA would affect the many federal laws that take marital status into account, the families that it hurts, or the federal government's long history of respecting the significant variability in state marriage laws for purposes of federal law.

1.a. DOMA affects *thousands* of Federal statutes and regulatory materials covering virtually every subject within the federal sphere, including Social Security, housing, nutrition, veterans' and military benefits, employment, immigration, and many other areas. Yet Congress did not study a single affected law or program or refer the bill to committees with jurisdiction over those and many other relevant subjects. As the dissenting views in the House Report stated, DOMA's "consequences [were] not adequately analyzed," and because the "committees of the Congress [did not] hold[] hearings on the various aspects of" the law, the majority was able to "use ignorance as an excuse for haste." House Report at 42.

In fact, Congress did not even know which, or how many, federal laws were affected when it voted on the bill. It was not until nearly two months after DOMA passed the House, and just five days before it passed the Senate, that House Judiciary Committee Chairman Henry Hyde even *asked* the GAO to analyze DOMA's effects on federal laws and programs. See Defense of Marriage Act, B-275860, GAO/OGC-97-16 (Jan. 31, 1997), at 1.[9] And Congress did not

[9] The GAO's January 1997 report identified 1,049 Federal statutes, classified into subject-matter categories, for which marital status was a factor. See Defense of Marriage Act, B-275860, GAO/OGC-97-16 (Jan. 31, 1997). The GAO's more

wait for GAO's answer, which came nearly four months after DOMA was signed into law. *Ibid*. The Congressional Budget Office did not release an estimate of DOMA's potential budgetary impact until June 2004—nearly eight years later.

b. Similarly unexamined were sweeping and unsupported assertions that denying federal recognition to same-sex couples would serve the welfare of children. The House Report claimed that because of "the possibility of begetting children inherent in heterosexual unions," the federal government has an interest in promoting marriage as a means of "encouraging [different-sex] citizens to come together in a committed relationship." House Report at 14. As discussed more fully below, that misstates Congress's interest in marriage. Moreover, DOMA's proponents, then and now, have failed to explain how the federal government's refusal to recognize the marriages of committed *same-sex* couples in any way encourages *different-sex* couples to marry or affects their parenting behavior.

The asserted interest in defending "traditional marriage" was also deemed "[c]losely related" to "a corresponding interest in *promoting heterosexuality*," according to the official House Report (at 15 n.53 (emphasis added)). Relying heavily on an opinion piece in *Commentary Magazine*, the House Report posited that "sexual identity confusion" was increasing and that homosexuality could and should be discouraged. *Ibid*. According to the Report, "[m]aintaining a preferred societal status of heterosexual mar-

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recent assessment, now nine years old, increased that number to 1,138. See Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Jan. 23, 2004). No one has examined DOMA's full effect on the vast body of administrative law.

riage thus will also serve to encourage heterosexuality." *Ibid*. The Report continued: "reason suggest[s] that we guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop." *Ibid*. That acknowledged hostility toward homosexuality "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

c. The discussion of DOMA's purported advancement of Congress's interest in child welfare reveals the troubling desire of some lawmakers to prevent same-sex couples from parenting at all—a question that was not before Congress and lies beyond our authority—and an equally disturbing disregard for the welfare of children already being raised in households headed by same-sex couples. House Report at 7 n.21 ("recognizing same-sex 'marriages' would almost certainly have implications on the ability of homosexuals to adopt").

To be sure, some members questioned and objected to the unsupported and illogical assertions regarding same-sex couples and their families. But Congress declined to consult any family- or child-welfare experts on whether denying federal recognition to married gay and lesbian couples would serve child welfare or promote stability of American families. And, of course, DOMA does neither of those things. As the leading national associations of psychological, psychiatric, and family-therapy professions confirm: "the scientific research that has directly compared gay and lesbian parents with heterosexual parents has consistently shown that the former are as fit and capable parents as the latter and that their

children are as psychologically healthy and well adjusted." C.A. Am. Psychological Ass'n *Amicus* Br. 16.

d. Congress also failed to evaluate critically the many mistaken assertions about the supposed need for a "uniform" federal definition of marriage. BLAG and the U.S. Senators participating as *amici* in support of BLAG repeat that mistake, relying heavily on Congress's alleged interest in such uniformity. See BLAG Br. 8, 33-37; Sen. Hatch *Amicus* Br. 16. But as explained more fully in Section II.B.5 below, there was no single, uniform federal definition of marriage before DOMA, and there still is none today.

Indeed, invocations of "uniformity" should cause DOMA's defenders concern, rather than give them comfort. That DOMA represented an unprecedented break from Congress's long-standing deference to state marriage determinations was mentioned repeatedly during consideration of the bill. Professor Cass Sunstein testified that DOMA represented "a unique disability insofar as Congress has enacted no similar measure about any other kind of socially disapproved 'marriage,'" and that Congress was intruding on matters "traditionally handled at the state level." *S. 1740: A Bill to Define and Protect the Institution of Marriage: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 48 (1996). Many members echoed that concern on the House and Senate floors. For example, Senator Dianne Feinstein warned that "never in the history of this Nation—for over 200 years—has Congress usurped States' authority to define marriage." 142 Cong. Rec. S10118.

Often, "the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012)

(alterations omitted); see also *Romer*, 517 U.S. at 633 ("The absence of precedent * * * is itself instructive."). Just so here: Congress's stark departure from the long-standing practice of deferring to the States on matters of family law, and the resulting interference with state regulation of marriage (see *infra* Section II.B.3) are additional reasons why Congress should have viewed (and this Court *should* view) DOMA with deep skepticism.

Despite those red flags, DOMA's proponents insisted that the supposed harms of same-sex marriage were so self-evident that there was no need for Congress to look beyond reflexive beliefs. The predominant view was, as Representative Robert Inglis put it, that "no debate" was necessary because "there are some things that are true and right and some things that are wrong." *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 36 (1996).

2. Congress's minimal consideration of whether DOMA actually serves legitimate federal interests unsurprisingly produced a sweeping, discriminatory law that is utterly divorced from those interests.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Given that DOMA is neither "narrow * * * in scope" nor "grounded in [an objective] factual context" (*ibid.*), it is hardly surprising that such a relationship is lacking here.

Like Colorado's discriminatory Amendment 2 invalidated in *Romer*, DOMA "is a status-based enactment divorced from any factual context" from which

a "relationship to legitimate state interests" can be discerned. 517 U.S. at 635. It classifies married same-sex couples simply "for its own sake" and "then denies them protection across the board" (*id*. at 633, 635); it applies no matter the statute, no matter the regulation, and no matter the administrative interpretation; and it affects thousands of laws and regulations—many more than the eight laws and policies identified by the petitioners in *Romer*. Brief for Petrs. 5-6, *Romer* v. *Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008429.

Given the lack of grounding in any of the affected statutes or regulations, it is impossible to discern a rational connection between DOMA and any of the legitimate purposes that those laws are designed to achieve. In fact, and as revealed by the only hearing ever held to explore the statute's effect on American families—taking place fifteen years after the law's enactment—DOMA does not serve, but *undermines*, the federal laws and programs that it affects. See generally *S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, 112th Cong. (2011) ("Respect for Marriage Hrg.").

For example, the purposes of the Social Security program are not served when denial of survivor benefits to a lesbian's or a gay man's surviving spouse leaves the spouse destitute even though both spouses paid into the Social Security system on the same terms as other citizens.[10] Cf. *Weinberger* v. *Weisen-*

[10] Testifying in the Senate Judiciary Committee, Ron Wallen from California stated: "[B]eyond the emptiness caused by the loss of the man I have spent my entire adult life with, my life has also been thrown into financial turmoil, because of DOMA." Respect for Marriage Hrg. at 312.

feld, 420 U.S. 636, 651 (1975) ("Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational."). The goal of maximizing the financial well-being and independence of widows is not furthered by depriving Edie Windsor and others like her of the estate-tax exemption that other married Americans receive.[11] The policy of encouraging employers to provide family health benefits is not served either by denying to employers the tax deduction for providing those benefits to married gay and lesbian couples or by refusing to cover spouses of gay and lesbian federal employees. Our national security is undermined by denying spousal benefits to gay and lesbian servicemembers, especially during periods of armed conflict.[12] Our veterans are dishonored when we deny them the right to have their spouses buried alongside them in our national cemeteries.[13]

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[11] Mark Kalend and Steven Kazan from California testified in the Senate Judiciary Committee that Mr. Kalend had to pay more than $2 million in estate and gift taxes because of DOMA. Respect for Marriage Hrg. at 180-85.

[12] S. Rep. No. 93-235, at 7 (1973) ("No soldier can be and remain at his best with the constant realization that his family and loved ones are in dire need of financial assistance.").

[13] Jill Johnson-Young from California testified in the Senate Judiciary Committee that her late wife, Linda, was a veteran, but that "despite her service, our country made her unwelcome in our national cemetery." Respect for Marriage Hrg. at 178.

Other examples abound. In striking down DOMA as unconstitutional, the First Circuit observed:

> DOMA's definition of marriage arguably undermines both federal ethics laws, and abuse reporting requirements in the military, insofar as it facially excludes same-sex married couples from their strictures. Other curiosities likely unintended are possible impacts on anti-nepotism provisions; judicial recusals, restrictions on receipt of gifts, and on travel reimbursement; and the crimes of bribery of federal officials, and threats to family members of federal officials.

Mass., 682 F.3d at 13 n.8 (citations omitted).

The arbitrary results of the many applications of DOMA demonstrate that the statute lacks any rational relationship to the objectives of the laws and programs that it affects. DOMA "is so far removed from [the] particular justifications [offered in its defense] that * * * it [is] impossible to credit them." *Romer*, 517 U.S. at 635. And the "immediate, continuing, and real injuries" caused by DOMA "outrun and belie any legitimate justifications that may be claimed" for it. *Ibid.*; cf. *Sugarman* v. *Dougall*, 413 U.S. 634, 642 (1973) ("[T]he State's broad prohibition" applies "to many positions with respect to which" the "proffered justification has little, if any, relationship").

4. DOMA is also unlike most other Acts of Congress in another critical respect: A clearly stated purpose for its enactment was to express moral disapproval of a disfavored minority group. Many proponents repeatedly stated their intent to "honor a collective moral judgment" reflecting "moral disap-

proval of homosexuality" (House Report at 15-16). Chairman Hyde explained, for example, that "most people do not approve of homosexual conduct * * * and they express their disapprobation through the law." 142 Cong. Rec. H7501 (July 12, 1996). Lead Senate sponsor Don Nickles likewise stated that "we find ourselves at the point today that this legislation is needed" because of the "erosion of values." 142 Cong. Rec. S4870 (May 8, 1996).

Those views no doubt reflect "profound and deep convictions," reflecting the "ethical and moral principles" of those who hold them. *Lawrence*, 539 U.S. at 571. But this Court has made clear that such "considerations do not answer the question before us." *Ibid*. No matter how sincerely held,[14] such beliefs are not a constitutionally valid basis for enacting "a classification of persons undertaken for its own sake" and "den[ying] them protection across the board." *Romer*, 517 U.S. at 633, 635.

B. None of the arguments advanced in DOMA's defense justifies the denial of federal recognition for married gay and lesbian couples.

BLAG advances a number of purported justifications for DOMA, but none provides a sufficient basis to uphold the statute. BLAG mistakenly assumes that the law will survive rational-basis review as

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[14] As the participation of many religious organizations as *amici curiae* on both sides in this case demonstrates, there is no single religious view about same-sex marriage. The Constitution encourages and protects that diversity and prohibits governmental interference or endorsement. The Constitution also demands, however, that civil laws afford equal protection to all persons, which DOMA fails to do.

long as married different-sex couples benefit from federal recognition. That gets matters backwards. The point of DOMA is not to recognize different-sex marriages; federal recognition of those marriages was the status quo ante. Rather, DOMA classifies and excludes married same-sex couples. It is *that* exclusion that must rationally serve a legitimate federal interest. Cf. *U.S. Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973) (exclusion of "unrelated" households, not inclusion of "related" ones, must rationally serve a legitimate federal interest). It does not do so.

1. Preservation of tradition is not a valid basis for DOMA.

BLAG argues (at 43-48) that the desire to preserve "traditional marriage" (which, in BLAG's view, includes only married heterosexual couples) suffices to justify imposing DOMA's sweeping disability on gay men and lesbians.

That same-sex couples were previously excluded from marriage, and therefore from federal responsibilities and rights that hinge on marriage, cannot itself justify their *continued* exclusion. After all, there is no guarantee that tradition—which often reflects fallible social norms and biases—is itself rational. Thus, "[t]hat the governing majority * * * has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" (*Lawrence*, 539 U.S. at 577), and "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis" (*Heller* v. *Doe*, 509 U.S. 312, 326 (1993)). DOMA must rationally serve legitimate federal interests independent of consistency with tradition or historical practice. It doesn't.

2. DOMA harms American families and serves no legitimate federal interest in procreation or child-rearing.

DOMA's supporters in 1996 argued that Congress's primary interest in marriage is "encouraging responsible procreation and child-rearing," and that limiting federal marriage-based rights to different-sex couples is rational because of "the possibility of begetting children inherent in heterosexual unions." House Report at 13-14. BLAG now narrows the meaning of marriage still more, and in a manner that degrades its true significance, as being geared only to "providing a stable structure to raise unintended and unplanned offspring." BLAG Br. 44 (emphasis and capitalization omitted). But far from serving any legitimate governmental interest in procreation or child-rearing, DOMA *harms* the children of married same-sex couples, providing an additional basis to find it unconstitutional. See *Plyler* v. *Doe* 457 U.S. 202, 230 (1982).

1. DOMA does not affect, much less benefit, different-sex couples or their children. The reason why is plain: federal benefits of marriage are available to those families regardless of DOMA. And as common sense would predict, the trends in marriage and divorce in States that now allow same-sex couples to marry remain unchanged. As one study shows, "laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women." Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292, 305-306 (June 1, 2009); *see also* Chris Kirk & Hanna Rosin, *Does Gay Marriage De-*

stroy Marriage? A Look at the Data, Slate, May 23, 2012, http://tinyurl.com/doma09 ("In 2010, four of the five states [that then recognized same-sex marriage] had a divorce rate that was lower than both the national divorce rate and the divorce rate of the average state."). There is no rational connection between excluding lesbian and gay couples from federal marriage recognition, on the one hand, and fostering beneficial marital or parenting behavior of heterosexual couples, on the other.

What is more, the harms that DOMA inflicts on gay and lesbian couples and their children are not justified by the "tendency of opposite sex relationships to produce unplanned and unintended pregnancies," as BLAG would have it (at 44). Marriage's purpose is not so limited; "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567. See also *id.* at 605 (Scalia, J., dissenting) ("encouragement of procreation" is no justification "for denying the benefits of marriage to homosexual couples" since "the sterile and the elderly are allowed to marry"). And DOMA does not advance even that artificially constrained view of Congress's interest in marriage: Excluding same-sex couples from federal marriage recognition does not benefit heterosexual couples who marry because of an unplanned pregnancy.

Like their same-sex counterparts, many married different-sex couples plan for children through adoption, surrogacy, *in vitro* fertilization, egg donation, and other methods of assisted reproduction. But Congress has never distinguished among married different-sex couples based on whether they can or do have "unintended and unplanned offspring"

(BLAG Br. 44 (emphasis and capitalization omitted)), nor would any such classification make sense. Indeed, the grant of federal recognition to different-sex couples who cannot have unplanned pregnancies—but not to same-sex married couples who are similarly situated—suggests precisely the sort of irrational exclusion that this Court has deemed unconstitutional before. See *Cleburne*, 473 U.S. at 450.

2. The evidence is clear, moreover, that DOMA harms children raised in the households of married same-sex couples. It "ham-fistedly deprives * * * children of government services and benefits desirable, if not necessary, to their physical and emotional well-being and development[,] creating an increased potential that they will become a burden on society." *Pedersen*, 881 F. Supp. 2d at 338. That is because DOMA denies children of same-sex couples "the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law." *Gill* v. *Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (internal quotation marks omitted), aff'd *sub nom Mass.* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012). Those advantages promote stability for households, including by providing favorable tax treatment, the ability to take medical leave to care for a spouse, inclusion of all family members under a family health-insurance plan, receipt of Social Security benefits, and so forth. See *Mass.*, 682 F.3d at 6.[15]

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[15] In response to a question from Chairman Patrick Leahy, a witness called in DOMA's defense conceded that DOMA harms the children of married same-sex couples. Respect for Marriage Hrg. at 21.

Beyond harm to children, DOMA unquestionably disadvantages married adults, whose welfare is an equally important aspect of marriage. Federal laws and federal programs routinely use marital status to allocate responsibilities and rights, regardless of whether there are children in the family. For example, Social Security spousal survivor benefits (42 U.S.C. § 7385s-3(d)(1)) and ability to file joint tax returns (26 U.S.C. § 6013) are not limited to spouses who have procreated. The Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, recognizes that spouses care for one another during times of illness, whether or not they have children. The Federal Employee Compensation Act, 5 U.S.C. §§ 8101 *et seq.*, acknowledges the financial interdependence of spouses regardless of the presence of children, and it provides spousal survivor benefits if a federal employee is killed on the job. And the bankruptcy code permits an individual debtor and "such individual's spouse" to file a joint bankruptcy petition, whether or not the couple has children. See 11 U.S.C. § 302(a). DOMA's sweeping exclusion of married gay and lesbian couples thus undermines Congress's legitimate interests in ensuring economic and health security for adults.[16]

Many married lesbians and gay men raise children together. DOMA harms them and their children, and affords no benefit to different-sex couples or their children. It thus cannot survive equal-protec-

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[16] Susan Murray, a Vermont lawyer testifying about how DOMA affects her family and her clients, said: "All of these things, large and small, add up over time, and it is like waves hitting the sand on a beach, over and over. They have the effect of eroding our financial security." Respect for Marriage Hrg. at 18.

tion review. Cf. *Plyler*, 457 U.S. at 238-240 (Powell, J., concurring) (rejecting proffered state interest that is undermined or poorly served by state law at issue).

3. DOMA undercuts Congress's long-standing practice of deferring to the States on matters of family law.

Although DOMA's proponents asserted that the law would protect state sovereignty over marriage, it does the opposite. Before DOMA, "Congress ha[d] never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Mass.*, 682 F.3d at 12. Rather, Congress recognized *state* definitions of marriage for federal-law purposes.

Nine States—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—and the District of Columbia allow same-sex couples to marry. DOMA interferes with the ability of those States to ensure equal treatment of their married citizens, and to carry out their laws fully. See *Mass.*, 682 F.3d at 12 ("the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts").

For example, veterans' cemeteries operated by the States receive funding from the Department of Veterans Affairs, but VA regulations forbid the States to allow same-sex spouses to be buried in those cemeteries—on pain of losing the federal funds. See *Mass.* v. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 239-240 (D. Mass. 2010), aff'd, 682 F.3d 1 (1st Cir. 2012); 38 C.F.R. § 39.10(a), (c). When Massachusetts asked the federal government about that issue, the government replied that it believed it-

self to "be entitled to recapture Federal grant funds" if Massachusetts permitted same-sex spouses to be buried in a veterans' cemetery. *Mass.*, 698 F. Supp. at 240.[17]

Having now witnessed DOMA's encroachment on state autonomy, many Members who supported the law in 1996 have changed their minds about its legitimacy. For example, DOMA's author, former Georgia Congressman Bob Barr, has since concluded that:

> DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA's language reflects one-way federalism: * * * [T]he heterosexual definition of marriage for purposes of federal laws—including immigration, Social Security survivor rights and veteran's benefits—has become a de facto club used to limit, if not thwart, the ability of a state to choose to recognize same-sex unions.

Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times, Jan. 5, 2009; see also *Mass.*, 682 F.3d at 12-13 ("Congress' effort to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws does bear on how the justifications are assessed.").

DOMA's intrusion into a matter that Congress had previously left to the States contradicts tradi-

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[17] Then-Governor Mitt Romney raised a similar issue before the Senate Judiciary Committee: "[W]e have been told that we cannot use federal funds to provide meals for an elderly same-sex spouse if the person's eligibility for the services is due to their spousal status." *Preserving Traditional Marriage: A View from the States: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 90 (2004).

tional principles of federalism by conditioning federal respect on a State's agreement with Congress. In that light, DOMA is more naturally explained by a desire to preclude marriage between same-sex couples than by any genuine interest in protecting state sovereignty.

4. The supposed interest in conserving public resources does not justify DOMA.

"[P]reserving scarce government resources" was also advanced as a justification for DOMA. House Report at 18. But "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227. That is particularly true when the justification is advanced to defend a law that singles out a politically unpopular minority for unfavorable treatment under more than 1,100 federal laws, many of which having nothing to do with financial support. See *Moreno*, 413 U.S. at 534; cf. *Cleburne*, 473 U.S. at 450 (interest accorded less weight when used to single out a particular group for unfavorable treatment). While the government "may legitimately attempt to limit its expenditures," it "may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971).

Here, the legislative history reveals that many members simply wanted to ensure that federal funds would not flow to married gay and lesbian couples and their families, thus imposing special burdens on them that the general public does not bear. As Representative Charles Canady said, "I believe that it is certainly within our prerogative to determine that [federal] funds will not be used to support an institution which is rejected by the vast majority of the

American people." 142 Cong. Rec. H7489 (July 12, 1996). And as Representative Dave Weldon said, "I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same-sex marriages." *Id.* at H7493. Representative William Lipinski expressed a similar concern, stating that "[u]nless this bill is passed establishing a Federal definition of marriage, all Americans will then be paying for benefits for homosexual marriages." *Id.* at H7495. All of that dooms DOMA: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

BLAG nevertheless contends that Congress acted prudently in enacting DOMA because there was uncertainty over the budgetary effects of recognizing married same-sex couples. We are aware of no other instance in which Congress has sought to reduce the number of married couples or discourage marriage. This casts further doubt on the credibility of the claimed budgetary concerns here. And as explained above, Congress did not seek any information about DOMA's actual effects on federal programs or the federal budget when it considered the bill in 1996. Just one paragraph in the House Report is devoted to the topic, and it blithely asserts that providing federal benefits to same-sex spouses would "cost the federal government money." House Report at 18.

Congress did not bother to ask for any assessment of the budgetary impact until 2004—eight years after DOMA's enactment. That assessment, de-

livered by the Congressional Budget Office, shows that federal recognition of married gay and lesbian couples would not cost the federal government *any* money, and likely would *improve* the federal balance sheet. U.S. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, June 21, 2004, http://tinyurl.com/doma12. Other studies project similar positive net effects on state budgets.[18]

5. The asserted desire for federal "uniformity" does not justify DOMA.

Differences in state marriage and family laws have always existed. It is well understood that "[r]ules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State," and that "equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships." *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983). Those differences are sometimes significant and controversial. States have disagreed, for example, over whether interracial couples may marry (*Loving* v. *Virginia*, 388 U.S. 1 (1967)) and the circumstances under which couples may divorce (*Haddock* v. *Haddock*, 201 U.S. 562 (1906); *Williams* v. *North Carolina*, 317 U.S. 287 (1942)). Other im-

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[18] See M.V. Lee Badgett & R. Bradley Sears, *Putting A Price on Equality? The Impact of Same-Sex Marriage on California's Budget*, 16 Stan. L. & Pol'y Rev. 197 (2005); Brad Sears *et al.*, *The Impact of Extending Marriage to Same-Sex Couples on the New Jersey Budget*, The Williams Institute (Dec. 2009), http://tinyurl.com/doma11; M.V. Lee Badgett *et al.*, *The Impact On Oregon's Budget Of Introducing Same-Sex Domestic Partnerships* (Feb. 2008), http://tinyurl.com/-doma10.

portant differences—including age and consanguinity restrictions and the legality of common-law marriage—continue to this day.

Such differences have always resulted in "geographical disparities in the eligibility for federal benefits." BLAG Br. 8 (emphasis omitted). Variations in state marriage laws, and corresponding inconsistencies in eligibility for marriage-based federal benefits, were certainly not new in 1996. Nor do they provide a credible or legitimate justification for DOMA, an unprecedented federal foray into family law.

Before DOMA, Congress never thought it necessary to override differences in state marriage rules. Instead, Congress consistently deferred to the States on issues of marriage and family law. See, *e.g.*, *De Sylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); *Seaboard Air Line Ry.* v. *Kenney*, 240 U.S. 489, 493-494 (1916); *Renshaw* v. *Heckler*, 787 F.2d 50, 53-54 (2d Cir. 1986); *Lembcke* v. *United States*, 181 F.2d 703, 706 (2d Cir. 1950). Even when some States imposed race-based restrictions on marriage, the federal government applied state law to determine federal eligibility for marriage-based benefits. See, *e.g.*, 20 C.F.R. § 404.1101 (Supp. 1952) (recognizing that application of choice-of-law rules would mean that some married interracial couples would be ineligible for federal benefits).

BLAG nevertheless asserts (at 33-34) that marriage of gay and lesbian couples poses new challenges because those couples may move to other States. The Senate *amici* defending DOMA before this Court echo that concern, arguing that "marriage tourism"—a term intended to describe couples who travel to a State that permits same-sex marriage and subsequently seek recognition of their marriage upon

returning home to a State that does not—would give rise to unprecedented uncertainty. Sen. Hatch *Amicus* Br. 18.

Congress has faced similar issues in the past, yet it has never before adopted its own definition as a substitute for state marital determinations. For example, it was not until the 1980s that most States adopted provisions for no-fault divorce. Before then, there was tremendous diversity in state fault-based divorce laws, producing the so-called migratory divorce phenomenon. See, *e.g.*, C.A. Family Law Professors *Amicus* Br. 9-11. Because the number of divorces in the United States each year far exceeds the number of same-sex marriages, migratory divorce would appear to have presented far more uncertainty than so-called marriage tourism would today. Yet Congress did not enact a sweeping, general federal divorce standard to determine whose divorces would receive federal recognition and whose would not. "It never—in the name of caution, uniformity, administrative expediency, defending the status quo, or preserving traditional marriage—denied states the right to define the status of 'divorced' as they choose." *Id.* at 11.[19]

To this day, with full understanding that married couples may be treated differently in different States, the federal government continues to defer to

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[19] BLAG likewise asserts (at 35-37) that Congress wanted to treat all gay and lesbian couples uniformly. But the benefits at issue in this case turn on marital status, not the sexual orientation of one's spouse or partner. Married same-sex and different-sex couples are similarly situated in that regard. BLAG's point thus acknowledges that DOMA singles out all gay and lesbian couples for uniformly unfavorable treatment, confirming that it must be struck down.

state law to determine marital status and resolve disputes related to divorce, using choice-of-law rules when needed. See, *e.g.*, *Slessinger* v. *Dep't of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (per curiam); *Money* v. *Office of Pers. Mgmt*, 811 F.2d 1474, 1477 (Fed. Cir. 1987); *Weiner* v. *Astrue*, 2010 WL 691938, at *4 (S.D.N.Y. 2010).

That Congress had never before substituted its own definition of marriage for those of the States casts considerable doubt on the credibility of any asserted interest in uniformity here. When the newfound interest in uniformity focuses solely on gay and lesbian couples and imposes burdens exclusively on a historically disfavored minority group, it is "wholly unconvincing" under the Equal Protection Clause. *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring); accord *id.* at 447-450 (majority opinion). As Justice Jackson recognized decades ago, "nothing opens the door to arbitrary action so effectively as to allow [public] officials to pick and choose only a few to whom they will apply legislation." *Ry. Express Agency* v. *New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). As Justice Scalia more recently observed: "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan* v. *Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). DOMA fails that basic test.

CONCLUSION

DOMA imposes a sweeping and unjustifiable federal disability on married same-sex couples. It is "class legislation" that lacks any rational connection to legitimate federal interests, thus violating the Fifth Amendment's equal-protection guarantee.

The judgment of the court of appeals accordingly should be affirmed.

Respectfully submitted.

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MARCH 2013

APPENDIX

The Members of Congress participating as *amici* are:

United States Senators

Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin Cardin
Thomas R. Carper
Christopher Coons
William "Mo" Cowan
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten Gillibrand
Tom Harkin
Martin Heinrich
Mazie K. Hirono
Tim Kaine
Angus S. King, Jr.
Amy Klobuchar
Frank R. Lautenberg
Patrick J. Leahy
Claire McCaskill
Robert Menendez
Jeff Merkley
Barbara A. Mikulski
Christopher S. Murphy
Patty Murray
Harry Reid
Bernie Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Debbie Stabenow
Jon Tester
Mark Udall
Mark R. Warner
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

Members of the U.S. House of Representatives

Robert E. Andrews
Ron Barber
Karen Bass
Joyce Beatty
Xavier Becerra
Ami Bera
Timothy H. Bishop
Earl Blumenauer
Suzanne Bonamici
Robert A. Brady
Bruce L. Braley
Corinne Brown
Julia Brownley
Cheri Bustos
Lois Capps
Michael E. Capuano

Members of the U.S. House of Representatives (continued)

Tony Cárdenas
John C. Carney, Jr.
André Carson
Matthew A. Cartwright
Kathy Castor
Joaquin Castro
Judy Chu
David N. Cicilline
Yvette D. Clarke
Wm. Lacy Clay
Emanuel Cleaver
James E. Clyburn
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Joe Courtney
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan A. Davis
Diana DeGette
John K. Delaney
Rosa L. DeLauro
Suzan K. DelBene
Theodore E. Deutch
John D. Dingell
Lloyd Doggett
Michael F. Doyle
Tammy Duckworth
Donna F. Edwards
Keith Ellison
Eliot L. Engel
Anna G. Eshoo
Elizabeth H. Esty
Sam Farr
Chaka Fattah
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard
John Garamendi
Joe Garcia
Alan Grayson
Al Green
Raúl M. Grijalva
Luis V. Gutierrez
Janice Hahn
Colleen W. Hanabusa
Alcee L. Hastings
Denny Heck
Brian Higgins
James A. Himes
Rush Holt
Michael M. Honda
Steven A. Horsford
Steny H. Hoyer
Jared Huffman
Steve Israel
Sheila Jackson Lee
Hakeem S. Jeffries
Eddie Bernice Johnson
Henry C. “Hank” Johnson, Jr.
Marcy Kaptur
William R. Keating

Members of the U.S. House of Representatives (continued)

Joseph P. Kennedy III
Daniel T. Kildee
Derek Kilmer
Ann Kirkpatrick
Ann M. Kuster
James R. Langevin
John B. Larson
Barbara Lee
Sander M. Levin
John Lewis
David Loebsack
Zoe Lofgren
Alan S. Lowenthal
Nita M. Lowey
Michelle Lujan Grisham
Daniel B. Maffei
Carolyn B. Maloney
Sean Patrick Maloney
Edward J. Markey
Doris O. Matsui
Carolyn McCarthy
Betty McCollum
Jim McDermott
James P. McGovern
Jerry McNerney
Gregory W. Meeks
Grace Meng
Michael H. Michaud
George Miller
Gwen Moore
James P. Moran
Patrick Murphy
Jerrold Nadler
Grace F. Napolitano
Richard E. Neal
Gloria Negrete McLeod
Richard M. Nolan
Eleanor Holmes Norton
Beto O'Rourke
William L. Owens
Frank Pallone, Jr.
Bill Pascrell, Jr.
Ed Pastor
Donald M. Payne, Jr.
Nancy Pelosi
Ed Perlmutter
Gary C. Peters
Scott H. Peters
Chellie Pingree
Mark Pocan
Jared Polis
David E. Price
Mike Quigley
Charles B. Rangel
Lucille Roybal-Allard
Raul Ruiz
C.A. Dutch Ruppersberger
Bobby L. Rush
Tim Ryan
Linda T. Sánchez
Loretta Sanchez
John P. Sarbanes
Janice D. Schakowsky
Adam B. Schiff

Members of the U.S. House of Representatives (continued)

Bradley S. Schneider
Allyson Y. Schwartz
Robert C. "Bobby" Scott
José E. Serrano
Carol Shea-Porter
Brad Sherman
Kyrsten Sinema
Albio Sires
Louise McIntosh Slaughter
Adam Smith
Jackie Speier
Eric Swalwell
Mark Takano
Mike Thompson
John F. Tierney
Dina Titus
Paul Tonko
Niki Tsongas
Chris Van Hollen
Juan Vargas
Marc A. Veasey
Nydia M. Velázquez
Timothy J. Walz
Debbie Wasserman Schultz
Maxine Waters
Henry A. Waxman
Peter Welch
John A. Yarmuth