No. 12-307

In the
Supreme Court of the United States

The 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 *Amicus Curiae* of the Family Research Council in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

INTEREST OF *AMICUS CURIAE*[*]

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected in the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the source of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian world view as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families in America.

FRC actively supported the Defense of Marriage Act, the constitutionality of which is the subject of this litigation. FRC, therefore, has a particular interest in the outcome of this case. Requiring the United States to extend the federal benefits of marriage to couples who have entered into same-sex marriages would not promote any of

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

the interests on the basis of which opposite-sex marriage is a protected social institution. And, for the reasons set forth herein, nothing in the Constitution, properly understood, compels that result. Accordingly, the judgment of the Court of Appeals for the Second Circuit should be reversed.

INTRODUCTION

Section 3 of the Defense of Marriage Act provides:

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

1 U.S.C. § 7.

In her complaint, plaintiff alleged that § 3 of DOMA "discriminates on the basis of sexual orientation" "in violation of the right of equal protection secured by the Fifth Amendment." Amended Complaint, ¶¶ 84, 85.[1] Plaintiff argued that § 3 should be reviewed under the strict scrutiny standard of review (or at least intermediate scrutiny) "because homosexuals as a class present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable

[1] Although the Fifth Amendment does not contain express equal protection language, the due process protection conferred by the Amendment ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law") has been construed to include an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class's ability to perform in contribute to society." Order of June 6, 2012, at 13-14 (summarizing plaintiff's argument).

The district court declined plaintiff's invitation to apply heightened scrutiny to § 3 for several reasons. First, although there was "no case law in the Second Circuit binding the Court to the rational basis standard in this context," eleven of the other twelve circuit courts of appeal "have applied the rational basis test to legislation that classifies on the basis of sexual orientation." *Id*. at 14. Second, "as the Supreme Court has observed, 'courts have been very reluctant, as they should be in our federal system,' to create new suspect classes." *Id*. at 14-15 (quoting *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 (1985)). Third, the Court "has not designated homosexuals as a suspect class, even though it has had the opportunity to do so." *Id.* at 15 (citing *Romer v. Evans*, 517 U.S. 1 (1992) (striking down, on rational basis grounds, Colorado's Amendment 2)).

The district court, however, declared § 3 of DOMA unconstitutional under the rational basis standard. The court suggested that a more "searching" form of "rational basis scrutiny" *might* be required "where a classification burdens

homosexuals as a class,"[2] and where the States' "prerogatives are concerned," referring to the States' traditional authority over domestic relations, including marriage.[3] Order of June 6, 2012, at 16.

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[2] None of the four cases the district court cited supports the proposition that "law[s that] exhibit[] . . . a desire to harm a politically unpopular group" should be subjected to "a more searching form of rational basis review . . . under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring). The district court's quotation from Justice O'Connor's concurring opinion in *Lawrence* (Order at 15-16) is curious because the court did *not* find that DOMA was motivated by an anti-homosexual animus. In any event, *Lawrence* was decided on due process, not equal protection, grounds. *Romer*, *City of Cleburne* and *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), all applied standard rational basis review.

[3] In the district court, plaintiff claimed that "[t]he federal government . . . has *always* deferred to the [S]tates' determinations of whether a couple is validly married" and has "*never* . . . categorically disregarded state determinations of who is validly married and substituted its own definition." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 2, 10 (emphases added). Apart from the observation that DOMA does not dictate whether, for purposes of *state* law, marriages between members of the same sex are valid, plaintiff's claim is demonstrably false. First, historically, the federal government required several States to ban polygamy in their constitutions as a condition of joining the Union. *Arizona*: Enabling Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569; *New Mexico*: Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558; *Oklahoma*: Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269; *Utah*: Enabling Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108. Second, federal, not state, law determines the validity of marriages for purposes of immigration if state law "offends federal public policy." *Adams v. Howerton*, 486 F.Supp. 1119, 1123 (C.D. Cal. 1980) (even assuming that Colorado would recognize a same-sex

Without deciding, however, whether a more "searching" form of rational basis scrutiny is required, the district court determined that § 3 does not pass muster even under normal rational basis review. The court did not dispute the legitimacy of any of the legislative interests sought to be advanced by § 3, specifically, "defending and nurturing the traditional institution of marriage; promoting heterosexuality; encouraging responsible procreation and childrearing; preserving scarce resources; . . . defending traditional notions of morality[;] maintaining consistency in citizens' eligibility for federal benefits[;] promoting a social understanding

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marriage, "as a matter of federal law, [Congress] 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. 1039 (9th Cir. 1981) ("the intent of Congress governs the conferral of spouse status under [the Immigration and Nationality Act of 1952], and a valid marriage is determinative *only if Congress so intends*") (emphasis added). Similarly, although several States and the District of Columbia appear to recognize "proxy" marriages, in which one party to the marriage ceremony is not physically present at the time of the marriage, *see In re Valente's Will*, 188 N.Y.S.2d 732, 736 (Surr. Ct. 1959), and *Ferraro v. Ferraro*, 77 N.Y.S.2d 246 (N.Y. Fam. Ct. 1948), *aff'd sub nom. Fernandes v. Fernandes*, 87 N.Y.S.2d 707 (N.Y. App. Div. 1949) (interpreting District of Columbia law), federal immigration law does not recognize such marriages for purposes of the "spouse" preference, at least when the marriage has not been consummated. 8 U.S.C. § 1101(a)(35). Third, federal, not state, law determines the validity of marriages for purposes of federal bankruptcy law. *In re Kandu*, 315 B.R. 123, 132 (W.D. Wash. 2004) (DOMA does not "overstep[] the boundary between federal and state authority" in the definition of marriage because "DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty").

that marriage is related to childrearing[;] and providing children with two parents of the opposite sex." *Id*. at 17. Instead, the court determined that § 3 of DOMA either did not advance those interests or interfered with the States' "exclusive[]" authority over "domestic relations law." *Id*. 18-26.[4]

The court of appeals, Judge Straub dissenting in part, affirmed, but on different grounds. The majority held that "Section 3 of DOMA requires heightened scrutiny" because "all four factors" that this Court has considered in determining whether a given class is suspect (requiring strict scrutiny) or quasi-suspect (requiring intermediate scrutiny) are satisfied, specifically, that "homosexuals as a group have historically endured persecution and discrimination," that "homosexuality has no relation to aptitude or ability to contribute to society," that "homosexuals are a discernable group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages," and that "the class remains a politically weakened minority." Op. at 24-25. "[B]ased on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court

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[4] The district court's conclusion that § 3 of DOMA "does not square with our federalist system of government," *id*. at 24, is difficult to reconcile with the court's acknowledgment that "DOMA does not affect the state laws that govern marriage." *Id* at 19. *See also* n. 3, *supra*. Moreover, plaintiff did not claim and the district court did not hold that, in enacting § 3 of DOMA, Congress exceeded its powers under art. I of the Constitution or that § 3 violates the Tenth Amendment. Plaintiff's claim is based *solely* on equal protection principles.

concluded that the class (homosexuals) is "quasi-suspect (rather than suspect)." *Id*. at 34. "To withstand intermediate scrutiny, a classification must be 'substantially related to an important government interest.'" *Id*. at 34-35 (quoting *Clarke v. Jeter*, 486 U.S. 456, 461 (1988)).

The Bipartisan Legal Advisory Group of the House of Representatives (BLAG) argued that § 3 advances "unique federal interests," to wit, "maintaining a consistent federal definition of marriage, protecting the fisc, and avoiding 'the unknown consequences of a novel redefinition of a foundational social institution.'" Op. at 34 (summarizing argument). BLAG argued further "that Congress enacted the statute to encourage 'responsible procreation,'" *Id*. The majority held that none of these interests could satisfy the intermediate scrutiny standard of review. *Id.* at 34-43.

Judge Straub dissented in part and concurred in part. Dissenting from the majority's selection of the intermediate scrutiny standard of review, Dissent at 35-40, Judge Straub stated that "[t]he discrimination in this case does not involve a recognized suspect or quasi-suspect classification," but, rather, "is squarely about the preservation of the traditional institution of marriage and its procreation of children." *Id*. at 2. The classification created by § 3 of DOMA "is to be reviewed on the basis of whether it has a rational relation to any legitimate end." *Id*. at 2-3. When reviewed under that standard, § 3 passes constitutional muster. *Id*. at 3-5, 17-35

SUMMARY OF ARGUMENT

Amicus curiae submits that the Second Circuit's conclusion that § 3 of DOMA should be evaluated under a heightened standard of judicial review is deeply flawed. First, § 3, on its face, does not discriminate between heterosexuals and homosexuals, but between opposite-sex married couples and same-sex married couples. Although § 3 admittedly has a greater *impact* on homosexuals than heterosexuals, that impact, under this Court's precedents, is not constitutionally relevant unless it can be traced back to an *intent* or *purpose* on behalf of Congress to discriminate against homosexuals, as opposed to the mere *knowledge* that § 3 would have a disparate impact on them. Neither the plaintiff nor the Government, however, has presented any relevant evidence of discriminatory intent or purpose on the part of the Congress that enacted DOMA (as opposed to individual members thereof) or President Clinton, who signed the bill into law. Second, even assuming that § 3 may be said to classify on the basis of sexual orientation, such classification is subject to traditional rational basis review. Homosexuals do not satisfy the criteria this Court has considered in determining whether a class should be subject to strict scrutiny (as in the case of race, national origin or alienage) or intermediate scrutiny (as in the case of gender and illegitimacy). When evaluated under the appropriate standard of review (rational basis), the constitutionality of § 3 of DOMA is readily apparent. Section 3 is reasonably related to multiple, legitimate governmental interests, including promoting

responsible procreation and ensuring that the children so procreated will experience, whenever possible, the benefits of being raised in a household with both a mother and father to whom the children are biologically related. Accordingly, the judgment of the court of appeals striking down § 3 of DOMA should be reversed.

ARGUMENT

SECTION § 3 OF DOMA DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Plaintiff argued below (and the court of appeals agreed) that § 3 of DOMA should be reviewed under a heightened standard of judicial review because it discriminates on the basis of sexual orientation. Both the premise and conclusion of plaintiff's argument are erroneous.

Section 3 of DOMA, On Its Face, Does Not Discriminate On The Basis Of Sexual Orientation.

Plaintiff's argument assumes that § 3 of DOMA discriminates against same-sex married couples on the basis of their sexual orientation. That assumption is mistaken. Section 3, on its face, does not define "marriage" for purposes of federal law in terms of the sexual orientation of the parties to a marriage, but whether the parties are of the opposite sex. *See Smelt v. County of Orange*, 374 F. Supp.2d 861, 874 (C.D. Cal. 2005) (DOMA "does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits"), *aff'd in part*, *vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006). "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Baehr v. Lewin*, 852 P.2d 44, 51 n.

11 (Haw. 1993) (plurality).[5] *See also Dean v. District of Columbia*, 653 A.2d 307, 363 n. 1 (D.C. App. 1995) (following *Baehr*) ("just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals"); *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 953 n. 11 (Mass. 2003) (same).[6]

In his concurring opinion in *Andersen v. King County*, 138 P.3d 963 (Wash. 2006), Justice J.M. Johnson noted that the state DOMA "does not distinguish between persons of heterosexual orientation and homosexual orientation," *id*. at 997 (J.M. Johnson, J., concurring in judgment only), and identified a recent case in which a man and a woman, both identified as "gay," entered into a valid opposite-sex marriage. *Id*. at 991 n. 1, 996 (citing *In re Parentage of L.B.*, 89 P.3d 271, 273 (Wash. Ct. App. 2004), *aff'd in part*, *rev'd in part on other*

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[5] Accordingly, "'[h]omosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is not, in theory, oxymoronic"). *Id*.

[6] Judges in other cases have made the same observation. *See*, *e.g.*, *Baker v. State*, 744 A.2d 864, 890 (Vt. 1999) (Dooley, J., concurring) ("[t]he marriage statutes do not facially discriminate on the basis of sexual orientation); *id*. at 905 (Johnson, J., concurring in part and dissenting in part) (noting that "sexual orientation does not appear as a qualification for marriage under the marriage statutes" and the State "makes no inquiry into the sexual practices or identities of a couple seeking a license"); *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring) (same).

grounds, 122 P.3d 161 (Wash. 2005)).[7] It is apparent, therefore, that the right to enter into a marriage that would be recognized under § 3 of DOMA "is not restricted to (self-identified) heterosexual couples," *id*. at 991, n. 1, but extends to all adults without regard to "their sexual orientation." *Id*. at 997. Contrary to the understanding of the California Supreme Court, *see In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008), a law that restricts marriage (or the benefits thereof) to opposite-sex couples does not, *on its face*, discriminate between heterosexuals and homosexuals. The classification in the statute is not between men and women, or between heterosexuals and homosexuals, but between opposite-sex (married) couples and same-sex (married) couples.

The Disparate Impact Of Section 3 Of DOMA On Homosexuals Who Wish To Marry Persons Of The Same Sex Is Not Constitutionally Cognizable In The Absence Of Any Evidence That In Enacting § 3, Congress Had The Purpose Or Intent To Discriminate Against Homosexuals.

Admittedly, § 3 has a greater *impact* on those homosexuals who would want to marry someone of the same sex than on heterosexuals who would want to marry someone of the opposite sex. Nevertheless,

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[7] In the federal challenge to Proposition 8, the district court acknowledged that "some gay men and lesbians have married members of the opposite sex." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted* Dec. 7, 2012 (No. 12-144).

disparate impact alone is insufficient to invalidate a classification, even with respect to suspect or quasi-suspect classes such as race and gender. Under well-established federal equal protection doctrine, a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or gender unless that impact can be traced back to a discriminatory purpose or intent. The challenger must show that the law was enacted (or the act taken) *because of*, not *in spite of*, its foreseeable disparate impact. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (rejecting equal protection challenge to police department's use of a job-related employment test to evaluate verbal skills of employment applicants on which a higher percentage of blacks than whites failed where there was no showing that racial discrimination entered into the establishment of formulation of the test); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-71 (1977) (municipality's refusal to amend zoning ordinance to allow multi-family, low income housing in village where single family homes predominated did not violate the Equal Protection Clause, even though such refusal to rezone had a disproportionate impact on blacks, where there was no evidence of discriminatory intent); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (upholding hiring preference for veterans in state employment despite it dis-proportionate impact on women where there was no evidence that the statute conferring the preference was enacted with an intent to discriminate against women, as opposed to non-veterans of either sex).

Even assuming, for purposes of disparate impact analysis, that sexual orientation is to be treated in the same manner as race or gender and subject to heightened scrutiny, neither plaintiff nor the Government has cited any evidence that even remotely supports the conclusion that in enacting § 3 of the Defense of Marriage Act, *Congress*, as opposed to certain individual members thereof, had the *intent* or *purpose* to discriminate against homosexuals who wish to marry someone of the same sex, rather than the mere *knowledge* that § 3 could have a disparate impact on them. In a related challenge to § 3, the First Circuit rejected the charge "that DOMA's hidden but dominant purpose was hostility to homosexuality," observing that "[t]he many legislators who supported DOMA acted from a variety of motives, one central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of Western civilization." *Massachusetts v. United States Dep't of Health & Human Services*, 682 F.3d 1, 16 (1st Cir. 2012) (citing H.R. Rep. No. 104-664, at 12, 16). "Preserving this institution," the court explained, "is not the same as 'mere moral disapproval of an excluded group,' *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring), and that is singularly so in this case given the range of bipartisan support for the statute." *Id*. Although, as in this case,[8] "[t]he opponents of section 3 point to selected comments from a few individual legislators," "the motives of a small group cannot taint a statute supported by

[8] *See* Br. of Plaintiff-Appellee, No. 12-2335, at 11-14 & nn. 6-7.

large majorities in both Houses and signed by President Clinton." *Id.*[9] "Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity – not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held." *Id.* Other courts have concurred in rejecting claims that statutes reserving marriage to opposite-sex couples have been motivated by anti-gay prejudice.

In *Andersen v. King County*, the Washington Supreme Court rejected the argument that the state DOMA had been enacted because of "anti-gay sentiment." After reviewing the legislative history, the court concluded that "the far more likely explanation for the majority, if not all [of the votes in favor of DOMA], is that they were not motivated by anti-gay sentiment in 1998 but instead were convinced for other reasons that marriage should not be extended to same-sex couples." 138 P.3d at 981 (plurality). Those "other reasons" included "traditional and generational attitudes toward marriage." *Id.* at 981 n. 15. *See also Dean v. District of Columbia*, 653 A.2d at 362-63 (Op. of Steadman,

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[9] Plaintiff conceded below that "it may be the case that many of the lawmakers enacting DOMA were not motivated by a conscious desire to harm lesbians and gay men, or a deliberate bias toward them . . . ." Br. of Plaintiff-Appellee at 12. That concession is fatal to plaintiff's equal protection claim. Where, as here, a law, *on its face*, does not discriminate between classes of persons, the mere fact that it may have a disparate *impact* on a particular group is of no constitutional significance in the absence of evidence of a discriminatory *intent* or *purpose*.

J., concurring) (finding no "purposeful" or "invidious" discrimination against homosexuals in former statute reserving marriage to opposite-sex couples). In upholding the State's marriage laws, the New York Court of Appeals refused to attribute an anti-homosexual prejudice to state statutes that, as construed by the court, limited marriage to opposite-sex couples. The court noted that "[t]he idea that same-sex marriage is even possible is a relatively new one," and observed that, "[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 sexes," *Hernandez v. Robles*, 855 N.E.2d at 8 (plurality). "A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude." *Id*.[10] Plaintiff has not shown DOMA was enacted *for the purpose* of discriminating against homosexuals, as opposed to maintaining the traditional definition of marriage.

Assuming That Section 3 Of DOMA Classifies On The Basis Of Sexual Orientation, Such Classification Is Subject To Traditional Rational Basis Review.

Finally, even assuming, *arguendo*, that § 3 classifies persons on the basis of their sexual orientation, that classification is subject to rational

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[10] In striking down the State's marriage statutes, the California Supreme Court expressly repudiated the suggestion that "the current marriage provisions were enacted with an invidious intent or purpose." *In re Marriage Cases*, 183 P.3d at 452 n. 73.

basis review. This Court has reviewed such classifications under the rational basis standard, *see Romer v. Evans*, 517 U.S. 629 (1996), not under a higher standard of review. Eleven of the thirteen federal courts of appeals have held that homosexuals do *not* constitute a suspect or quasi-suspect class requiring greater than rational basis review.[11]

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[11] *Cook v. Gates*, 528 F.3d 42, 60-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*); *Scarborough v. Morgan County Board of Education*, 470 F.3d 250, 260-61 (6th Cir. 2006); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261, 265-68 & n. 2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand*, 128 F.3d 289, 292-93 & nn. 1-2 (6th Cir. 1997); *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51, 953-54 (7th Cir. 2002); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n. 8 (7th Cir. 1989); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-69 (8th Cir. 2006); *Richenberg v. Perry*, 97 F.3d 256, 260 & n. 5 (8th Cir. 1996); *Witt v. Dep't of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1137 (9th Cir. 2003); *Holmes v. California National Guard*, 124 F.3d 1126, 1132-33 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1999); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n. 9 (10th Cir. 2008); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 470 U.S. 903 (1985); *Lofton v. Secretary of the Dep't of Children & Family Services*, 358 F.3d 804, 818 & n. 16 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (*en banc*); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

Throughout this litigation, plaintiff and the Government have attempted to dismiss the significance of these cases on the ground that they relied, directly or indirectly, upon this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that there is no right to engage in homosexual sodomy. *See* Br. of Plaintiff-Appellee, No. 12-2335 (Second Circuit) at 18; Br. for the United States, Nos. 12-2335, 12-2435 (Second Circuit) at 10, 33-34). It must be noted, however, that of the twenty-three cases cited in n.11, *supra*, three (*Baker*, *Rich* and *National Gay Task Force*) were decided *before Bowers* and, therefore, could not have been based on the Court's opinion in that case, and thirteen others (*Cook*, *Johnson*, *Scarborough*, *Equality Foundation*, *Schroeder*, *Citizens for Equal Protection*, *Richenberg*, *Witt*, *Flores*, *Holmes*, *Philips*, *Price-Cornelison* and *Lofton*) were decided *after* this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), which clearly, if only by implication, cast a long shadow on the continuing precedential value of *Bowers*. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (Court's holding that "homosexuality cannot be singled out for disfavorable treatment . . . contradicts a decision, unchallenged here, pronounced only 10 years ago") (citing *Bowers*). And seven of those cases (*Cook*, *Johnson*, *Scarborough*, *Citizens for Equal Protection*, *Witt*, *Price-Cornelison* and *Lofton*) were decided after *Bowers* was overruled. Moreover, although the Court overruled *Bowers* in *Lawrence*, *Lawrence* employed the rational basis standard of review, the very same standard that was used in the pre-*Lawrence* authorities cited

above. Those authorities remain relevant precedents in suggesting the appropriate standard of review this Court should employ in deciding this case. *See Loomis v. United States*, 68 Fed. Cl. 503, 518, 522 (2005) (noting continuing vitality of pre-*Lawrence* cases holding that classifications based on homosexuality are not subject to heightened scrutiny).[12]

It should not be surprising that, with the exception of the court of appeals opinion in this case, no federal court of appeals (and no state court applying federal equal protection analysis) has concluded that homosexuals are members of a suspect (or quasi-suspect) class. They do not meet the standards applicable to such classifications. This Court has identified four characteristics that suspect classes commonly share: (1) a history of discrimination; (2) a trait that "bears no relation to ability to perform or contribute to society[;]" (3) an immutable trait; and (4) political powerlessness. *City of Cleburne*, *Texas v. Cleburne Living Center*, 473 U.S. 432, 440-46 (1985); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). *Amicus curiae* does not dispute

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[12] The Government's argument, in another challenge to § 3, that cases involving "challenges to military policy on homosexual conduct" are distinguishable because "classifications in the military context" "present different questions from classifications in the civilian context," Superceding Br. for the United States Dep't of Health & Human Services, Nos. 10-2204 10.2297, 10-2214 (First Circuit) at 27 n. 10, is misleading. The "military context" of those cases was relevant only to the strength of the military's interest in enforcing its policy against homosexuality, not whether homosexuals should be treated as members of a suspect class.

that homosexuals have been subjected to a history of discrimination, but they do not satisfy the remaining criteria (or "indicia") of "suspectness."

With respect to the second criterion, *amicus curiae* acknowledges that homosexuals are able to "perform or contribute to society" in many areas. But, for purposes of equal protection analysis, "groups that are treated differently by a statute are not similarly situated unless they 'are in *all* relevant respects alike.'" *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 520 (Conn. 2008) (Zarella, J., dissenting) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added by Justice Zarella). "The fact that same sex couples cannot engage in sexual conduct of a type that can result in the birth of a child is a critical difference in this context." *Id*. So, too, is the fact that, by definition, same-sex couples are unable to provide the benefits of dual-gender parenting. As an institution, marriage exists for the primary purpose of "ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). Because same-sex couples can neither "procreate by themselves" nor "provide dual-gender parenting," *id*., they are not similarly situated to opposite-sex couples. *See Hernandez v. Robles*, 855 N.E.2d at 11 (plurality) ("[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children

best"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674 (Tex. App. 2010) ("a person's sexual orientation . . . does bear on whether he or she will enter a relationship that is naturally open to procreation and thus trigger the state's legitimate interest in child-rearing"). The Court has cautioned that "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441-42. "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id*. at 442.

Section 3 of DOMA, of course, does not dictate what kinds of marriage the States may recognize. That is a matter for the States to decide. But in reserving the federal benefits of marriage to opposite-sex couples, Congress acted reasonably. Extending such benefits to same-sex couples would not promote Congress' interests in "responsible procreation," *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005), or in dual-gender parenting. That is sufficient to sustain its constitutionality. *See Johnson v. Robison*, 415 U.S. 361, 383 (1974) (when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification . . . is invidiously discriminatory").

With respect to the third criterion – immutability – there is no evidence (and plaintiff has

presented none) that sexual orientation, unlike race, sex or national origin, is irrevocably fixed at birth. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("sex, like race and national origin, is an immutable characteristic *determined solely by the accident of birth*") (emphasis added). Nor, contrary to the court of appeals understanding, Op. at 30 n. 4, is a person's sexual orientation, which develops over time and cannot be known at birth, comparable to the other two suspect (or quasi-suspect) classes the Court has recognized – illegitimacy and alienage. Although illegitimates may be legitimated, discrimination against them, *as illegitimates*, is based upon an immutable characteristic, *i.e.*, their illegitimacy *at the time of their birth*. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) ("the Equal Protection Clause . . . enable[s] us to strike down discriminatory laws relating to the status *of birth*") (emphasis added); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (same). Similarly, although an alien may acquire citizenship through naturalization, discrimination based on alienage is often a subterfuge for discrimination based on national origin (or ancestry), *see Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 422 (1948) (Murphy, J., concurring), which *is* an immutable characteristic. Moreover, one cannot be an "alien" unless one is of foreign birth which is an immutable characteristic.

As the Federal Circuit Court of Appeals explained in *Woodward*, "Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-

suspect classes. Members of recognized suspect or quasi-suspect classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." 871 F.2d at 1076. *See also Lyng*, 477 U.S. at 638 ("[t]he disadvantaged group is . . . . not a 'suspect' or 'quasi-suspect' class . . . . they do not exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group").[13] "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. *See also High Tech Gays*, 895 F.2d at 573 ("[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes");[14]

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[13] The court of appeals' observation that "sexual preference is necessarily disclosed when two persons of the same sex apply for a marriage license," Op. at 30-31, ignores the fact that not all homosexuals desire to enter into a same-sex marriage and those who do not desire to marry someone of the same sex do not necessarily exhibit "obvious, immutable or distinguishing characteristics that define them as a group." Whether a particular characteristic (here, homosexuality) should be regarded as suspect (or quasi-suspect) cannot turn on whether those who share that characteristic choose to "disclose" it. This Court has never recognized a suspect (or quasi-suspect) class on the basis of the *behavior* (or *choices*) of individual members of the class.

[14] Although, in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds*, *Thomas v. Gonzales*, 408 F.3d 1177, 1187 (9th Cir. 2005), the Ninth Circuit characterized sexual orientation and sexual identity as "immutable," in subsequent cases the court has

Padula, 822 F.2d at 102-03 (implying that homosexuality is behavioral).

As the Sixth Circuit has explained, even assuming sexual orientation is a "characteristic beyond the control of the individual," "the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives and thoughts." *Equality Foundation*, 54 F.3d at 267.

> Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamations of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]"

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adhered to its decision in *High Tech Gays* and has continued to evaluate classifications based on a person's sexual orientation under the rational basis standard of review. *See Flores*, 324 F.3d at 1137; *Witt*, 527 F.3d at 821.

Id. (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

In rejecting a state constitutional challenge to the state law prohibiting same-sex marriage, the Maryland Court of Appeals concluded that the plaintiffs had failed to demonstrate that a person's sexual orientation is an immutable characteristic determined at birth:

> Based on the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny to be accorded the statute in the present case.

Conaway v. Deane, 932 A.2d at 614. Plaintiffs "point neither to scientific nor sociological studies, which have withstood analysis for evidentiary admissibility, in support of an argument that sexual orientation is an immutable characteristic." *Id.* at 615. In rejecting a similar challenge to the state DOMA, the Washington Supreme Court noted that the plaintiffs had failed to cite "any studies in support of the conclusion that homosexuality is an immutable characteristic." *Andersen v. King County*, 138 P.3d at 974.

Significantly, in each of the cases in which a state supreme court recognized (on state grounds) homosexuals as members of a suspect (or quasi-suspect) class, the court dispensed with the immutability requirement, concluding that it was sufficient if the characteristic at issue (sexual orientation) would be very difficult to change. *See In re Marriage Cases*, 183 P.3d at 442 ("immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes" under the state constitution); *Kerrigan*, 957 A.2d at 437 ("it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable"); *Varnum v. Brien*, 763 N.W.2d 862, 892-93 (Iowa 2009) (under state equal protection analysis, "[t]he constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change").

With respect to the fourth criterion, homosexuals cannot be said to be "politically powerless" in influencing and shaping national policy.[15] For example, in 1990, the Immigration and

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[15] Contrary to the understanding of the court of appeals, *see* Op. at 24 (questioning whether a group's "lack of political power" is "strictly necessary" in "identify[ing] a suspect class"), "the political power of the group that seeks heightened scrutiny is a highly relevant consideration in the four part test to determine whether the legislation at issue is to be subject to that degree of scrutiny." *Kerrigan*, 957 A.2d at 491-92 (Borden, J., dissenting) (case decided on state grounds). Based upon a review of this Court's precedents, Justice Borden concluded

Nationality Act was amended to clarify the grounds on which an alien may be excluded on mental health grounds and to delete "sexual deviation," which had been understood from the legislative history to include homosexuality, as a specific ground for exclusion. Pub. L. 100-649, § 601(a), 104 Stat. 4978, 5067, *codified as* 8 U.S.C. § 1182(a). More recently, in the National Defense Authorization Act for Fiscal Year 2010, Congress enacted the "Matthew Shepard and James, Byrd, Jr., Hate Crimes Prevention Act," which defined as criminal certain acts of violence (or attempted violence) based on, *inter alia*, the victim's "actual or perceived . . . sexual orientation." Pub. L. 111-84, § 4707, 123 Stat. 2190, 2839. Two months later, Congress repealed the military's "Don't Ask, Don't Tell," policy, which barred openly gay and lesbian persons from military service. Pub. L. 111-321, § 2, 124 Stat. 3515, 3516.

President Obama has directed the Secretary of State and Director of the Office of Personnel Management to extend benefits "to qualified same-sex domestic partners of Federal employees where doing so can be achieved and is consistent with

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that "a principal purpose underlying heightened scrutiny judicial intervention into the realm of legislative judgment – into its essential process of classification – is directly related to the political power factor. Heightened scrutiny analysis is designed as an extraordinary form of judicial intervention on behalf of those insular minority classes who presumably are unlikely to be able to rectify burdensome or exclusive legislation through the political process." *Id*. at 490. For the reasons set forth in the text, such intervention is not warranted on behalf of homosexuals.

federal law." Presidential Memorandum, Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29393 (June 17, 2009); Presidential Memorandum, Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32247 (June 2, 2010). Most tellingly, the Department of Justice, at the direction of the President and the Attorney General, has refused to defend § 3 of the DOMA in this (or any related) litigation and, in fact, is challenging it as unconstitutional. In light of the foregoing evidence of their demonstrated ability to influence and shape national policy relating to their interests, it cannot plausibly be said that homosexuals are "politically powerless."[16]

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[16] In striking down their statutes prohibiting same-sex marriage, the Supreme Courts of California, Connecticut and Iowa all held that classifications based on sexual orientation warrant intermediate (or strict) scrutiny. *See In re Marriage Cases*, 183 P.3d at 440-44; *Kerrigan*, 957 A.2d at 431-61; *Varnum*, 763 N.W.2d at 885-96. Those holdings, however, were based on the courts' interpretation of their own state constitutions and are inconsistent with the holdings of every other federal court of appeals to have considered the issue that such classifications require only rational basis review. Moreover, in addition to discarding the immutability factor, those courts were able to conclude that classifications based on sexual orientation are suspect (or quasi-suspect) only by eliminating (in California) or diluting to the point of irrelevancy (in Connecticut and Iowa) the requirement that the class in question be politically powerless. *See In re Marriage Cases*, 183 P.3d at 443; *Kerrigan*, 957 A.2d at 439-61; *Varnum*, 763 N.W.2d at 893-95. But that is to dispense with a factor that this Court has consistently identified as one of the "traditional indicia of suspectness." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See also City of Cleburne*, 473 U.S. at 447-49 (1985); *Lyng*, 477 U..S. at 638.

Any lingering doubt that gays and lesbians are able to influence public policy, particularly with respect to the issue of same-sex marriage, should have been laid to rest by the results of the last election. Three States – Maine, Maryland and Washington, by popular vote, approved laws allowing same-sex marriage, and in a fourth State – Minnesota – voters rejected an amendment to the state constitution that would have prohibited same-sex marriage.[17] Even in States where such amendments have been approved, the margin of victory has often been narrow, in some cases barely passing (as in California in 2008 and South Dakota in 2006), indicating that homosexuals, who comprise no more than one to two percent of the population, have succeeded in enlisting many heterosexuals to

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[17] Of the nine States that allow same-sex marriage, only three (Connecticut, Iowa and Massachusetts) have done so as the result of a state supreme court decision. *Kerrigan*, *Varnum* and *Goodridge v. Dep't of Health*. The other six (Maine, Maryland, New Hampshire, New York, Vermont and Washington), as well as the District of Columbia, have done so by the voluntary choice of their state legislature or, in the case of the District of Columbia, the city council, or by a vote of the people. Significantly, in three of those States (Maryland, New York and Washington) the legislature and/or the people approved same-sex marriage *after* their statutes prohibiting such marriages had been upheld by their state high courts, *see Conaway*, *Hernandez* and *Andersen*, which suggests that a decision by this Court upholding DOMA (or Proposition 8) would not foreclose reconsideration of DOMA (or Proposition 8) by the political branches of government or by the people themselves. But a decision by this Court striking down DOMA (or Proposition 8) would short-circuit and paralyze the political process from functioning as it should in a democracy.

support their cause for same-sex marriage.[18] In such a dynamic social and cultural environment, the belief that homosexuals are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S. at 445, strains credulity.[19]

"[P]ublic discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest." *Equality Foundation*, 128 F.3d at 297 n. 8 (citing *Romer*, 517 U.S. at 632). This holding is supported by cases rejecting equal protection challenges to various forms of alleged discrimination against homosexuals where, regardless of animus, the discrimination in question was rationally related to a legitimate governmental

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[18] The votes, percentages and texts may be found at http://www.marriagedebate.com/pdf/iMapp.Fact.Sheet.Votes.pdf.

[19] The nine States where same-sex marriage is allowed, together with the District of Columbia, constitute almost 14% of the population, according to the most recent (2010) census data. When the eight States that recognize civil unions (or its legal equivalent) for same-sex couples (California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon and Rhode Island) are added, the percentage of the population that lives in States that allow same-sex marriage or its legal equivalent rises to almost 36%, more than one-third. The civil union statutes (or, in the case of California, the Domestic Partner Act) may be found at http://www.marriagedebate.com/pdf/iMapp.Fact.Sheet.Snapshot2.pdf.

purpose.[20] So, too, state courts have upheld state marriage statutes, notwithstanding claims that they were motivated in part by an anti-homosexual animus, because they determined that the statutes are reasonably related to legitimate state interests. *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Andersen*, 138 P.3d at 980-85.[21] For the reasons set forth above and set forth in more detail in the brief of the Bipartisan Legal Advisory Group, § 3 of DOMA is reasonably related to multiple, legitimate governmental interests. That is enough to sustain its constitutionality under the Fifth Amendment. The judgment of the court of appeals should be reversed.

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[20] *See Equality Foundation*, 128 F.3d at 300-01 (upholding city charter amendment that removed homosexuals, gays, lesbians and bisexuals from the protections afforded by the municipality's anti-discrimination ordinances, and precluded municipality from restoring them to protected status); *Citizens for Equal Protection*, 455 F.3d at 864-69 (upholding state constitutional amendment reserving marriage to opposite-sex couples); *Lofton*, 358 F.3d at 817-26 (upholding state law prohibiting practicing homosexuals from adopting children).

[21] In *Standhardt*, the Arizona Court of Appeals held that "Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else." 77 P.3d at 465. In *Andersen*, the Washington Supreme Court explained that under rational basis review, "*even if* animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests." 138 P.3d at 981-82 (emphasis in original) (citing *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)).

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of respondent Bipartisan Legal Advisory Group of the House of Representatives, *amicus curiae*, the Family Research Council, respectfully requests that the judgment of the court of appeals declaring § 3 of the Defense of Marriage Act unconstitutional be reversed.

Respectfully submitted,

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