UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as executor of the estate of THEA CLARA SPYER, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 10-CV-8435 (BSJ)(JCF)

MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF ITS MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Legislative Documents

Other Authorities

INTRODUCTION

This action involves a constitutional challenge to Section 3 of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7. Plaintiff's action should be dismissed with prejudice. DOMA, which as an act of Congress is entitled to a strong presumption of constitutionality, is subject to rational basis review. (As explained in the Opposition simultaneously filed by the Bipartisan Legal Advisory Group of the U.S. House of Representatives (the "House"), DOMA is not subject to heightened scrutiny because it neither implicates a fundamental right nor involves the classification of a suspect class.) DOMA easily passes the rational basis test and does not violate the Equal Protection component of the Fifth Amendment.

In enacting DOMA, Congress rationally could have been, and in fact was, concerned with employing proper caution in the face of a proposed redefinition of the centuries old definition of marriage. Congress' interest in protecting the public fisc also provided a rational basis for DOMA, as does Congress' interest in maintaining consistency with regard to eligibility for federal benefits. Congress also rationally could have been, and in fact was, concerned about creating a social understanding of bearing, begetting, and rearing children that was separated from marriage. Finally, Congress' interest in ensuring that children have parents of both sexes also constitutes a rational basis supporting DOMA.

Moreover, any effort to redefine the institution of marriage as something other than the union of one man and one woman is a matter best left in the hands of the elected, politically accountable branches of the federal government and the citizenry through the democratic process. As the Ninth Circuit has noted, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if

there is an alternative." *Smelt v. Cnty. of Orange*, 447 F.3d 673, 681 (9th Cir. 2006). And there is an alternative: Determining the federal rights of same-sex couples "remains a fit topic for [Congress] rather than the courts." *Id*. at 684 n.34 (citing several bills pending in the 109th Congress). In short, the question at issue in this case is not a question that is "unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This is a quintessential legislative and democratic question that should be decided by the people, not by the courts. Accordingly, this Court should grant the House's motion to dismiss.

But the Court need not even address these questions: As is explained in the House's memorandum in support of its opposition to Plaintiff's motion for summary judgment, Plaintiff lacks standing because she has failed to prove that her Canadian marriage to Thea Spyer validly was recognized by New York State at the time she paid taxes on Ms. Spyer's estate.

BACKGROUND

Edith Schlain Windsor and Thea Clara Spyer

Plaintiff Edith Schlain Windsor, a resident of New York State, and Thea Clara Spyer received a marriage certificate in Toronto, Canada, in May 2007. Am. Compl. (Feb. 2, 2011) (ECF No. 9) ¶¶ 11, 40. In February 2009, Ms. Spyer died, leaving her substantial estate to Plaintiff. Am. Compl. ¶ 51. While New York law allegedly recognizes an out-of-country same-sex marriage, *see* Am. Compl. ¶ 4, the federal government does not. For couples who are married consistent with the federal law definition, the property of a deceased spouse ordinarily passes to the surviving spouse without the surviving spouse incurring any federal estate tax. *See* 26 U.S.C. § 2056(a). Because Spyer's estate exceeded the exclusion amount in 26 U.S.C. § 2010(c), and because Spyer and Plaintiff were not married according to federal law, federal law treated Plaintiff like any other recipient of a substantial bequest. Plaintiff had to pay applicable

estate taxes, in the amount of approximately $360,000. Am. Compl. ¶ 76. Plaintiff brought this action alleging that DOMA violates the equal protection component of the Fifth Amendment's Due Process Clause and asking this Court to declare DOMA unconstitutional. Am. Compl. ¶ 85 & "Prayers for Relief."

The Defense of Marriage Act of 1996

Section 3 of DOMA defines "marriage" for purposes of federal law as the legal union of a man and a woman:

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

1 U.S.C. § 7. Congress did not, of course, invent the definition of "marriage" and the related term "spouse" in 1996. Rather, in DOMA, Congress merely codified and confirmed what Congress always has meant in using those words. Even before DOMA, whenever Congress used terms connoting a marital relationship, it meant a traditional male-female couple. *See, e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return); 38 U.S.C. § 101(3) (1975) ("The term 'surviving spouse' means . . . a person of the opposite sex who was the spouse of a veteran . . . ."); Final Rule, *Family Medical Leave Act*, 60 Fed. Reg. 2180, 2190-91 (1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would include "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting

1901 District of Columbia marriage statute, intended "that 'marriage' is limited to opposite-sex couples"); 150 Cong. Rec. S7966 (daily ed. July 13, 2004) (Sen. Inhofe) ("In the late 19th century, Congress would not admit Utah into the Union unless it abolished polygamy and committed to the common national definition of marriage as one man and one woman."); *see also* 152 Cong. Rec. S5473 (daily ed. June 6, 2006) (Sen. Talent) ("Marriage is our oldest social institution. It is older than our system of property. It is older than our system of justice. It certainly predates our political institutions and our Constitution.").

Congress designed DOMA to apply comprehensively to all manner of federal programs. According to the GAO, as of 2004, there were 1,138 provisions in the United States Code "in which marital status is a factor in determining or receiving benefits, rights, and privileges." U.S. Gen. Accounting Office, *Defense of Marriage Act*, GAO-04-353R at 1 (Jan. 23, 2004). DOMA seeks to reaffirm the definition of marriage already reflected in those statutes, namely, the traditional definition of marriage as between one man and one woman.

DOMA's Legislative Branch History

The 104th Congress enacted DOMA in 1996 with overwhelming, bipartisan support. DOMA passed by a vote of 342-67 in the House and 85-14 in the Senate. *See* 142 Cong. Rec. 17093-94 (1996) (House vote); 142 Cong. Rec. 22467 (1996) (Senate vote). In all, 427 Members of Congress voted for DOMA. President Clinton signed DOMA into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

DOMA was enacted in response to the Hawaii Supreme Court's opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), finding that the denial of a marriage license to a same-sex couple was subject to strict scrutiny under the Hawaii Constitution. *See* H.R. Rep. No. 104-664, at 4-5 (1996) ("House Rep."). The Hawaii courts "appear[ed] to be on the verge of requiring that

State to issue marriage licenses to same-sex couples." *Id*. at 2. Congress was concerned that the decision by the Hawaii Supreme Court could interfere with the ability of other states and the federal government to define marriage along traditional lines. Section 2 of DOMA addressed the concern about the Hawaii decision being given preclusive effect in other states. And with Section 3, Congress ensured that, no matter what Hawaii or any other state might do to redefine marriage under state law, the definition of marriage for purposes of federal law would remain, as it always has been, the lawful union of one man and one woman.

The legislative history confirms that, even in statutes enacted before DOMA, Congress never intended the word "marriage" to include same-sex couples. *See id*. at 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id*. at 29 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *id*. at 17072 (Rep. Sensenbrenner). In enacting DOMA, Congress was concerned with more than semantics: It intended to ensure that the meaning of federal statutes already on the books, and the legislative judgments of earlier Congresses, would be respected and that the array of federal benefits tied to marriage therefore would be reserved for traditional marital relationships. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 32 (1996) (hereinafter, "House Hrg.") (statement of Rep. Sensenbrenner) ("When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages.").

During its deliberations over DOMA, Congress repeatedly emphasized "[t]he enormous

importance of marriage for civilized society." House Rep. at 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)); *see also* House Rep. at 12 (quoting H.R. 3396, 104th Cong. (2d Sess. 1996)). The House Report quoted approvingly from *Murphy v. Ramsey*, in which the Supreme Court referred to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." House Rep. at 12 (quoting *Murphy*, 114 U.S. 15, 45 (1885)); *see also* 142 Cong. Rec. 16799 (1996) (Rep. Largent) ("[T]here is absolutely nothing that we do that is more important than protecting our families and protecting the institution of marriage."); *id*. at 16970 (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id*. at 22442 (Sen. Gramm) ("[T]he traditional family has stood for 5,000 years. There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society — it is the oldest institution that exists."); *id.* at 22454 (Sen. Burns) ("[M]arriage between one man and one woman is still the single most important social institution.").

In enacting DOMA, Congress also recognized that, historically in American law, the institution of marriage consisted of the union of *one* man and *one* woman. *See* House Rep. at 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); House Hrg. 1 (statement of Rep. Canady) ("Simply stated, in the history of our country, marriage has never meant anything else."); 142 Cong. Rec. 16796 (1996) (Rep. McInnis) ("If we look at any definition, whether it is Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as union between a man and a woman, and that should be upheld . . . and this Congress should respect that."). This historical definition was by no means a singling out of homosexual relationships: rather, it identified one type of relationship (traditional marriage) as especially

important, and excluded *every* other kind of relationship from the definition of "marriage." And Congress concluded that such an important institution should not be radically redefined at the federal level to include same-sex relationships. Senator Dorgan expressed the views of many Members of Congress when he stated: "For thousands of years, marriage has been an institution that represents a union between a man and a woman, and I do not support changing the definition of marriage or altering its meaning." 142 Cong. Rec. S10552 (Sept. 13, 1996); *see id*. at 16802 (Rep. Stearns) ("If we change how marriage is defined, we change the entire meaning of the family."); *id*. at 22451 (Sen. Coats) (DOMA "merely restates the understanding of marriage shared by Americans, and by peoples and cultures all over the world"); *id*. at 22452 (Sen. Mikulski) (DOMA "is about reaffirming the basic American tenet of marriage").

In adopting a single definition of marriage to govern all federal laws, Congress decided that eligibility for federal benefits should not vary depending on how a state might choose to define marriage. As Senator Ashcroft stated, a federal definition "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently . . . , people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." *Id*. at 22459. He added that benefits "should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State." *Id*.

In adhering to the historic definition of marriage, Congress explained that marriage is afforded a special legal status because only a man and a woman can beget a child together, and because historical experience has shown that a family consisting of a married father and mother is an effective social structure for raising children. For example, the House Report states that the reason "society recognizes the institution of marriage and grants married persons preferred legal

status" is that it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. at 12, 13. Many Members of Congress supported DOMA on that basis. *See* 142 Cong. Rec. 22446 (1996) (Sen. Byrd) ("The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere in which a man and a woman pledge themselves exclusively to one another and who bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large."); 142 Cong. Rec. S10002 (daily ed. Sept. 6, 1996) (Sen. Lieberman) ("I intend to support the Defense of Marriage Act because I think that affirms another basic American mainstream value, . . . marriage as an institution between a man and a woman, the best institution to raise children in our society."); House Hrg. at 1 (Rep. Canady) ("[Marriage] is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children."); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) ("[M]arriage of a man and woman is the foundation of the family. The marriage relationship provides children with the best environment in which to grow and learn.").

Congress received and considered advice on DOMA's constitutionality and determined that DOMA is constitutional. *See, e.g.*, House Rep. at 32 (DOMA "plainly constitutional"); *id*. at 33-34 (letters to the House from DOJ advising that DOMA is constitutional); House Hrg. at 86-117 (testimony of Professor Hadley Arkes); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 2 (1996) (hereinafter, "Senate Hrg.") (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id*. at 2 (DOJ letter to the Senate advising that DOMA is constitutional); *id*. at 23-41 (testimony of Professor Lynn D. Wardle); *id*. at 56-59 (letter from Professor Michael W.

McConnell); *see also* 150 Cong. Rec. S7879 (daily ed. July 9, 2004) (Sen. Hatch) ("There is an obvious[ ] rational basis for legislation that protects traditional marriage."); 150 Cong Rec. H7896 (daily ed. Sept. 30, 2004) (Letter from former Attorney Gen. Edwin Meese to Rep. Musgrave) ("As marriage is a fundamental social institution, it is not only reasonable but also obligatory that it be preferred and defended in the law."); 150 Cong. Rec. S8008 (daily ed. July 13, 2004) (Sen. Sessions) ("No one disputes that a two-parent traditional family is a healthy, positive force for our society. That is why it is perfectly legitimate for any government to provide laws that further [marriage].").

DOMA's Executive Branch History

During the Clinton Administration, the Justice Department three times advised Congress that DOMA was constitutional, stating, for example, that it "continues to believe that [DOMA] would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. . . . [T]he Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis." Letter from Andrew Fois, Ass't Att'y Gen., to Hon. Charles T. Canady (May 29, 1996), *reprinted in* House Rep. at 33; *see also* Letters from Andrew Fois, Ass't Att'y Gen., to Hon. Henry J. Hyde (May 14, 1996), *reprinted in* House Rep. at 22-23, and to Hon. Orrin G. Hatch (July 9, 1996), *reprinted in* Senate Hrg. at 2.

During the Bush Administration, DOJ successfully defended DOMA against several constitutional challenges, prevailing in every case to reach final judgment. *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (upholding Section 3 against due process and equal protection claims), *aff'd in part*, 447 F.3d 673 (9th Cir. 2006) (holding that plaintiffs lacked standing to challenge Section 3), *cert. denied*, 549 U.S. 959 (2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (upholding Section 3 against due process and equal protection

claims); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting plaintiff's request for voluntary dismissal after defendants filed their motion to dismiss); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35) (upholding Section 3 against due process and equal protection claims); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (same).

During the first two years of the Obama Administration, DOJ continued to defend DOMA, albeit without defending Congress' stated justifications for the law. However, in February of this year, the Executive Branch abruptly reversed course. The Attorney General notified Congress that DOJ had decided "to forgo the defense" of DOMA. Letter from Eric H. Holder, Jr., Attorney General, to John A. Boehner, Speaker, U.S. House of Representatives, at 5 (Feb. 23, 2011) (ECF No. 10-2). Attorney General Holder stated that he and the President are now of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." *Id*. at 6. At the same time, the letter acknowledged that:

(1) at least *ten* federal appellate courts have issued binding circuit precedent holding that sexual orientation classifications are properly judged under the highly deferential rational basis test, not "heightened" scrutiny, *id*. at 3-4 nn.4-6;

(2) in light of "the respect appropriately due to a coequal branch of government," DOJ "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id*. at 5; and

(3) in fact, "a reasonable argument for Section 3's constitutionality *may be proffered* under that permissive [rational basis] standard," *id*. at 6 (emphasis added).

Despite the Obama Administration's decision to decline to defend DOMA's constitutionality, the Holder letter states that "the President has instructed Executive agencies to continue to comply with Section 3 of DOMA." *Id*. at 5. Thus, Executive Branch officials now are in the seemingly

untenable position of enforcing a statute that the head of the Executive Branch views as unconstitutional and that the Executive Branch's chief law enforcement officer declines to defend when those Executive Branch official's actions are challenged in court. All of this despite the fact that the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, surely includes the duty to defend as well as enforce the law.

ARGUMENT

I. DOMA FULLY COMPLIES WITH THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

Section 3 of DOMA does not violate the equal protection component of the Fifth Amendment.[1]

A. As an Act of Congress, DOMA Is Entitled to a Strong Presumption of Constitutionality.

The Supreme Court has explained that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). "'The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.'" *Id*. (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc*., 468 U.S. 641, 652 (1984).

For these reasons, the Supreme "Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to

[1] Section 3 also comports with due process: "[I]f a federal statute is valid under the equal protection component of the Fifth Amendment, it is perforce valid under the Due Process Clause of that Amendment." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 n.8 (1980).

deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker*, 453 U.S. at 64. "This deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted" violates the Fifth Amendment. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985). The Supreme Court "accord[s] great weight to the decisions of Congress even though the legislation . . . raises equal protection concerns." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (internal quotation marks omitted) (*receded from on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995)).

B. Binding Supreme Court Precedent Supports DOMA's Constitutionality.

No matter how this Court might view DOMA if it were an open question, this Court is bound by Supreme Court precedent squarely holding that defining marriage as between one man and one woman comports with equal protection.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court held that two men, Baker and McConnell, had no constitutional right to marry each other. Their application to the clerk of Hennepin County, Minnesota, for a marriage license was declined, based on state law, "on the sole ground that [they] were of the same sex." *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) (en banc). The Minnesota Supreme Court rejected their constitutional challenge to the state statute defining marriage as "the state of union between persons of the opposite sex." *Id*. at 186. The court rejected their arguments "that the right to marry without regard to the sex of the parties is a fundamental right" and that "restricting marriage to only couples of the opposite sex

is irrational and invidiously discriminatory." *Id*. It held instead that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id*. at 187. The court noted that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Id*. at 186.

The two men took an appeal as of right to the U.S. Supreme Court under former 28 U.S.C. § 1257(2) (repealed 1988). In their Jurisdictional Statement, they included on their list of Questions Presented the following: "Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement for Appellant at 3, *Baker v. Nelson*, No. 71-1027 (1972), attached as Exhibit A. And they expressly argued that the Minnesota statutes violated equal protection. *See id*. at 11-18. The U.S. Supreme Court summarily affirmed the Minnesota Supreme Court's decision, deeming the equal protection challenge insubstantial. The Supreme Court unanimously ordered that "[t]he appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810.

In Supreme Court practice, such a disposition is a decision on the merits. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*Hicks* "held that lower courts are bound by summary actions on the merits by this Court"). It means that "the Court found that the decision below was correct and that no substantial question on the merits was raised." Eugene Gressman et al., Supreme Court Practice 365 (9th ed. 2007); *see White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984) ("A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question operates as a decision on the

merits on the challenges presented in the statement of jurisdiction."). The dismissal in *Baker* is no mere denial of certiorari. The Court's certiorari jurisdiction is discretionary, whereas its appellate jurisdiction under 28 U.S.C. § 1257(2) was mandatory. Thus, in *Baker*, "the Supreme Court had no discretion to refuse to adjudicate the case on its merits." *Wilson*, 354 F. Supp. 2d at 1304. The Jurisdictional Statement in *Baker* expressly argued that Minnesota's refusal to license same-sex marriages violated equal protection, and "dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." *Mandel*, 432 U.S. at 176.

Referring specifically to *Baker*, the Eighth and Ninth Circuits have explained that "the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication on the merits which is binding on the lower federal courts." *McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976);[2] *accord Adams v. Howerton*, 673 F.2d 1036, 1039 n.2 (9th Cir. 1982). Other federal courts also have recognized *Baker*'s effect. Rejecting an equal protection challenge to DOMA, the court in *Wilson* held that *Baker* "is binding precedent upon this Court and Plaintiffs' case against Attorney General Ashcroft must be dismissed." *Wilson*, 354 F. Supp. 2d at 1305; *see also Adams*, 486 F. Supp. at 1124 ("*Baker* . . . is controlling."). State courts, too, have recognized that *Baker* remains binding precedent. *See Andersen v. King Cnty.*, 138 P.3d 963, 999 & n.19 (Wash. 2006) (equal protection claim in *Baker* "was so frivolous as to merit dismissal without further argument"); *Morrison v. Sadler*, 821 N.E.2d 15, 19-20 (Ind. Ct. App. 2005); *In re Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1993).

[2] After Hennepin County denied Baker and McConnell a marriage license, they obtained one from the clerk of Blue Earth County, and the two "were 'married' by a minister." *McConnell v. Nooner*, 547 F.2d at 55. Despite this marriage, the Eighth Circuit in 1976 rejected their claim for federal veteran's spousal benefits. *Id*. at 55-56. It also rejected, in 2006, their claim for a federal tax refund. *See McConnell v. United States*, 188 Fed. App'x 540 (8th Cir. 2006).

Baker effectively holds that a state may define marriage as the union of one man and one woman without violating equal protection. Since "[the Supreme] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment," *Adarand Constructors*, 515 U.S. at 217, it necessarily follows from *Baker* that Congress rationally may define marriage, for federal law purposes, using that same historic definition of marriage consistent with equal protection. *See Wilson*, 354 F. Supp. 2d at 1305 (holding that *Baker* had "dispositive effect" on equal protection challenge to DOMA Section 3).

This Court is obligated to follow *Baker*, even if it believes that later Supreme Court cases have undermined *Baker* or that a majority of the current Justices might decide *Baker* differently today. *See Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *see also Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (same); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (admonishing lower courts not to "conclude our more recent cases have, by implication, overruled an earlier precedent").[3] "The Supreme Court has not explicitly or implicitly overturned its holding in *Baker*." *Wilson*, 354 F. Supp. 2d at 1305. Thus, this Court "is bound to follow the Supreme Court's decision." *Id.*

[3] When the Supreme Court has considered the weight of its summary affirmances *in subsequent Supreme Court cases*, it has noted that such affirmances "do not . . . have the same precedential value *here* as does an opinion of this Court after briefing and oral argument on the merits." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979) (emphasis added) (citing *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (discussing the *stare decisis* weight of summary affirmances)). This does not change the well-settled rule that these decisions are binding precedents for lower courts.

C. Rational Basis Review, Not Any Form of Heightened Scrutiny, Applies to DOMA.

In judging an equal protection claim, the deferential rational basis test applies where, as here, "a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks omitted); *see also Wilson*, 354 F. Supp. 2d at 1308 (judging equal protection challenge to DOMA under rational basis test); *Smelt*, 374 F. Supp. 2d at 879-80 (same); *In re Kandu*, 315 B.R. at 140-41 (same); *see also Adams*, 673 F.2d at 1042-43 (applying rational basis test to congressional definition of spouse as person of the opposite sex).

1. DOMA Does Not Infringe the Fundamental Right to Marriage.

a. Same-Sex Marriage Is Not a Fundamental Right.

Fundamental rights are those rights that "are objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (citations omitted). Same-sex marriage simply cannot be described as a fundamental right under the Supreme Court's definition. And, even if it could, DOMA does not prohibit same-sex marriage; it merely supplies a definition for purposes of federal law.

The right to marry someone of one's own sex is, of course, not deeply rooted in American law and history—indeed, it has scarcely any roots at all. Although the landscape has changed somewhat in the past fifteen years, when Congress enacted DOMA in 1996, not one of the fifty states permitted same-sex marriage, and no American court had discovered a state or federal constitutional right to same-sex marriage. *See* House Rep. at 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry. No State now or at any time in

American history has permitted same-sex couples to enter into the institution of marriage."). Only the Hawaii Supreme Court, by a bare 3-2 vote, had suggested that such a right *might* exist under its state constitution. *See Baehr*, 852 P.2d at 65; *but see id*. at 74 (Heen, J., dissenting) ("This court should not manufacture a civil right which is unsupported by any precedent.").

Since DOMA's enactment, same-sex marriage has gained legal recognition in some jurisdictions, often as the result of judicial interpretations of state constitutional provisions and increasingly through the democratic process. But those recent developments do not remotely amount to a deeply-rooted tradition. In America, same-sex marriage was first legally recognized in 2004 in Massachusetts, following the decision in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Same-sex marriage also currently is permitted in Vermont, New Hampshire, Connecticut, Iowa, the District of Columbia, and most recently here in New York. And, for a time, California issued same-sex marriage licenses, after its Supreme Court held that such couples had a right under the state's constitution to marry. (That ruling was superseded by a state constitutional amendment, which now is being challenged on equal protection grounds.) Undeniably, therefore, same-sex marriage jurisdictions remain even today a relatively small minority in this country. Forty-one states have constitutional amendments or statutes defining marriage as the union of one man and one woman. *See* List of Statutes, attached as Exhibit B hereto. As far as same-sex marriage has come in a short span of time, it cannot be said that an institution that first gained legal recognition in 2004 is, only seven years later, "deeply rooted."

Before DOMA, every court to address the issue had held that there is no statutory, common law, or constitutional right to same-sex marriage. *See Baker*, 191 N.W.2d at 186-87, *appeal dismissed*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) ("The law makes no provision for a 'marriage' between persons of the same sex.

Marriage is and always has been a contract between a man and a woman."); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) ("We find no constitutional sanction or protection of the right of marriage between persons of the same sex."); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (rejecting federal equal protection claim) ("[T]he courts known by us to have considered the question have all concluded that same-sex relationships are outside of the proper definition of marriage."); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that two persons of the same sex cannot contract a common law marriage); *In re Cooper*, 592 N.Y.S.2d 797 (following *Baker v. Nelson*); *Dean*, 653 A.2d at 361-62 (Terry, J., concurring) (rejecting Fifth Amendment equal protection challenge to District of Columbia marriage statute enacted by Congress); *id*. at 362-64 (Steadman, J., concurring) (same); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287 (N.Y. Sup. Ct. 1996) (rejecting argument that "denial of a marriage license to a same sex couple destroys a fundamental right").

Thus, every federal and state court to consider the question has held that same-sex marriage is not a fundamental federal right deeply rooted in American law and history. *See Smelt*, 374 F. Supp. 2d at 879 ("[T]he fundamental due process right to marry does not include a fundamental right to same-sex marriage . . . ."); *Wilson*, 354 F. Supp. 2d at 1307 ("[T]he right to marry a person of the same sex is not a fundamental right under the Constitution."); *In re Kandu*, 315 B.R. at 140 (Supreme Court has not "conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship"); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 675 (Tex. App. 2010) ("Plainly, [same-sex marriage] is not [deeply rooted]. Until 2003, no state recognized same-sex marriages."); *Conaway v. Deane*, 932 A.2d 571, 624 (Md. 2007) (same-sex marriage not "so deeply embedded in the history, tradition, and culture of this State and the Nation that it should be deemed fundamental"); *Standhardt v. Superior Ct. of Ariz.*, 77

P.3d 451, 460 (Ariz. Ct. App. 2003) ("The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process."); *see also Shahar v. Bowers*, 114 F.3d 1097, 1099 & n.2 (11th Cir. 1997) (en banc) ("Given the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be 'married' to another woman . . . ."; "[N]o federal appellate court or state supreme court has recognized the federal rights of same-sex marriage claimed by Plaintiff . . . .").

As New York's highest court aptly observed: "Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). The notion that same-sex marriage is a fundamental right, as the Supreme Court of Washington observed, would be "an astonishing conclusion, given the lack of any authority supporting it; *no* appellate court applying a federal constitutional analysis has reached this result." *Andersen*, 138 P.3d at 979.

By contrast, in cases involving traditional, opposite-sex marriage, the Supreme Court has indeed recognized a fundamental right to marry. *See Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 541 (1942). But it has never suggested, let alone held, that same-sex marriage comes within the scope of this right. Indeed, it has indicated to the contrary. The Court has repeatedly warned of the need for "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721. Here, careful consideration reveals that the Court has deemed marriage to be fundamental precisely

because of its connection to procreation, something that same-sex spouses cannot accomplish, un-aided, with each other. *See, e.g., Zablocki*, 434 U.S. at 386 (referring to the "decision to marry and raise the child in a traditional family setting"); *Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the [human] race.").

b. DOMA Implicates Federal Benefits, Not the Right of Same-Sex Couples to Marry.

Regardless of whether same-sex marriage is a fundamental right, DOMA does not "'directly and substantially' interfere" with the ability of same-sex couples to marry, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *In re Kandu*, 315 B.R. at 141 & n.6, because it does not bar same-sex marriages. Congress has defined marriage for purposes of federal law, but that definition implicates eligibility for federal benefits and burdens, it "does not . . . prevent any" same sex couple from marrying under state law. *Lyng*, 477 U.S. at 638. DOMA does not operate "by banning, or criminally prosecuting nonconforming marriages." *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977).

DOMA only defines marriage for purposes of benefits—*and burdens*[4]—created by other federal laws. As Senator Nickles, the principal sponsor of DOMA in the Senate, stated: "These definitions apply only to Federal law. We are not overriding any State law. We are not banning gay marriages." Senate Hrg. at 5. Congress "did not penalize" same sex couples; it "decided not to offer them a special inducement." *Alexander v. Fioto*, 430 U.S. 634, 640 (1977).

[4] For only a few examples, covering only federal statutes (not agency regulations), *see, e.g.*, *Druker v. Comm'r*, 697 F.2d 46 (2d Cir. 1982) (rejecting challenge to "marriage penalty" in federal tax code); 42 U.S.C. § 1396a(a)(17)(D) (non-spouses' income cannot be counted against an individual in determining Medicaid eligibility); 20 U.S.C. § 1087nn(b)(1) (spousal income counted in determining amount of student loan eligibility); *id.* § 1087oo(f)(3) (stepparent's income counted in determining amount of student loan eligibility); *id.* § 1087e(e) (spousal income counted in determining income-contingent repayment amounts on student loans); 31 U.S.C. § 1353(a) (mandating regulations under which travel by Executive-Branch spouses may be reimbursed by non-federal sources).

Furthermore, DOMA does not prevent federal agencies from extending benefits to same-sex couples, or their dependents, on an otherwise lawful basis apart from marital status. *See* Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act, 2007 WL 5254330, at *1 (Opinion of the Office of Legal Counsel 2007) (opining that DOMA permits such benefits); *Smelt*, 447 F.3d at 683 (DOMA "does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [DOMA's] definition"). Nor does DOMA alter marital benefits under state law. *See* House Rep. at 31 ("Whether and to what extent benefits available to married couples available under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.").

Both of these features dramatically distinguish DOMA from other laws that the Supreme Court has found to infringe the right to marry. In these cases the states had not merely declined to offer benefits to some married couples, but instead had affirmatively *prohibited* their marriages and (in two of the three cases) attached severe penalties to the celebration of such marriages. *Loving*, 388 U.S. at 4 (Virginia voided interracial marriages and punished them with one to five years' imprisonment); *Zablocki*, 434 U.S at 375 & n.1, 387 (Wisconsin prohibited marriage without court order for certain persons, on pain of criminal sanctions); *Turner*, 482 U.S. at 82 (prohibition on marriage by prisoners except with permission of superintendent for "compelling reasons"). DOMA does neither.

As a result, even assuming that the fundamental right to marriage included the ability to enter a same-sex marriage—which, as discussed above, it does not—in order to conclude that DOMA restricts the fundamental right to marriage, a court would have to expand equal

protection from the current rule that *prohibitions* on marriage are subject to strict scrutiny, to a rule that offering different or lesser *benefits* to any category of potential marriages is subject to strict scrutiny. The Supreme Court expressly has held that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki*, 434 U.S. at 386. While same-sex couples may object to the government's refusal to treat their decisions to enter state-law marriages in the same manner as those of opposite-sex couples, Section 3 of DOMA does absolutely nothing to "interfere with" those decisions in any way.

2. DOMA Does Not Employ a Suspect or Quasi-Suspect Classification.

The recognized suspect classes are "race, alienage, [and] national origin." *City of Cleburne*, 473 U.S. at 440. Classifications based on sex or illegitimacy are quasi-suspect. *Id*. at 440-41. The Supreme Court has rejected many other proposed suspect and quasi-suspect classes, such as mental retardation, *id*. at 442-47, age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). It would be inappropriate for this Court to add to the list of suspect and quasi-suspect classes, particularly in light of the Supreme Court's binding decision in *Baker*. The Supreme Court has not expanded the list in nearly forty years, *see Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex), and since that time no federal district court or court of appeals has added to the list of suspect and quasi-suspect classes without being reversed by a higher court.

DOMA's definitions of "marriage" and "spouse" do not implicate any suspect or quasi-suspect class. The definitions do not turn on homosexuality as such, and in situations in which federal burdens are at issue, DOMA actually benefits same-sex couples. *See supra* at 20 n.4. To be sure, the overwhelming majority of same-sex marriages will be between two individuals who

share the same sexual orientation. But sexual orientation never has been viewed as a suspect or quasi-suspect classification by federal courts. First, "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006). On the contrary, the Supreme Court applied the rational basis test to equal protection challenges of classifications based on sexual orientation. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003). Second, every circuit court that has addressed the question has concluded that homosexuals are not a suspect or quasi-suspect class. No fewer than eleven federal circuits have held that homosexuals are not a suspect class. *See Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008) ("Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read *Romer* as recognizing homosexuals as a suspect class for equal protection purposes."), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009); *Citizens for Equal Prot.*, 455 F.3d at 866; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing cases from the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits) ("[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class."), *cert. denied*, 543 U.S. 1081 (2005); *see, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) ("Our review compels us to agree with the other circuits that have ruled on this issue and to hold that homosexuals do not constitute a suspect or quasi-suspect class."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("[W]e must depart from [the district court's] analysis, in which [it] found that homosexuals constitute a suspect class, justifying heightened scrutiny of the regulation . . . .").

In *Cook*, for instance, the First Circuit considered the constitutionality of the federal "Don't Ask, Don't Tell" Act, 10 U.S.C. § 654. The plaintiffs in *Cook* "contend[ed] that the district court erred by applying rational basis review" to the Act and that "the Supreme Court's decisions in *Romer* and *Lawrence* mandate a more demanding standard." *Cook*, 528 U.S. at 61 (citation omitted). The First Circuit *expressly* rejected those contentions, holding that "neither *Romer* nor *Lawrence* mandate heightened scrutiny of the Act because of its classification of homosexuals." *Id*. The court further held that "the district court was correct to analyze the plaintiffs' equal protection claim under the rational basis standard." *Id.*

Nor does DOMA discriminate based on sex. No court ever has concluded to the contrary, and the House is unaware of *any* traditional-marriage provision, State or federal, that ever has been held to classify based on sex within the meaning of the federal Constitution. Instead, every court to have considered the question as a matter of federal law has concluded that DOMA classifies, if at all, on the basis of sexual orientation, not of sex. *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1182 (N.D. Cal. 2011); *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010); *Wilson v. Ake*, 354 F. Supp. 2d 1298; *Smelt*, 374 F. Supp. 2d 861; *In re Kandu*, 315 B.R. 123; *Conaway*, 932 A.2d 571; *see also In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Andersen*, 138 P.3d 963; *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Baker v. State*, 744 A.2d 864, 890 (Vt. 1999).[5]

[5] State courts have reached the same conclusion with respect to state laws defining marriage. *See, e.g.*, *Conaway*, 932 A.2d at 598 (Maryland's "marriage statute does not discriminate on the basis of sex"); *Andersen*, 138 P.3d at 969 (Washington's "DOMA treats both sexes the same"); *In re Marriage Cases*, 103 P.3d at 401. Although dealing with the California constitution, the California Supreme Court actually *rejected* the contention urged by plaintiff, stating that "we do not agree with the claim . . . that the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender." *Id.* Only *Baehr v. Lewin* is to the contrary, and the court there expressly noted that it was interpreting the Hawaii constitution, that "[t]he equal protection clauses of the United States

(*Continued*)

This common-sense conclusion is not inconsistent with *Loving v. Virginia*. In *Loving*, recognizing that "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination," the Court struck down a Virginia statute prohibiting interracial marriage. 388 U.S. at 10. Anti-miscegenation statutes such as the one struck down in *Loving* were, of course, enacted precisely to disadvantage racial minorities and "maintain White Supremacy." *Id.* at 11. While they necessarily prohibited some marriages to members of any race, in doing so they imposed—and were obviously intended to impose—vastly greater social and numerical restrictions on the choice of potential spouses by members of the disfavored minority group. By contrast, there is not the slightest indication in either history or reason that DOMA was intended to effect or perpetuate any inequality between the sexes. Nor does it do so: the numbers of men and women in the population are very nearly equal, and in stark contrast to anti-miscegenation statutes, the very nature of traditional-marriage statutes precludes any possibility that they could be intended to prevent members of a supposedly inferior sex from marrying outside their sex. Instead, and quite obviously, DOMA was intended to distinguish between same-sex and opposite-sex *relationships*. It therefore is not sex discrimination.

In sum, a governmental definition of marriage as between a man and a woman does not classify based upon a suspect or quasi-suspect class, as four federal courts already have held specifically. *See Citizens for Equal Prot.*, 455 F.3d at 866-67; *Wilson*, 354 F. Supp. 2d at 1307-08; *Smelt*, 374 F. Supp. 2d at 874-75, *aff'd in part*, 447 F.3d 673 (9th Cir. 2006) (holding that plaintiffs lacked standing to challenge Section 3), *cert. denied*, 549 U.S. 959 (2006); *In re*

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and Hawaii Constitutions are not mirror images of one another," 852 P.2d at 59, and that Hawaii's equal protection clause "is more elaborate" than the federal one, *id.* at 60. In any event, *Baehr* has since been rejected by an amendment to Hawaii's constitution.

Kandu, 315 B.R. at 144 (holding that *Lawrence* did "not eviscerate" the Ninth Circuit's holding in *High Tech Gays* that homosexuals did not constitute suspect or quasi-suspect class). *See also* Mem. in Supp. of House's Opp'n to Pl.'s Mot. for Summ. J. (Aug. 1, 2011) (discussing why homosexuality fails to meet criteria for suspect or quasi-suspect class).[6]

D. DOMA Easily Satisfies Rational Basis Review.

Rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). Under such review, a classification in a statute receives "a strong presumption of validity," *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*. at 313. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The government "has no obligation to produce evidence to sustain the rationality of a statutory classification," and "a statute is presumed constitutional, and the *burden* is on the *one attacking* the legislative arrangement to *negative every conceivable basis* which might support it, whether or not that basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (quotation marks, brackets, and citations omitted) (emphasis added). Under rational basis review, a court must accept a legislature's generalizations even when there is an imperfect fit between means and ends. *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009) (citing *Heller*, 509 U.S. at 320). Furthermore, the courts may not "substitute our personal

[6] While we do not concede in the least that a form of heightened scrutiny is applicable to DOMA, even under that more searching standard DOMA's classification is constitutional, especially in light of its minimal impact on the underlying right to marry.

notions of good public policy for those of Congress." *Shweiker v. Wilson*, 450 U.S. 221, 234 (1981). And on rational basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

The Supreme Court has recognized the existence of a broad category of regulations in which "Congress had to draw the line somewhere," *id.* at 316, and where "inevitably . . . some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see also Schweiker*, 450 U.S. at 238 (line-drawing statutes "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle") (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)). In such cases, Congress' decision about precisely where to draw the line is "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316. "The only remaining question" is whether the line Congress drew was "patently arbitrary or irrational." *U.S. R.R. Ret. Bd.*, 449 U.S. at 177.

Here, it is beyond dispute that "some line is essential" to delineate the boundaries of the institution of marriage. *Cf. Mathews*, 426 U.S. at 83. No matter what definition of "marriage" one adopts, there will remain some relationships that fall outside that definition; the only question is precisely where the line will be drawn. Until 2004, the constant practice in this country had been to draw the line defining marriage as including relationships between one adult man and one adult woman who were not closely related by blood, and to exclude all other

relationships. DOMA merely reinforced this historical line, and the Plaintiff in this case simply wishes that it had been drawn slightly differently.

Deference to Congressional line-drawing is particularly appropriate when it comes to questions of federal benefits because such a limitation always furthers the legitimate purpose of conserving the public fisc. For example, in *Schweiker* the Supreme Court considered an equal-protection challenge to Congress' decision to extend Supplemental Security Income benefits to elderly, blind, or disabled citizens, including (on a more limited basis) to those residing in hospitals or nursing homes that receive Medicaid funds, but to deny SSI benefits to such persons residing in non-Medicaid facilities. 450 U.S. at 226. Applying rational basis review, the Supreme Court did not ask whether the denial of benefits to persons in non-Medicaid institutions would somehow further Congress' purpose of aiding other aged, blind, or disabled people. Instead, the Court simply noted that Congress rationally could have concluded that the care and maintenance of persons in non-Medicaid institutions was primarily a state and not a federal responsibility, and upheld the statute on that basis. *Id.* at 238-39.

1. Myriad Rational Bases Support DOMA.

a. Congress Rationally Could Have Acted with Caution in the Face of the Unknown Consequences of a Proposed Novel Redefinition of the Foundational Social Institution.

In DOMA, Congress acted to maintain the definition of marriage that was universally accepted in American law, and indeed largely normative throughout world history, until just a few years ago. *See supra* at 3-9; *Murphy v. Ramsey*, 114 U.S at 45 (marriage is "the union for life of one man and one woman"); *Baker*, 191 N.W.2d at 186 ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *Adams*, 486 F. Supp. at 1122 ("The term 'marriage'

. . . necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes. That is the way the term 'marriage' is defined in every legal source I have examined, starting with Black's Law Dictionary."); *Black's Law Dictionary* 756 (1st ed. 1891) ("the civil status of one man and one woman united in law for life"); *Webster's Third New Int'l Dictionary* 1384 (1976) ("The state of being united to a person of the opposite sex as husband or wife."). Whatever else may be at issue in the debate over marriage, no one can deny that Congress reasonably could have found the institution of central importance to civilized society, as it has been virtually everywhere for all of recorded history.

Viewed in this light, Congress had a supremely rational basis to proceed with caution in considering whether to drop a criterion—opposite-sex couples—that until now has been an essential element of such an enormously important social concept as marriage. *See* 150 Cong. Rec. S7994 (daily ed. July 13, 2004) (Sen. Clinton) ("marriage is not just a bond but a sacred bond between a man and a woman" and is "the fundamental bedrock principle that exists between a man and a woman, going back into the midst of history as one of the foundational institutions of history and humanity and civilization"). Congress' valid and specifically declared purpose of "nurturing" the foundational institution of marriage, and all the social benefits that flow from it, House Report at 12, would more than justify its acting with caution.[7]

As an empirical matter, the long-term social consequences of granting legal recognition to same-sex relationships remain unknown. In these circumstances, Congress was justified in waiting for evidence spanning a longer term before engaging in what it reasonably could regard as a major redefinition of a foundational social institution. *See* 150 Cong. Rec. S2836 (daily ed.

[7] As was explained above, *see supra* at 20-22, Congress did not "ban" gay marriage in DOMA, instead leaving that question to the states. But it did express a policy judgment that, even if states choose to experiment in this fashion, it would be unwise or at least premature for the United States to throw its weight behind the venture.

Mar. 22, 2004) (Sen. Cornyn) ("The institution of marriage is just too important to leave to chance. . . . The burden of proof is on those who seek to experiment with traditional marriage, an institution that has sustained society for countless generations."); 150 Cong. Rec. S7880 (daily ed. July 9, 2004) (Sen. Hatch) ("The jury is out on what the effects on children and society will be and only legislatures are institutionally-equipped to make these decisions. If nothing else, given the uncertainty of a radical change in a fundamental institution like marriage, popular representatives should be given deference on this issue."); *id.* at S7887 (Sen. Frist) (calling same-sex marriage "a vast untested social experiment for which children will bear the ultimate consequences"); *id.* at S7888 (Sen. Sessions) ("I think anybody ought to be reluctant to up and change [the traditional definition of marriage]; to come along and say, well, you know, everybody has been doing this for 2000 years, but we think we ought to try something different."); 150 Cong. Rec. S7914 (daily ed. July 12, 2004) (Sen. Kyl) ("We cannot strip marriage of its core—that it be the union of a man and woman—and expect the institution to survive."); 150 Cong. Rec. S8089 (daily ed. July 14, 2004) (Sen. Smith) ("[W]hen we tinker with the most basic institution that governs relationships of men and women, we are tinkering with the foundations of our culture, our civilization, our Nation, and our future."); 152 Cong. Rec. S5473 (daily ed. June 6, 2006) (Sen. Talent) ("[T]he evidence is not even close to showing that we can feel comfortable making a fundamental change in how we define marriage so as to include same-sex marriage within the definition.").

In other words, in DOMA, Congress rationally could distinguish between opposite-sex marriage and same-sex marriage because opposite-sex marriage is a deeply rooted, historic institution—and a fundamental constitutional right—and same-sex marriage is neither of those things and, by comparison with our civilization's appreciation of traditional marriage, a relative

unknown. *See supra* at 16-20. Traditional marriage, to borrow the Supreme Court's description of another longstanding practice, "is deeply embedded in the history and tradition of this country" and "has become part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). In sharp contrast, same-sex marriage has existed as a legal right in some American jurisdictions only since 2004, and did not exist at all in 1996.

To be sure, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns." *Id*. at 790. Because DOMA does not implicate a suspect class, Congress rationally could decide to adhere to the historic, fundamental-rights definition of marriage — for purposes of federal law only, and without prohibiting any marital arrangements that a particular state might choose to permit. Consistent with equal protection principles, Congress reasonably could choose to extend federal benefits based on the historic definition of marriage rather than a recently-minted definition that would encompass same-sex marriages. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("preserving the traditional institution of marriage" is a rational basis for "laws distinguishing between heterosexuals and homosexuals"); *cf. Regan v. Taxation With Representation*, 461 U.S. 540, 550-51 (1983) (holding that it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations" because "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages"). And in choosing to define marriage as it did in Section 3 of DOMA, Congress reasonably could rely upon the Supreme Court's decision in *Baker*.

b. Congress Rationally Could Have Acted to Protect the Public Fisc and Preserve the Balance Struck by Earlier Congresses in Allocating Federal Burdens and Benefits.

Wholly apart from the broader debate about the definition of marriage, Congress had ample rational bases for preserving the traditional definition of marriage for the specific purpose of allocating federal burdens and benefits, which is all that Section 3 of DOMA addresses. In particular, by maintaining the traditional definition of marriage, Congress preserved both the public fisc and the legislative judgments of countless earlier Congresses that used terms like "marriage" and "spouse" with reference to traditional marriages and traditional marriages alone.

First, unlike state laws confining marriage to the traditional definition, DOMA is justified by a unique and independent federal interest—the protection of the public fisc. Although DOMA applies to both federal burdens as well as benefits, on balance, Congress reasonably could have concluded that a more restricted definition of marriage would save money and preserve the federal fisc.[8] That is certainly the case with respect to the application of DOMA challenged here. In the context of a statute that apportions federal benefits, saving money by declining to expand pre-existing eligibility requirements is itself a rational basis. Congress expressly relied on this rationale in enacting DOMA. *See* House Rep. at 18.

[8] In 2004, the Congressional Budget Office opined that treating same-sex couples as married under federal law would result in so many of them becoming ineligible for federal means-tested benefits (after the incomes of their same-sex partners were included) that it would actually result in a net benefit to the Treasury, even after a decrease in tax revenues was considered. Douglas Holtz-Eakin, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf. This report is a little more than nine pages in length, lacks a high degree of detailed analysis, and, of course, did not exist in 1996. In any event its estimate—and that is all it claims to be—that being married would actually constitute a net fiscal *detriment* to same-sex couples as a class is implausible enough that Congress rationally could have chosen to reject it even if it had existed in 1996.

Furthermore, the particular context of DOMA makes that judgment particularly rational. DOMA recognized that a host of pre-existing federal statutes allocating benefits and, in some cases, burdens all necessarily were premised on the traditional definition of marriage. Pre-DOMA statutes that classified by marital status used the traditional definition of marriage because at the time of classification there was no other definition. Each of those statutes involved its own unique legislative debate about the importance of the benefit and the countervailing importance of fiscal restraint and related issues. In the case of the estate tax, the impact on tax revenues would loom large, while in the immigrations context, total level of immigration and asylum requests might have been relevant. But whatever the precise dynamic of the earlier debates, by preserving the traditional definition of marriage, Congress acted in 1996 to preserve the balance between the objectives of hundreds of federal programs and the countervailing concerns, such as fiscal constraint. DOMA thus not only conserves the federal fisc, but preserves the balance struck in countless earlier congressional debates. In the context of federal spending, that is surely a rational basis.

c. Congress Rationally Could Have Acted to Provide for Consistency in Eligibility for Federal Benefits Based on Marital Status.

There is another rational basis for DOMA rooted in its unique character as a federal statute, with no precise analog in the context of state definitions of marriage: The federal interest in uniform treatment of federal benefits. Congress rationally could decide to base eligibility for federal benefits on the traditional definition of marriage to avoid arbitrariness and inconsistency in such eligibility. *See* 142 Cong. Rec. S4870 (daily ed. May 8, 1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal benefits"); 142 Cong. Rec. S10121 (daily ed. Sept. 10, 1996) (Sen. Ashcroft) (stating that federal definition "is very important, because

unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently . . . , people in different States would have different eligibility to receive Federal benefits, which would be inappropriate").

Opposite-sex couples can, of course, marry in every American jurisdiction while same-sex couples can marry in only a few states and the District of Columbia. If same-sex couples were eligible for federal marriage benefits, some same-sex couples would be eligible and some would not depending on the vagaries of state law. A same-sex couple living in a same-sex marriage state could marry and become eligible for federal benefits, whereas a couple residing in a non-same-sex marriage state could not do so in their home state.

More confusion would arise regarding the status of a same-sex couple that obtains a marriage license in a state where same-sex marriage licenses are available but resides in a state where same-sex marriage is not permitted. Such a couple might or might not be recognized as "married" in their state of residence. *See* 152 Cong. Rec. S5481 (daily ed. June 6, 2006) (Sen. Carper) ("If we have a same-sex couple in Delaware who decide to go to another country or another place where same-sex marriages are allowed, and then that couple comes back to Delaware and claims they are married, they are not married in my State."). Differing state rules about the recognition of foreign same-sex marriage licenses—a key issue in this case—add further complexity and disuniformity. A same-sex couple obtaining a marriage license in Canada at the exact same time as Plaintiff would be ineligible for federal benefits in a state that refused to recognize such foreign marriages. In enacting DOMA Section 3, Congress rationally could and did decide to avoid creating such a patchwork. *See* 142 Cong. Rec. S10121 (daily ed. Sept. 10, 1996) (Sen. Ashcroft) (discussed *supra* at 33-34); *see also* 150 Cong. Rec. S7966 (daily ed. July 13, 2004) (Sen. Inhofe) (same-sex marriage "should be handled on a Federal level

[because] people constantly travel and relocate across State lines throughout the Nation. Same-sex couples are already traveling across country to get married").

Congress' interest in a uniform definition of marriage for purposes of federal benefits based on marital status also is revealed by Section 2 of DOMA, which provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738c. Congress foresaw that, with the advent of same-sex marriage, same-sex couples residing in jurisdictions where same-sex marriage is not permitted would travel to jurisdictions that issue same-sex marriage licenses to become married and then return home. And that is exactly what has happened, including in this case. *See* 150 Cong. Rec. S7961 (daily ed. July 13, 2004) (Sen. Hutchison) ("Today, same-sex couples from 46 States have traveled to Massachusetts, California, and Oregon to receive marriage licenses with the intention of returning to their respective States . . . ."). Section 2 of DOMA advances Congress' interest in uniformity by ensuring that States that do not permit same-sex marriage need not recognize same-sex marriage licenses obtained out of state.

d. Congress Rationally Could Have Acted to Avoid Creating a Social Understanding That Begetting and Rearing Children Is Not Inextricably Bound up with Marriage.

Whether or not same-sex marriages are as beneficial to society as traditional marriage in other respects, it would have been reasonable for Congress to have been concerned that defining same-sex relationships as "marriages," despite the fact that they necessarily cannot result in children without assistance—and are (and particularly in 1996, were) less likely to involve children—would weaken society's understanding of the importance of marriage for children.

Accordingly, Congress rationally could have been concerned that, by undermining the logic and message that children are a central reason why the state recognizes marriage, recognition of same-sex marriages would lead to an increase in the number of children being raised outside the marital context. *Cf.* 150 Cong. Rec. S7922 (daily ed. July 12, 2004) (Sen. Cornyn) ("[C]ountless statistics and research attest to the fact that when marriage becomes less important because it is expanded beyond its traditional definition to include other arrangements, that untoward consequences such as greater out-of-wedlock childbirths occur."); *id.* at S7927 (Sen. Brownback) ("There is a real question about the future of societies that do not uphold traditional marriage.").

In fact, in 2004 Congress heard testimony vividly illustrating the impact on communities of racial minorities of the corrosion of the social sense that children are a fundamental purpose of marriage.[9] *See Judicial Activism v. Democracy: Nat'l Implications of the* Mass. Goodrich *Decision & Judicial Invalidation of Traditional Marriage Laws*, Hrg. Before S. Subcomm. on the Constitution, 108th Cong. at 10 (Mar. 3, 2004) (testimony of Rev. Richard Richardson) ("That [traditional] institution [of marriage] plays a critical role in ensuring the progress and prosperity of the black family and the black community at large. . . . The dilution of the ideal — of procreation and child-rearing within the marriage of one man and one woman — has already had a devastating effect on [the African-American] community."); *id.* at 12-15 (testimony of

[9] This testimony obviously was not before Congress as a formal matter in 1996 when it enacted DOMA, but "[t]he absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis," because "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315 (citation, quotation marks, and brackets omitted). And, while this testimony was in the context of marriage in general rather than same-sex marriage in particular, it reveals Congress' concern with the strength of the societal link between marriage and children. In enacting DOMA, Congress rationally could have anticipated the kinds of problems illustrated by the 2004 hearings.

Pastor Daniel de Leon) (similar observations regarding the importance of traditional marriage to the Hispanic community).

Members of Congress also expressed a concern in 2004 that legal recognition of same-sex relationships has had precisely this effect in Scandinavia and the Netherlands. *See* 150 Cong. Rec. S7921 (daily ed. July 12, 2004) (Sen. Cornyn) ("Today, about 15 years after Denmark created this new institution [in 1989], a majority of children in Scandinavia are born out of wedlock, including more than 50 percent in Norway, and 55 percent of the children in Sweden, and in Denmark, a full 60 percent of first-born children have unmarried parents. In Scandinavia, as a whole, traditional marriage is now an institution entirely separated from the idea of child rearing or childbearing or child-rearing . . . ."); 150 Cong. Rec. H5951 (daily ed. July 19, 2004) (Rep. Osborne) ("[Several Scandinavian countries] have changed the traditional definition of marriage. The result has been a decline in traditional marriage and a surge in out-of-wedlock births in these countries."); 150 Cong. Rec. S7880 (daily ed. July 9, 2004) (Sen. Hatch) (noting scholars' findings regarding the "marked decline in marriage culture" and "spectacular rise in the number of illegitimate births" in the Netherlands since adoption of domestic partnerships and same-sex marriage); 150 Cong. Rec. S8003-07 (daily ed. July 13, 2004) (reprinting Stanley Kurtz, *The End of Marriage in Scandinavia*, Weekly Standard (Feb. 2, 2004)); 150 Cong. Rec. H7912 (daily ed., Sept. 30, 2004) (Rep. Pence) ("In some parts of Norway, as many as 80 percent of first-born children and two-thirds of subsequent children are now born out of wedlock."). While some have disputed this conclusion, such disagreement is hardly sufficient to render Congress' decision irrational.

Members of Congress noted the publication in July 2004 of an open letter by five Dutch scholars cautioning that, while "definitive scientific evidence" does not yet exist, "there are good

reasons to believe the decline in Dutch marriage may be connected to the successful public campaign for the opening of marriage to same-sex couples in The Netherlands." 150 Cong. Rec. S7928 (daily ed. July 12, 2004). They reported:

> Until the late 1980[]s, marriage was a flourishing institution in The Netherlands. . . . It seems, however, that legal and social experiments in the 1990[]s have had an adverse effect on the reputation of man's most important institution. Over the past fifteen years, the number of marriages has declined substantially, both in absolute and relative terms. . . . This same period also witnessed a spectacular rise in the number of illegitimate births—in 1989 one in ten children were born out of wedlock (11 percent), by 2003 that number had risen to almost one in three (31 percent). . . . It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their offspring.

Id. at S7927. In short, in enacting DOMA, Congress rationally could have been concerned about the effect that changing the federal definition of marriage could have on the institution of marriage and out-of-wedlock births.

e. Congress Rationally Could Have Acted to Foster Marriages That Provide Children with Parents of Both Sexes.

Congress rationally could distinguish between opposite-sex couples and same-sex couples based on biological differences. The equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439; *see Miller v. Albright*, 523 U.S. 420, 445 (1998) (plurality opinion) (recognizing that "biological differences" between paternity and maternity can "provide a relevant basis" for statutory classification). Congress rationally could decide to base eligibility for federal marital benefits on the basic biological differences between the two classes. Opposite-sex spouses generally are capable of procreating with each other; same-sex couples are not. 150 Cong. Rec. S7913 (daily ed. July 12, 2004) (Sen. Bunning) ("Only a man and a woman have the ability to create children. It is the law of nature."). Indeed, most sexually-active opposite-sex relationships have an

inherent ability to produce children whether or not the spouses are seeking to do so at any given time. And the fact that opposite-sex relationships produce unplanned and unintended pregnancies is at the heart of society's traditional interest in promoting the institution of marriage and providing incentives for these unplanned offspring to be raised in the context of a traditional family unit. Whatever else is true of the procreative potential of same-sex couples, the phenomena of unplanned and unintended pregnancies is limited to opposite-sex couples. Congress rationally could have concluded that a special legal category was necessary to recognize the special concerns that face a couple who must take account of this inherent possibility of their relationship, and to support and incentivize such relationships despite the increased responsibility they place upon the spouses.

In enacting DOMA, Congress found that "society recognizes the institution of marriage and grants married persons preferred legal status" because of the "deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. at 12, 13. This rationale explains DOMA's definition of marriage as between one man and one woman. Encouraging couples to raise children in the context of the traditional marital family is, without question, a legitimate objective,[10] and Congress rationally could conclude that this objective is advanced by extending benefits to couples meeting the historic definition of marriage. *See, e.g.*, *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 607 (7th Cir. 2001) ("[S]o far as heterosexuals are concerned, the evidence that" marriage "provides a stable and nourishing framework for child rearing refutes any claim that policies designed to promote marriage are irrational.") (citing Linda J. Waite & Maggie Gallagher, The Case for Marriage: Why Married People are Happier,

[10] *See, e.g.*, *Lofton*, 358 F.3d at 819 ("It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society . . . .").

Healthier, and Better Off Financially (2000); David Popenoe, Life without Father: Compelling New Evidence That Fatherhood & Marriage are Indispensable for the Good of Children & Society (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999)); *Lofton*, 358 F.3d at 820 ("Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model."); *see also Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (noting that "considerable scholarly research . . . indicates that '[t]he optimal situation for the child is to have both an involved mother and an involved father'") (quoting H. Biller, *Paternal Deprivation* 10 (1974)); 150 Cong. Rec. S683 (daily ed. Feb. 6, 2004) (Sen. Cornyn) (traditional marriage "has been found over countless years to benefit children, to provide a stable emotional and economic foundation for children so that they then prosper and become responsible, productive adults"); 150 Cong. Rec. S1507 (daily ed. Feb. 24, 2004) (traditional marriage is the "best and most optimal arrangement found yet in the history of mankind to have and raise children so that they will be productive citizens").[11]

[11] In 2004, Congress extensively reviewed the evidence that children whose mother or father is absent are comparatively worse off. *See* 150 Cong. Rec. S5894 (daily ed. May 20, 2004) (Sen. Brownback) ("a marriage between a man and a woman . . . is the best place to raise children according to all of our sociological data."); 150 Cong. Rec. H5951 (daily ed. July 19, 2004) (Rep. Osborne) ("[R]esearch shows that children do better when they live with their biological father and mother in a long-term stable relationship. Twelve leading family scholars summarized thousands of studies on child rearing as follows: children raised by both biological parents within a marriage are less likely to become unmarried parents, live in poverty, drop out of school, have poor grades, experience health problems, die as infants, abuse drugs and alcohol, experience mental illness, commit suicide, experience sexual and verbal abuse, engage in criminal behavior."); 150 Cong. Rec. H7826 (daily ed. Sept. 29, 2004) (Rep. Pence) (citing Barbara Dafoe Whitehead, *Dan Quayle Was Right*, The Atlantic, Apr. 1993, at 47; 150 Cong. Rec. S7914 (daily ed. July 12, 2004) (Sen. Kyl) (noting the "overwhelming body of social science testimony" that "children on average experience the highest levels of overall well-being in the context of healthy marital relationships"); *id.* at S7926 (Sen. Brownback) ("Study after

(*Continued*)

Congress also could "rationally decide that, for the welfare of children, it is more important to promote stability and to avoid instability, in opposite-sex sex [rather] than in same-sex relationships." *Hernandez*, 855 N.E.2d at 7. This is because "[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not." *Id.* Congress could have found that "it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman . . . and find that this will continue to be true." *Id*. Accordingly, Congress "could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite sex couples who make a solemn, long-term commitment to each other." *Id*. Furthermore, Congress could "find that this rationale for marriage does not apply with comparable force to same-sex couples" and that "unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples." *Id*. Once again, the general ability of opposite-sex couples not only to procreate but to do so unintentionally is at

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study shows children do best in a home with a married, biological mother and father . . . . '[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage.'") (quoting Child Trends organization); 150 Cong. Rec. S7994 (daily ed. July 13, 2004) (Sen. Clinton) (recognizing that marriage's "primary, principal role during th[e] millennia has been the raising and socializing of children for the society into which they become adults"); 152 Cong. Rec. H5295 (daily ed. July 18, 2006) (Rep. Ryan) (citing President Clinton's domestic policy advisor, Dr. Bill Galston); 150 Cong. Rec. S7886 (daily ed. July 9, 2004) (Sen. Frist) ("Marriage is the union between a man and a woman for the purpose of procreation, and has been, until this point, one of the great settled questions of human history and culture."); *id.* at S7889 (Sen. Sessions) ("The reason a State has an interest in preserving marriage, traditional marriage, is because children are produced in that arrangement."); 150 Cong. Rec. H7896 (daily ed. Sept. 30, 2004) (Rep. Musgrave); 150 Cong. Rec. S7967 (daily ed. July 13, 2004) (Sen. Inhofe) ("The evidence of the benefits to children being raised by a mother and father is overwhelming.") (citing, *inter alia*, the Senate testimony and research of Barbara Dafoe Whitehead and Patrick Fagan); 150 Cong. Rec. S8088 (daily ed. July 14, 2004) (Sen. McConnell) ("Two decades of modern social science have arrived at the conclusion borne out by at least two millennia of human experience: that family structure matters for children and hence for society, and the family structure that helps children the most is a family headed by a mom and a dad.").

the heart of the need to incentivize marriage and stable relationships in opposite-sex couples. Couples who can procreate only with considerable pre-meditation raise different issues and Congress could rationally treat those different groups differently. That is all rational basis review requires.

Finally, the experience of a child raised by a man and a woman may differ from that of a child raised by same-sex caregivers. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.") (quotation marks and brackets omitted); 150 Cong. Rec. H7913 (daily ed. Sept. 30, 2004) (Rep. Jo Ann Davis) (mothers and fathers play important but different roles in child-rearing). The federal courts that have upheld DOMA all have recognized that encouraging child-rearing by a married mother and father is a legitimate governmental interest, and that DOMA furthers that interest. *See Wilson*, 354 F. Supp. 2d at 1308-09; *Smelt*, 374 F. Supp. 2d at 880; *In re Kandu*, 315 B.R. at 146-47. Congress rationally could conclude that each child will benefit from having a role model of his or her own sex as a parent, and from being exposed within the family to how that parent relates to an adult of the opposite sex. 150 Cong. Rec. S1507 (daily ed. Feb. 24, 2004) (Sen. Cornyn) (marital family consisting of a husband and a wife provides role models for children); 150 Cong. Rec. S7960 (daily ed. July 13, 2004) (Sen. Talent) (noting that "one thing that two people of the same sex cannot give children" is "a mom *and* a dad") (emphasis added); 150 Cong. Rec. H5951-52 (daily ed. July 19, 2004) (Rep. Osborne) ("a man and a woman produce a child" and each makes "a unique contribution" to a child's well-being); 150 Cong. Rec. H7892 (daily ed. Sept. 30, 2004) (Rep. Akin) ("[W]e all know from experience that kids are best off when they have a mom and a dad."). But while some same-sex couples may prove capable parents in many other regards, children raised by

them inevitably will miss out on one or both of these benefits. State constitutional amendments and statutes defining marriage in accord with its historic definition also have been upheld on this basis. *See, e.g.*, *Citizens for Equal Prot.*, 455 F.3d at 867-68; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway*, 932 A.2d at 630-34; *Andersen*, 138 P.3d at 982-85; *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 22-27; *Standhardt*, 77 P.3d at 462-64; *see also* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773 (2002); Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771 (2001).

Moreover, the debate about the child-rearing abilities of same-sex couples who undergo significant advanced planning to have children need not be resolved or even engaged in order to uphold DOMA. Concerns about the experience of children who are the product of unintended pregnancies and providing incentives for those children to be raised by married couples is a rational basis for providing incentives for traditional marriages in the first place. For those purposes, the relevant comparison is unplanned children raised by two married parents versus unplanned children raised in an alternative arrangement. Congress' decision to preserve that traditional relationship and not extend it to a group that due to biological differences simply does not raise the same concern about unintended offspring is rational both because of the biological differences and because of the federal interests in uniformity, preserving the fisc and prior federal judgments.

II. ANY REDEFINITION OF MARRIAGE SHOULD BE LEFT TO THE DEMOCRATIC PROCESS.

Any effort to redefine the institution of marriage as something other than the union of one man and one woman is a matter best left in the hands of the elected, politically accountable, branches of the federal government and the citizenry through the democratic process. As the

Ninth Circuit has noted, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt*, 447 F.3d at 681. And there is an alternative: Determining the federal rights of same-sex couples "remains a fit topic for [Congress] rather than the courts." *Id*. at 684 n.34 (citing several bills pending in the 109th Congress). Those that support same sex-marriage do not lack political power in Congress or the executive branch. *See, e.g.*, Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010); Presidential Memorandum, *Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, 75 Fed. Reg. 32247 (June 2, 2010); Presidential Memorandum, *Federal Benefits and Non-Discrimination*, 74 Fed. Reg. 29393 (June 17, 2009) (directing State Department and OPM to extend benefits "to qualified same-sex domestic partners of Federal employees" consistent with federal law). *See generally* House Mem. Opposing Summ. J. at 12-21. Unlike the blunt, binary instrument of judicial review, which can only declare a practice to be constitutional or not, the legislative process is well suited to accommodating differing viewpoints and finding satisfactory compromises between competing interests.

Congress and the states are the proper fora for resolving the issue of same-sex marriage. Just last month, New York—the Nation's third-most-populous State—enacted same-sex marriage through the democratic process. It is "not this Court's role" to declare same-sex marriage a constitutional right and eliminate that discussion and resolution. *Wilson*, 354 F. Supp. 2d at 1309. "The legislatures of the individual states may decide to permit same-sex marriage or the Supreme Court may decide to overturn its precedent and strike down DOMA. But, until then, this Court is constrained to [up]hold DOMA." *Id.*; *see also In re Kandu*, 315 B.R. at 145 ("[T]he creation of new and unique rights is more properly reserved for the people through the

legislative process."); *Hernandez*, 855 N.E.2d at 9 ("[A]ny expansion of the traditional definition of marriage should come from the Legislature."). Indeed, "it would not be proper for judges to use the vague concept of 'equal protection' to undermine marriage just because it is a heterosexual institution." *Irizarry*, 251 F.3d at 609. The equal protection doctrine "is not a charter for restructuring the historic institution of marriage by judicial legislation." *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 681 n.12 (internal brackets omitted) (citing *Baker*, 191 N.W.2d at 186).

CONCLUSION

For all of the foregoing reasons, the House respectfully requests that this action be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 1, 2011, I served one copy of the Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of Its Motion to Dismiss by CM/ECF and by electronic mail (.pdf format) on the following:

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