UNITED STATES DISTRICT COURT
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.	10 Civ. 8435 (BSJ) (JCF) ECF Case

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION TO DISMISS

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For the reasons set forth below, Plaintiff Edith Schlain Windsor respectfully submits that the motion to dismiss of Defendant-Intervenor, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG"), should be denied.

PRELIMINARY STATEMENT

This Court is no doubt aware by now who Plaintiff Edith ("Edie") Windsor is and what this case is about. Edie Windsor, now 82 years old, spent more than four decades with her beloved spouse, Thea Spyer, who died in 2009. As a result of the so-called Defense of Marriage Act, or DOMA, Edie was forced to deal not only with the terrible grief of losing her spouse, but with the indignity of having to pay a $363,000 federal estate tax bill that she would not have had to pay had she been married to a man, instead of a woman. So Edie Windsor is seeking her money back by challenging DOMA as a violation of her right to equal protection of the laws, as guaranteed by the United States Constitution.

In its motion to dismiss her complaint, BLAG tries very hard to argue that it need not address Plaintiff's equal protection concerns at all. How does BLAG do this? BLAG begins its brief with the argument that DOMA does not classify Plaintiff and other gay and lesbian citizens in a way that even implicates equal protection concerns. According to BLAG, DOMA doesn't exclude any class of persons from federal protections; rather, it simply extends such protections only to other people who traditionally had them. Thus, all that needs to be justified, according to BLAG, is the

federal government's decision to recognize and protect married straight couples. (BLAG MTD at 6–7.)[1]

Really? Merely to repeat this proposition is to demonstrate its illogic—both are two sides of the same coin. DOMA operates to deprive married same-sex couples of the rights and privileges afforded all other married couples; as such, it presents the paradigmatic case of an equal protection violation. If equal protection of the laws means anything at all, it means that statutes like DOMA that classify groups of citizens based on characteristics like their sexual orientation are subject to judicial review of their purported rationales under the Constitution.

Similarly, BLAG's attempt to avoid engaging in the appropriate equal protection analysis by trying to equate DOMA with some sort of administrative scheme like the regulation and licensing of cable television is also implausible on its face. DOMA is not such a statute. It does not administer a regulatory scheme or merely allocate federal benefits. Rather, Section 3 of DOMA is a definitional statute that excludes married same-sex couples from any of the protections or rights (or obligations) afforded to other married couples.

Eventually, BLAG urges this Court to dismiss Plaintiff's complaint under rational basis review. DOMA, however, fails even under that (incorrect) standard because, as four other federal courts have recently held, DOMA lacks any legitimate rational basis. *See Dragovich* v. *U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011); *Gill* v. *Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *In re*

[1] References to Defendant-Intervenor's Memorandum in Support of its Motion to Dismiss are hereinafter referred to as "BLAG MTD at __."

Levenson, 587 F.3d 925 (9th Cir. 2009) (Reinhardt, J.); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

Indeed, when BLAG finally gets to the equal protection issues, it distorts the Constitution into nothing more than a judicial rubber stamp. Although BLAG ignores Congress' original articulation of its rationales for passing DOMA in 1996, not a single one of the rationales that BLAG now offers passes constitutional muster either.

Not surprisingly, BLAG's principal justifications rely on history, tradition, and "caution." These purported justifications, however, do nothing more than restate DOMA's classification. In other words, they are simply another way of saying that continuing to deny married same-sex couples federal marital protections is permissible because the federal government has denied same-sex couples those protections in the past. Equal protection jurisprudence, however, requires more than that. BLAG cannot justify the existence of a discriminatory statute simply by pointing out that it enshrines discrimination that has existed for a long time. Tradition is no substitute for either logic or justice, and it certainly provides no rationale under our Constitution for the perpetuation of second-class citizenship.

BLAG's remaining justifications, which largely concern parenting and procreation, suffer from a different, though equally fatal flaw. As other courts have concluded, any alleged congressional interests in encouraging heterosexual couples to marry or encouraging responsible procreation by straight couples, whether or not legitimate, simply lack any rational connection to what DOMA does. *See Dragovich*, 764 F. Supp. 2d at 1190–91; *Gill*, 699 F. Supp. 2d at 388–89; *Levenson*, 587 F.3d at 931–34; *In re Balas*, 449 B.R. at 578–79. What DOMA does is deny protections to married

same-sex couples; logically, that denial cannot incentivize straight couples to do anything at all. This kind of topsy-turvy logic requires the kind of irrational thinking that demonstrates why DOMA cannot be justified under any standard of review.

The only interest that DOMA does advance—one that is painfully apparent from the congressional record—is to codify a deep discomfort with and disapproval of gay men and lesbians. As Plaintiff previously demonstrated in her motion for summary judgment, the record makes it clear that, when faced with the possibility of civil marriage for same-sex couples in Hawaii in 1996, Congress sought to ensure that if any state granted same-sex couples the opportunity to marry (as six states and the District of Columbia now have), those married same-sex couples would be excluded from any federal protections otherwise afforded married couples. Because there is no rational justification for such an exclusion, Section 3 of DOMA is unconstitutional even under the lowest level of constitutional scrutiny. BLAG's motion to dismiss should be denied.

ARGUMENT

I.

BLAG'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE APPROPRIATE LEVEL OF SCRUTINY CANNOT BE DETERMINED ON A MOTION TO DISMISS

BLAG urges this Court to dismiss Plaintiff's complaint under the deferential rational basis standard, arguing that government discrimination against same-sex couples is presumed to be constitutional. (BLAG MTD at 26.) But BLAG's claim that sexual orientation classifications warrant rational basis review is not based on an analysis of the factors that courts are to consider in determining what level of judicial scrutiny applies to laws that discriminate: strict, intermediate, or rational basis review. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985). Instead,

BLAG merely states that DOMA's discrimination against married same-sex couples is entitled to deference because certain out-dated and out-of-circuit decisions have held that rational basis review applies to classifications that discriminate on the basis of sexual orientation.[2]

As set forth in more detail in Plaintiff's motion for summary judgment, the level of scrutiny that applies to sexual orientation classifications is an open question in the Second Circuit. (*See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 13 n.4 and accompanying text (citing *Able* v. *United States*, 155 F.3d 628, 632 (2d Cir. 1998).) BLAG seeks to persuade this Court as a matter of law to follow out-of-circuit cases that do not address the factors that mandate heightened scrutiny and instead rely, either directly or indirectly, on the Supreme Court's decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which has been overruled by *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003).[3] Because none of these cases control in this circuit, this Court must determine the appropriate level of scrutiny for itself.

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[2] Contrary to BLAG's suggestion, Plaintiff does not assert in her complaint or elsewhere either that DOMA violates the fundamental right to marry (BLAG MTD at 16–20), or that DOMA's classification constitutes impermissible sex discrimination (BLAG MTD at 24–25). BLAG's inclusion of these arguments in its brief is therefore somewhat puzzling. In any event, because Plaintiff has not raised these arguments, this Court need not reach them in order to resolve the pending motions.

[3] *See Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (relying on *Bowers*) and *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same) (cited in BLAG MTD at 23). The post-*Lawrence* cases BLAG cites simply adhered to the pre-*Lawrence* case law and relied on cases that, in turn, relied on *Bowers*, *see Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (relying on *Holmes* v. *Cal. Army Nat. Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), and *Richenberg* v. *Perry*, 97 F.3d 256, 260 n.5 (8th Cir. 1996)) (cited in BLAG MTD at 23), or failed to consider the relevant heightened scrutiny factors, *see Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008) and *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859 (8th Cir. 2006) (cited in BLAG MTD at 23).

In order to resolve this issue, the Court must answer factual questions that cannot be resolved on the pleadings, such as the ability of lesbians and gay men to contribute to society. Because these factual questions must be adjudicated in order for the Court to decide Plaintiff's claim, the issue of the applicable level of judicial scrutiny is not the proper subject of a motion to dismiss. Fed. R. Civ. P. 12(b)(6); *see E.S. Originals Inc.* v. *Totes Isotoner Corp.*, 734 F. Supp. 2d 523, 528 ("A disputed issue of fact is inappropriate to consider in the context of a Rule 12(b)(6) motion.") (quoting *DiBlasio* v. *Novello*, 344 F.3d 292, 304 (2d Cir. 2003)).

Moreover, BLAG made a calculated decision *not* to argue that Section 3 of DOMA is constitutional, if (contrary to its stated position) heightened scrutiny applies. And BLAG could not do so even if it wanted to on a motion to dismiss because it would be inappropriate to seek to prove facts outside the complaint to try to satisfy the government's burden under heightened scrutiny. *See Goldman* v. *Belden*, 754 F.2d 1059, 1071 (2d Cir. 1985) (district court erred when "it relied on facts and assumptions outside the pleadings, which should not have been considered on a Rule 12(b)(6) motion"); *S.E.C.* v. *Kueng*, No. 09 Civ. 8763, 2010 WL 3026618, at *2 (S.D.N.Y. Aug. 2, 2010) (Jones, J.). Because, for the factual reasons set forth in Plaintiff's memorandum in support of her motion for summary judgment, heightened scrutiny does apply, BLAG's motion to dismiss must be denied for this reason alone.[4]

[4] To answer a footnote with a footnote, while BLAG denies conceding that DOMA fails heightened scrutiny (BLAG MTD at 26 n.6), it fails to offer any factual basis on which it could meet the government's high burden under that standard. In any event, arguments raised only in a footnote need not be addressed. *See In re Gildan Activewear, Inc. Sec. Litig.*, No. 08 Civ. 5048 (HB), 2009 WL 4544287, at *4 n.4 (S.D.N.Y. Dec. 4, 2009) ("[I]t is by now well-established that a court need not address an argument made wholly in a footnote to a brief."); *Rowley* v. *City of New York*, No. 00 Civ. 1793 (DAB), 2005 WL 2429514, at *6 (S.D.N.Y. Sept. 30, 2005) (collecting cases).

Finally, were this Court to find any rational relationship between the justifications that BLAG asserts and DOMA, or to conclude that those justifications are legitimate federal interests, dismissal would still be inappropriate because a party bringing an equal protection challenge to a statute "may introduce evidence supporting their claim that it is irrational." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). In other words, a statute like DOMA must be invalidated if the challenger is able to "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); *see also Mahone* v. *Addicks Utility Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988) ("[R]ationality analysis requires more than just a determination that a legitimate state purpose exists; it also requires that the classification chosen by the state actors be rationally related to that legitimate state purpose. Although the legitimate purpose can be hypothesized, the rational relationship must be real. Consequently, the determination of the fit between the classification and the legitimate purpose—the search for rationality—may also require a factual backdrop.") (internal citations omitted).

In this case, Edie Windsor has presented factual evidence of DOMA's irrationality in connection with her motion for summary judgment, and it is in the context of those facts that the Court should consider the parties' arguments both on heightened scrutiny and rational basis. For this reason as well, BLAG's motion to dismiss is procedurally improper and should be denied by this Court.

II.

BLAG'S TWO THRESHOLD ARGUMENTS LACK MERIT

In order for DOMA to satisfy the rational basis standard, BLAG must identify how Section 3's classification is rationally related to a legitimate government interest (which, as discussed below, BLAG cannot do). Instead, BLAG argues that this Court should not even engage in the appropriate equal protection analysis, offering two misguided reasons: (1) that DOMA supposedly does not exclude same-sex couples from federal protections; and (2) to the extent that DOMA does exclude same-sex couples, as a "line-drawing" statute, it is "virtually unreviewable." Both of these arguments lack merit.

A. DOMA's Classification Excludes Married Same-Sex Couples

BLAG contends that DOMA does not actually exclude married same-sex couples from federal protections. Instead, according to BLAG, DOMA reflects a codification of earlier congressional understandings that federal benefits and protections should be granted only to "traditional" (*i.e.*, heterosexual) married couples. (*See* BLAG MTD at 31 (issue is whether "Congress reasonably could choose to extend federal benefits based on the historic definition of marriage").) This argument is the functional equivalent of saying that Augusta National doesn't really exclude women golfers—they just preserve the tradition of men playing golf together without women.

BLAG also misstates both what DOMA does and what it was intended to do. DOMA does not actually grant any affirmative protections to anyone. It is a relatively simple statute—all that it does is *exclude* married same-sex couples from whatever federal rights and privileges are afforded to all other married couples. Properly framed, the question before this Court is whether that *exclusion* is rationally related to

any legitimate government interest. *Cf. U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 529 (1973) ("This case requires us to consider the constitutionality of [the Food Stamp Act of 1964 which,] excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. In practical effect, [the act] creates two classes of persons for food stamp purposes.").

In any event, as a factual matter, it is not correct that Congress "had drawn the line defining marriage as including relationships between one adult man and one adult woman" before same-sex couples could legally marry in the United States. (BLAG MTD at 27–28.) In our federal system, states decide who can get married, not the federal government. "The whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (citations omitted). Consistent with this, prior to DOMA's enactment in 1996, an individual's eligibility for federal benefits always turned on whether that person's marriage was recognized as valid in his or her home state. *See, e.g.*, *Dunn* v. *Comm'r*, 70 T.C. 361, 366 (1978) ("[W]hether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile."). DOMA obliterated this longstanding practice by excluding one specific class of validly married couples from all federal protections. Despite what BLAG says, it is that departure that must rationally advance a legitimate state interest.

Moreover, DOMA did not merely "preserve[]" the definition of marriage in earlier congressional enactments, as BLAG contends. (BLAG MTD at 32–33.) Since there were no states that recognized legal marriages of same-sex couples in the United

States before 2004, the Congresses that passed earlier statutes were not thinking about whether to exclude or include married same-sex couples from the specific protections of the law. BLAG cites no authority that would suggest otherwise. Indeed, the longstanding practice before DOMA was that federal laws simply referred to marriages in general. *See, e.g.*, 5 U.S.C. § 8901(5) (eligibility for Federal Employees Health Benefits Program to include "the spouse of an employee"); 8 U.S.C. § 1186b(a)(2)(A) (right to obtain conditional permanent residence for non-citizen spouse); 26 U.S.C. § 1 ("married individual . . . who makes a single [tax] return jointly with his spouse"); 29 U.S.C. § 2612(a)(1)(C) (eligibility for unpaid leave under Family and Medical Leave Act to "care for the spouse . . . if such spouse . . . has a serious health condition"); 42 U.S.C. § 416(h)(1)(A)(i) (Social Security lump sum death benefit applicant "is the wife, husband, widow or widower" of an insured person "if the courts of the State" of the deceased's domicile "would find such applicant and such insured individual were validly married").[5]

Section 3 of DOMA does one thing and one thing only: it excludes validly married same-sex couples from all federal protections and obligations afforded to all other married couples. As such, it is a statute that classifies citizens based on a defining characteristic. That is what equal protection is all about. To contend otherwise

[5] BLAG points to the veteran's benefits eligibility requirements in support of its claim that DOMA repeated existing federal practice. (*See* BLAG MTD at 3 (citing, *inter alia*, 38 U.S.C. § 101(3).) But the mere fact that BLAG has found *one* of the over 1,100 federal protections relating to marriage that uses the term "opposite sex" does not show that Congress deliberately excluded same-sex couples since there were no married same-sex couples in 1975. Indeed, the legislative history of that section shows that the phrase "person of the opposite sex" replaced language referring solely to "widow" and "wife," at a time when no state recognized marriages for same-sex couples, and was intended to render the language gender neutral, not to impose a federal definition of marriage. *See* S. Rep. No. 94-568 (1975).

is a fundamental mischaracterization not only of DOMA, but of the Fifth Amendment to the Constitution.

B. DOMA Is Not a "Virtually Unreviewable" Line-Drawing Statute

BLAG also contends that because DOMA is purportedly a "line-drawing statute," it is "virtually unreviewable" under the holding of the United States Supreme Court's decision in *Federal Communications Commission* v. *Beach Communications*, 508 U.S. 307 (1993). (BLAG MTD at 27.) Because *Beach Communications* dealt with completely different statutes that are neither implicated here nor remotely analogous to DOMA, this argument, too, is unavailing.

Beach Communications involved the Cable Communications Policy Act and the Federal Communications Commission's interpretation of the term "cable system" for purposes of a local governmental franchising requirement. *See* 508 U.S. at 311. The *Beach Communications* Court discussed "line-drawing" in statutes that created specific, economic, regulatory requirements such as the franchising requirement and exemptions at issue in that case. As a result, the Court in *Beach Communications* recognized that, in those circumstances, "[d]efining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* at 315–16 (internal citations omitted). According to BLAG, under the holding of *Beach Communications*, because Congress needed some definition of marriage for purposes of federal law, it should receive significant deference for the definition chosen in DOMA.

But DOMA is neither a regulatory nor a government benefits statute, and so does not in and of itself provide any benefits or burdens. Rather, Section 3 of DOMA is a *definitional* statute, and, as discussed below, its novel categorical exclusion of any married same-sex couples from all government programs otherwise granted to married couples involved none of the considered decision-making regarding the allocation of particular benefits that might otherwise be entitled to judicial deference. *Cf. Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981) (upholding statute that gave stipend only to residents of Medicaid-funded institutions but not to residents of private institutions because "[a]warding this type of benefits inevitably involves the kind of line-drawing that will leave some comparably needy person outside the favored circle"). Here, unlike in *Beach Communications*, the issue is a difference in kind, not in degree. Any comparison of DOMA to some kind of administrative law regime is obviously inapplicable on its face.

Moreover, Congress had *already* drawn a line determining eligibility for federal protections and obligations—namely, people had long been eligible for federal marital protections if (and only if) their marriage were recognized under the law of their state. *See, e.g.*, *Dunn*, 70 T.C. at 366 ("[W]hether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile."). DOMA departed from the federal government's longstanding practice of deferring to state determinations of whether a person is married; it cannot be justified by the purported need for a definition of marriage. *See Gill*, 699 F. Supp. 2d at 392 ("[T]he passage of DOMA marks the *first* time that the federal government has ever attempted to

legislatively mandate a uniform federal definition of marriage—or any other core concept of domestic relations.").[6]

To the extent that DOMA, like any classification challenged under equal protection, involves line-drawing, the line it draws is between straight and gay people. That, of course, does not change this Court's role under the Constitution. As the Second Circuit has explained, "while we recognize that legislation . . . always 'involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary,' the line-drawing process must itself rest on a rational foundation." *Bacon* v. *Toia*, 648 F.2d 801, 809 (2d Cir. 1981) (quoting *Califano* v. *Aznavorian*, 439 U.S. 170, 174 (1978)).

III.

DOMA FAILS EVEN THE MORE DEFERENTIAL RATIONAL BASIS STANDARD

BLAG also asserts five purported rational bases for DOMA's discrimination, which are not exactly the same as the six justifications articulated by Congress in the legislative history of DOMA:[7] (1) "caution" in the face of "a proposed novel redefinition of the foundational social institution" of marriage (BLAG MTD at 28–31); (2) protecting the public fisc and preserving "the balance struck by earlier Congresses," (*id.* at 32–33); (3) "provid[ing] for consistency in eligibility for federal

[6] Under the logic of *Beach Communications*, Congress might be entitled to additional deference in making the determination to award specific protections and allocate specific obligations to married couples, rather than unmarried couples, in the first instance. But it cannot do so in a way that violates constitutional equal protection.

[7] Congress's six stated justifications for DOMA were (1) to defend the traditional institution of heterosexual marriage; (2) to promote heterosexuality; (3) to encourage responsible procreation; (4) to protect democratic self-governance; (5) to preserve government resources; and (6) to promote a "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." H.R. Rep. No. 104-664, at 12–18 (1996). As argued in Plaintiff's motion for summary judgment, none of those rationales can withstand constitutional scrutiny even under the rational basis standard.

benefits based on marital status" (*id.* at 33–35); (4) "avoid[ing] creating a social understanding that begetting and rearing children is not inextricably bound up with marriage" (*id.* at 35–38); and (5) "foster[ing] marriages that provide children with parents of both sexes" (*id.* at 38–43). As demonstrated below, not one of these rationales suffices to save DOMA from its obvious infirmity under equal protection.

While the Constitution's "promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," *Romer* v. *Evans*, 517 U.S. 620, 631 (1996), classifications drawn by statutes must still bear a rational relationship to a legitimate government objective. *Heller* v. *Doe*, 509 U.S. 312, 320 (1993). As a result, courts have not hesitated to strike down legislation when a statute's classification did not bear the necessary rational relationship to any legitimate end. *See, e.g.*, *Romer*, 517 U.S. at 632 (striking down state constitutional amendment that banned any nondiscrimination protections for lesbians, gay men, and bisexuals); *Moreno*, 413 U.S. at 534–35 (striking down law that denied unrelated members of a household access to federal food stamp program because the law could only have been viewed as targeting "hippies" and "hippie communes"); *Hooper* v. *Bernalillo Cnty. Assessor*, 472 U.S. 612, 619 (1985) (striking down state law providing veterans preference only for those veterans who were state residents at the time they originally entered the military because that residency requirement was not logically related to the purported goal of encouraging all veterans to move to the state). This is so because "the search for the link between classification and objective gives substance to [equal protection analysis]." *Romer*, 517 U.S. at 632.

Laws can also fail constitutional scrutiny where, as here, the fit between the classification and the asserted government interest is so attenuated that it is impossible to credit the justification. *See, e.g.*, *Romer*, 517 U.S. 620. And a statute can fail rational basis scrutiny if the justification, even if legitimate, cannot be credited as a plausible rationale for a legislature's actions. *See, e.g.*, *City of Cleburne*, 473 U.S. at 447–48 (striking down zoning ordinance that banned a group home for the mentally ill because other zoning uses that posed similar risks were not banned); *see also Bd. of Trustees of the Uni*v. *of Alabama* v. *Garrett*, 531 U.S. 356, 366 n.4 (2001) (noting that a law will fail rational basis review where the "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"). In other words, where the line drawn by legislation does not "find some footing in the realities of the subject addressed by the legislation," the classification is unconstitutional. *Heller*, 509 U.S. at 321.

Moreover, the interest advanced by legislation must be a legitimate interest cognizable by the government that enacted the law. Animus, or the "bare congressional desire to harm a politically unpopular group," can never constitute a legitimate interest because the government cannot rely on the mere desire to discriminate to explain a classification. *Moreno*, 413 U.S. at 534. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. In other words, equal protection requires that the classification drawn and the purpose it intends to serve be sufficiently independent such that the classification exists not simply for its own sake.

For these reasons, it is wrong to suggest that this Court should simply "rubber stamp" the discrimination against gay people, including Edie Windsor, wrought by DOMA, or leave it to the "democratic process" to eventually correct it. (*See* BLAG MTD at 43–45.) As the Supreme Court declared over 200 years ago in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177; *accord Cruzan by Cruzan* v. *Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (equal protection ensures that "the democratic majority . . . accept for themselves and their loved ones what they impose on you and me").

A. Acting with "Caution" and Preserving the Traditional Institution of Heterosexual Marriage Are Not Legitimate Governmental Interests

BLAG asserts that DOMA can be justified as rationally related to the congressional desire to defend and nurture the traditional institution of heterosexual marriage, and relatedly, 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." (BLAG MTD at 29 (emphasis added).) An argument that Congress can discriminate because Congress always has discriminated doesn't justify a classification; it merely repeats it. *See Romer*, 517 U.S. at 633 (equal protection requires an "independent" justification); *Gill*, 699 F. Supp. 2d at 393 ("Staying the course is not an end in and of itself, but rather a means to an end.").

Similarly, although BLAG contends that "'there is far more here than simply historical patterns,'" (BLAG MTD at 31 (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983))), it fails to offer any other justification for preserving what it claims is the historical definition of marriage. History is decidedly not a legitimate interest.

Heller, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). Moreover, it is not the case, as BLAG contends, that Section 3 of DOMA's exclusionary definition of marriage is "ancient"—the federal government had never before adopted its own definition of marriage. *See*, *e.g.*, *Levenson*, 587 F.3d at 933 (DOMA "disrupted the long-standing practice of the federal government deferring to each state's decisions as to the requirements for a valid marriage."). Thus, even if history were relevant to the rational basis analysis (and it is not), history can neither support DOMA's departure from the longstanding federal practice of deferring to state definitions of marriage, nor be a legitimate federal interest to regulate domestic relations, an area long reserved to the states. *See, e.g.*, *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975).

Again, because DOMA does not in and of itself grant any benefits or protections to married heterosexual couples, DOMA's classification does nothing to protect or nurture the traditional institution of marriage for straight couples. *See, e.g.*, *Gill*, 699 F. Supp. 2d at 389 ("[D]enying marriage-based benefits to same-sex couples certainly bears no reasonable relationship to any interest the government might have in making heterosexual marriage more secure."); *see also Levenson*, 587 F.3d at 932 ("[D]enying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of 'defending traditional notions of morality,' as it also is with respect to achieving the objective of 'defending and nurturing the institution of traditional, heterosexual marriage.'").

BLAG now argues that "proceeding with caution" justifies DOMA's exclusion of married same-sex couples. That too is merely another way of saying that

Congress could have decided to exclude married same-sex couples from federal protections because same-sex couples had previously been denied the right to marry. This "go slow" argument is purely tautological—it does not offer any rationale as to why Congress would want to "proceed with caution," and "does nothing more than describe what DOMA does." *Gill*, 699 F. Supp. 2d at 393. After all, this same "go slow" argument could have been (and indeed was) made against extending rights to, for example, African-Americans. *See, e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 535–36 (1963) (finding that arguments in favor of desegregating city parks slowly to prevent "community confusion and turmoil" were based on nothing "more than personal speculations or vague disquietudes").

B. DOMA Cannot Be Justified by an Alleged Desire to "Preserve The Public Fisc"

BLAG's assertion that DOMA can be justified by a congressional desire to "preserve the public fisc" also lacks merit. As with BLAG's "act with caution" rationale, this justification fails to provide any independent reason for the exclusion of married same-sex couples.

Even under rational basis review, it is not enough to argue that excluding a class of people from federal benefits will result in saving money. *See, e.g.*, *Gill*, 699 F. Supp. 2d at 390 ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.") (quoting *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982)); *see also Levenson*, 587 F.3d at 933 ("There is no rational relationship between the sex of an employee's spouse and the government's desire to limit its employee health insurance outlays."). "[T]he preservation of resources does not justify barring some arbitrarily chosen group of individuals from a government program."

Dragovich, 2011 WL 175502, at * 11. Nor does BLAG offer any basis to conclude that DOMA saves the federal government money.[8]

The question here is whether the government could even choose to save money on the backs of married same-sex couples. BLAG has no answer to this question, beyond the fact that the earlier Congresses had acted at a time before any states permitted same-sex couples to marry. (*See* BLAG MTD at 33.) As discussed above, history and tradition cannot justify imposing a discriminatory burden on only one class of citizens.

C. DOMA Does Not "Provide for Consistency in Eligibility for Federal Benefits Based on Marital Status"

BLAG also asserts that Congress could have legitimately chosen to exclude same-sex couples from the federal protections and obligations that come with marriage because it sought to achieve a "federal interest in uniform treatment of federal benefits." (BLAG MTD at 33.) In other words, according to BLAG, "Congress rationally could decide to base eligibility for federal benefits on the traditional definition of marriage to avoid arbitrariness and inconsistency in such eligibility." (*Id.*)

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[8] Incredibly, in the face of a Congressional Budget Office report finding that if Congress were to recognize married same-sex couples, that recognition would result in modest overall net cost *savings* to the federal government (*The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (June 21, 2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf), BLAG asserts without citation that this estimate is "implausible enough that Congress rationally could have chosen to reject it even if it had existed in 1996." (BLAG MTD at 32 n.8.) Even if that were true (and it is not), BLAG ignores the fact that many of the federal programs from which DOMA excludes same-sex couples are not expenditure programs at all. For example, married persons enjoy the right to sponsor a non-citizen spouse for naturalization, *see* 8 U.S.C. § 1430, and to obtain conditional permanent residence for that spouse, *id.* at § 1186b(a)(2)(A), and, in the case of eligible employees, the right to take up to twelve workweeks of unpaid leave to care for a spouse with a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(C). Moreover, the legislative history from 1996 indicates that cost saving was not a concern to Congress when DOMA was passed. *See Gill*, 699 F. Supp. 2d. at 390 n.116 ("This court notes that, though Congress paid lip service to the preservation of resources as a rationale for DOMA, such financial considerations did not actually motivate the law. In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact prior to passage.") (citing 142 Cong. Rec. H7503–05 (daily ed. July 12, 1996)).

But this justification is simply impossible to credit because both prior to and since the enactment of DOMA there has always been significant inconsistency in federal marital benefits as a function of the federal government's deference to the states' determinations of who can marry and which marriages are considered valid.[9] Although the rational basis inquiry may not require a perfect fit between a classification and its justification, "this deferential constitutional test nonetheless demands some *reasonable* relation between the classification in question and the purpose it purportedly serves." *Gill*, 699 F. Supp. 2d at 396 (emphasis in original).

State eligibility requirements for marriage have varied widely from state to state throughout our country's history and continue to do so. *See, e.g.*, *id.* at 391. As a result, heterosexual couples who can validly marry in one state might not be able to marry in another. "And yet the federal government has fully embraced these variations and inconsistencies in state marriage laws by recognizing as valid for federal purposes any heterosexual marriage which has been declared valid pursuant to state law." *Id.* Because Congress has never before chosen to create *federal* uniformity and indeed continues to recognize marriages despite significant variations in state marriage laws, it is impossible to credit this justification to support DOMA. *See Cleburne*, 473 U.S. at 448 (under rational basis review, government may not single out a group for disfavored treatment unless the group presents a "special threat to the [state's] legitimate interests");

[9] As discussed above, prior to DOMA, the federal government had never engaged in a wholesale definition of marriage and had always deferred to state definitions in allocating federal marital protections and obligations. *See Levenson*, 587 F.3d at 933 (DOMA "disrupted the long-standing practice of the federal government deferring to each state's decisions as to the requirements for a valid marriage.").

see also Romer, 517 U.S. at 633 (noting that novel legislative classifications require "careful consideration to determine whether they are obnoxious to the [C]onstitution").

In fact, as other courts have noted, when it comes to states that recognize the marriages of same-sex couples, DOMA actually creates a unique inconsistency. For the first time, the federal government, through DOMA, has established two tiers of marriages in states like New York that permit same-sex couples to marry and that recognize as valid the out-of-state marriages of same-sex couples. *See Gill*, 699 F. Supp. 2d at 395 ("DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not."). This undermines even further any purported interest in "uniformity."

BLAG attempts to rationalize this inconsistency by arguing that a same-sex couple who married 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." (BLAG MTD at 34.) While this is undoubtedly true, it simply defies logic to claim that it is more "consistent" to treat Edie Windsor and Thea Spyer like unmarried same-sex couples from Alabama or Wisconsin, than it would be to treat them like a married couple from New York, where they actually lived. *Cf. African Trade & Info. Ctr., Inc.* v. *Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002) ("The Equal Protection Clause requires the government to treat all similarly situated people alike."). In other words, because Congress, in allocating protections to married couples, has "already made the determination that married people make up a class of similarly-situated individuals, different in relevant respects from the class of non-married people[,] . . . the claim that

the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny." *Gill*, 699 F. Supp. 2d at 395.[10]

D. DOMA Is Not Rationally Related to Any Legitimate Interest in "Avoid[ing] Creating a Social Understanding that Begetting and Rearing Children Is Not Inexplicably Bound Up with Marriage"

Using somewhat awkward language, BLAG next argues that a rational legislator might reasonably have believed that DOMA advances a purported federal interest to "avoid creating a social understanding that begetting and rearing children is not inextricably bound up with marriage." (BLAG MTD at 35.) It is not entirely clear what BLAG means by this. BLAG might be saying that excluding married same-sex couples from federal protections advances a government interest in ensuring that people understand children to be the central purpose of marriage. Alternatively, BLAG might be saying that DOMA somehow prevents people (presumably, heterosexual couples) from thinking that they should have children outside the confines of a marriage. Neither argument makes any sense.

As for the first potential argument, according to BLAG, federal recognition of marriages of same-sex couples would undermine the message that "children are a central reason why the state recognizes marriage." (BLAG MTD at 36.) But BLAG nowhere explains how the federal government treating validly married same-sex couples the same as other validly married couples would undermine that message,

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[10] For the same reason, BLAG's suggestion that DOMA Section 2, which provides that states are not required to recognize out-of-state marriages of same-sex couples, 28 U.S.C. § 1738C, supports its interest in uniformity under DOMA Section 3 is a red herring. (BLAG MTD at 35.) As explained above, "DOMA [Section 3] seems to inject complexity . . . by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not." *Gill*, 699 F. Supp. 2d at 395.

even if it were a legitimate federal interest. There is simply no connection. Having children is not and never has been a prerequisite for marriage, nor does the federal government make eligibility for federal marital benefits contingent on the ability or willingness to procreate. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (observing that marriage has never been conditioned on the ability to procreate); *Dragovich*, 764 F. Supp. 2d at 1190 ("DOMA's definition of marriage does not bear a relationship to encouraging procreation, because marriage has never been contingent on having children."); *Gill*, 699 F. Supp. 2d at 389 ("[T]he federal government has never considered denying recognition to marriage based on an ability or inability to procreate."). Equally as important, many same-sex couples are raising children together, regardless of whether they live in states that permit them to marry. Thus, it is incomprehensible how granting or denying federal benefits to married same-sex couples could have any impact on whether people believe marriage is about having children.

BLAG's second argument assumes that providing federal protections for married same-sex couples would somehow discourage more heterosexual couples from marrying or discourage them from having children within the context of marriage. This assumption is neither logical nor plausible. It simply defies everything we know about human nature (not to mention common sense) to conclude that any straight man or woman anywhere in this nation would decide not to get married because same-sex couples like Edie Windsor and Thea Spyer were treated like all other married couples for proposes of federal law. Not surprisingly, a number of courts agree. *See, e.g.*, *Gill*, 699 F. Supp. 2d at 389. Moreover, some of DOMA's supporters acknowledged in 1996 that allowing lesbian and gay couples to marry would have no actual impact on the marriages

of heterosexual couples: "two men loving each other does not hurt anybody else's marriage, but it demeans, it lowers the concept of marriage by making it something that it should not be and is not, celebrating conduct that is not approved by the majority of the people." 142 Cong. Rec. H7501 (daily ed. July 12, 1996) (statement of Rep. Henry Hyde, Chairman, House Jud. Comm.).

Faced with the difficulty of this argument, BLAG asserts that because Congress could have believed that married same-sex couples might be less likely to have children than married straight couples, it might also reasonably have believed that "defining same-sex relationships as 'marriages'" could lead others (presumably straight people) to stop thinking that marriage is for having children. (*See* BLAG MTD at 35.) Even if there were any logical connection between whether same-sex couples marry and what straight couples did, DOMA does nothing to change the fact that same-sex couples can and are likely to marry. Along with New York, five other states and the District of Columbia currently grant the right to marry to same sex couples.[11] There are between 50,000 and 80,000 legally married same-sex couples living in the United States today.[12] Whether or not the federal government discriminates against married same-sex couples will not change that reality. Because DOMA thus bears "no rational relationship to" Congress' asserted objective in ensuring that straight couples marry before having children, it cannot provide a constitutionally sufficient rational basis. *Cf. Hooper* v.

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[11] *See* N.Y. Dom. Rel. Law § 10-a (McKinney 2011); D.C. Code § 46-401 (2009); Mass. Gen. Laws ch. 207 (2009); N.H. Rev. Stat. Ann. § 457-1:a (2009); Vt. Stat. Ann. Tit. 15 § 8 (2009); *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

[12] Williams Institute, UCLA School of Law, Written Testimony: S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families 2 (July 20, 2011), *available at* http://www3.law.ucla.edu/williamsinstitute/home.html.

Bernalillo Cnty. Assessor, 472 U.S. 612, 619 (1985) (striking down veteran's preference where the classification drew a distinction between classes of veterans eligible for the preference that bore no logical connection to the asserted goal of encouraging veterans to move to the state).

For the same reason, congressional musings in 2004 regarding whether or not legal recognition for same-sex couples in certain European countries has corresponded with an increase in out-of-wedlock births (*see* BLAG MTD at 37–38) cannot justify DOMA either. Once more, this assertion only makes sense if one accepts the tortured chain of logic that if the federal government recognizes the marriages of same-sex couples, straight couples will come to believe that having children is not central to marriage (or that marriage is not important for children), will then act on that belief by declining to marry, and will then have more children while unmarried. That argument is not only completely ridiculous, but provides no justification for why the federal government would distinguish between couples who are validly married under state law. Indeed, BLAG itself concedes that DOMA has a "minimal impact on the underlying right to marry." (BLAG MTD at 26 n. 6.) In other words, BLAG admits that the presence or absence of DOMA won't change same-sex couples' behavior in terms of whether or not they get married. Accordingly, it is impossible to understand how any reasonable person could believe that DOMA, if it does not impact whether or not gay couples marry in states that permit it, could have an impact on whether straight couples have children within marriage.

E. DOMA Does Nothing to Advance Any Congressional Interest in Fostering Marriages that Provide Children With a Mother and Father

Finally, BLAG argues that Congress could have reasonably believed that by excluding same-sex couples from federal marital protections, DOMA drew a rational distinction "between opposite-sex couples and same-sex couples based on biological differences." (BLAG MTD at 38.) These "biological differences," according to BLAG, are of two kinds. First, only heterosexual couples can produce "unplanned and unintended pregnancies," and BLAG asserts this fact lies "at the heart of society's traditional interest in promoting the institution of marriage." (*Id.* at 39.) Second, BLAG claims that Congress might reasonably have believed that "the experience of a child raised by a man and a woman may differ from that of a child raised by same-sex caregivers." (*Id.* at 42.) While BLAG does not go quite so far as to say that same-sex couples cannot successfully raise and nurture children (*see id.* at 43) ("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"), it asserts that DOMA can be sustained because it furthers the governmental interest in "encouraging child-rearing by a married mother and father." *Id.* at 42. Even assuming that these are legitimate governmental interests, DOMA cannot be sustained because it does not rationally advance either of them.

No one could conceivably think that DOMA was intended to encourage couples to raise children in the "traditional" institution of marriage since all that DOMA does is exclude one group of already married couples from federal protections. *See*, *Gill*, 699 F. Supp. 2d at 389 ("Such denial does nothing to promote stability in heterosexual parenting."). In other words, even if it were "rational" to think that past Congresses

wanted to encourage heterosexual couples to marry and have children within marriage, and to think that this desire was, in part, why earlier Congresses decided to provide federal protections for married couples, that is not what DOMA does.[13] As discussed above, DOMA *excludes* married same-sex couples from those federal protections. And that exclusion cannot be rationally understood to encourage heterosexual couples to marry or to have children within marriage.

DOMA impacts only those same-sex couples who are otherwise married under state law. As BLAG concedes (BLAG MTD at 20), it does not deter anyone from marrying. Nor is there any logical connection between what DOMA does (increase burdens on same-sex couples), and what BLAG says Congress could have reasonably sought to achieve through DOMA (provide support to straight couples). As a matter of fact, DOMA's only relationship to parenting is to inflict harm on children raised by married same-sex couples. *See Gill*, 699 F. Supp. 2d at 389. Accordingly, this "justification" cannot provide a rational justification for DOMA even under the most deferential rational basis review. *See Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Romer*, 517 U.S. at 635 (striking down state amendment under equal protection rational basis review because "[t]he breadth of the amendment is so far removed" from the asserted justifications that it was "impossible to credit them"); *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F.2d 266, 276 (2d

[13] Plaintiff notes that many of the federal protections that married same-sex couples are barred from receiving as a result of DOMA have no relationship at all to parenting or child-rearing. This is yet another reason why BLAG's suggestion that federal marital benefits—or DOMA—are all about incentivizing heterosexual parenting is so difficult to credit. *See Romer*, 517 U.S. at 635 (holding that such a disconnect between a purported rationale and what a law actually does makes such rationale impossible to credit).

Cir. 1985) (striking down state civil service statute giving a preference to veterans who joined the military while they were New York residents because "we cannot see that any legitimate purpose advanced by the State has any rational relationship to the exclusion of those veterans who were not residents of the State when they entered the armed services").

DOMA does not advance any interest that the federal government might have in encouraging heterosexual couples to raise children. As with the "responsible procreation" argument, it is simply irrational to believe that excluding married same-sex couples from federal protections will result in any children being raised by heterosexual parents.[14] DOMA does not provide heterosexual couples with any incentive to have children or to do so within marriage. *See Gill*, 699 F. Supp. 2d at 388–89 ("[A] desire to encourage heterosexual couples to procreate and rear their own children more responsibly would not provide a rational basis for denying federal recognition to same-sex marriages.").

None of the cases on which BLAG relies considered whether encouraging heterosexual parenting is a legitimate interest rationally advanced by denying federal recognition to same-sex couples. In any event, they were wrongly decided, at the very least, insofar as they failed to articulate any rational link between the exclusion of same-sex couples from marriage and encouraging heterosexual couples to do anything at all. *See Wilson* v. *Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (analyzing DOMA Section 2

[14] If what BLAG means instead is that DOMA can be justified as intending to actually deter same-sex couples from having children, that presents an entirely different constitutional problem. Such naked congressional intent to burden the exercise of the fundamental right of having children would require far more searching review. *See Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (disparate burden on fundamental right to decide "whether to bear or beget a child" requires heighted scrutiny). DOMA cannot come close to satisfying that standard and BLAG does not seriously contend that it can.

without explaining how Florida's state-law marriage restriction could rationally advance a legitimate state interest in encouraging the raising of children in a home with a married mother and father) (cited in BLAG MTD at 9, 14–16, 18, 24–25, 42, 44); *In re Kandu*, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004) (accepting in bankruptcy an argument that DOMA encouraged "the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents" without explanation of how).[15]

Finally, any purported justification for DOMA that rests on the supposed superiority of a married mother and father as the ideal child-rearing environment also lacks any relationship to factual reality. "Since the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill*, F. Supp. 2d at 388; *see also Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) ("The gender of a child's parent is not a factor in a child's adjustment. The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."). Accordingly, to the extent BLAG claims that deterring married same-sex couples from raising children is a

[15] For the same reason, the remaining cases cited by BLAG as upholding *state* restrictions on marriage to heterosexual couples (*see* BLAG MTD at 43), cannot provide support for DOMA. BLAG ignores the fundamental difference between the question of whether a state may permissibly restrict marriage to only straight couples, and what justification Congress has for excluding already-married same-sex couples from federal statutory and administrative protections.

legitimate federal interest advanced by DOMA, Plaintiff should have an opportunity to "introduce evidence supporting [her] claim that it is irrational." *Clover Leaf Creamery*, 449 U.S at 464. Plaintiff has done so in her motion for summary judgment through an extensive record of expert testimony. As such, this "rationale" can provide no grounds for dismissal of her complaint.

F. DOMA Advances the *Illegitimate* Purpose of Expressing Moral Disapproval Of Lesbians and Gay Men, and Their Relationships

Once BLAG's purported justifications are stripped away, the only government interest that DOMA can be viewed as advancing is expressing disapproval of same-sex couples. *See Gill*, 699 F. Supp. 2d at 396 ("Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification the Constitution clearly will not permit.").

Indeed, "animus toward, and moral rejection of, homosexuality and same-sex relationships are apparent in the congressional record" of DOMA. *Dragovich*, 746 F. Supp. 2d at 1190; *see, e.g.*, 142 Cong. Rec. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr) (referring to homosexuality as "hedonism," "narcissism," and "self-centered morality," and referring to marriage equality activists as "extremists intent, bent on forcing a tortured view of morality on the rest of the country"); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer) ("We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. . . . When one State wants to move towards the recognition of same-sex marriages, it is wrong."); 142 Cong. Rec. H7487

(daily ed. July 12, 1996) (statement of Rep. Funderburk) ("Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies. The only reason it has been able to gain such prominence in America today is the near blackout on information about homosexual behavior itself."); 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith) (referring to same-sex intimacy as "unnatural and immoral"); 142 Cong. Rec. H7501 (daily ed. July 12, 1996) (statement of Rep. Hyde) ("The homosexual movement has been very successful in intimidating the psychiatric profession. Now people who object to sodomy, to two men penetrating each other are homophobic."). As a result, "the denial of federal benefits to same-sex spouses cannot be justified as an expression of the government's disapproval of homosexuality, preference for heterosexuality, or desire to discourage gay marriage." *Levenson*, 587 F.3d at 932.

But "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno,* 413 U.S. at 534 (emphasis added). Where, as here, a law's "sheer breadth is so discontinuous with the reasons offered for it," the Supreme Court has held that it "seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632.

In striking down Colorado's Amendment 2—which categorically excluded all lesbians, gay men, and bisexual people from non-discrimination protections within the state—the Supreme Court explained that such status-based legislation amounts "a classification of persons undertaken for its own sake, something the Equal Protection

Clause does not permit." *Romer*, 517 U.S. at 635. Like Colorado's Amendment 2, DOMA "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* That is unconstitutional.

IV.

***BAKER* v. *NELSON* IS INAPPLICABLE**

Contrary to BLAG's suggestion, (BLAG MTD at 12–15), the Supreme Court's four-decade-old summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), *dismissing appeal from* 191 N.W.2d 185 (Minn. 1971), has no bearing on the resolution of the legal issues before this Court.

A. Reliance on *Baker* Is Inappropriate Given Substantial Doctrinal Developments

A number of doctrinal developments since *Baker* was decided in 1972 significantly undermine the reasoning upon which the Minnesota Supreme Court decision rested. For example, the Minnesota Supreme Court applied rational basis scrutiny, although it found the statute at issue classified based on sex. *Baker*, 191 N.W.2d at 186–87. Courts today, however, apply heightened scrutiny to sex-based classifications. *See Frontiero* v. *Richardson*, 411 U.S. 677, 682 (1977); *e.g.*, *Nguyen* v. *INS*, 533 U.S. 53, 60–61 (2011).

More significantly, the Supreme Court's equal protection jurisprudence with respect to sexual orientation discrimination has changed dramatically since *Baker*. *See Lawrence*, 539 U.S. 558 (striking down criminal sodomy law, holding fundamental right to privacy protects gay and straight people equally); *Romer*, 517 U.S. 620 (holding

that laws and classifications with no purpose other than to disadvantage gay people cannot survive even rational basis review).[16]

Because *Baker* has been undermined so significantly by subsequent Supreme Court case law, several courts have rejected *Baker*'s application to challenges to Section 3 of DOMA. *See Smelt* v. *Cnty. of Orange*, 374 F. Supp. 2d 861, 873–74 (C.D. Cal. 2005); *Kandu* 315 B.R. at 137–38. Indeed, recent court decisions have rejected *Baker's* application, even to challenges to state restrictions on the right to marry—the actual issue in *Baker*, unlike this case—because the law has changed so much since 1972. *See, e.g.*, *Hernandez* v. *Robles*, 855 N.E.2d 1, 9 (N.Y. 2006). Thus, it is no longer "reasonable to conclude that the questions presented [in *Baker*] would still be viewed by the Supreme Court as unsubstantial." *Smelt*, 374 F. Supp. 2d at 873 (internal quotations omitted).

B. This Case Presents Very Different Legal Questions and Facts Than Did *Baker*

In any event, summary dismissals for want of a substantial federal question are binding only in subsequent cases that present the precise legal questions and facts that were before the Supreme Court. *See Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979) ("[T]he precedential effect of a summary

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[16] BLAG's suggestion that this Court must ignore doctrinal developments and treat *Baker* as binding until it has been explicitly overruled (BLAG MTD at 15) is incorrect. *See Delta Air Lines, Inc.* v. *Kramarsky*, 666 F.2d 21, 22, 25 (2d Cir. 1981) (stating that "even absent an explicit statement that the decision has been overruled, departure from a summary precedent may be warranted on the basis of 'doctrinal developments,'" and finding that subsequent Supreme Court case law rendered a summary decision "no longer controlling"), *aff'd in part and vacated in part on other grounds sub nom.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *see also Soto-Lopez*, 755 F.2d at 274. The cases BLAG cites (*see* BLAG MTD at 15) do not speak to summary dispositions and the effect doctrinal developments have on their precedential weight. Instead, those cases hold only that lower courts should not treat non-summary Supreme Court opinions as overruled by implication.

affirmance can extend no farther than the precise issues presented and necessarily decided by those actions.") (internal quotations omitted); *Alexander* v. *Cahill*, 598 F.3d 79, 89 n.7 (2d Cir. 2010); *Mandel* v. *Bradley*, 432 U.S. 173, 177 (1977) (Brennan, J., concurring) (rejecting summary disposition as binding where "facts [were] very different"). Thus, before relying on a summary disposition, a court must "be certain that the constitutional questions presented were the same." *Mandel*, 432 U.S. at 180 (Brennan, J., concurring).

Here, the question before the Court is quite different from the question addressed in *Baker*. The issue in *Baker* was whether a state could constitutionally refuse to *allow* same-sex couples to marry. (BLAG MTD App. A, Jurisdictional Statement for Appellant at 3 (whether state's refusal "to sanctify appellants' marriage" violated due process, equal protection, and privacy guarantees) [hereinafter "Jurisdictional Statement"].) *See Baker*, 191 N.W.2d at 186–87 (addressing plaintiffs' "right to marry" and whether they were "authorized to marry"). Plaintiff here does not seek the right to marry. Edie Windsor and Thea Spyer were already validly married in 2007.

The central question here, unlike in *Baker*, is whether the federal government violates equal protection by departing from its practice of recognizing for federal purposes all state-sanctioned marriages except for those of same-sex couples. The court in *Baker* did not opine on whether a definition of marriage that serves that purpose is constitutional or not.[17]

[17] The equal protection challenge in *Baker*, moreover, was cast by plaintiffs and considered by the court as prohibited sex discrimination. *See, e.g.*, Baker, 191 N.W. at 187 (discussing marriage restriction as "one based upon the fundamental difference in sex"); Jurisdictional Statement at 16 ("The discrimination in this case is one of gender."). Similarly, Plaintiff here is not arguing that DOMA unconstitutionally discriminates on the basis of sex. Plaintiff argues that DOMA violates equal protection because it unconstitutionally discriminates

For these reasons, courts have rejected the notion that *Baker* has any binding or persuasive effect on constitutional challenges to Section 3 of DOMA. *See* Pl. Br. at 42 (discussing *Smelt*, 374 F. Supp. 2d at 874, and *Kandu* 315 B.R. at 137–38).[18] *Baker* does not resolve the issues presented in Plaintiff's challenge to DOMA Section 3, and BLAG's motion to dismiss on this ground should be denied.

CONCLUSION

For the foregoing reasons, BLAG's motion to dismiss Plaintiff's first amended complaint should be denied.

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between validly married couples based on the couples' sexual orientation and excludes one class of validly married couples from the federal protections of marriage based on animus towards gay people. The *Baker* Court did not consider, let alone opine on, a sexual orientation discrimination theory. Nor, importantly here, did it consider nor opine on whether sexual orientation constitutes a suspect classification deserving of heightened scrutiny, one of the central issues in this case. BLAG deals with these critical differences by ignoring them.

[18] BLAG ignores these cases, and instead relies on cases that either address *Baker*'s continuing application to state restrictions on the right to marry or do not discuss *Baker*'s binding effect at all.

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