No. 12-307

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON THE MERITS QUESTION

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their state.

PARTIES TO THE PROCEEDING

Petitioner, who was a defendant in the district court and an appellant in the court of appeals, is the United States of America.

The private individual respondent, who was plaintiff in the district court and an appellee in the court of appeals, is Edith Schlain Windsor.

Respondent Bipartisan Legal Advisory Group of the United States House of Representatives intervened in this case in defense of Section 3 of DOMA.

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OPINIONS BELOW

The opinion of the court of appeals (Supp. App. 1a-83a)[1] is reported at 699 F.3d 169. The opinion of the district court (Pet. App. 1a-22a) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (Pet. App. 25a-26a, 27a-29a). A petition for a writ of certiorari before judgment was filed on September 11, 2012. The judgment of the court of appeals was entered on October 18, 2012. On

[1] "Supp. App." refers to the appendix to the government's supplemental brief at the certiorari stage.

October 26, 2012, the United States filed a supplemental brief pursuant to Rule 15.8 of the Rules of this Court. The petition for a writ of certiorari was granted on December 7, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a.

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two operative provisions. The first, Section 2, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, regardless of whether a marriage is recognized under state law. Section 3 provides:

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

> only to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (House Report). Hawaii ultimately did not permit same-sex marriage, but other states later recognized such marriages under their respective laws.

Section 3 of DOMA does not purport to invalidate same-sex marriages in those states that permit them. Section 3, however, excludes such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (identifying 1138 federal laws contingent on marital status or in which marital status is a factor). Section 3 thus denies to legally married same-sex couples many substantial benefits afforded to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. *Id.* at 16-18.

2. In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit. Pet. App. 3a; J.A. 152 (Am. Compl. ¶¶ 10, 11).

In her capacity as executor of Spyer's estate, plaintiff paid $363,053 in federal estate taxes. She then

filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim solely on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a). Pet. App. 3a-4a; J.A. 169-170 (Am. Compl. ¶¶ 72-78), 245-252 (IRS denial letter). The IRS did not identify or address any question concerning the recognition of plaintiff's marriage under New York law. J.A. 251-252.

Plaintiff filed this tax-refund suit challenging the constitutionality of Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating legally married same-sex couples in New York differently from legally married opposite-sex couples in New York, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,053 in federal estate taxes paid by Spyer's estate. Pet. App. 4a; J.A. 172 (Am. Compl. ¶¶ 82-85).

3. a. After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that the President and he had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. J.A. 183-194. The letter explained that, while the Department of Justice had previously defended Section 3 where binding precedent in the circuit required application of rational-basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a

new examination of the issue after two lawsuits (this one and *Pedersen* v. *OPM*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. J.A. 184. The Attorney General explained that, after examining factors identified by this Court as relevant to the applicable level of scrutiny—including the history of discrimination against gay and lesbian individuals and the irrelevance of sexual orientation to legitimate policy objectives—the President and he had concluded that Section 3 warrants application of heightened scrutiny rather than rational-basis review. J.A. 185-189. The Attorney General further explained that the President and he had concluded that Section 3 fails that standard and is therefore unconstitutional. J.A. 189-191.

The Attorney General's letter reported that, notwithstanding this determination, the President had "instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." J.A. 191-192. The Attorney General explained that "[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to notify courts of the President's views and cease defense of Section 3. J.A. 191-193. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to

participate" in litigation concerning the constitutionality of Section 3. J.A. 193.

b. Following the Attorney General's announcement, the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene in this case in defense of Section 3.[2] The district court granted the motion. J.A. 218; see Pet. App. 4a.

Both the government and BLAG moved to dismiss plaintiff's challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss plaintiff's constitutional claim solely to ensure that the court had Article III jurisdiction to enter judgment for or against the United States. J.A. 437-439. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 and that, under that standard, Section 3 violates the equal protection guarantee of the Fifth Amendment. J.A. 486-489.

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates equal protection. Pet. App. 1a-22a. The court first rejected two threshold arguments advanced by BLAG: (1) the court concluded that New York law in 2009 (the relevant tax year) required recognition of same-sex marriages performed in other jurisdictions, thus ensuring Article III standing, *id.* at 6a-8a; and (2) the court held that this Court's summary dismissal of the appeal

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[2] Two of the group's five members declined to support intervention. J.A. 196 n.1.

in *Baker* v. *Nelson*, 409 U.S. 810 (1972), did not foreclose plaintiff's challenge because Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," Pet. App. 9a. Turning to the merits of plaintiff's challenge, the district court declined to decide whether heightened scrutiny or even "a more 'searching' form of rational basis scrutiny is required." *Id.* at 13a-14a. The court instead held that neither the legislative purposes articulated in support of Section 3 at the time of its enactment nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. *Id.* at 13a-22a.

5. The court of appeals affirmed. Supp. App. 1a-83a.

a. At the outset, the court of appeals rejected BLAG's argument that the government is not an aggrieved party that can take an appeal. Supp. App. 4a-5a. Relying on *INS* v. *Chadha*, 462 U.S. 919, 931 (1983), the court held that the government is aggrieved because "the United States continues to enforce Section 3" and Section 3's constitutionality "will have a considerable impact on many operations of the United States." Supp. App. 4a-5a.

b. The court of appeals then rejected BLAG's threshold request that it should certify to the New York Court of Appeals the question, which BLAG characterized as implicating plaintiff's standing, whether New York in 2009 recognized same-sex marriages entered into in other jurisdictions. Supp. App. 5a-7a. Relying on the "useful and unanimous" rulings of New York's intermediate appellate courts on that question, *id.* at 6a, the court of appeals agreed with

the district court and concluded that New York recognized such marriages at the relevant time, *id.* at 6a-7a.

c. The court of appeals also rejected BLAG's argument that this Court's summary dismissal of the appeal in *Baker*, *supra*, controls plaintiff's equal protection challenge. Supp. App. 7a-11a. After noting the limited precedential force of summary dismissals, the court of appeals explained that the "question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Id.* at 8a. The court reasoned, moreover, that even if "*Baker* might have had resonance" when it was decided, "it does not today" because of the "manifold changes to the Supreme Court's equal protection jurisprudence" since *Baker*. *Id.* at 9a.

d. Turning to the constitutionality of Section 3, the court of appeals noted that "the existence of a rational basis for Section 3 of DOMA is closely argued," Supp. App. 12a, but concluded that it need not resolve that argument "if heightened scrutiny is available, as it is in this case," *id.* at 14a. In considering the applicable level of scrutiny, the court first looked to whether the class has historically been subjected to discrimination. *Id.* at 16a-17a. The court found "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Id.* at 16a. "Perhaps the most telling proof of animus and discrimination," the court determined, "is that, for many years and in many states, homosexual conduct was criminal." *Ibid.* Noting that "BLAG concedes that homosexuals have endured discrimination in this country since at least the 1920s,"

the court concluded that "[n]inety years of discrimination is entirely sufficient." *Id.* at 17a.

The court of appeals then assessed whether sexual orientation, the distinguishing class characteristic, typically bears on a person's ability to contribute to society. Supp. App. 17a-18a. The court reasoned that, while "[t]here are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society," sexual orientation "is not one of them." *Id.* at 18a. The court determined that sexual orientation "has nothing to do with aptitude or performance." *Ibid.*

Next, the court of appeals examined the discernibility of sexual orientation, Supp. App. 19a-21a, explaining that "what matters here is whether the characteristic invites discrimination when it is manifest," *id.* at 21a. The court rejected the characterization of this factor as one confined to "immutability," finding that "the test is broader." *Id.* at 19a-20a. Analogizing to classifications based on alienage, illegitimacy, and national origin, *id.* at 19a-21a, the court concluded that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals," *id.* at 21a.

Finally, the court evaluated the political power of gay and lesbian people. Supp. App. 21a-23a. The court acknowledged that "homosexuals have achieved political successes over the years." *Id.* at 21a. But the relevant question, the court explained, "is whether they have the strength to politically protect themselves from wrongful discrimination." *Ibid.* Pointing to "the seemingly small number of acknowledged homosexuals" in positions of power, among other evidence, *id.* at 22a, the court concluded that gay and

lesbian people cannot "adequately protect themselves from the discriminatory wishes of the majoritarian public," *id.* at 23a.

Based "on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect," the court concluded that "the class is quasi-suspect" and thus calls for the application of intermediate scrutiny. Supp. App. 23a.

e. The court of appeals then held that Section 3 of DOMA fails under intermediate scrutiny. Supp. App. 23a-31a. The court concluded that the purposes advanced by BLAG and Congress in support of Section 3 do not bear a substantial relationship to an important governmental objective, *id.* at 24a-30a, noting that "BLAG's counsel all but conceded [at argument] that these reasons for enacting DOMA may not withstand intermediate scrutiny," *id.* at 24a.

The court first determined that an asserted interest in "maintaining a consistent federal definition of marriage" cannot withstand intermediate scrutiny. Supp. App. 24a. The court explained that, among other problems, "DOMA's sweep arguably creates more discord and anomaly than uniformity"; "[b]ecause DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity." *Id.* at 25a.

Nor could the court of appeals discern a substantial relationship between Section 3 and the interest in "sav[ing] government resources." Supp. App. 26a. "DOMA is so broad," the court concluded, *id.* at 27a, that it "transcends a legislative intent to conserve public resources," *id.* at 28a. And while "[f]iscal prudence is undoubtedly an important government inter-

est," *id.* at 27a, the court noted, the "saving of welfare costs cannot justify an otherwise invidious classification," *ibid.* (quoting *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971)).

Turning to the asserted interest in "preserving traditional marriage as an institution," Supp. App. 28a, the court explained that the "ancient lineage of a legal concept does not give a law immunity from attack," *ibid.* (quoting *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) (brackets omitted)). The court concluded, moreover, that "[e]ven if preserving tradition were in itself an important goal, DOMA is not a means to achieve it"; "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, preserve the institution of marriage as one between a man and a woman." *Id.* at 29a (citation and internal quotation marks omitted).

Finally, the court determined that Section 3 does not advance an interest in the "encouragement of responsible procreation and child-rearing," *id.* at 30a, because "DOMA does not affect in any way" the incentives for opposite-sex couples to engage in such procreation and child-rearing, *id.* at 29a. "Incentives for opposite-sex couples to marry and procreate (or not)," the court concluded, "were the same after DOMA was enacted as they were before." *Id.* at 30a.

f. Judge Straub dissented in part. While he concurred with the parts of the court's opinion denying BLAG's motion to dismiss the government's appeal and declining to certify to the New York Court of Appeals the marriage-recognition issue, Supp. App. 31a, he would have held that *Baker* forecloses petitioner's equal protection challenge, *id.* at 40a-48a. Even if *Baker* did not control, Judge Straub would

have upheld Section 3 applying rational-basis scrutiny. *Id.* at 48a-83a.

SUMMARY OF ARGUMENT

Section 3 of DOMA violates the fundamental constitutional guarantee of equal protection. The law denies to tens of thousands of same-sex couples who are legally married under state law an array of important federal benefits that are available to legally married opposite-sex couples. Because this discrimination cannot be justified as substantially furthering any important governmental interest, Section 3 is unconstitutional.

A. This Court has understandably reserved the application of heightened constitutional scrutiny to a small number of classifications. But the Court has yet to determine whether classifications based on sexual orientation qualify. Under the factors articulated by this Court, such classifications warrant heightened scrutiny.

First, gay and lesbian people have been subject to a significant history of discrimination in this country. Until *Lawrence* v. *Texas*, 539 U.S. 558 (2003), criminal laws in many states prohibited their private sexual conduct. In addition, gay and lesbian people have long suffered discrimination in employment, immigration, criminal violence, child custody, police enforcement, voter referenda, and other contexts.

Second, sexual orientation, unlike disability or age, generally bears no relation to ability to participate in and contribute to society. Rather than dispute that unassailable fact, BLAG seeks to avoid its force by inventing its own query untethered to this Court's precedents (Br. 54): whether the classification turns on a characteristic "relevant to the distinctions actual-

ly drawn." But that formulation would drain the constitutional inquiry of any real meaning by conflating the question whether a classification withstands heightened scrutiny in a particular case (the second step of the equal-protection analysis) with the antecedent question whether heightened scrutiny applies to that classification (the first step).

Third, discrimination against gay and lesbian people is based on an immutable or distinguishing characteristic. Sexual orientation is a core aspect of identity. Its expression, particularly in loving and committed relationships, is an "integral part of human freedom." *Lawrence*, 539 U.S. at 577. There is broad scientific and medical consensus that sexual orientation is typically not a voluntary choice, and that efforts to change an individual's sexual orientation are generally futile and potentially harmful. In any event, as long as it distinguishes a group, a characteristic may support application of heightened scrutiny even if—as with illegitimacy or alienage—it is subject to change or not readily visible.

Fourth, gay and lesbian people are a minority group with limited political power. Although some of the harshest and most overt forms of discrimination against gay and lesbian people have receded, that progress has hardly been uniform (either temporally or geographically), and has in significant respects been the result of judicial enforcement of the Constitution, not political action. *E.g.*, *Lawrence*, *supra*. The vast majority of state voter initiatives directed at gay and lesbian people, even within the last decade, have repealed protections against sexual-orientation discrimination or denied gay and lesbian people the ability to marry. In any event, as confirmed by the

applicability of heightened scrutiny to classifications based on gender, the fact that gay and lesbian people have achieved some political gains does not tilt this factor against, let alone preclude, heightened scrutiny. See *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

B. Section 3 fails heightened scrutiny. None of Section 3's actual purposes as expressed in the House Report, or any of the additional interests now asserted by BLAG, substantially furthers an important governmental objective.

Congress's stated interest in asserting moral disapproval of homosexuality cannot justify Section 3. BLAG does not contend otherwise. As the Court has explained, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577 (citation omitted).

Congress's asserted interest in defending the institution of "traditional, heterosexual" marriage (House Report 12) fails for similar reasons. *E.g.*, *United States* v. *Virginia*, 518 U.S. 515, 535-536 (1996) (*VMI*). In any event, because Section 3 imposes no restriction on the ability of any state to provide for same-sex marriage, it does not substantially further any interest in preserving "traditional, heterosexual" marriage.

Nor can DOMA be justified based on the interest in promoting responsible parenting and child-rearing that BLAG identifies as the principal societal justification for recognizing marriage. Even apart from the expert consensus that children raised by gay and lesbian parents are as likely to be well adjusted as children raised by heterosexual parents, Section 3

does nothing to promote responsible opposite-sex parenting or to prevent irresponsible same-sex parenting. Denying federal benefits to married same-sex couples creates no additional incentive for heterosexual couples to marry, procreate, or raise children together; nor does it disturb any state-conferred parental rights for same-sex couples.

Congress's interest in "protecting state sovereignty and democratic self-governance" (House Report 12, 18) applies to Section 2, not Section 3, of DOMA. BLAG invokes a parallel sovereign interest in enabling the *federal* government to formulate its own definition of marriage for its own purposes. That asserted interest, however, simply begs the question in this case: whether the exercise of federal authority is consistent with equal protection.

Section 3 also cannot be justified based on an interest in preserving government resources. Even assuming that Section 3 actually saves the government money (a dubious assertion), that would not suffice under heightened scrutiny. *E.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982).

The related interests in national uniformity and administrability with respect to federal benefits eligibility are not "actual purposes" expressed either in DOMA itself or the accompanying House Report, and therefore cannot be considered for purposes of heightened scrutiny. *VMI*, 518 U.S. at 535-536. Those interests also fail because the federal government ordinarily has given effect to marriages lawfully recognized under state law despite a number of inconsistencies among state marriage laws. Section 3 breaks from that established practice in a way that creates administrative difficulties, *i.e.*, requiring the

federal government to determine whether a valid state marriage involves individuals of the same sex.

Finally, the asserted interest in proceeding with caution pending state experimentation with the definition of marriage likewise lacks a basis in DOMA or the House Report. Section 3, at any rate, affects the institution of marriage, if at all, only "at the margin" (BLAG Br. 43). Section 3, moreover, is not framed as a temporary measure designed to facilitate further study.

C. If the Court declines to apply heightened scrutiny to Section 3 of DOMA, the government does not challenge the constitutionality of Section 3 under the highly deferential standard of rational-basis review. Insofar as the Court were to apply a "more searching form of rational basis review" (*Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment)) because of the unique nature of the classification at issue, however, Section 3 would fail that analysis for largely the same reasons that it fails heightened scrutiny.

ARGUMENT

SECTION 3 OF DOMA VIOLATES EQUAL PROTECTION

The Constitution's guarantee of equal protection of the laws, applicable to the federal government through the Due Process Clause of the Fifth Amendment, see *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), embodies a defining constitutional ideal that "all persons similarly situated should be treated alike," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Section 3 of DOMA stands at odds with that fundamental principle: it allows states to define the category of "similarly situated" persons—those who are legally married under state law—but it then denies federal benefits to legally married same-sex cou-

ples that are available to legally married opposite-sex couples.

The present case vividly illustrates the character of this discrimination: Section 3 of DOMA required the federal government to deny plaintiff a $363,000 reduction in estate taxes solely because her marriage, although fully recognized as a matter of state law, was with another woman. The statute inflicts a vast array of similarly severe harms upon the tens of thousands of legally married same-sex couples in this country. A same-sex spouse of an active-duty military service-member is excluded from certain housing, health-insurance, and disability benefits that would be afforded to an opposite-sex spouse. A federal employee is denied leave under the Family and Medical Leave Act to care for a sick same-sex spouse, who is also ineligible for health-insurance coverage. A non-citizen same-sex spouse of a United States citizen cannot qualify as the citizen spouse's immediate relative for purposes of obtaining lawful permanent residence, subjecting the non-citizen spouse to the possibility of removal (if in the United States) or continued separation (if abroad). A same-sex surviving spouse is denied certain Social Security and pension benefits that would be available to an opposite-sex spouse. And a same-sex spouse of a military veteran is ineligible to be buried alongside his or her spouse in a national cemetery (absent a discretionary designation of eligibility by the Secretary of Veterans Affairs), or to receive certain survivor benefits upon a veteran's service-connected death. 38 U.S.C. 1310, 2402(a)(5) and (6); see also 38 U.S.C. 101(3) and (31) (defining "spouse" for Title 38 as a person of the opposite sex who is a wife or husband).

The question in this case is whether those results compelled by DOMA are consistent with equal protection. They are not.[3]

A. Classifications Based On Sexual Orientation Should Be Subject To Heightened Scrutiny

Legislation is generally presumed valid and sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. When "individuals in the group affected by a law have distinguishing characteristics relevant to interests the [government] has the authority to implement," courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441-442. But when legislation classifies on the basis of a factor that "generally provides no sensible ground

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[3] BLAG asserts in a footnote (Br. 24 n.6) that "[b]efore it can consider DOMA's constitutionality, this Court must resolve a threshold issue of Article III standing," in that plaintiff "only has standing to challenge DOMA * * * if New York would have recognized her 2007 Ontario marriage certificate" at the time of Thea Spyer's death. As explained in our certiorari reply (at 3-4 & nn.1-2), however, both courts below concluded that New York recognized plaintiff's marriage at the relevant time (Supp. App. 5a-7a; *id.* at 31a (Straub, J., dissenting); Pet. App. 6a-8a)—a conclusion entitled to controlling deference by this Court. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976). Notably, BLAG makes no affirmative argument for disturbing the Second Circuit's and district court's common understanding of New York law, instead contending only that the issue is "not free from doubt." In any event, because IRS's denial of plaintiff's tax-refund claim was based solely on Section 3 of DOMA, without questioning the validity of her marriage under either Ontario or New York law (see p. 4, *supra*), BLAG's objection in fact goes to the merits rather than to standing.

for differential treatment"—such as race or gender—equal protection imposes a greater burden on the government to justify the classification. *Id.* at 440-441.

Such suspect or quasi-suspect classifications are subject to heightened scrutiny, under which the government must show, at a minimum, that the classification drawn is "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). That more stringent standard enables courts to ascertain whether the government has employed the classification for a significant and proper purpose, and provides a heightened measure of protection in circumstances where there is a greater danger that the classification results from impermissible prejudice or stereotypes. See, *e.g.*, *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (*VMI*).

This Court has yet to resolve the appropriate level of scrutiny for classifications based on sexual orientation. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the Court held that the state law at issue, which repealed existing—and prohibited future—legal protections for gay and lesbian people, failed "even" rational-basis review under the Equal Protection Clause. *Id.* at 632. In *Lawrence* v. *Texas*, 539 U.S. 558 (2003), the Court invalidated a state criminal ban on homosexual sodomy under the Due Process Clause of the Fourteenth Amendment because the law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578. The Court accordingly had no need in either case to decide whether heightened scrutiny applies for pur-

poses of equal-protection review of sexual-orientation classifications. Nor did the Court decide the question in its one-line summary dismissal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), of an appeal as of right from a state supreme court decision denying a same-sex couple the right to marry under state law. See Supp. App. 7a-11a. As BLAG acknowledges (Br. 25-26), the Court's summary order unsurprisingly gives no indication that it considered, much less resolved, the applicable level of scrutiny.

The Court has, however, established a set of factors that guide the determination of whether to apply heightened scrutiny to a classification that singles out a particular group: (1) whether the class in question has suffered a history of discrimination, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the characteristic prompting the discrimination "frequently bears no relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-441 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); (3) whether the discrimination against members of the class is based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602 (citation omitted); and (4) whether the class is "a minority or politically powerless," *ibid.*

The first two considerations—a history of discrimination and the distinguishing characteristic's lack of relation to an individual's capabilities—are at the core of the inquiry and are common to every class this Court has deemed suspect. That is fully understandable: those factors provide direct and powerful reasons to be suspicious of a classification. Though relevant, neither immutability nor political powerlessness is a

precondition or sufficient to warrant heightened scrutiny. See, *e.g.*, *Cleburne*, 473 U.S. at 443 n.10 ("[T]here's not much left of the immutability theory, is there?") (quoting John Hart Ely, *Democracy and Distrust* 150 (1980)); *id.* at 472 n.24 (Marshall, J., concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."). At any rate, as the court of appeals correctly determined (Supp. App. 16a-23a), all four of the factors demonstrate that classifications based on sexual orientation should be subject to heightened scrutiny.[4]

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[4] The decisions of other courts of appeals concluding that rational-basis review applies to sexual-orientation classifications are flawed. Many of those courts relied in whole or in part on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), which this Court overruled in 2003. *Lawrence*, 539 U.S. at 578. They reasoned that "[i]f homosexual conduct may constitutionally be criminalized," as *Bowers* held, "then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); see *Equality Found.* v. *City of Cincinnati*, 54 F.3d 261, 266-267 & n.2 (6th Cir. 1995), vacated by, 518 U.S. 1001 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); see also *Richenberg* v. *Perry*, 97 F.3d 256, 260 (8th Cir. 1996) (citing reasoning of prior appellate decisions based on *Bowers*), cert. denied, 522 U.S. 807 (1997); *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir.) (same), cert. denied, 519 U.S. 948 (1996).

1. Gay and lesbian people have been subject to a history of discrimination

Gay and lesbian people have suffered a significant history of discrimination in this country. No court to consider the question has concluded otherwise, and any other conclusion would be insupportable. Supp. App. 16a; see, *e.g.*, *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) ("[G]ays and lesbians have long been the subject of discrimination."), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012); *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[W]e do agree that homosexuals have suffered a history of discrimination."); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 465 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree."), cert. denied, 494 U.S. 1004 (1990).

Perhaps most stark is the history of criminal prohibitions on the sexual intimacy of gay and lesbian people: that history ranges from colonial laws ordering the death of "any man [that] shall lie with mankind, as he lieth with womankind," Public Statute Laws of the State of Connecticut, 1808 tit. LXVI, ch. 1, § 2, 294-295 & n.1 (enacted 1642; rev. 1750), to state laws that, until very recently, "demean[ed] the[] existence" of gay and lesbian people "by making their private sexual conduct a crime," *Lawrence*, 539 U.S. at 578. "[T]hat declaration in and of itself [wa]s an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 575. The federal government, state and local governments, and private parties all have contributed to a

regrettable history of discrimination against gay and lesbian people in a variety of contexts:

- *Employment*: By the 1950s, based on Presidential and other directives, the federal government investigated its civilian employees for "sexual perversion," *i.e.*, homosexuality. Until 1975, "[t]he regulations of the Civil Service Commission for many years ha[d] provided that * * * immoral or notoriously disgraceful conduct, which includes homosexuality or other types of sex perversion, are sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service." *Employment of Homosexuals and Other Sex Perverts in Government, Interim Report submitted to the Committee by its Subcommittee on Investigations pursuant to S. Res. 280*, S. Doc. No. 241, 81st Cong., 2d Sess. 8 (1950). Intrusive investigations by the FBI and other agencies forced thousands of federal employees out of their jobs based on the suspicion that they were gay or lesbian. See, *e.g.*, *id.* at 6-8; Brad Sears et al., The Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, ch. 5 at 7, Sept. 2009, http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment. The same was true on the state and local government level, *id.* at 18-

34, and pervasive employment discrimination persists to this day in the private sector, *id.* at 8-9.[5]

- *Immigration*: For decades, gay and lesbian noncitizens were categorically subject to exclusion from the United States on the ground that they were "persons of constitutional psychopathic inferiority," "mentally . . . defective," or sexually deviant. *Lesbian/Gay Freedom Day Comm., Inc.* v. *INS*, 541 F. Supp. 569, 571-572 (N.D. Cal. 1982) (quoting Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875), see *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967) ("The legislative history of the [Immigration and Nationality] Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals."). That exclusion remained in effect until June 1, 1991. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

- *Hate crimes*: After racial minorities, gay and lesbian people are the most frequent victims of reported hate crimes. See FBI, *Hate Crime Statistics 2011*, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-1 (hate crimes motivated by victim's sexual orientation constituted second highest category reported with 1508 offenses or over 20% of total). From 2007 to 2011 (the latest year for which data has been reported), hate crimes motivated by sexual orientation *increased* 3%, even as hate crimes overall *decreased* 19%. Compare *ibid.*

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[5] Until September 2011, open military service by gay and lesbian people was prohibited first by regulation and then by statute, 10 U.S.C. 654.

with FBI, *Hate Crime Statistics, 2007*, http://www2.fbi.gov/ucr/hc2007/table_01.htm.

- *Child custody*: States and localities have denied child custody and visitation rights to gay and lesbian parents based on their intimate relationships. See, *e.g.*, *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (concurring in denial of custody to lesbian mother on ground that "[h]omosexual conduct is * * * abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God * * * [and] an inherent evil against which children must be protected"); *Bowen* v. *Bowen*, 688 So. 2d 1374, 1381 (Miss. 1997) (holding that trial court did not err in granting father custody based on public rumor that son's mother was involved in lesbian relationship); *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that while "a lesbian mother is not *per se* an unfit parent," "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth" and "that conduct is another important consideration in determining custody").

- *Police enforcement*: Liquor licensing laws were used to raid establishments patronized by gay and lesbian people long before the Stonewall riots of 1969. See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U. L. Rev. 703, 761-766 (1997). Police similarly relied on laws prohibiting lewdness, vagrancy, and disorderly conduct to harass gay and lesbian people when congregating in public. See, *e.g.*, *Pryor* v. *Municipal Court*, 599 P.2d 636, 644 (Cal. 1979); Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City,*

1960-1980, 12 Colum. Hum. Rts. L. Rev. 159, 162-164 (1980); Florida State Legislative Investigation Committee, *Report: Homosexuality and Citizenship in Florida* 14 (1964).

- *Voter referenda*: Efforts to combat discrimination have engendered significant political backlash, as evidenced by a series of successful state and local ballot initiatives, starting in the 1970s, repealing anti-discrimination protections for gay and lesbian people. See Robert Wintemute, *Sexual Orientation and Human Rights* 56 (1995) ("From 1974 to 1993, at least 21 referendums were held on the sole question of whether an existing law or executive order prohibiting sexual orientation discrimination should be repealed or retained. In 15 of these 21 cases, a majority voted to repeal the law or executive order."). The voter initiatives at issue in *Romer*, *supra*, and *Equality Foundation* v. *City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), vacated by, 518 U.S. 1001 (1996), are two of a number of more recent examples. See also pp. 33-34, *infra* (discussing success of state ballot measures prohibiting marriage of same-sex couples).

BLAG offers two responses to that well-documented history of discrimination. First, BLAG observes (Br. 57) that gay and lesbian people, unlike certain other protected classes, have never been denied the right to vote. But this Court has never enumerated political disenfranchisement as a separate factor, let alone a requirement, for according heightened scrutiny, and it would make little sense to do so. Citizens born out of wedlock, for instance, have never been denied the right to vote, but the Court has treat-

ed them as a quasi-suspect class for equal-protection purposes. See *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978).

Second, BLAG contends (Br. 57) that, unlike other protected classes, gay and lesbian people have not suffered discrimination "for longer than history has been recorded." Of course, that is not the relevant inquiry; as the court of appeals noted (Supp. App. 17a), "whether such discrimination existed in Babylon is neither here nor there." In any case, in addition to the colonial-era criminal prohibitions on homosexual conduct, BLAG concedes that gay and lesbian people have endured discrimination in this country since the 1920s. Any perceived shortage of evidence of overt or officially sanctioned discrimination before that time is likely attributable to the fact that gay and lesbian people, by and large, kept their sexual orientation hidden for fear of discrimination or persecution. In any event, given its breadth and depth, the undisputed twentieth-century discrimination has lasted long enough.

2. Sexual orientation bears no relation to ability to perform or contribute to society

A pivotal consideration distinguishing classifications that call for application of heightened scrutiny from classifications that do not is whether the characteristic in question generally bears on an "individual's ability to participate in and contribute to society." *Cleburne*, 473 U.S. at 441 (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976)). When the characteristic is ordinarily one that "the government may legitimately take into account," *id.* at 446, this Court declines to apply heightened scrutiny even if other factors would support its application. See *id.* at 442-447 (mental

disability); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312-315 (1976) (per curiam) (age). Conversely, "what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion).

The same is true of sexual orientation. Historically, discrimination against gay and lesbian people had nothing to do with ability or performance, but rested instead on the view that they are, for example, sexual deviants, mentally ill, or immoral. See pp. 22-27, *supra*. As the American Psychiatric Association concluded some forty years ago, however, "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974). Like gender, race, or religion, sexual orientation bears no inherent relation to a person's ability to participate in or contribute to society.

That fact is evident throughout all aspects of society, including military service. "[V]alor and sacrifice are no more limited by sexual orientation than they are by race or by gender or by religion or by creed," and gay and lesbian Americans have served with honor "to protect this nation and the ideals for which it stands." *Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010*, Dec. 22, 2010, http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

Gay and lesbian people have made similar contributions beyond the military, even when they could not live openly with regard to their sexual orientation. Plaintiff's own pathbreaking career as a computer programmer, while she kept her long-term relationship with Spyer "invisible," is but one example. J.A. 154, 156-157 (Am. Comp. ¶¶ 19, 27).

BLAG cannot dispute any of this. Instead, BLAG would prefer to transform the inquiry into a markedly different, case-specific one (Br. 54): whether the classification turns on a characteristic "relevant to the distinctions actually drawn," *i.e.*, "whether a married couple is of the opposite sex is relevant to the government's interests in recognizing marriage." This Court has never framed the inquiry in that way, and for good reason. As the court of appeals explained, this Court's decisions make clear that the relevance of the classification to the "distinctions actually drawn" by a particular law "bear[s] upon whether the law withstands scrutiny (the second step of analysis) rather than upon the level of scrutiny to apply" in the first place. Supp. App. 18a (citing *Clark*, 486 U.S. at 461). When the inquiry is properly framed, the answer is clear. Sexual orientation—like gender—"frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion).

3. Gay and lesbian people possess a distinguishing characteristic that defines them as a group

Sexual orientation is a sufficiently discernible characteristic to define a discrete minority group. BLAG (Br. 54-56) and its amici contend that sexual orientation is not necessarily fixed, suggesting that it may

change over time and vary along a spectrum. That contention is both irrelevant and incorrect.

a. As the Court's precedents indicate, this factor is broader than "immutability" or "obviousness"; it asks whether there are "obvious, immutable, *or* distinguishing characteristics that define * * * a discrete group." *Gilliard*, 483 U.S. at 602 (emphasis added; citation omitted); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986). A classification may be constitutionally suspect even if it rests on a characteristic, such as illegitimacy or alienage, that is not readily visible or is subject to change. See *Mathews*, 427 U.S. at 504, 506 ("[I]llegitimacy does not carry an obvious badge, as race or sex do."); *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (alienage). As the court of appeals explained (Supp. App. 19a-20a), the salient question "is whether the characteristic of the class calls down discrimination when it is manifest."

Sexual orientation is such a "distinguishing characteristic," and that is true even though so many gay and lesbian people have been forced for so long to hide their identities in order to avoid discrimination. As this Court has recognized, sexual orientation is a core aspect of human identity, and its expression is an "integral part of human freedom." *Lawrence*, 539 U.S. at 562, 576-577; see also *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (Sexual orientation is "fundamental to one's identity" and gay and lesbian individuals "should not be required to abandon" it.).

BLAG also contends (Br. 55) that sexual orientation differs from other suspect or quasi-suspect classes because it is defined "by a propensity to engage in a certain kind of conduct." This Court has squarely

rejected such a status/conduct distinction. See *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) (rejecting contention that the organization "does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong'" because the Court's "decisions have declined to distinguish between status and conduct in this context"); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

b. In any event, the broad consensus in the scientific community is that, for the vast majority of people (gay and straight alike), sexual orientation is not a voluntary choice.[6] There is likewise a medical consen-

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[6] See, *e.g.*, Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176, 186-188 (2010), http://www.springerlink.com/content/k186244647272924/fulltext.pdf (in national survey of more than 650 self-identified lesbian, gay, and bisexual adults, 95% of gay men and 83% of lesbian women reported "no choice at all" or "a small amount of choice" when asked "How much choice do you feel you had about [your self-described sexual orientation]?"); Am. Psychological Ass'n et al. (APA) C.A. Amicus Br. 6-8 ("Homosexuality is a normal expression of human sexuality, is generally not

sus that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being.[7] Accordingly, sexual orientation readily constitutes an "obvious, immutable, or distinguishing characteristic" for purposes of equal-protection law.

4. Gay and lesbian people are minorities with limited political power

The final consideration is whether gay and lesbian people are "a minority or politically powerless." *Giliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). They are both. It is undisputed that gay and lesbian

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chosen, and is highly resistant to change."); see also *Hernandez-Montiel*, 225 F.3d at 1093 ("Sexual orientation and sexual identity are immutable."); *Watkins* v. *United States Army*, 847 F.2d 1329, 1347-1348 (9th Cir. 1988) ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation."), rev'd en banc, 875 F.3d 699 (9th Cir. 1989).

[7] See, *e.g.*, Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("[E]fforts to change sexual orientation are unlikely to be successful and involve some risk of harm."); see also Richard A. Posner, *Sex and Reason* 101 n.35 (1992) (describing "failure of treatment strategies * * * to alter homosexual orientation"); Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 226 (1994) (describing "lack of empirical support for conversion therapy").

Every major mental health organization has adopted a policy statement cautioning against the use of so-called "conversion" or "reparative" therapies to change the sexual orientation of gay and lesbian people. Those policy statements are reproduced in a 2008 publication of the American Psychological Association, *Just the Facts about Sexual Orientation and Youth*, http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

people are a minority group, and, for much of the history of discrimination against them (see pp. 22-27, *supra*), they lacked any ability to protect themselves through the political process. To be sure, that has begun to change. But in critical respects that change has resulted from judicial enforcement of constitutional guarantees, *e.g.*, *Lawrence*, *supra*, not political action. And efforts to combat discrimination against gay and lesbian individuals frequently have sparked successful voter referenda or legislative action scaling back protections. See p. 26, *supra* (noting numerous examples including referendum at issue in *Romer*). As one recent example, in May 2011, the Tennessee legislature repealed local ordinances prohibiting discrimination on the basis of sexual orientation and barred future enactment of such ordinances. Tenn. House Bill No. 600, Pub. Ch. No. 278, http://state.tn.us/sos/acts/107/pub/pc0278.pdf.

The recent history of marriage initiatives confirms that gay and lesbian people continue to lack any consistent or widespread "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. BLAG notes (Br. 52) that voters in three states (Maine, Maryland, and Washington) approved same-sex marriage this past November—something that had never happened before at the ballot box. Focusing on this extremely recent progress, BLAG ignores the broader context, which overwhelmingly demonstrates the political challenges faced by the gay and lesbian minority. In 1996, at the time DOMA was enacted, only three states had laws expressly restricting marriage to opposite-sex couples. See Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 Loy. U. Chi. L.J. 265, 265-266 (2007). Today, 39

states have such laws, including voter-approved constitutional amendments in 30 states barring same-sex marriage.[8] Only six states, by comparison, have conferred marriage rights to same-sex couples through the political process; the other three have through judicial decision.[9] That is not a convincing record of political power rendering protection unnecessary.[10]

In any event, BLAG can find no justification in this Court's precedents for its assertion (Br. 54) that "the

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[8] Two other states (New Mexico and Rhode Island) have no express constitutional or statutory ban on marriage for same-sex couples, but those state governments do not permit same-sex couples to marry there. Both states, as a matter of comity, do recognize validly entered out-of-state marriages of same-sex couples.

[9] Connecticut (judicial decision), Iowa (judicial decision), Maine (ballot), Maryland (legislature, approved by ballot), Massachusetts (judicial decision), New Hampshire (legislature), New York (legislature), Vermont (legislature), and Washington (legislature, approved by ballot).

[10] By way of example, in May 2008, the California Supreme Court held that the state was constitutionally required to recognize same-sex marriage. *In re Marriage Cases*, 183 P.3d 384, 419-420 (Cal. 2008). In November 2008, California's voters passed Proposition 8, which amended the state constitution to restrict marriage to opposite-sex couples. (The constitutionality of Proposition 8 is now before this Court. *Hollingsworth* v. *Perry*, No. 12-144 (cert. granted Dec. 7, 2012).) In November 2010, Iowa voters recalled all three Iowa state supreme court justices up for reelection after that court's unanimous decision legalizing same-sex marriage. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. Times, Nov. 4, 2010, at A1. On May 8, 2012, North Carolina became the thirtieth state to amend its constitution to prohibit same-sex marriages. National Conference of State Legislatures, *State Same-Sex Marriage Laws: Legislatures and Courts*, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx (last updated Feb. 14, 2013).

political strength of gays and lesbians in the political process should be outcome determinative here." When the Court recognized in 1973 that gender-based classifications were subject to heightened scrutiny, *Frontiero*, 411 U.S. 682-688 (plurality opinion), women already had achieved major political victories, including a constitutional amendment granting them the right to vote and protection against employment discrimination under Title VII.[11] See *id.* at 685-686 (plurality opinion) ("It is true, of course, that the position of women in America has improved markedly in recent decades," but "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.").

As *Frontiero* and the subsequent cases applying heightened scrutiny to gender-based classifications demonstrate, any limited measure of political progress achieved by gay and lesbian people in no way compels declining to apply heightened scrutiny. To the contrary, their status as a minority, and one with a relative lack of political power, reinforces the applicability of heightened scrutiny based on all of the relevant considerations.

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This Court understandably has been reluctant to recognize new suspect (or quasi-suspect) classes. See *Cleburne*, 473 U.S. at 441-442, 445-446. The govern-

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[11] Notably, Congress has enacted no similar laws to protect gay and lesbian people from employment discrimination, and most states provide no such protection either. See Teresa Welsh, *Should Employers Be Able to Fire Someone for Being Gay?,* U.S. News, May 14, 2012, http://www.usnews.com/opinion/articles/2012/05/14/should-employers-be-able-to-fire-someone-for-being-gay.

ment has not lightly concluded that the Court's decisions dictate that heightened scrutiny applies to classifications based on sexual orientation. This is the rare circumstance in which a faithful application of the Court's established criteria compels applying heightened scrutiny to an additional classification. While those criteria have appropriately and reliably proved, and will continue to prove, difficult to satisfy, none of the Court's reasons for rejecting heightened scrutiny for other classifications—*e.g.*, age,[12] mental disability,[13] kinship,[14] and poverty[15]—applies to sexual orientation. Rather, sexual orientation falls squarely in the limited category of classifications for which heightened scrutiny is designed.

B. Section 3 Of DOMA Fails Heightened Scrutiny

Because a classification based on sexual orientation calls for the application of heightened scrutiny, BLAG must establish that DOMA Section 3, at a minimum, is

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[12] *Murgia*, 427 U.S. at 313 (rejecting heightened review for classifications based on age because such persons "have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities") (internal quotation marks omitted).

[13] *Cleburne*, 473 U.S. at 442-443 (rejecting heightened review for mentally disabled persons because they have "a reduced ability to cope with and function in the everyday world" and "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter").

[14] *Lyng*, 477 U.S. at 638 (rejecting heightened review for kinship classification because it meets none of the four factors).

[15] *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) (rejecting heightened review for classifications based on poverty because such a class would be too "large, diverse, and amorphous").

"substantially related to an important governmental objective." *Clark*, 486 U.S. at 461.[16] And under heightened scrutiny, a statute must be defended by reference to the "actual [governmental] purposes" behind it, not different "rationalizations." *VMI*, 518 U.S. at 535-536. A classification does not withstand heightened scrutiny when "the alleged objective" of the classification differs from the "actual purpose." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 730 (1982).

The House Report—the only congressional committee report on DOMA—sets forth the specific governmental interests purportedly advanced by DOMA:

> (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

House Report 12. Other than a cursory footnote (Br. 57 n.10), BLAG makes no argument that any of those interests, or any of the other interests BLAG now asserts, could satisfy heightened scrutiny. See Supp.

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[16] BLAG states in passing, in a footnote (Br. 25 n.7), that "[b]y its terms, DOMA does not classify based on a married couple's sexual orientation." Whether or not DOMA "by its terms" classifies on the basis of sexual orientation, it is plainly a law that classifies based on sexual orientation. Congress left no doubt that the sole and overriding purpose of Section 3 was to exclude "homosexual couples" from the federal definition of marriage. House Report 2. Section 3 denies recognition of a class of marriage into which, as a practical matter, only gay and lesbian people enter. As discussed above, the Court has rejected such distinctions between the status and conduct of gay and lesbian people. See pp. 30-31, *supra* (citing *Lawrence*, *Christian Legal Society,* and *Bray*).

App. 24a ("BLAG's counsel all but conceded that these reasons for enacting DOMA may not withstand intermediate scrutiny.") (citing C.A. Oral Arg. Tr. 16:24-17:6; reproduced at Pl. Resp. in Supp. of Writ of Cert. Before J. App. a16). The following analysis of the proffered justifications for Section 3 demonstrates why any such argument would fail.

1. Morality

The House Report claims that DOMA upholds "traditional notions of morality," but does so by condemning homosexuality and expressing disapproval of the intimate, loving and committed relationships of gay and lesbian people. *E.g.*, House Report 15-16 (relying on "moral disapproval of homosexuality" and "a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (referring to "a union that many people . . . think is immoral") (citation omitted); see also *id.* at 16 n.54, 33 (invoking holding of *Bowers* v. *Hardwick*, 478 U.S. 186, 196 (1986), that criminal prohibition served the purpose of expressing "the presumed belief * * * that homosexual sodomy is immoral and unacceptable"). The House Report also invokes an interest in extending legal preferences to heterosexual couples to "promot[e] heterosexuality" and discourage homosexuality. *Id.* at 15 n.53 ("Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality.").

BLAG makes no effort to defend Section 3 on the basis of this asserted interest, and for good reason. Moral opposition to homosexuality, though it may reflect deeply held personal views, is not a legitimate policy objective that can justify unequal treatment of

gay and lesbian people. See *Lawrence*, 539 U.S. at 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *id.* at 582-583 (O'Connor, J., concurring in judgment) ("Moral disapproval of [gay and lesbian people], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); see also *Romer*, 517 U.S. at 635 (noting that law cannot disfavor gay and lesbian people because of "personal or religious objections to homosexuality").

That is not to suggest that Section 3 of DOMA necessarily or universally resulted from hostile animus. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Disapproval may also be the product of longstanding traditions or sincerely held beliefs. Cf. *Massachusetts*, 682 F.3d at 16 ("[M]any of our own traditions rest largely on belief and familiarity."). Still, while "[p]rivate biases may be outside the reach of the law, * * * the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

2. Traditional Definition of Marriage

The House Report also articulated an interest in "defending and nurturing the institution of traditional, heterosexual marriage." House Report 12-15; see also

BLAG Br. 43. Marriage is, of course, a vitally important institution, and one supported by the federal government through benefits and other programs that rely on marital status. An interest in preserving marriage as limited to heterosexual persons, however, does not justify Section 3.

Tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles. See *VMI*, 518 U.S. at 535-536 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); see also *Lawrence*, 539 U.S. at 577-578 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *Heller* v. *Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis.").

In any event, Section 3 of DOMA cannot plausibly be thought to advance any interest in protecting "traditional" marriage limited to opposite-sex couples. States decide what marriages to recognize without any reference to DOMA. As the court of appeals reasoned, "because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman." Supp. App. 29a (citation omitted). Instead, Section 3 denies benefits to individuals, legally married under state law, on the basis of their sexual orientation. As a result, "[t]his is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthen-

ing the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citation omitted).

Even BLAG acknowledges (Br. 43) that "the federal government does not have the same direct effect on the institution of marriage as the sovereigns that directly issue marriage certificates," and that any effect of a federal definition of marriage on the institution is only "at the margin." Any such effects (if they exist at all) are so attenuated that they cannot be said to "substantially further" the interest in preserving tradition.

3. Procreation and child-rearing

The House Report identified "responsible procreation and child-rearing" not as a separate rationale for Section 3 of DOMA, but as a basis for Congress's general interest in defending "the institution of traditional, heterosexual marriage." *E.g.*, House Report 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship."); see also BLAG Br. 44-49. Even accepting this blinkered understanding of the moral and emotional foundations of marriage, see *Turner* v. *Safley*, 482 U.S. 78, 95-96 (1987), Section 3 does not substantially further any such interest.

First, no sound basis exists for concluding that same-sex couples who have committed to marriage are anything other than fully capable of responsible parenting and child-rearing. To the contrary, many leading medical, psychological, and social-welfare organizations have issued policy statements opposing restrictions on gay and lesbian parenting based on their

conclusions, supported by numerous scientific studies,[17] that children raised by gay and lesbian parents are as well adjusted as children raised by heterosexual parents.[18] Against this weight of expert authority, BLAG offers (Br. 48) only what it calls the "[c]ommon sense" notion that children benefit more from opposite-sex parents than from same-sex parents. That is (at best) uninformed speculation, and cannot satisfy heightened scrutiny. Consequently, even assuming Section 3 had the effect of encouraging opposite-sex parenting at the expense of same-sex parenting (but

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[17] The weight of the scientific literature strongly supports the view that same-sex parents are just as capable as opposite-sex parents. See, *e.g.*, Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Family 3 (2010), http://www.squareonemd.com/pdf/Does%20the%20Gender%20of%20Parents%20Matter%202010.pdf; see also APA C.A. Amicus Br. 5-6, 15-23 (concluding, based on a rigorous review of the literature, that "there is no scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted").

[18] See, *e.g.*, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, Feb. 2002, http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; Am. Psychological Ass'n, *Sexual Orientation, Parents, & Children*, July 2004, http://www.apa.org/about/governance/council/policy/parenting.aspx; Am. Acad. of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*, 2009, http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; Am. Med. Ass'n, *AMA Policies on GLBT Issues*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm.

see pp. 43-44, *infra*), there would be no adequate interest in doing so.

Second, any debate over the relative merits of same-sex parenting is beside the point: Section 3 neither promotes responsible opposite-sex parenting nor prevents irresponsible same-sex parenting. The legislative record contains no evidence that denying federal benefits to same-sex couples legally married under state law in any way serves to encourage responsible procreation or child-rearing, whether by opposite-sex or same-sex couples; and it is hard to imagine what such evidence would be. Congress did express the view that marriage plays an "irreplaceable role" in child-rearing. House Report 14. But it defies reason to suggest that Section 3 makes it any more likely that heterosexual individuals will marry or raise children together. See Supp. App. 29a ("DOMA does not affect in any way" these "incentives for heterosexual couples."). Nor does it deprive gay and lesbian individuals married under state law of the ability to raise children. See *Massachusetts*, 682 F.3d at 14 ("DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners."). If anything, the denial of federal benefits otherwise accorded to married individuals undermines the efforts of same-sex couples to raise their children, hindering rather than advancing any interest in promoting child welfare.

BLAG defends (Br. 44-47) the procreation/child-rearing rationale primarily on the ground that the traditional definition of marriage rationally relates to the government's interest in addressing "unplanned and unintended offspring"—a problem unique to

opposite-sex relationships. But Section 3 bears no relationship to that interest at all. If a state elects to limit marriage to opposite-sex couples because they alone present a risk of unintended offspring, Section 3 does not disturb that choice. Conversely, if a state elects to permit same-sex couples to marry, Section 3 does not preclude that choice either. Section 3 therefore does not further the end of providing a special institution at the state level to address unintended offspring. And Section 3 thus can bear no rational, let alone substantial, connection to any governmental interest in responsible parenting. See Supp. App. 30a ("Other courts have likewise been unable to find even a *rational* connection between DOMA and encouragement of responsible procreation and child-rearing.") (citing *Massachusetts*, 682 F.3d at 14-15; Pet. App. 18a-19a; *Pedersen* v. *OPM*, No. 3:10-cv-1750, 2012 WL 3113883, at *40-43 (D. Conn. July 31, 2012)).

4. Sovereign Choice

The House Report states an interest in "protecting state sovereignty and democratic self-governance." As the House Report's discussion of that interest makes clear, Congress was concerned with "protect[ing] the right of the people, acting through their *state* legislatures, to retain democratic control over the manner in which the *States* will define the institution of marriage." House Report 18 (emphasis added). But Congress sought to serve that interest through Section 2, not Section 3. See p. 2, *supra*; see also *Massachusetts*, 682 F.3d at 14 (interest in protecting state sovereign choices "was not directed to section 3" but "was concerned solely with section 2, which reserved a state's power not to recognize same-sex marriages performed in other states"). BLAG agrees (Br.

31), observing that "Section 2 preserved each state's ability to define marriage as it preferred."

BLAG attempts to justify Section 3 based on a parallel *federal* sovereign interest (Br. 30-33), *i.e.*, that the federal government has the "same latitude" as the states to define marriage for its own purposes. It is, of course, true that the federal government has an interest in defining marriage for purposes of federal law. That is why the government has vigorously (and successfully) defended against Tenth Amendment and Spending Clause challenges to Section 3. See *Massachusetts*, 682 F.3d at 12. But that authority cannot be exercised in a manner that runs afoul of equal protection. Just as the federal government could not invoke its "federal sovereign interest" in defining marriage to refuse to recognize a lawful state marriage between individuals of a different race (cf. *Loving* v. *Virginia*, 388 U.S. 1 (1967)), it cannot refuse to recognize a lawful state marriage between individuals of the same sex—at least to the extent that exclusion would violate equal protection. BLAG's reliance on the federal interest in defining marriage for federal purposes thus does no more than beg the question presented by this case.

5. Federal fisc

The House Report also identifies preservation of scarce government resources as an interest underlying Section 3's denial of federal benefits to same-sex couples married under state law. House Report 18; see also BLAG Br. 37-41. Many of the rights and obligations affected by Section 3, such as spousal evidentiary privileges and nepotism rules, involve no expenditure of federal funds. In other cases, exclusion of state-recognized same-sex marriages *costs* the

government money by preserving eligibility for certain federal benefits (*e.g.*, an individual who marries a higher-earning spouse might otherwise lose federal assistance). As the court of appeals concluded, "DOMA transcends a legislative intent to conserve public resources," such that the law is "not substantially related to the important government interest of protecting the fisc." Supp. App. 28a; see *Romer*, 517 U.S. at 635 (rejecting "interest in conserving resources" because "breadth of the amendment is so far removed from" that interest).

Even assuming that DOMA Section 3 saves the government money overall,[19] that interest cannot satisfy heightened scrutiny. The government may not single out a group for exclusion from a benefits program solely to conserve public resources. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *Graham*, 403 U.S. at 374-375 (rejecting "interest in preserving the fiscal integrity of [governmental] programs" through alienage-based exclusions) (citation omitted); *Massachusetts*, 682 F.3d at 14 (rejecting the preservation of scarce government resources as a basis for DOMA because "where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme

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[19] But see *Massachusetts*, 682 F.3d at 14 & n.9 ("[M]ore detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.") (citing Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, 2004, http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf).

Court precedent marks this as a reason undermining rather than bolstering the distinction").

6. Other Interests Asserted by BLAG

The "actual purposes" advanced for Section 3—and hence the only purposes relevant in applying heightened scrutiny—are those identified in the House Report and discussed above. But because BLAG essentially defends Section 3 only under a rational-basis standard, it offers two additional possible rationales: promoting national uniformity for purposes of federal benefits eligibility (Br. 33-37) and proceeding cautiously with a change in the definition of marriage (Br. 41-43). Those additional rationalizations, even if considered, would fail under heightened scrutiny.

a. Uniformity and administrability

BLAG contends that Section 3 can be justified based on interests in promoting national uniformity and administrability of federal benefits. Those related interests, articulated solely in floor statements of individual legislators,[20] are not properly considered as justifications under heightened scrutiny. They fail application of such scrutiny in any event.

i. Floor statements of individual legislators, without more, do not evidence the "actual purposes" of a law. The "actual purposes" of a statutory classification are most evident when set forth in the statute itself. See *Zobel* v. *Williams*, 457 U.S. 55, 61 n.7 (1982) ("These purposes were enumerated in the first section of the Act * * * . Thus we need not speculate as to the objectives of the legislature."). When a

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[20] See BLAG Br. 8-9 (citing 142 Cong. Rec. 22,459 (1996) (Sen. Ashcroft); *id.* at 22,453 (Sen. Murkowski)).

statute lacks an express statement of its purposes, as with Section 3 of DOMA, this Court has supported looking to congressional committee reports. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (bracket in original)); see also, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 & n.3 (1974) (citing Conference Committee Report for "primary purpose" of scheme challenged under heightened scrutiny); BLAG Br. 6-11 (assuming House Report sets forth congressional purposes).

Statements of individual legislators, by contrast, generally shed little light on a statutory classification's actual purposes. In determining legislative intent, this Court has "eschewed reliance on the passing comments of one Member" of Congress and "casual statements from the floor debates." *Garcia*, 469 U.S. at 76. Such comments and statements "reflect at best the understanding of individual Congressmen," not that of Congress. *Zuber*, 396 U.S. at 186. For purposes of heightened scrutiny, therefore, BLAG cannot rely solely on floor statements to defend DOMA under a uniformity/administrability rationale.

ii. That rationale fails in any event. While the federal government possesses the authority to set the terms of its own benefits and obligations (p. 45, *supra*), its longstanding traditional practice has been to recognize (with narrow, context-specific exceptions, see BLAG Br. 5 n.2) any marriage lawfully recognized

under state law. The federal government has consistently adhered to that practice in the face of inconsistencies among state marriage laws with respect to consanguinity, minimum-age, divorce, and other requirements and limitations concerning marriage. See Family Law Professors C.A. Amicus Br. 5-14. DOMA Section 3 sharply breaks from that established tradition of deference to state marriage laws, thereby trading one form of uniformity (consistent reliance on state marriage laws) for another (exclusion of a particular type of marriage, *i.e.*, that between same-sex couples) without providing a sufficient justification for preferring one to the other. See Supp. App. 26a ("Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.").

The latter form of "uniformity," moreover, creates its own administrative complications that make federal law less, not more, straightforward. For individuals from states that permit same-sex couples to marry, Section 3 places an administrative burden on government officials to look beyond a simple declaration of marriage or license—something many federal agencies had not typically done before DOMA—to determine whether the marriage involves individuals of the same sex. See *Golinski* v. *OPM*, 824 F. Supp. 2d 968, 1001-1002 (N.D. Cal. 2012) ("The passage of DOMA actually undermined administrative consistency by requiring that the federal government, for the first time, discern which state definitions of marriage are

entitled to federal recognition and which are not."). Congress gave no thought to that administrative burden relative to the potential burden associated with evaluating a change in domicile potentially affecting a same-sex couple's marital status. Accordingly, even assuming the asserted interests in uniformity and administrability were sufficiently important, BLAG has not met its burden of showing that Section 3 substantially furthers those interests. Cf. *Califano* v. *Goldfarb*, 430 U.S. 199, 220 (1977) (Stevens, J., concurring in judgment) ("administrative convenience was not the actual reason for the discrimination").

b. Proceeding with caution

BLAG contends (Br. 42) that Congress "rationally could have concluded that any experimentation with [marriage] should proceed first at the state level." BLAG cites no law for the proposition that an interest in "proceeding with caution" is sufficiently important to justify denying a benefit to a suspect or quasi-suspect class. Similar arguments could have been made with respect to racial integration and gender equality. See, *e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 528 (1963) (rejecting city's attempt to "justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts"). In any event, BLAG's contention overlooks that DOMA operates only for purposes of determining federal benefits. As BLAG itself acknowledges (Br. 43), because DOMA takes state law as a given, the federal definition affects the institution of marriage, if at all, only "at the margin."

There is, moreover, nothing temporary or provisional about Section 3. It contains no sunset provision

and no provision for any further study of the issue. See *Massachusetts*, 682 F.3d at 15 ("[T]he statute was not framed as a temporary time-out; and it has no expiration date, such as one that Congress included in the Voting Rights Act. The House Report's own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure.") (citations omitted). Section 3 thus does not substantially further any interest in proceeding cautiously pending further analysis or study.

C. The Government Does Not Challenge The Constitutionality Of DOMA Section 3 Under Deferential Rational-Basis Review, But Section 3 Would Fail A More Searching Form Of That Review

In the event the Court declines to apply heightened scrutiny, the question would be whether Section 3 satisfies rational-basis review. The Court generally applies rational-basis review in a highly deferential manner—for example, when "ordinary commercial transactions are at issue." *Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (citation omitted); see, *e.g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955). Under such review, the Court will uphold a legislative classification if it bears a "rational relationship" to "some legitimate governmental purpose." *Heller*, 509 U.S. at 320. The "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," including post-hoc rationalizations that did not actually motivate its adoption. *Ibid.* (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The statute generally must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classi-

fication," and "a legislative choice * * * may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314, 315 (1993).

The government has concluded that heightened scrutiny governs classifications based on sexual orientation and that DOMA Section 3 cannot be sustained under that standard. If the Court disagrees and applies rational-basis review, the government has previously defended Section 3 under rational-basis review, and does not challenge the constitutionality of Section 3 under that highly deferential standard.

Some have understood a line of this Court's decisions, however, to apply rational-basis review with added focus in certain circumstances. In her opinion concurring in the judgment in *Lawrence*, in considering a law "directed toward gay persons as a class," Justice O'Connor stated that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." 539 U.S. at 580, 583 (citing *Romer*, *supra*; *Cleburne*, *supra*; *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973)); see also, *e.g.*, *Massachusetts*, 682 F.3d at 10 ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.") (citing *Romer*, *supra*; *Cleburne*, *supra*; *Moreno*, *supra*).

In the government's view, those considerations are best taken into account through the established framework of heightened scrutiny. Insofar as this

Court were instead to apply rational-basis review with added focus, laws targeted at gay and lesbian people would be a particularly strong candidate for that approach. As explained, classifications based on sexual orientation—unlike other classifications for which the Court has denied suspect or quasi-suspect status—distinctively implicate each of the considerations this Court has identified for application of heightened scrutiny. To the extent sexual orientation may be considered to fall short in some dimension, the history of discrimination and the absence of relation to one's capabilities associated with this particular classification would uniquely qualify it for scrutiny under an approach that calls for a measure of added focus to guard against giving effect to a desire to harm an "unpopular group." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment).

Section 3 would fail to satisfy any such analysis, largely for the reasons it fails heightened scrutiny. Like the law struck down in *Romer*, Section 3 is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. It imposes a "broad and undifferentiated disability" (*id.* at 632) on the same narrow class of people at issue in *Romer*—gay and lesbian people—by denying effect to their state-recognized marital relationships across the entire spectrum of federal law. And the asserted rationales are sufficiently "far removed from" the effect of the law—particularly given its breadth—that they should not be credited as valid justifications. *Id.* at 635; see *Massachusetts*, 682 F.3d at 15 ("We conclude, without resort to suspect classifications or any impairment of *Baker*, that the rationales offered do not provide adequate support for section 3 of DOMA.").

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BLAG (Br. 58-59) makes an appeal to this Court to allow the democratic process to run its course. That approach would be very well taken in most circumstances. This is, however, the rare case in which deference to the democratic process must give way to the fundamental constitutional command of equal treatment under law. Section 3 of DOMA targets the many gay and lesbian people legally married under state law for a harsh form of discrimination that bears no relation to their ability to contribute to society. It is abundantly clear that this discrimination does not substantially advance an interest in protecting marriage, or any other important interest. The statute simply cannot be reconciled with the Fifth Amendment's guarantee of equal protection. The Constitution therefore requires that Section 3 be invalidated.

CONCLUSION

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

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides, in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. 28 U.S.C. 1738C (DOMA § 2) provides:

Certain acts, records, and proceedings and the effect thereof

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.

3. 1 U.S.C. 7 (DOMA § 3) provides:

Definition of "marriage" and "spouse"

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.