Nos. 12-15388 & 12-15409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,
Plaintiff-Appellee,
v.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

KAREN GOLINSKI,
Plaintiff-Appellee,
v.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendants-Appellants,
and
BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

On appeal from the United States District Court for the Northern District of California

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BRIEF OF MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES—INCLUDING OBJECTING MEMBERS OF THE BIPARTISAN LEGAL ADVISORY GROUP, REPRESENTATIVES NANCY PELOSI AND STENY H. HOYER—AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE*

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INTEREST OF THE *AMICI CURIAE*

Some *amici* voted against the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), while others voted for it; still others were not in Congress when DOMA was enacted. But all believe, today, that Section 3 of DOMA, which defines marriage for all federal purposes as "only a legal union between one man and one woman," lacks a rational relationship to any legitimate federal purpose and accordingly is unconstitutional.[1]

Having concluded that Section 3 fails to fulfill the equal protection component of the Fifth Amendment, *amici* wish to share their unique perspective on why this is so. *Amici* also wish to make clear that the Bipartisan Legal Advisory Group ("BLAG"), does not speak for a unanimous House on this issue. While Speaker Boehner directed the defense of DOMA by virtue of the divided 3-2 vote of the BLAG, many Members believe that Section 3 of DOMA violates the Constitution and should be struck down.

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[1] A list of the 132 Members of the U.S. House of Representatives participating as *amici* appears on the reverse of the cover to this brief. All parties have consented to the filing of this brief. No counsel to any party to this lawsuit authored this brief in whole or in part, nor did any party, party's counsel, or other person contribute money to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted DOMA in 1996, gay and lesbian couples could not marry anywhere in the world. *Bowers v. Hardwick*, 478 U.S. 186 (1986), was still good law, inviting discrimination as a means of expressing moral disapproval of lesbians and gay men.[2] In this atmosphere, many were reluctant to speak openly about themselves or their families. This understandable reticence permitted false stereotypes and reflexive bias to dominate the public and congressional debate about allowing same-sex couples to marry.

Some of DOMA's proponents capitalized on this, portraying the possibility of same-sex couples joining in marriage as an attack on traditional (heterosexual) marriage and exhorting Congress to act quickly to preempt this possibility. *See, e.g.*, 142 Cong. Rec. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (marriage is "under direct assault by homosexual extremists all across this country"); *id.* at H7443 (statement of Rep. Largent) ("There is ... a radical element, a homosexual agenda that wants to redefine what marriage is."). While some Members fought for rational con-

[2] The Judiciary Committee relied on *Bowers* as support for DOMA. *See* H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905, at *16 n.54 (July 9, 1996) (describing *Bowers* as permitting, as a rational government interest, the "presumed belief of a majority ... that homosexual sodomy is immoral and unacceptable").

sideration of the issues,[3] Congress passed DOMA without examining its impact on any of the thousand-plus federal laws that take marital status into account or hearing from child welfare or family law experts. Nor did Congress pause to examine why the federal government traditionally has respected state marriages for purposes of federal law despite the non-trivial differences in state marriage laws over this Nation's history before rupturing this longstanding federalist practice.

Congress did not proceed "cautiously" as BLAG now suggests (BLAG Br. 38), but acted hastily, and in a manner that reflects the reality that, as a historically disfavored minority, gay men and lesbians have often been targeted for harm based on stereotypes, bias, and the unfortunate desire to create partisan wedge issues for political gain.

Amici agree with the Department of Justice ("DOJ") and the District Court that laws like DOMA that disadvantage lesbians and gay men warrant heightened judicial review, and that DOMA cannot survive such review. *See* DOJ Br. 18-46; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982-990 (N.D. Cal. 2012). *Amici* agree that lesbians and gay men are the type of minority group that warrants the protection that

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[3] *See, e.g.*, H.R. Rep. 104-664, at 42 (dissenting views) ("In a rational legislative atmosphere ... committees of the Congress would be holding hearings on the various aspects of this so that we would not have to use ignorance as an excuse for haste.").

heightened judicial review provides, and illustrate below that this group lacks sufficient political power to obtain equality through the democratic process alone.

But the Fifth Amendment's equal protection guarantee renders Section 3 invalid under any judicial standard. A driving force behind this law was the desire to disapprove and disadvantage gay and lesbian couples, which is not a legitimate federal interest. There was no need to change the law to include heterosexual couples; the federal government recognizes their marriages regardless of DOMA. Unlike most acts of Congress, which are presumed valid and appropriately given judicial deference, DOMA was not the rational result of impartial lawmaking.

In 1996, Congress relied on implausible assertions about potential harms from allowing same-sex couples to marry, but the question for Congress was not whether to allow such marriages. That decision belongs to the States, six of which and the District of Columbia now allow gay and lesbian couples to marry. An estimated 132,000 gay and lesbian couples have done so. *See* Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), *available at* http://tinyurl.com/43qu56t.

DOMA harms these couples, their families, and the States that now allow them to marry; that harm was hypothetical fifteen years ago, but it

is very real today. As a result, it is clear that the refusal to recognize the legal marriages of a category of our citizens does not rationally serve a legitimate federal interest. Put simply, DOMA is one of those laws enacted when "times ... blind[ed] us to certain truths," but that "later generations can see ... in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

ARGUMENT

I. CONGRESS'S TREATMENT OF LESBIANS AND GAY MEN CONFIRMS THAT LAWS TARGETING THIS GROUP WARRANT HEIGHTENED JUDICIAL REVIEW.

Amici agree with DOJ that laws that single out lesbians and gay men should be reviewed under heightened scrutiny, and here elaborate upon the lack of political power of this identifiable minority group. Congress has recognized over time that sexual orientation is not a characteristic that bears on one's "ability to perform or contribute to society." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 441 (1985).[4] Nevertheless,

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[4] Hearings on legislation to extend protection from employment discrimination to gay and lesbian Americans have shown that sexual orientation "has no relation to ability in the workplace." *Employment Non-Discrimination: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 111th Cong. (Nov. 5, 2009) (testimony of Helen Norton, Assoc. Professor of Law, Univ. of Colo. School of Law). Congress's debate over the repeal of the "Don't Ask, Don't Tell" ("DADT") policy similarly confirmed that sexual orientation does not predict one's ability to serve the country with valor and courage. *See, e.g., Testimony Relating to the "Don't Ask, Don't Tell" Policy*: *Hearing Before S. Comm. on Armed Services*, 111th

gay men and lesbians have been unable to obtain basic protections routinely afforded others or to prevent hostile legislation on matters that significantly impact their lives.

BLAG argues that the courts should leave lesbian and gay Americans to the mercy of the democratic process. BLAG Br. 57-8. But Congress already has acted to prevent federal recognition of their lawful marriages. All persons are entitled to seek equal protection of the law through the courts and where, as here, an identifiable minority has not received favorable attention from lawmakers and has been targeted repeatedly for harm, heightened judicial review is warranted.

• ***DOMA demonstrates that lesbians and gay men cannot prevent even de jure discrimination.*** Gay men and lesbians were unable to prevent enactment of DOMA, a law that is remarkable in both its dramatic departure from Congress's previous respect for state marriage determinations and in its facially invidious discrimination against this identifiable minority group. While repeal bills have now been introduced in both Chambers of Congress, some Members who support repeal have been told that they "do so at their own peril" and targeted for aggressive opposition. *See, e.g.*, Nat'l Org. for Marriage, *Will Pro-Gay Marriage Mil-*

Cong., at 5 (Mar. 18, 2010) (statement of Sen. John McCain) ("[DADT] has allowed many gay and lesbian Americans to serve their country. I honor their service. I honor their sacrifices, and I honor them.").

lionaires Divide and Conquer the GOP (Sept. 27, 2011), *available at* http://tinyurl.com/3t2ddf4. These are not idle threats; those opposed to protections for gay men and lesbians have successfully mounted well-funded political campaigns to punish those who have safeguarded the rights of this group or to prevent or reverse legal gains.[5] Gay men and lesbians have lacked the political power to counteract this organized opposition, which unquestionably impairs their ability to obtain the consistent and favorable attention of lawmakers.

Moreover, in their efforts to first prevent and now repeal DOMA, gay men and lesbians have not received due consideration from Congress. In 1996, DOMA's proponents refused to grapple with the relevant issues, and although several courts have now acknowledged this failure—*see, e.g., Mass. v. U.S. Dep't of Health & Human Servs.,* 2012 WL 1948017, at *8 (1st Cir. 2012)*; Golinski*, 824 F. Supp. 2d at 980 (citing *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 379 (D. Mass. 2010))—the House still

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[5] National organizations spent nearly $1 million to unseat three Iowa Supreme Court justices who came up for retention following the Iowa Supreme Court's unanimous ruling that the Iowa constitution required that State to allow lesbian and gay couples to marry. *See, e.g.*, David Pitt and Michael Crumb, *3 Iowa justices ousted*, *rulings likely slowed*, Wash. Post (Nov. 3, 2010), *available at* http://tinyurl.com/5u2zlbo. The National Organization for Marriage claimed that it "was the largest single donor to the effort, giving roughly $600,000," and stated that the non-retention vote would "send shockwaves through the political establishment." *See* http://-tinyurl.com/5sk8qyn.

has not re-examined the law's validity despite repeated calls from Members that it do so. *See Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong., at 6 (Apr. 15, 2011) (statement of Rep. Nadler). In fact, in the fifteen years since DOMA's passage, only one hearing has considered possible repeal. *See The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before S. Comm. on the Judiciary*, 112th Cong. (July 20, 2011). In this same time period, however, Congress held at least ten hearings dedicated to preventing marriage equality for gay and lesbian couples.[6]

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[6] *Defending Marriage: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 112th Cong. (Apr. 15, 2011); *An Examination of the Constitutional Amendment on Marriage: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 109th Cong. (Oct. 20, 2005); *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (June 24, 2004); *Preserving Traditional Marriage: A View from the States: Hearing Before S. Comm. on the Judiciary*, 108th Cong. (June 22, 2004); *The Federal Marriage Amendment (The Musgrave Amendment): Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (May 13, 2004); *Legal Threats to Traditional Marriage: Implications for Public Policy: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (Apr. 22, 2004); *The Defense of Marriage Act: Hearing Before Subcomm. on the Constitution of H. Comm. on the Judiciary*, 108th Cong. (Mar. 30, 2004); *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary*, 108th Cong. (Mar. 3, 2004); *Ensuring the Continuity of the*

• ***Lesbians and gay men have been unable to obtain basic protection from discrimination.*** While frequently finding themselves the target of negative attention, gay men and lesbians have not obtained similar positive attention or been able to obtain desired legislative outcomes. For example, efforts to obtain protection from discrimination in housing, employment, public accommodation, public education, and federally-funded programs have failed. Those efforts started in 1977, with introduction of a bill to amend the Civil Rights Act of 1964 and Fair Housing Act. *See* H.R. 8269, 95th Cong. (1977). That bill was re-introduced in every Congress over the next twenty years, but never received broad support. A more targeted approach that focuses on protecting gay men and lesbians just from employment discrimination has not yet passed Congress despite the fact that 89% of Americans believe that such protection should exist. *Gay and Lesbian Rights*, Gallup, 2008, *available at* http://tinyurl.com/-278saqd. The Employment Non-Discrimination Act ("ENDA"), which would provide that protection, has been introduced in nine of the last ten Congresses. *See, e.g.*, H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong.

United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary, 108th Cong. (Jan. 27, 2004); *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before Subcomm. on the Constitution, Civil Rights & Property Rights of S. Comm. on the Judiciary,* 108th Cong. (Sept. 4, 2003).

(2011). It has been passed by the House just once (H.R. 3685, 110th Cong. (2007); 153 Cong. Rec. H13,252 (daily ed. Nov. 7, 2007) (recorded vote)), and has never passed in the Senate.

• ***Hard-fought legislative advances remain the exception, not the rule, and do not signal political power.*** It was not until 2009—more than ten years after the torture and murder of Matthew Shepherd brought sympathetic attention to the problem of anti-gay violence—that supporters of a bill that includes lesbian, gay, and transgender people in federal hate crimes legislation had sufficient votes to pass that bill. Despite congressional findings that gay men and lesbians are among the most frequent victims of reported hate crimes,[7] there still was insufficient support to ensure passage as a stand-alone measure; supporters had to attach hate crimes legislation to a must-pass defense bill. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Rider to the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, Pub. L. No. 111-84 (2009). Even then, the effort to include protections for the gay community met substantial opposition.[8]

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[7] *See* H.R. Rep. 111-86, at 9-10 (2009) ("According to 2007 FBI statistics, hate crimes based on the victim's sexual orientation ... constituted the third highest category reported—1,265 incidents, or one-sixth of all reported hate crimes.").

[8] For example, Representative Virginia Foxx stated on the House floor that characterizing Matthew Shepard's murder as a hate crime was a

Congress's "Don't Ask, Don't Tell" ("DADT") policy resulted in the discharge of more than 13,000 service men and women from the military. *See* Dep't of Defense, Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell," at 23 (Nov. 30, 2010), *available at* http://tinyurl.com/3by3olg. The policy cost the federal government between $190.5 and $363.8 million dollars in recruiting and training costs related to these discharges. *See* USA Today, *Report: 'Don't Ask, Don't Tell' costs $363M* (Feb. 14, 2006), *available at* http://tinyurl.com/3zyvztv. Yet Congress authorized the repeal of DADT in a lame-duck session just last year, and only after two federal courts had *already* declared the policy unconstitutional. *See Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010); *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008). Elimination of this discriminatory policy hardly illustrates affirmative political power, particularly given that the majority of Americans favored repeal long before it was achieved. *See* Lymari Morales, *In U.S., 67% Support Repealing "Don't Ask, Don't Tell"*, Gallup, Dec. 9, 2010, *available at* http://tinyurl.com/2abb22l (since 2005, more than 60% of Americans favored allowing gay men and lesbians to serve openly in the military).

"hoax" used to gain support for inclusive hate crimes legislation, thereby denying the legitimacy of anti-gay violence. *See* 155 Cong. Rec. H4934 (daily ed. Apr. 29, 2009) (statement of Rep. Foxx).

Limited legislative success, matched against a pervasive history of discrimination, confirms the need for a more exacting standard of review for laws that single out lesbians and gay men for unfavorable treatment. *Amici* urge the Court to confirm that sexual orientation is not a presumptively valid ground upon which to legislate and thus triggers heightened judicial review.

II. SECTION 3 IS UNCONSTITUTIONAL.

BLAG argues that DOMA is a routine "line-drawing exercise[]" that is "virtually unreviewable" by the courts. BLAG Br. 31-2. But a judicial determination that heightened scrutiny does not apply "does not leave [the disadvantaged class] entirely unprotected from invidious discrimination." *City of Cleburne*, 473 U.S. at 446.

Striving to portray DOMA as a benign definitional measure, BLAG fails to acknowledge that Congress explicitly sought through DOMA to express moral disapproval of lesbians, gay men, and their relationships; and that a clear aim and effect of the law was to disadvantage this class of citizens. *See, e.g.,* H.R. Rep. 104-664, at 15-16 (DOMA's purpose was to "honor a collective moral judgment" reflecting "moral disapproval of homosexuality"). This purpose, which was cited repeatedly in the official House Report and during floor debate, unquestionably influenced Congress's consideration of DOMA. It is also the only rationale for the law that actually finds

support in logic, as DOMA in fact accomplishes what some in Congress in 1996 regrettably sought to do: it places a stamp of disapproval on gay men, lesbians, and their families.[9]

This fact not only warrants judicial suspicion, it proves fatal to the law: "Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Lawrence*, 539 U.S. at 582; *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1972) ("a purpose to discriminate against [a politically unpopular group] cannot, in and of itself and without reference to some independent considerations in the public interest," support the constitutionality of a law). Because the blanket refusal to recognize married same-sex couples for all federal purposes does not rationally serve any independent legitimate federal interest, but only advances the illegitimate desire to disapprove and disadvantage gay and lesbian couples, Section 3 is unconstitutional.

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[9] The Court need not divine the motives of individual lawmakers or find that "legislators individually, or Congress as a whole, [was] motivated by 'animus,'" (Amicus Br. of Sen. Hatch, et al., at 7; BLAG Br. 57-8) to find DOMA unconstitutional. *See, e.g.*, *Mass. v. HHS*. 2012 WL 1948017 at *11 (clarifying that "we do not rely upon the charge the DOMA's hidden but dominant purpose was hostility to homosexuality" in finding the law unconstitutional). But neither can the Court ignore the fact that a stated purpose of this law was to express moral disapproval of a historically disfavored minority. This warrants judicial concern about impermissible discrimination and a "more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *Id.* at *6.

A. Section 3 is not the rational result of impartial lawmaking and violates our constitutional commitment to neutrality of the law where the rights of citizens are at stake.

BLAG argues that DOMA serves a legitimate federal interest in preserving "traditional marriage" (BLAG Br. 41), and simply reaffirms what Congress intended the words "marriage" or "spouse" to mean in federal law. *Id.* at 7-8. The fact that same-sex couples had been excluded in the past from marriage, and therefore from federal responsibilities and rights that hinge on marriage, cannot itself justify their continued exclusion. *See, e.g.*, *Williams v. Illinois*, 399 U.S. 235, 239-40 (1970) ("neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"). A mere desire to preserve a "traditional" (heterosexual) definition of marriage is insufficient:[10] the equal protection "commitment to the law's neutrality where the rights of persons are at stake" (*Romer v. Evans*, 517 U.S. 620, 623 (1996)) requires, instead, that there be "a correlation between the classification and either the actual purpose of the statute or a legitimate

[10] As the court noted in *Windsor*, this is particularly true in our federalist system because the states define the substance of marriage, with some states including gay and lesbian couples in their marriage laws—a fact that DOMA cannot prevent. *See Windsor v. U.S.,* 833 F. Supp. 2d 394, 403 n.3 (S.D.N.Y. 2012) ("tradition as a end in itself may not be a legitimate state interest in this case," but even if it is, DOMA does not advance this interest).

purpose that we may reasonably presume to have motivated an impartial legislature" (*U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180-82 (1980) (Stevens, J., concurring)). Section 3 fails this test.

In passing DOMA, Congress did not intend to further the purposes underlying the myriad federal laws and programs affected by it. In fact, Congress deliberately rejected suggestions that it consider whether its refusal to recognize married lesbian and gay couples would serve the policy objectives reflected in the thousand-plus federal laws that take marital status into account. *See*, *e.g.*, Markup Session, H.R. 3396, Subcomm. on the Constitution of the H. Comm. on Judiciary, at 67-68 (May 30, 1996) (statement of Rep. Frank) ("We have things here that are within the jurisdiction of the Social Security subcommittee" and "we have bankruptcy" and "there are significant responsibilities, as well as benefits involved.").

In the fifteen years since DOMA's passage, Congress has considered whether the exclusion of gay and lesbian couples serves a legitimate programmatic interest in only one specific context: the refusal to extend health and survivor benefits to the partners of federal employees. There, expert testimony established that excluding same-sex partners serves no legitimate interest but, instead, "directly undermines the Federal Government's ability to recruit and retain the nation's best workers." *The Do-*

mestic Partnership Benefits and Obligations Act of 2009: Hearing Before the Subcomm. on Federal Workforce, Postal Service, & D.C. of the Comm. on Oversight and Gov't Reform, 111th Cong. (July 8, 2009) (statement of John Berry, Dir. of U.S. Office of Personnel Mgmt.) (hereinafter "Berry Statement"), *available at* http://tinyurl.com/3r34xst.[11]

Judges similarly have concluded that excluding married gay and lesbian couples fails to serve—and affirmatively undermines—any legitimate programmatic goals. *See*, *e.g.*, *In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011). Indeed, it is impossible to believe that any legitimate federal interest is rationally served by denying federal employees like Golinski the opportunity to include their spouses on health insurance that they purchase to safeguard their families' physical and financial health and well-being. *Golinski*, 824 F. Supp. 2d at 980.

Section 3 does not serve but affirmatively undercuts the purposes underlying the laws and programs affected by DOMA. Where Congress has allocated federal burdens or benefits based on marital status, the deci-

[11] Congress has not yet remedied even the exclusion of same-sex partners, which only further demonstrates the lack of political power of this minority group. The relevant Committees in both the House and Senate reported favorably the *Domestic Partnership Benefits and Obligations Act of 2009*, H.R. 2517 and S. 1102, 111th Cong. (2009), but no further action was taken in either Chamber and this Congress has yet to revisit this issue.

sion to exclude an entire class of married citizens is not the rational result of impartial lawmaking.

B. Section 3 undermines Congress's legitimate interest in respecting state marriages as a means of ensuring the stability and welfare of American families.

Marriage is an important social and legal institution which increases the likelihood of stable relationships and thereby promotes the stability and productivity of adults, their children, and society. But Section 3 does not enhance stability or security for anyone. Six States and the District of Columbia have decided that allowing gay and lesbian couples to marry promotes the welfare of adults, children, and their States. Section 3 represents an unprecedented attempt by Congress to displace these determinations with its own policy judgments. But Congress has no legitimate federal interest in doing so.

1. "Responsible procreation and childrearing" does not justify discriminating against married gay and lesbian couples and their children.

In 1996, DOMA's supporters insisted that Congress's exclusive interest in marriage is "encouraging responsible procreation and childrearing," and that limiting federal marriage-based rights to different-sex couples is rational because of "the possibility of begetting children inherent in heterosexual unions." H.R. Rep. 104-664, at 13-14. But it is implausible that denying federal marriage-based benefits to gay and lesbian

couples who already are married, with many already raising children, rationally serves any such interest.

Section 3 does not strengthen the marriages of different-sex couples or provide any benefit to their children. The benefits of marriage are available to these families regardless of DOMA, and there is no rational connection between discriminating against lesbian and gay couples and the marital or parenting behavior of different-sex couples. Indeed, as common-sense dictates, the trends in marriage and divorce in the States that now allow same-sex couples to marry have been unaffected. *See*, *e.g.*, Laura Langbein & Mark A. Yost, *Same-Sex Marriage and Negative Externalities*, 90 Soc. Sci. Q. 292, 305-306 (June 1, 2009) ("[L]aws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women.").

BLAG mistakenly argues that rational basis review is satisfied so long as married different-sex couples benefit from federal recognition. *See* BLAG Br. 36. But Section 3 classifies married individuals in a manner that favors *some* (different-sex) and disfavors *others* (same-sex); and it does so not for the purpose of including heterosexual married couples (who qualify regardless of DOMA), but to *exclude* married same-sex couples. It is this exclusion—and the resulting harm to married same-sex couples—

that triggers equal protection concerns and that must rationally serve a legitimate federal interest, which it fails to do. *See*, *e.g.*, *Moreno*, 413 U.S. at 534 (exclusion of "unrelated" households—not the inclusion of "related"—must rationally serve a legitimate federal interest).

Nor can the harm imposed by Section 3 be justified on the ground that "opposite-sex relationships have inherent procreative aspects that can produce unplanned offspring." *See* BLAG Br. 44. Many married different-sex couples choose not to have children at all or, like many of their same-sex counterparts, plan for their children through adoption or surrogacy, insemination, egg donation, or other methods of assisted reproduction. Denying any of these married different-sex couples federal marriage-based benefits would not only be unwise as a matter of policy, it would also implicate constitutional concerns if Congress sought to do so. *See*, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the individual right to decide "whether to bear or beget a child"). Congress has never distinguished among married different-sex couples based on the desire or ability to "produce unplanned offspring"; this is not a valid distinguishing characteristic when it comes to married same-sex couples either. *See*, *e.g.*, *City of Cleburne*, 473 U.S. at 448-49.

2. Section 3 unjustifiably harms married gay and lesbian couples and their children, undermining Congress's legitimate interest in respecting state-sanctioned marriages.

Marriage encourages stable family relationships, fosters economic interdependence and security for all household members, and can enhance the financial and emotional wellbeing both of the adult partners and any children they may have. Through their marriage laws, States create legally enforceable obligations of adults to each other and their dependents, thus promoting economic and social stability that benefits particular individuals and society as a whole. *See*, *e.g.*, Charlotte A. Schoenborn, *Marital Status and Health: United States*, *1999-2002*, Advance Data From Vital and Health Statistics Report 351 (Dec. 15, 2004), *available at* http://tinyurl.com/pfj75; Michael A. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 301-304 (2001).

A litany of federal laws and programs use marital status to allocate responsibilities and rights to married adults, regardless of whether they have children,[12] confirming that Congress has a legitimate interest in res-

[12] Social Security spousal survivor benefits, 42 U.S.C. § 7385s-3(d)(1), and joint tax filing status, 26 U.S.C. § 6013, for example, are not limited to spouses who have procreated. The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq*., recognizes that spouses care for one another during times of illness, whether they have children or not; similarly, the Federal Employee Compensation Act ("FECA"), 5 U.S.C. §§ 8101 *et seq*., acknowledges the financial interdependence of spouses, regardless of

pecting state marriages as a means of fostering stability and security for spouses, as well as any children they may have. Section 3 clearly undermines this legitimate interest in marriage as a means of ensuring economic and health security for adults.

Section 3 also undermines legitimate child welfare interests by denying the children of married gay and lesbian couples "the immeasurable advantages that flow from the assurance of a stable family structure when afforded equal recognition under federal law." *Gill*, 699 F. Supp. 2d at 389 (internal quotation marks omitted). Section 3 deprives these children of financial benefits that otherwise would accrue to their families, including, for example, more favorable tax treatment or the ability to include all family members on a family health insurance plan. *See Massachusetts v. HHS*. 2012 WL 1948017, at *1 ("adverse consequences" of DOMA include "prevent[ing] same-sex married couples from filing joint federal tax returns ... prevent[ing] the surviving spouse of a same-sex marriage from collecting Social Security ... leave[ing] federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses."). Children also suffer from harmful social stigma when the government

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the presence of children of the marriage, and provides spousal survivorship benefits if a federal employee is killed on the job. And the bankruptcy code permits an individual debtor and "such individual's spouse" to file a joint bankruptcy petition whether or not the couple has children. *See* 11 U.S.C. § 302(a).

treats their families as illegitimate and undesirable. *See*, *e.g.*, Amicus Curiae Br. of Am. Psychoanalytic Ass'n et al., *Jackson v. D.C. Bd. of Elections & Ethics*, No. 10-CV-20, at 20 (D.C., filed Mar. 26, 2010).

Lesbians and gay men are raising children; DOMA cannot and does not prevent that.[13] Congress should maximize the stability and security of these children, just as it does for children of married different-sex couples, by recognizing and respecting their parents' lawful marriages.

C. DOMA undercuts Congress's legitimate interest in respecting state sovereignty.

Because no State had yet included gay and lesbian couples in its marriage laws, Congress in 1996 was not confronted with just how disruptive it would be for the federal government to override state marriage determinations. Now, however, six States—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont—and the District of Columbia allow same-sex couples to marry.[14] DOMA plainly interferes with

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[13] The leading national associations of psychological, psychiatric, and marriage/family therapy professions confirm that "lesbian and gay parents are as fit and capable as heterosexual parents, and their children are as psychologically healthy and well-adjusted as children reared by heterosexual parents." Amicus Br. of Am. Psychological Ass'n et al. at 20, *Perry v. Brown*, 639 F.3d 1153 (9th Cir. 2011) (No. 10-16696), 2010 WL 462257.

[14] The New York legislature voted in June 2011 to allow gay and lesbian couples to marry. *See* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. Times, June 24, 2011, at A1. The District of Columbia, New Hampshire, and Vermont passed enabling legislation in 2009. *See* N.H. Rev. Stat. Ann.

the ability of these States to ensure equal treatment for all of their married citizens and to carry out their laws fully. *See Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 248 (D. Mass. 2010); Plaintiff-Appellee Br. 2.

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

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

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§ 457:46 (2009); Vt. Stat. Ann. tit. 15, § 8 (2009); Wendy R. Ginsberg, Cong. Research Serv., *Federal Employee Benefits and Same-Sex Partnerships* 1 n.2 (2011). The state supreme courts in Connecticut, Iowa, and Massachusetts ruled that their constitutions require those states to marry gay and lesbian couples. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Connecticut legislature later codified that ruling (*see An Act Implementing The Guarantee of Equal Protection Under The Constitution of The State for Same Sex Couples*, S.B. 899, Jan. 2009 Leg. (Conn. 2009)), and the Massachusetts legislature voted overwhelmingly to defeat a proposed constitutional amendment that would have disallowed marriage for same-sex couples (*see* Pam Belluck, *Mass. Rejects Bill to Eliminate Gay Marriage*, N.Y. Times, Sept. 15, 2005).

Bob Barr, *No Defending the Defense of Marriage Act*, LA Times, Jan. 5, 2009.

As Mr. Barr's statement acknowledges, DOMA's intrusion into a matter that Congress previously had left to the States contradicts core values of federalism by conditioning federal respect on a State's agreement with Congress. In this light, DOMA is more naturally explained by a desire to preclude marriage between same-sex couples than by any genuine interest in protecting state sovereignty.

D. Congress's interest in conserving resources—an interest likely undercut by DOMA—cannot come at the cost of equal protection.

"[P]reserving scarce government resources" was also advanced as justification for DOMA. H.R. Rep. 104-664, at 18. But "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. J. & R. Doe*, 457 U.S. 202, 227 (1982). Even apart from that, the government's own analyses demonstrate that DOMA does *not* preserve governmental resources.

When considering the bill in 1996, Congress sought no information about DOMA's actual effects on federal programs or the budget. Just one paragraph in the House Report is devoted to the topic, and it incorrectly presumes that providing federal benefits to same-sex spouses would "cost the federal government money." H.R. Rep. 104-664, at 18. In fact, it was

not until nearly six months following DOMA's enactment that the General Accounting Office even produced a list of the provisions affected by DOMA—identifying 1,049 laws. *See* U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16, at 2 (Jan. 31, 1997), *available at* http://tinyurl.com/4rj2s.[15] A 2004 follow-up GAO report requested by Senate Majority Leader Bill Frist revised that number upward, to a total of 1,138 federal laws. Letter from Dayna K. Shah, GAO Assoc. General Counsel, to Hon. Bill Frist, Senate Majority Leader (Jan. 23, 2004), *available at* http://tinyurl.com/2l5t6v.

Had Congress elected to obtain this information before it passed DOMA, it might have recognized what the Congressional Budget Office has since made clear: that federal recognition of married gay and lesbian couples would not cost the federal government *any* money, and likely would *improve* the federal balance sheet. U.S. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*,

[15] A footnote in the House Report referred to a "partial list of federal government programs that might be affected by state recognition of same-sex 'marriage'" prepared by the Congressional Research Service at the request of Representative Tom DeLay, but noted that the Committee did not "undertake[] an exhaustive examination of those benefits." H.R. Rep. No. 104-664, at 18 & n.60.

June 21, 2004, *available at* http://tinyurl.com/5gfwbf.[16] Other studies project similar net-positive effects on state budgets.[17]

Even if one focuses on a specific program where equal treatment of same-sex partners might seem to impose some financial costs, those costs are minimal and far outweighed by other benefits. The Director of the U.S. Office of Personnel Management, for example, testified before Congress in favor of extending benefits to federal employees' same-sex partners. He explained that the cost of adding health insurance and survivor benefits for federal workers and federal retirees would be "negligible"—about $56 million in 2010, or about 0.2% of the entire cost of federal employee health insurance. By contrast, the current policy "directly undermines the Feder-

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[16] BLAG dismisses this report as "implausible," BLAG Br. 44, n.12, but Congress has long relied on CBO to prepare cost estimates of legislation and other economic and budgetary analyses. *See*, *e.g.*, 2 U.S.C. § 653 (requiring CBO cost estimates for bills); House Manual § 840, Rule XIII, cl. 3(c)(3) (112th Cong.) (requiring CBO estimates in committee reports).

[17] One study found that allowing same-sex couples to marry in California would benefit the state budget. M.V. Lee Badgett & R. Bradley Sears, *Putting A Price on Equality? The Impact of Same-Sex Marriage on California's Budget*, 16 Stan. L. & Pol'y Rev. 197 (2005). Another study concluded that Connecticut would save between $3 million and $13 million per year if same-sex couples could marry. M. V. Lee Badgett et al., *Counting on Couples: Fiscal Savings from Allowing Same-Sex Couples To Marry in Connecticut*, The Williams Institute (Mar. 2005), *available at* http://tinyurl.com/3layzh9. A third study found that New Jersey could save over $55 million annually if gay couples were permitted to marry. R. Bradley Sears & Suzanne Goldberg, *Supporting Families, Saving Funds: A Fiscal Analysis Of New Jersey's Family Equality Act*, The Williams Institute (Nov. 2003), *available at* http://tinyurl.com/3kutbuk.

al Government's ability to recruit and retain the nation's best workers." *See Berry Statement*.

Of course, the inability to include one's legal spouse on family health insurance also creates the risk that a spouse will be uninsured or underinsured, which harms the physical and financial health of families and the Nation. *See Gill*, No. 1:09-cv-10309, Dkts. 29-43, 45.

E. The reasons invented in response to litigation also do not justify Section 3.

Going beyond the reasons cited in the official House report, BLAG contends that DOMA is justified by a federal interest in promoting "uniformity" in eligibility for federal benefits. BLAG Br. 33. But disunity in state marriage laws and any corresponding inconsistency or uncertainty in the administration of federal marriage-based benefits were not new phenomena in 1996, nor do they provide a credible or legitimate justification for Section 3.

Marriage eligibility rules have varied significantly from State-to-State over the years, with important differences—including age and consanguinity restrictions and the fact that some jurisdictions now allow same-sex couples to marry—continuing to this day. BLAG asserts that marriage of gay and lesbian couples poses new challenges because these couples may not be recognized as married in a State where they reside.

Senate amici echo this concern, arguing that the alleged risk of "marriage tourism" (where a couple would travel to Hawaii, marry, and seek recognition after returning to a home state whose marriage law does not include same-sex couples) presented an unprecedented degree of uncertainty because of the potential number of couples involved and that this justifies Section 3. Amicus Br. of Sen. Hatch, et al. 27.

To deal with differences among state marriage laws that have always existed by virtue of the fact that each State sets its own marriage rules, however, the federal government has always used choice-of-law rules to determine marital status for purposes of federal law. For example, during a time when some States imposed race-based restrictions in their marriage laws, the federal government used choice-of-law rules to accommodate differing state marriage policies and determine marital status for purposes of federal law. *See* 20 C.F.R. § 404.1101 (Supp. 1952). Congress also refused to step in to address the uncertainty created by "migratory divorce"; instead, it continued to defer to state marital determinations despite the large number of opposite-sex couples whose marital status needed to be determined for purposes of state and federal law through application of even-handed choice-of-law rules. *See* Amicus Br. Fam. Law Profs. 7, *Massachusetts v. HHS*, (1st Cir. No. 10-224), 2012 WL 1948017. Congress departed from this practice for the first and only time when it

enacted DOMA, and a new-found interest in "uniformity" or "certainty" that has been applied only to same-sex couples is "wholly unconvincing" for purposes of the equal protection analysis of a law that burdens an historically disfavored minority. *Cleburne*, 473 U.S. at 455 (Stevens, J., concurring and citing majority opinion at 447-50).

The benefits at issue are marriage-based, making marital status—not the sexual orientation of spouses—the relevant distinguishing characteristic. *Gill*, 699 F. Supp. 2d at 394-95. BLAG's rationale substitutes a desire to treat all gay men and lesbians (whether married or not) alike and less favorably over Congress's obligation to treat similarly situated parties alike. Married same-sex and different-sex couples are similarly situated with regard to federal marriage-based benefits, and the Constitution requires Congress to treat them with equal regard.

CONCLUSION

Prior to DOMA, Congress achieved its legitimate federal interests in promoting the welfare of American families by working cooperatively with the States and respecting state marriage determinations. Congress's radical departure from that federalist practice was a mistake; because Section 3 violates the Fifth Amendment's equal protection guarantee, it is also unconstitutional. The decision below should be affirmed.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *amici* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,973 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Michael B. Kimberly*
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July 10, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of July, 2012, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system, which will send electronic notice of such filing to all participants in the case.

/s/ *Michael B. Kimberly*
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July 10, 2012