No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF ON THE MERITS OF *AMICI CURIAE* UNITED STATES SENATORS ORRIN G. HATCH, SAXBY CHAMBLISS, DAN COATS, THAD COCHRAN, MIKE CRAPO, CHARLES GRASSLEY, LINDSEY GRAHAM, MITCH McCONNELL, RICHARD SHELBY AND ROGER WICKER IN SUPPORT OF RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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January 29, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTERESTS OF *AMICI CURIAE*[1]

Amici Orrin G. Hatch, Saxby Chambliss, Dan Coats, Thad Cochran, Mike Crapo, Charles Grassley, Lindsey Graham, Mitch McConnell, Richard Shelby and Roger Wicker are sitting United States Senators who served in the 104th Congress House or Senate and voted for passage of the Defense of Marriage Act (DOMA) in 1996. As such, they have an interest in the constitutionality of Section 3 of DOMA, which defines the terms "marriage" and "spouse" for purposes of federal law, and in informing the Court of the important government interests that it was enacted to serve.

One of the Amici, Senator Orrin G. Hatch, chaired the Senate Judiciary Committee, which had jurisdiction over the DOMA legislation. In considering DOMA in 1996, the committee heard from witnesses regarding the potential recognition of same-sex marriage by the highest court in the State of Hawaii and the impact that this would have on federal law. The committee also heard testimony from constitutional scholars supporting the constitutionality of DOMA,[2] and Senator Hatch received written assur-

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[1] Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than Amici and their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] Two witnesses, Professor Lynn D. Wardle and Mr. David Zweibel, testified that Section 3 of DOMA, which is at issue in this case, was clearly within Congress's constitutional power. *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 37-39, 54 (1996) ("Senate Hearing"). Another witness, Professor Cass R. Sunstein, testified in opposition to DOMA; however, Professor Sunstein's

ance from the Department of Justice that it saw no constitutional infirmity in the statute.[3]

Amici are particularly concerned that the Department of Justice, having repeatedly assured Congress of DOMA's constitutionality during the legislative process, now seeks to have the law judicially invalidated. If the Department believed that there was an inadequate federal interest to justify DOMA, the time to speak was in 1996, when Congress gave careful consideration to the need for DOMA. Rather than urging the courts to give appropriate deference to an Act of Congress, as befits its proper role in our system of government, the Department now groundlessly impugns the motives of the overwhelming bipartisan majority that supported DOMA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A. Passage of DOMA. DOMA was enacted in 1996 after passing each house of Congress with more than 80% of the votes in favor, an overwhelming and bipartisan majority.[4] President Clinton signed DOMA into law on September 21, 1996. 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

The enactment of DOMA was in large part a direct legislative response to *Baehr v. Lewin*,[5] a 1993 deci-

testimony related solely to Section 2, and he noted that he did not believe that Section 3 was unconstitutional. *Id.* at 44 n.1.

[3] Senate Hearing at 2.

[4] The House approved the bill by a vote of 342-67, while the Senate passed it by a vote of 85-14. 142 Cong. Rec. 17094, 22467 (1996).

[5] 852 P.2d 44 (Haw. 1993).

sion of the Hawaii Supreme Court. The *Baehr* decision had found that denials of marriage licenses to same-sex couples were subject to strict scrutiny under the Hawaii Constitution, and it had remanded the case to the lower courts to determine whether the state could meet that burden. At the time Congress considered DOMA, it appeared that the Hawaii courts were "on the verge of requiring that State to issue marriage licenses to same-sex couples." H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("House Report").

Congress's concern was not with Hawaii's marriage laws. *See* House Report at 5 (House Judiciary Committee "expresses no opinion on the propriety of the ruling in *Baehr*"). Instead, Congress was concerned with the impact that recognition of same-sex marriage in one or more states would have on other states and on the federal government. House Report at 6-7. The likely effects were explored in hearings held before the House and Senate Judiciary Committees, which showed (1) *Baehr* was merely one facet of an organized litigation strategy designed to secure nationwide recognition of same-sex marriage;[6] and (2)

[6] At a May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution, a 23-page memorandum from the Lambda Legal Defense and Education Fund, Inc. (LLDEF) was placed into the record. This memorandum laid out a strategy for using the expected legal victory in Hawaii to obtain recognition of same-sex marriages in other states and by the federal government:

> Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions. Despite a powerful

legal experts, both for and against DOMA, agreed that recognition of same-sex marriage in one or more states would likely have unpredictable and inconsistent legal impacts on other states and the federal government.[7] Indeed, same-sex marriage ad-

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> cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states *and the federal government*, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?
>
> We at Lambda believe that the correct answer to these questions is "Yes."

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 15 (1996) ("House Hearing") (emphasis added).

[7] For example, Professor Michael W. McConnell of the University of Chicago Law School opined that it was "not unlikely" that couples who entered into same-sex marriages in Hawaii would be entitled to legal recognition in other states under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, although he allowed that it was "not certain" and "[i]t is possible that states with laws against same-sex unions will be able to resist recognition of these marriages under the so-called 'public-policy' exception." Senate Hearing at 57. Professor Cass R. Sunstein, also of the University of Chicago Law School, thought it was "unlikely" that the Full Faith and Credit Clause would require the recognition of out-of-state marriages, but he acknowledged that it was not clear how this "traditional view" could be squared with the language of the clause. *Id.* at 44-45. All legal experts agreed that if the public policy exception applied, it would mean varying results in different states.

As Professor Lynn D. Wardle of Brigham Young University, an expert in family law, testified: "[T]his is the kind of issue that is best resolved before the cases arise. Waiting until after some state legalizes same-sex marriage and a flood of cases are filed demanding that same-sex unions formed in such as state

vocates hoped to use the "legal and practical nightmare" created by this situation to generate pressure for uniform nationwide recognition of same-sex marriages. *See* House Hearing at 19. The House Judiciary Committee thus "described *Baehr* as part of an 'orchestrated legal assault being waged against traditional heterosexual marriage.'" Supp. App. 37a (quoting House Report at 2-3).

To address these problems, DOMA has two simple provisions. Section 2, 28 U.S.C. § 1738C, provides a uniform national rule under which states may, but are not required to, recognize same-sex marriages entered into in other states. Section 3, which is at issue in this case, defines, for purposes of federal law, the terms "marriage" as "mean[ing] only a legal union between one man and one woman as husband and wife" and "spouse" as referring "only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7.

By adopting Section 3, Congress sought to avoid the federal government having to litigate, on a statute by statute and state by state basis, whether (a) federal law provided benefits for same-sex marriages that were valid under state law and if so, (b) the particular marriage in question was valid under state law. As Professor Lynn Wardle testified before the Senate Judiciary Committee, "Section 3 eliminates what could be a lot of very messy and

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be treated as 'marriages' for purposes of federal laws would be very unwise. It would invite a multitude of unnecessary litigation, and create confusion, inconsistency, and unfairness. Different courts in different districts and circuits might reach contradictory conclusions adding to the uncertainty." *Id.* at 33-34.

costly litigation for the federal government." Senate Hearing at 34.

B. The Windsor Litigation. Respondent Edith Windsor and Thea Clara Spyer were issued a certificate of marriage in Canada in 2007. Ms. Windsor resided in New York at the time of Ms. Spyer's death in 2009. In 2010, she commenced this action against the United States, claiming Section 3 of DOMA unconstitutionally denied her the benefit of the marital estate tax deduction, 26 U.S.C. § 2056(a). *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), reproduced in the Appendix to the Supplemental Brief for the United States ("Supp. App.") at 1a-2a.

The United States defended the case until February 23, 2011, when Attorney General Holder informed Congress, pursuant to 28 U.S.C. § 530D,[8] the Department of Justice would no longer defend the constitutionality of DOMA. *See* Letter from the Hon. Eric H. Holder to the Hon. John A. Boehner (Feb. 23, 2011), reproduced in the Joint Appendix ("J.A.") at 183. Among the reasons assigned by the Attorney General for this abrupt and "unprecedented," Supp. App. 36a, change of position was the claim that DOMA's legislative record "contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family

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[8] This statute requires the Attorney General to provide notice to designated congressional officials, including the Senate and House leadership, the chairs and ranking members of the Senate and House Judiciary Committees, the Senate Legal Counsel and the General Counsel of the House, when the Department of Justice refuses to defend the constitutionality of a federal statute.

relationships – precisely the kind of stereotype- based thinking and animus the Equal Protection Clause is designed to guard against." J.A.191.

Following the Attorney General's announcement, the Department of Justice "switch[ed] sides to advocate that the statute be ruled unconstitutional" in *Windsor*. Supp. App. 4a. The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") intervened to conduct the defense of the statute.

The district court granted summary judgment in favor of Ms. Windsor, holding that Section 3 of DOMA violated equal protection because it was supported by no "rational basis." Supp. App. 3a. On appeal, the Second Circuit affirmed. The panel first held that Ms. Windsor had standing because it predicted that New York courts would recognize her Canadian marriage in 2009, although New York itself did not license same-sex marriages until 2011. *Id.* at 7a.

On the merits, a majority of the Second Circuit panel declined to consider whether Section 3 of DOMA satisfies rational basis review. *Id*. at 14a. Instead, it applied intermediate scrutiny and found Section 3 unconstitutional because BLAG could not offer "an exceedingly persuasive justification" for it. *Id*. at 26a. Dissenting on the merits, Judge Straub found that rational basis review should be applied and that Section 3 satisfied this standard for at least two reasons: (1) it promotes traditional marriage, which furthers a legitimate government interest in encouraging responsible procreation and childrearing and (2) it promotes the federal interest in preserving the uniformity of federal law and maintaining the

status quo with respect to the definition of marriage. Supp. App. 76a-77a.

C. Amici's Argument. In this brief Amici explain a number of significant federal interests underlying DOMA. Although there are important interests served by DOMA, such as preserving the connection between marriage and procreation, which also underlie the decision of states to preserve the traditional definition of marriage as between one man and one woman, our focus here is on specifically federal interests that were considered and explained throughout DOMA's legislative history, but were ignored, misunderstood, or summarily dismissed below:

- Pre-DOMA federal law did not recognize same-sex marriages. Rather than dramatically changing federal law, as the Second Circuit majority assumed, Section 3 merely clarified and re-affirmed the existing federal definition of marriage. It is apparent, for example, that the pre-DOMA marital estate tax deduction at issue in this case did not apply to same-sex couples.

- Section 3 of DOMA promotes a significant government interest in uniformity and certainty in the application of federal law. As the legislative history of DOMA amply substantiates, efforts to obtain judicial recognition of same-sex marriage at the state level, as was occurring in Hawaii at the time, posed a unique and unprecedented threat to the stability and uniformity of federal law. In enacting DOMA, Congress responded to this challenge by preserving the status quo with

respect to non-recognition of same-sex marriage at the federal level, thereby averting state by state and statute by statute litigation seeking federal benefits, and the likelihood of inconsistent and unfair results.

- By taking away the incentive of federal benefits, Congress protected the ability of states to preserve traditional marriage. Section 2 of DOMA recognizes the authority of each state to decide for itself whether to recognize same-sex marriage. If federal benefits were available for same-sex couples validly married under state law, however, federal law would serve as an incentive for state recognition of same-sex marriage, either by legislative or judicial action. By re-affirming that the federal definition of marriage does not include same-sex unions, Section 3 ensured that federal benefits will not be used to undermine traditional marriage at the state level.

In addition, Amici respond to the argument that DOMA violates equal protection because it was allegedly motivated by unconstitutional "animus." Notwithstanding the Attorney General's belated discovery of DOMA's allegedly unconstitutional motivation, this argument is flawed because legislative motivation is not a basis for setting aside a federal statute supported by legitimate and rational government interests. This Court's precedents do not support evaluating the constitutionality of a federal statute based on subjective characterizations of the motives of individual legislators. In any event, support for traditional marriage cannot be equated to "animus," as Justice O'Connor observed in her con-

currence in *Lawrence v. Texas*, 539 U.S. 558, 585 (2003). It would be particularly inappropriate to invalidate DOMA based on the alleged motivations of individual supporters, given that the statute was passed with overwhelming bipartisan support and signed into law by President Clinton.

Amici therefore respectfully urge this Court to reverse the judgment of the court below, and uphold the constitutionality of Section 3 of DOMA.

ARGUMENT

I. Ample Federal Interests Supported the Enactment of DOMA

The Second Circuit rejected all of the proffered justifications for DOMA, finding that BLAG failed to meet the burden of establishing an "exceedingly persuasive" rationale for the law.[9] Supp. App. 26a. The court's conclusion was based in part on the following premises: (1) that pre-DOMA federal law recognized same-sex marriages for purposes of federal benefits to the extent such marriages were valid under state law; (2) that Congress had no substantial interest in promoting uniformity in the application of federal law; and (3) that there was no connection between

[9] The Second Circuit applied intermediate scrutiny as the standard of review, implicitly conceding that it would be difficult to justify striking down DOMA under a rational basis standard. Supp. App. 14a (court "decline[s] to take issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review"). Although Amici strongly believe that rational basis is the appropriate standard of review, we address here the interests advanced by DOMA, rather than the standard of review to be applied.

Section 3 of DOMA and Congress's interest in preserving a traditional definition of marriage. As discussed below, each of these premises is demonstrably incorrect.

(A). Pre-DOMA federal law did not recognize same-sex marriages. The court below asserted that "Windsor was denied the benefit of the spousal deduction * * * solely because [of] Section 3 of the Defense of Marriage Act * * *." Supp. App. 2a. The logical implication of this assertion is that absent the passage of DOMA, Windsor would have been entitled to claim the spousal deduction. The court, however, makes virtually no effort to substantiate this proposition.

As of the enactment of DOMA, there were 1,049 federal statutory provisions in which benefits, rights and privileges were contingent on marital status or in which marital status was a factor.[10] When these provisions were enacted, same-sex marriage was not recognized in any state, and Congress clearly did not contemplate that the term "marriage" in these statutes would encompass same-sex unions. As the dissent below observed, "[t]he history of federal legislation in respect of the meaning of marriage or spouse was never even suggested to mean anything other than the lawful union of one man and woman for all federal purposes." Supp. App. 34a.

The legislative history of DOMA makes clear Congress's understanding that Section 3 merely clarified and restated the *existing* definition of "marriage" in federal law in response to the fact that the Hawaiian courts were on the verge of recognizing a right to

[10] *See* U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act 1 (Jan. 23, 2004).

same-sex marriage under that state's constitution. *See* House Report at 10 ("Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married."); *id*. ("[T]he Committee believes that it can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples"); 142 Cong. Rec. 22446 (1996) (Sen. Byrd) ("We are not overturning the status quo in any way, shape or form. On the contrary, all this bill does is reaffirm for purposes of Federal law what is already understood by everyone."); *id*. at 23186 (Sen. Dorgan) ("For thousands of years, marriage has been an institution that represents a man and a woman, and I do not support changing the definition of marriage or altering its meaning."); *id*. at 16796 (Rep. McInnis) ("If we look at any definition, whether its Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as [a] union between a man and woman * * *."); id. at 17076 (Rep. Canady) ("all we are doing * * * is reaffirming what everyone has always understood by marriage, what everyone has always understood by the term 'spouse'").

Congress's understanding of pre-DOMA law was entirely reasonable and supported both by judicial authority[11] and by expert testimony received during

[11] *See Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982) (holding, for purposes of federal immigration laws applying to the "spouse" of a U.S. citizen, that a same-sex marriage, even though allegedly valid under state law, would not be a "marriage" within the meaning of federal law); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter

the legislative process.[12] No evidence has been advanced to suggest that the terms "marriage" or "spouse" encompassed same-sex unions before DOMA was enacted, either as a matter of ordinary language or as a matter of technical statutory usage.

That pre-DOMA federal law embraces the traditional understanding of "marriage" can be seen plainly by looking at the language of particular statutes.[13] Most significantly for the present case, it is apparent that a "surviving spouse" entitled to a deduction for federal estate taxes under 26 U.S.C. § 2056(a) is the survivor of the "husband and wife" entitled to file a joint tax return under 26 U.S.C.

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of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes"), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (For purposes of District of Columbia's marriage statute, "'marriage' is limited to opposite-sex couples."); *see also Murphy v. Ramsey*, 114 U.S. 15, 44 (1885) (referring to the "idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony [as] the sure foundation of all that is stable and noble in our civilization").

[12] Professor Wardle testified before the Senate Judiciary Committee: "[I]f some state legalizes same-sex marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely the essential fungibility of the concepts of 'marriage' from one state to another. Section 3 clarifies the premise upon which two centuries of federal legislation using marriage terms has been predicated." Senate Hearing at 27 n.4.

[13] *See, e.g.*, 42 U.S.C. § 416(b) (For Social Security Act a "'wife' means the wife of an individual, but only if she * * * is the mother of *his* son or daughter [or] was married to *him* * * *") (emphasis added); 38 U.S.C. § 101(31) (For purposes of veteran's benefits, "'spouse' means a person of the opposite sex").

§ 6013.[14] The legislative history of the marital estate tax deduction likewise confirms that the deduction was understood to apply to the surviving spouse of a marriage consisting of one man and one woman.[15] This was entirely consistent with the ordinary meaning of the word "marriage" at all relevant times.[16]

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[14] For example, in *Eccles v. Comm'r*, 19 T.C. 1049, 1053-054, *aff'd*, 208 F.2d 796 (4th Cir. 1953), *nonacq. withdrawn,, acq.* 1957-2 C.B. 3 (1957), a case cited by the Second Circuit, see Supp. App. 5a, the Tax Court noted the "inconsistency" that would arise if the determination of whether a couple was "husband and wife" for purposes of filing joint tax returns were different than the determination of whether they were married for purposes of taking the marital estate tax deduction.

[15] *See, e.g.*, Staff of Joint Comm. On Taxation, 97th Cong., Background and Description of Administration Proposal Relating to Estate and Gift Taxes 32 (Joint Comm. Print 1981) ("Proponents of increased marital deductions argue that there should be no tax imposed on transfers between spouses since a husband and wife should be treated as a single economic unit for estate and gift tax purposes, as they generally are for income tax purposes"); Revenue Act of 1948, S. Rep. No. 80-1013, at 27 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1189 ("S. Rep. No. 80-1013") ("The most obvious instance of the failure to attain equalization results from the use of life tenancies in the common-law States. In this situation the husband transfers or bequeaths to his wife a life estate, with remainder over to the children. At his death the whole of the estate is taxed, but at the wife's death there is no tax on the cessation of her life estate. On the other hand in a community-property State, the husband may not by his will dispose of his wife's interest in community property.").

[16] For example, at the time of the Economic Recovery Tax Act of 1981, which established the current unlimited marital estate tax deduction, Black's Law Dictionary defined "Marriage" as "Legal union of one man and one woman as husband and wife." Black's Law Dictionary 876 (5th ed. 1979); *see also* Webster's Third New International Dictionary 1384 (1976) ("The state of

Without directly addressing the understanding of pre-DOMA law articulated by Congress and by the dissent, or even considering the pre-DOMA meaning of the marital estate tax deduction, the majority below simply assumed that federal law would automatically recognize any marriage valid under state law. The explanation for this assumption apparently lies in the following sentence from the court's opinion: "To the extent that there has ever been 'uniform' or 'consistent' rule [sic] in federal law concerning marriage, it is that marriage is 'a virtually exclusive province of the States.'" Supp. App. 25a (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

There is a logical chasm between this general assertion and the conclusion that federal law uses the term "marriage" as an empty vessel into which the states can pour any relationship they please. The latter is not, and never has been, true. If it were the case, it would be irrational for Congress to condition any benefits on the existence of a marital relationship because one state's definition of marriage might be completely distinct from another's. Accordingly, interpreting the term "marriage" (and related terms) in federal law requires *some* understanding of the meaning of that term apart from state law.[17]

The evidence discussed above strongly suggests that Congress was correct in concluding that the pre-DOMA federal definition of "marriage" did not extend to same-sex unions. To be sure, it may be impossible

being united to a person of the opposite sex as husband or wife"); The American Heritage Dictionary 768 (2d ed. 1985) ("The legal union of a man and woman as husband and wife").

[17] *See supra*, note 12.

to answer with certainty the question of how courts would have interpreted every federal statute in the absence of DOMA, given that no state had recognized same-sex marriage at the time of DOMA's enactment. But avoiding such uncertainty is one of the reasons that Congress was fully justified in enacting Section 3 of DOMA.

(B). Section 3 of DOMA promotes a significant government interest in uniformity and certainty in the application of federal law. As the Second Circuit recognized, the legislative history of DOMA reflects that Section 3 was designed in significant part to ensure uniformity of eligibility for federal benefits among the states. Supp. App. 24a-25a & n.5. For example, Senator Ashcroft explained that "unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996).

The pendency of the *Baehr* litigation in Hawaii confronted Congress with the realistic possibility, for the first time, that same-sex couples would seek federal benefits on the ground that they were married under state law. Indeed, the uncontradicted evidence presented to Congress demonstrated that organized litigants such as LLDEF planned to use the recognition of same-sex marriage in a single state, such as Hawaii, as a means of obtaining federal benefits for same-sex couples nationwide. House Hearing at 15. This would be accomplished by out-of-state couples traveling to Hawaii, getting married and returning to their home states, where they would

seek to be considered as "married" for purposes of both state and federal law.

Absent DOMA, the outcome of these cases would depend on (1) whether a court construed the particular federal statute to authorize benefits for same-sex couples married under state law and (2) whether the court determined that the couple in question *was* married under state law. Assuming that the court answered the first question in the affirmative (contrary to congressional intent), it would face the second.

If there was one thing upon which all of the legal experts who testified before Congress agreed, it was that determining whether State A would recognize a same-sex marriage performed in State B would be a difficult, uncertain and unpredictable task. *See supra* note 7. It would in all likelihood depend on whether State A had a "strong public policy" against same-sex marriages, which in turn would depend on a variety of factors that might differ from state to state. There was a virtual certainty of varying and inconsistent results, which would only multiply if both state and federal courts were simultaneously ruling on the issues. Results would likely vary among and within states, among judges and court systems, between types of jurisdictions and laws (state or federal) and among different statutory schemes.

It was not only opponents of same-sex marriage who recognized the chaotic and inequitable situation that would result. In a memorandum entered into the record during a May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution, LLDEF described how state-by-state adjudication of

these issues would give rise to a "legal and practical nightmare" that would create enormous pressure for a uniform national solution. House Hearing at 19. By enacting DOMA, Congress sought to mitigate this national confusion by clarifying the definition of marriage for purposes of federal law, while preserving the authority of states to make determinations with regard to their own laws. By preserving the status quo (non-recognition of same-sex marriage) with respect to federal benefits, Congress reduced the incentives for "marriage tourism," forestalled the use of federal courts for LLDEF's litigation strategy, and averted the "legal and practical nightmare" that would result from disparate treatment of similarly situated same-sex couples for purposes of federal law.

The Second Circuit described Congress's interest in uniform treatment as "suspicious" because Congress has normally deferred to state law with regard to the determination of marriage and other domestic relations issues. Supp. App. 24a. The court's view is flawed for several reasons. First, it fails to distinguish between incorporating state law with respect to the legality of a particular relationship, and deferring to state law with respect to the ordinary meaning of a term used in federal law. The ordinary meaning of the term "marriage," when DOMA was enacted and before, was the "[l]egal union of one man and one woman as husband and wife." *See supra* note 16. The fact that Congress normally looks to state law to determine whether a particular union of a man and a woman is "legal" does not mean that it looks to state

law to determine whether "marriage" means "one man and one woman" in the first place.[18]

Second, the touchstone for interpretation of federal statutes is congressional intent, not state law. As this Court explained in *Lyeth v. Hoey*:

> In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted "so as to give a uniform application to a nationwide scheme of taxation." Congress establishes its own criteria and the state law may control only when the federal taxing act, by express language or necessary implication, makes its operation dependent upon state law.

305 U.S. 188, 194 (1938) (quoting *Burnet v. Harmel*, 287 U.S. 103, 110 (1932) (internal citation omitted)).

As the *Lyeth* Court suggests, there is nothing novel or unprecedented about Congress preferring uniformity to deference to state law. Indeed, the original purpose of the marital estate tax deduction, adopted in the Revenue Act of 1948, was to equalize treatment of married couples in common law and community property states. *See* Revenue Act of 1948,

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[18] This distinguishes the case of same-sex marriage from other examples pointed to by the court of appeals, such as minimum age and consanguinity. Supp. App. 25a.The latter involve only the question of whether a relationship that otherwise falls within the ordinary meaning of "marriage" constitutes a "legal union."

Pub. L. No. 80-471, 62 Stat. 110 (1948). As the Senate Committee on Finance explained, the differences between marital property rights in these types of states "resulted in geographic inequalities in the effect of the estate and gift taxes." S. Rep. No. 80-1013, at 26. While the surviving spouse in a community property state escaped taxation on one-half of the community property, the surviving spouse in a common law property state generally was taxed on the full amount of the estate. The Revenue Act of 1948 provided a marital deduction up to one-half the value of the common law (but not community) property, thereby ensuring that differences in state law would not result in radically different federal law treatment of similarly-situated spouses.

Finally, in dismissing Congress's interest in preserving the stability and uniformity of federal law, the Second Circuit failed to take into account the unique circumstances addressed by DOMA. Congress was faced with an organized and unprecedented effort to redefine marriage in a manner, as the court acknowledged, "unknown to history and tradition." Supp. App. 31a. This situation was not comparable in any way to the minor variations among states with respect to age or consanguinity. Moreover, the court's assertion, Supp. App. 26a, that it would have been "simpler" for Congress to have asked "whether a couple was married under the law of the state of domicile," rather than maintain a uniform federal rule with regard to same-sex marriage, not only improperly substitutes its policy judgment for that of

Congress, but is contradicted by the legislative record and the very facts of the case at bar.[19]

(C). Section 3 of DOMA protects the ability of states to preserve traditional marriage. The court below implied that Section 3 of DOMA interferes with the autonomy of states with regard to domestic relations, terming it "an unprecedented breach of longstanding deference to federalism." Supp. App. 26a. At the same time (and somewhat inconsistently),

[19] In the present case, Ms. Windsor claims the marital estate tax deduction by virtue of her 2007 marriage in Canada to Thea Clara Spyer. She was a resident of New York at the time of Ms. Spyer's death in 2009. Although New York did not permit same-sex couples to marry prior to 2011, the Second Circuit "predicted" that the New York Court of Appeals would ultimately hold out-of-state same-sex marriages to be recognized in 2009 under New York law, an issue that the New York Court of Appeals expressly declined to reach in *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). The Second Circuit refused to exercise the option of certifying the question to the New York Court of Appeals, noting that court had preferred the issue be resolved by the New York legislature and stating "[w]e hesitate to serve up to the Court of Appeals a question that it is reluctant to answer for a prudential reason." Supp. App. 6a.

It is difficult to imagine a set of facts more clearly rebutting the Second Circuit's claim that it would be "simpler" to apply the law of the state of domicile than to apply Section 3 of DOMA. It is also noteworthy that, regardless of whether the Second Circuit correctly "predicted" New York law in this regard, its decision awards a federal benefit to Ms. Windsor that would not be available to the same-sex couples in the great majority of U.S. states, even if they had been married in Canada or another jurisdiction that licenses such marriages, or even to most same-sex couples in New York itself. It is particularly noteworthy that Ms. Windsor would treated more favorably than the surviving member of civil unions that have been recognized, as an alternative to marriage, in a number of states. *See, e.g.*, Haw. Rev. Stat Ann. § 572B (West 2013).

it contended that DOMA could not advance a government interest in preserving traditional marriage because the decision whether same-sex couples may marry is left to the states. *Id*. at 29a.

Both of these observations are incorrect. DOMA does not interfere with the authority of the states with respect to licensing and recognizing marriage. To the contrary, Section 2 of DOMA preserves and protects the autonomy of each state in that regard.

Section 3 of DOMA, however, advances the objective of preserving traditional marriage, not by interfering with state authority, but by removing an incentive that might otherwise encourage efforts to change state law. The prospect of obtaining numerous federal benefits for same-sex couples could be a tremendous weapon in the arsenal of those who would seek to gain recognition of same-sex marriage at the state level. It would be particularly tempting for courts to recognize same-sex marriage in order to award federal benefits to sympathetic plaintiffs.

In this way, Section 3 functions much like the original marriage estate tax deduction enacted by Congress. Congress recognized that the prospect of obtaining federal tax benefits (including both income and estate/gift taxes) was driving states to shift from common law to community property, despite the otherwise serious downside to making this shift:

> The adoption of community property has been advocated widely in spite of a growing awareness of the substantial differences between community property and common law which make a transition from one system to the other extremely difficult. It is now recognized that this

> transition will be a period of extreme confusion during which the courts, the administrative officials and the legislatures will be working out the detailed application of a new and strange system of property law. Nevertheless, many responsible State officials have reached the conclusion that the difference between the impact of the Federal income tax as it applies in community-property and common-law jurisdictions is so great that the use of community property cannot be avoided.

S. Rep. No. 80-1013.

Congress's concerns regarding state adoption of community property regimes were, of course, not the same as its concerns regarding state recognition of same-sex marriage, but it was entirely rational and legitimate for Congress in both cases to remove an unwarranted federal incentive for states to change their domestic-relations law.

By enacting Section 3 of DOMA, Congress not only protected the federal treasury, but it ensured that the federal treasury would not be used as an incentive to undermine the traditional state law of marriage.

II. Support for Traditional Marriage is Not Unconstitutional "Animus"

Although the Second Circuit avoided any direct attack on the motivations of individual legislators who supported DOMA, the United States maintained below that "the statute was motivated in significant part by disapproval of gay and lesbian people and their intimate and family relations" and that therefore "Section 3 classifies gay and lesbian individuals 'not to further a proper legislative end but to make

them unequal to everyone else.'" Br. for United States 37, Windsor, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). The United States does not explain whether this alleged motivation can be attributed to President Clinton, who signed the law, or the current Vice President of the United States, who as a U.S. Senator voted for it.

The position of the United States, if accepted, would mean that it is permissible for the executive branch to disavow the constitutionality of a statute based on pejorative characterizations of what motivated certain legislators (or motivated them "in significant part"), despite the fact that the Department of Justice contemporaneously advised the Congress that the statute was clearly constitutional and vigorously defended the statute's constitutionality for more than a decade after enactment. Amici note the troubling implications of this position for separation of powers, comity between the branches, and the ability of Congress to assess the constitutionality of proposed legislation.

Fortunately, the position of the United States is without merit.[20] In the first place, this Court's "ani-

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[20] Another example of this mode of analysis is the majority opinion in *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), in which the Ninth Circuit held that Proposition 8, an amendment to the California Constitution adopted by a vote of the people in 2008, violated the Equal Protection Clause of the Fourteenth Amendment by withdrawing from same-sex couples the right to be married, a right that had first been afforded to such couples by a decision of the California Supreme Court earlier in 2008. *See also In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The opinion discusses evidence that Proposition 8 "was born of disapproval of gays and lesbians," *Perry*, 671 F.3d

mus" jurisprudence does not support invalidating an otherwise constitutional statute based on what may have "motivated" individual legislators. In *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), which involved an amendment to the Food Stamp Act withdrawing benefits from otherwise eligible individuals if they lived in a household with unrelated individuals, the Court first noted that the provision was clearly irrelevant to the purposes stated in the original Act itself (e.g., to provide a market for agricultural surpluses and to satisfy the nutritional requirements of food stamp recipients). *Id.* at 534. Noting that there was "little legislative history" to illuminate the purposes of the amendment, this Court observed that the only purpose reflected in the history was "that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* This Court held that "[t]he challenged classification clearly cannot be sustained by reference to this congressional purpose [because] * * * a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534-35. *Moreno* does not suggest that the law in question is invalid because it was allegedly

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at 1094-95. However, as the dissent in that case points out, this Court's precedent in *Romer v. Evans*, 517 U.S. 620 (1996) does not support the conclusion that evidence of animus, standing alone, justifies a finding of unconstitutionality. *Perry*, 671 F.3d at 1104 (Smith, J., concurring in part and dissenting in part) ("*Romer* was a case where the only basis for the measure at issue was animus. However, in a case where the measure at issue was prompted both by animus and by some independent legitimate purpose, the measure may still be constitutionally valid.").

motivated by disapproval or dislike of "hippies." A law furthering a legitimate governmental interest, such as a law making it a crime to use marijuana, would not be unconstitutional even if some or all members who voted for it expressed disapproval of "hippies" as their reason for doing so. *Moreno* merely stands for the proposition that such views alone do not constitute a legitimate government purpose or interest.

Subsequent cases are to the same effect. In *Romer*, this Court struck down a Colorado constitutional amendment which (1) repealed existing laws classifying gays and lesbians as a group protected from discrimination and (2) prohibited any future legislative, executive or judicial action to provide such protection at any level of state or local government. 517 U.S. at 624. Although the Court noted that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 634, this inference was based on the structure of the amendment and the absence of "any identifiable legitimate purpose or discrete objective." *Id.* at 635. It was not based on a subjective evaluation of the motives of the legislative actors, in that case the people of Colorado. Moreover, the Court did not suggest that an otherwise constitutional law would be invalidated by improper motives of some legislators.

This distinction is of critical importance because judicial scrutiny of legislative motives is fraught with peril.[21] Evaluating constitutionality based on assess-

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[21] *See Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous

ment of legislative motives would mean that the same law could be constitutional or unconstitutional, depending on the particular legislature that enacted it. For example, in the case of DOMA, there can be no doubt that the overwhelming majority of Congress reasonably believed that the pre-existing federal definition of "marriage" did not, and was not intended to, encompass same-sex marriage. If constitutionality were determined by subjective motivation, the pre-existing definition of "marriage" would clearly be constitutional (since there is no suggestion that Congress enacted that definition with any "motives" related to same-sex relationships), yet DOMA's re-affirmation of the same definition might not be. Such an approach would be utterly at odds with our constitutional traditions. [22]

Moreover, judicial scrutiny of legislative motives inevitably raises insoluble problems of proof. A court lacks information to determine the true motives of particular legislators, much less to determine whether to impute such motives to the legislature as a whole. As Chief Justice Marshall noted in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810), a court cannot declare a legislative act to be "a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

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matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.").

[22] Justice Story explained that it would be "novel and absurd" to suggest that "the same act passed by one legislature will be constitutional, and by another unconstitutional," depending on the motives for enacting it. 2 Joseph Story, Commentaries on the Constitution of the United States 533, § 1086 (1st ed.1833).

Judicial review of legislative motives also raises serious separation of powers problems. Judicial "psychoanalysis" of legislative motives, to use Justice Cardozo's phrase, is a highly subjective exercise, which threatens needless friction between the branches.[23] Scouring the congressional record for "sound-bites" to divine and disparage the motives of individual legislators also chills the freedom of legislative speech that is the hallmark of robust democratic debate.

Furthermore, with respect to DOMA in particular, there is no basis to equate support for the traditional definition of marriage with unconstitutional animus or "a bare congressional desire to harm a politically unpopular group." As Justice O'Connor noted in her concurrence in *Lawrence v. Texas*, "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[24] It is simply not irrational or bigoted to oppose the re-definition of marriage in a manner "unknown to history and tradition," to use the language of the court below.[25] To the contrary, when faced with a proposed fundamental redefinition of the institution of marriage, it would be irrational *not* to consider

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[23] *See United States v. Constantin*e, 296 U.S. 287, 298-99 (1935) (Cardozo, J., dissenting).

[24] 539 U.S. 558, 585 (2003) (O'Connor, J., concurring); *see also Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 16 (1st Cir. 2012) ("Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held.").

[25] Supp. App. 31a.

"American society's historical view of a marriage as being between a man and a woman."[26]

The fact that DOMA passed both houses of Congress with overwhelming support across the political spectrum, and was signed by into law by President Clinton, further undercuts any attempt to characterize it as the result of unconstitutional "animus."[27] Many DOMA supporters were on record as opposing discrimination against gays and lesbians. See, e.g., 142 Cong. Rec. 22452 (1996) (Sen. Mikulski) ("My support for the Defense of Marriage Act does not lessen in any way my commitment to fighting for fair treatment for gays and lesbians in the workplace."). These included, for example, 16 original Senate co-sponsors of S.932, which was introduced in 1995 to ban employment discrimination on the basis of sexual orientation.[28]

Finally, as Judge Straub pointed out below, if "states may use the traditional definition of marriage for state purposes without violating equal protection, it necessarily follows that Congress may define marriage the same way for federal purposes without

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[26] Supp. App. 34a (Straub, J., dissenting in part and concurring in part).

[27] As the First Circuit has noted with respect to DOMA, "selected comments by a few individual legislators . . . cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." *Massachusetts*, 682 F.3d at 16.

[28] *See* Employment Nondiscrimination Act of 1995, S. 932, 104th Cong. The primary sponsor of S. 932, Senator Jeffords, voted for DOMA, as did 15 co-sponsors (Senators Bingaman, Bradley, Chafee, Dodd, Glenn, Harkin, Kohl, Lautenberg, Leahy, Levin, Lieberman, Mikulski, Murray, Sarbanes and Wellstone). *See* 142 Cong. Rec. 22467 (1996).

violating equal protection." Supp. App. 45a. It certainly cannot represent unconstitutional "animus" to wish to define "marriage," for federal law purposes, in this constitutionally permissible manner.

It is manifest that the traditional definition of marriage, which was overwhelmingly supported by bipartisan majorities in 1996, is more controversial today, both among the public and their elected representatives. This, however, is not a reason to end the democratic debate by asking the courts to stigmatize the motives of one side. To the contrary, as Judge Straub aptly noted in his dissent, "[c]ourts should not intervene where there is a robust political debate because doing so poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate." Supp. App. 83a.

CONCLUSION

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

Respectfully submitted,

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January 29, 2013