No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,

*Respondent*s.

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

BRIEF OF *AMICI CURIAE* FAMILY AND CHILD WELFARE LAW PROFESSORS ADDRESSING THE MERITS AND IN SUPPORT OF RESPONDENTS

KENDALL BRILL
& KLIEGER LLP
Laura W. Brill
Meaghan L. Field
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
(310) 556-2700

Joan Heifetz Hollinger
John and Elizabeth Boalt
Lecturer-in-Residence
UC Berkeley School of Law
465 Boalt Hall
Berkeley, CA 94720

Courtney Joslin
Professor of Law
UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

SULLIVAN & CROMWELL LLP
H. Rodgin Cohen
Sharon L. Nelles*
William H. Wagener
Garrard R. Beeney
Mitchell S. Eitel
Heather H. Volik
Diana G. Iskelov
125 Broad Street
New York, NY 10004
(212) 558-4000
nelless@sullcrom.com

Katharine Silbaugh
Professor of Law and
Law Alumni Scholar
BU School of Law
765 Commonwealth Avenue
Boston, MA 02215

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI[1]

Amici, professors of family and child welfare law, submit this brief in support of Appellee Edith Schlain Windsor and in support of affirmance of the judgment below.[2] This brief seeks to provide the Court with a more complete understanding of the history of law and policy with respect to the relationship between marriage and procreation. We explain that the purported justifications for the Defense of Marriage Act ("DOMA"), section 3, asserted by the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") and its amici that pertain to procreation, childrearing, and child welfare lack a "footing in the realities" of the law, policy, history, or logic of marriage and do not provide a rational basis for DOMA. *Heller* v. *Doe*, 509 U.S. 312, 321 (1993). We also demonstrate how DOMA undermines and is inconsistent with other federal and state laws and policy regarding families and childrearing.

SUMMARY OF THE ARGUMENT

The essence of BLAG's argument in support of DOMA's constitutionality is that the federal government may exclude same-sex couples who are

---

[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the amici curiae make any monetary contribution to the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

lawfully married under state law from all federal marital benefits, protections and responsibilities because the "core purpose and defining characteristic" of marriage is "to deal with the inherently procreative nature of the male-female relationship." (Brief of the Bipartisan Legal Advisory Group ("BLAG Br.") 45; *see id.* at 10–11.) Specifically, BLAG contends that DOMA's purposes include promoting "responsible procreation and childrearing" by opposite-sex couples by encouraging such couples to raise their biological children in a stable setting. (*Id.* at 11.) According to BLAG, the federal government's core interest in extending marital benefits is to support families that consist of, or potentially could consist of, children and their married biological parents.

As the Second Circuit correctly held, and as amici here explain, BLAG's asserted justifications cannot sustain the constitutionality of DOMA's categorical exclusion of married same-sex couples from all federal marital benefits, protections and responsibilities.[3] First, amici show that the States' interest in regulating marriage, and the federal government's interest in supporting marital families, have never been conditioned on a couple's ability or willingness to procreate. Although procreation often occurs within marriage, it is not a prerequisite to marriage. In addition, this Court has made clear that the fundamental constitutional rights to marry

[3] While amici agree that the Second Circuit correctly applied heightened-scrutiny analysis to the sexual orientation classification in DOMA, amici believe that DOMA is unconstitutional under any standard of review.

and to procreate are distinct and independent. Moreover, there is no singular purpose of marriage; marriage serves multiple purposes.

Second, amici show that there is no legal basis for the assertion that federal law favors *biological* parentage over the well-considered decisions of many married couples—both opposite-sex and same-sex—to adopt children or conceive children through assisted reproduction. Federal law and policy reflect a deep commitment to the welfare of *all* children, whether or not they are raised by their biological parents. In fact, this Court has made clear that the Equal Protection Clause prohibits the disparate treatment of children based on the circumstances of their birth. In sum, BLAG's claim that the "core purpose and defining characteristic" of marriage is to link marriage and unassisted procreation (*id.* at 45), lacks footings in law and policy. DOMA, therefore, fails even under the lowest level of constitutional scrutiny.

Finally, as family and child welfare law professors, amici share the government's commitment to promoting the welfare of children and encouraging parents to be responsible for their children's well-being. Amici agree that marriage can benefit children by providing support and stability to their families. However, DOMA hinders rather than furthers any federal interest in child welfare because its effect is to *deny* hundreds of important rights and protections to a class of married parents and, by extension, their children. DOMA does not change the legal status of any opposite-sex couples or their children, expand their federal protections, or offer any additional inducements to heterosexuals to

engage in "responsible" procreation or childrearing. DOMA's sole effect is to harm married same-sex couples and their children, while leaving opposite-sex couples (and their children) untouched. Therefore, there is no rational relationship between DOMA and furthering the welfare of families consisting of children and their biological parents. DOMA's effect is contrary to any legitimate federal concerns about child welfare.

ARGUMENT

I. Procreation is Not an Essential Element of Marriage.

BLAG broadly claims that adhering to a traditional definition of marriage is rational because "opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring," which makes it appropriate not to "extend the benefit of marriage" to relationships that do not accidentally procreate. (BLAG Br. 45.) This assertion is not supported by the history or law of marriage.

A. The Ability or Desire to Procreate Has Never Been the Defining Feature of or a Prerequisite for a Valid Marriage.

Neither sexual intimacy nor the willingness or ability of a married couple to biologically procreate has ever been a prerequisite for a valid marriage under state law.

For example, states did not and do not require spouses to consummate their marriage. Once the parties fulfilled the statutory requirements for solemnization and licensing, they were married,

regardless of whether they shared any form of sexual intimacy. *See*, *e.g.*, *Mitchell* v. *Mitchell*, 11 A.2d 898, 906 (Me. 1940) ("[C]oition is unnecessary in the case of a ceremonial marriage.") (internal citation omitted); *Franklin* v. *Franklin*, 28 N.E. 681, 682 (Mass. 1891) ("[C]onsummation of a marriage by coitus is not necessary to its validity."); *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989) (consummation unnecessary to validate marriage); *Beck* v. *Beck*, 246 So. 2d 420, 428–29 (Ala. 1971) (sexual activity is not essential for valid common law marriage).

Similarly, as the legislative history of DOMA admits, no state has ever required prospective spouses to agree to procreate, to remain open to procreation, or even to be able to procreate, to marry. H.R. Rep. No. 104-664, at 14 (1996), *reprinted in* U.S.C.C.A.N. 2905, 2919 ("[S]ociety permits heterosexual couples to marry regardless of whether they intend or are even able to have children."); *see also*, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.") (internal citation omitted); *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008) ("[M]en and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry.").

Likewise, infertility[4] is not a basis for invalidating a marriage. *See*, *e.g.*, *In re Marriage Cases*, 183 P.3d at 431 n.48 ("[N]o case has suggested that an inability to have children—when disclosed to a prospective partner—would constitute a basis for denying a marriage license or nullifying a marriage"); *Lapides* v. *Lapides*, 171 N.E. 911, 913 (N.Y. 1930) ("The inability to bear children is not such a physical incapacity as justifies an annulment."). Some states expressly presume female infertility after a certain age, *see*, *e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(1) (women over age 55 presumed infertile); MD. CODE ANN. HEALTH-GEN. § 13-2301 (defining "women of childbearing age" as women between 15 and 45 years old), but this does not disqualify such women from marrying or enjoying federal marital protections. Indeed, some states permit certain classes of people to marry only if they *cannot* procreate. *See*, *e.g.*, WIS. STAT. ANN. § 765.03(a) (first cousins can marry only if "the female has attained the age of 55 years or where either party . . . submits an affidavit signed by a physician stating that either party is permanently sterile.").

---

[4] Data from 2002 show that approximately seven million women and four million men suffer from infertility. Michael L. Eisenberg M.D. *et al.*, *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis: Examination of a Prospective U.S. Cohort*, 94 FERTILITY & STERILITY 2369, 2369 (2010). Approximately two to three million couples are infertile. ENCYC. OF CONTEMP. AM. SOC. ISSUES 1182 (Michael Shally-Jensen ed., 2011).

Annulments related to infertility or procreation generally are granted only when there has been a misrepresentation about the spouse's fertility or desire to procreate. *See*, *e.g.*, *Jarzem* v. *Bierhaus*, 415 So. 2d 88, 90 (Fla. Dist. Ct. App. 1982) ("[I]f the wife's claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such fact before the marriage."); *Feynman* v. *Feynman*, 4 N.Y.S.2d 787, 787–88 (N.Y. Sup. Ct. 1938) (granting annulment where man kept silent when woman discussed children before marriage, consummated marriage, but later admitted he "hated children" and "never intended to live" with wife); *cf. Martin* v. *Otis*, 124 N.E. 294, 296 (Mass. 1919) (marriage not induced by fraud where woman disclosed physical incapacity).[5]

State divorce and annulment laws similarly reflect the principle that the right to marry is not dependent upon the ability to procreate. "Fault-based" divorce and annulment laws traditionally focused on the failure of the *spousal relationship*, listing as grounds for divorce abandonment, cruel and inhuman treatment, imprisonment, and

---

[5] While someone who is deceived about a spouse's ability to have sexual relations in some states may *choose* to end the marriage, the state does not void a marriage for this reason. *See*, *e.g.*, *Martin*, 124 N.E. at 296 (impotence renders a marriage voidable by the disappointed party, but not void). If the marriage is acceptable to the spouses without sexual relations, state marriage laws have upheld that choice.

adultery.[6] More recent "no-fault" divorce laws, now enacted in every state, are even more explicit that the basis for the divorce is the failure of the spousal relationship.[7]

The lack of a procreation-based foundation for valid marriage or divorce under state law renders implausible BLAG's contention that the core purpose of marriage has been to encourage and protect families with biological children.

B. The Constitutional Rights to Marry and to Procreate Are Distinct and Independent.

The fundamental rights to marry and to procreate are distinct. "If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (emphasis in original). Accordingly, individuals possess a fundamental right to choose whether or not to procreate that is not dependent on their marital status. *See Carey* v. *Population Servs., Int'l*, 431 U.S. 678, 687 (1977) ("[T]he constitutional

---

[6] *See*, *e.g.*, N.Y. DOM. REL. LAW §§ 7, 170(1)–(6); 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 14.1–14.8, at 1–53 (2d ed. 1988).

[7] No-fault divorces are granted upon a finding that "the relationship between husband and wife has broken down irretrievably." N.Y. DOM. REL. LAW § 170(7); *see also* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1676 n.41, 1704 (2011).

protection of individual autonomy in matters of childbearing is not dependent" on marital status); *Griswold* v. *Connecticut*, 381 U.S. 479, 485–86 (1965) (married couples have the right to use contraception, thereby avoiding procreation); *Eisenstadt*, 405 U.S. at 453 (married and unmarried persons have the same right to contraception).

This Court has also made clear that individuals cannot be excluded from the right to marry simply because they are unable to engage in procreation. *Turner* v. *Safley*, 482 U.S. 78 (1987), struck down a Missouri regulation under which approval of a prison inmate's marriage was generally given only when a pregnancy or the birth of an out-of-wedlock child was involved. *Id*. at 82, 96–97. The Court recognized that incarcerated prisoners—even those with no right to conjugal visits, and thus no opportunity to procreate—have a fundamental right to marry, because many "important attributes of marriage remain, . . . after taking into account the limitations of prison life." *Id.* at 95. The Court explained that marriage has multiple purposes unrelated to procreation, *e.g*., "the expression of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." *Id*. at 95–96. Even under the deferential standard applicable to prison regulations, these remaining non-procreative elements of marriage were held to be "sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96.

BLAG reduces the purpose of marriage to no more than society's response to "the biological fact that opposite-sex relationships have a unique

tendency to produce unplanned and unintended offspring." (BLAG Br. 45.) But as Justice Kennedy noted in *Lawrence*, "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. BLAG's narrow understanding of the purpose of marriage demeans the depth and significance of the marital relationship.

This Court has also rejected attempts to prevent "irresponsible procreators" from marrying. Marriage is a fundamental right for all individuals, regardless of their procreative abilities or choices. *See Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978) ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing and family relationships"). In *Zablocki*, Wisconsin sought to deny the right to marry to parents the state considered to be irresponsible because they had failed to pay child support. 434 U.S. at 375. In holding that conditioning marriage on a person's parenting conduct was an unconstitutional infringement of the right to marry, the Court distinguished between the right to marry and the separate rights of "procreation, childbirth, child rearing, and family relationships." *Id*. at 386, 388–89.

Finally, BLAG's assertion that opposite-sex relationships are "inherently procreative" (BLAG Br. 45), ignores not only the fact that many heterosexual couples are infertile[8] but also the widespread

[8] *See* note 4, *supra*.

availability of contraception in the wake of *Griswold* and *Eisenstadt*. By 2008, "[c]ontraceptive use in the United States [was] virtually universal among women of reproductive age," with 99% of sexually active women having used contraception, and between 70 and 80% of married or cohabiting women of childbearing age currently using contraceptives.[9]

C. Marriage Serves Multiple Purposes, the Majority of Which Are Not Related to Children.

While states regulate entry into the marital relationship, both state and federal law provide numerous benefits and assign numerous responsibilities to married couples in recognition of the multiple purposes that marriage serves. "[T]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (listing statutes affected by marital status under Massachusetts law). *See also generally* Amicus Brief of American Historical Association.

The vast majority of these state and federal marital benefits enable the spouses to protect and foster their personal and financial relationship to one another. Under state law, married couples receive many protections and benefits and assume mutual responsibilities pertaining, for instance, to

---

[9] CTRS. FOR DISEASE CONTROL AND PREVENTION, USE OF CONTRACEPTION IN THE UNITED STATES: 1982-2008, 7, 25 & tbl. 8 (2009).

health care decisions,[10] workers' compensation and pension benefits,[11] property ownership,[12] spousal support,[13] inheritance,[14] taxation,[15] insurance coverage,[16] and testimonial privileges.[17]

---

[10] *See*, *e.g.*, KY. REV. STAT. ANN. § 311.631(1) (spouse may make health-care decisions for incapacitated spouse); VA. CODE ANN. § 54.1-2986(A) (same).

[11] *See*, *e.g.*, HAW. REV. STAT. § 88-85(a) (accidental death benefit of government employee payable to surviving spouse); N.Y. WORKERS COMP. LAW §§ 16, 33 (workers' compensation death benefits to surviving spouse); N.Y. RET. & SOC. SEC. LAW § 162 (certain widows entitled to supplemental pension payments).

[12] *See*, *e.g.*, CAL. CIV. CODE § 682 (married persons may own community property); LEONARD GABINET, TAX ASPECTS OF MARITAL DISSOLUTION §§ 3:6–3:10 (2d ed. 2005) (summarizing spousal property rights in various states); ROBERT S. TAFT & LEONARD G. FLORESCUE, TAX ASPECTS OF DIVORCE AND SEPARATION § 2.02 (updated 2012) (discussing state rules governing rights and liabilities of marriage, including property rights).

[13] *See*, *e.g.*, 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.1, at 251–52 (2d ed. 1988) (spouses owe duty to support each other); IOWA CODE § 597.14 (family and educational expenses chargeable to both spouses).

[14] *See*, *e.g.*, IOWA CODE §§ 633.211–12 (surviving spouse has priority claim when spouse dies intestate); N.Y. EST. POWERS & TRUSTS LAW § 5-3.1 (excluding certain property from estate, for benefit of surviving spouse and children); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 160 (2008) ("With the exception of Georgia, every American state limits the ability of a testator to disinherit a surviving spouse.").

[15] *See*, *e.g.*, IOWA CODE § 422.9 (1) (standard deduction for spouses filing jointly, surviving spouse, or head of household); N.Y. TAX LAW § 952 & I.R.C. § 2056 (together, reducing New

In the more than 1,000 references to marriage under federal law, Congress likewise recognizes the diverse purposes of marriage, most of which have nothing to do with the ability or willingness to bring children into a family. Numerous federal legal protections assume and protect the mutual loyalty of spouses and their emotional interdependence. Under the Family and Medical Leave Act, qualified workers in a covered workplace may take a leave to care for a seriously ill spouse. 29 U.S.C. § 2612(a)(1)(C) & (D). When a U.S. citizen becomes engaged to and marries a foreign national, he or she may petition for an "immediate relative" visa for the non-citizen spouse to enable the couple to remain together. 8 U.S.C. § 1154(a)(1)(A)(i), (b), (c). And, the Federal Rules of Evidence recognize the common-law rule that spouses cannot be compelled to testify against one another, furthering "the important public interest in marital harmony." *Trammel* v. *United States*, 445 U.S. 40, 53 (1980); *see also* FED. R. EVID. 501, advisory committee's note.

Many other federal laws promote the economic interdependence of a married couple. These include

---

York estate tax imposed where property passes from decedent to his or her surviving spouse); HAW. REV. STAT. § 235-5.5 (establishing deduction for spouses filing joint tax return).

[16] *See*, *e.g.*, MINN. STAT. § 65B.43(5) (defining "insured" to include a spouse under no-fault automobile insurance law); N.Y. INS. LAW § 3221(e)(7) (spouse has right to convert group medical insurance policy to individual policy upon death or divorce of insured spouse).

[17] *See*, *e.g.*, ALA. R. EVID. 504(b); HAW. R. EVID. 505; WASH. REV. CODE § 560.60.060.

the ability to file income taxes under the "married" status, 26 U.S.C. § 6013, the ability to file a joint bankruptcy case, 11 U.S.C. § 302(a), Social Security spousal and surviving spouse benefits, 42 U.S.C. § 402(b)–(c),(e)–(f), increased veterans' disability payments upon marriage, 38 U.S.C. § 1115, and death benefits for a surviving spouse, 38 U.S.C. § 1311. Spouses can transfer assets to each other during marriage or at divorce without incurring added tax burdens. 26 U.S.C. § 1041. At divorce, courts may issue a Qualified Domestic Relations Order to divide otherwise non-divisible retirement assets. 29 U.S.C. § 1056(d)(1); 26 U.S.C. §§ 401(a)(13)(B), 414(p). Conflict of interest rules prohibit public officials from using their positions to promote their spouse's professional or financial interests. 5 U.S.C. § 3110; 18 U.S.C. § 208.

These and most of the other more than 1,000 federal marital rights and obligations do not relate in any way to procreation or childrearing.[18] Moreover, as described in more detail below, the marital benefits provisions that *do* relate to children and childrearing are not dependent upon a biological parent-child relationship. Indeed, some of these provisions explicitly encourage the formation of parent-child relationships in the absence of a biological connection.

BLAG's brief conspicuously fails to explain how denying Appellee access to the marital

---

[18] For a full overview, *see* GEN. ACCOUNTING OFFICE REPORT GAO-04-353R, DEFENSE OF MARRIAGE ACT - UPDATE TO PRIOR REPORT (2004).

protection at issue in this case—the spousal exemption from the federal estate tax, 26 U.S.C. § 2056(a)—promotes any interest relating to procreation or children. Clearly, no deceased spouse can engage in unassisted procreation, and surviving spouses receive this exemption regardless of whether they had ever raised, or were raising children when their spouses died.

In sum, there is no historical or legal justification to support BLAG's claim that the "core purpose and defining characteristic" of marriage is to link marriage and unassisted procreation. (BLAG Br. 45.)[19] While marriage is a relationship in which unassisted procreation often occurs, many married couples use assisted reproduction and adoption to bring children into their families. Others marry when they are beyond childbearing age; others are childless by choice or for other reasons. Amici do not claim that procreation and marriage never go hand in hand, but BLAG's position that the core purpose of marriage is procreation diminishes the institution of marriage and ignores its myriad other purposes,

---

[19] A Hawaii district court recently upheld Hawaii's marriage ban based on the claim that the core purpose of marriage is to further the State's alleged interest in responsible procreation. *Jackson* v. *Abercrombie*, No. 11-00734, 2012 U.S. Dist. LEXIS 111376 (D. Haw. Aug. 8, 2012). As detailed herein, however, procreation—responsible or not—is not and never has been an essential element of marriage, and the reasoning of the *Jackson* court lacks a footing in law or reality. Moreover, because DOMA does not provide anything to heterosexual couples—the only thing it does is deny protections to married same-sex couples—DOMA has no possible or plausible impact on their decisions concerning procreation and marriage.

including its traditional protections of the mutual love of two individuals and their exclusive commitment to each other.

II. The Federal Government Has Not Sought to Promote Biological Parenthood Over Other Forms of Parenthood.

BLAG contends that denying federal marital protections to married same-sex couples rationally promotes the federal government's alleged goal of promoting children's welfare by encouraging two biological parents to raise their own children. (*See*, *e.g.*, BLAG Br. 11 ("Congress sought to encourage the raising of such children by both their biological parents in a stable family structure.").) This alleged preference for biological parenting is the keystone of BLAG's effort to explain DOMA's unequal treatment of married same-sex and opposite-sex couples.

But federal law and policy do not support this purported preference. First, state parentage law—from which federal law draws—does not prefer or privilege biology over all other factors. Moreover, this Court repeatedly has upheld States' decisions not to privilege biology over other bases for establishing parentage.

In seeking support for its claims from this Court's prior decisions, BLAG incorrectly conflates legal parentage and biological parentage. Federal and state laws, and decisions of this Court, have protected and continue to protect *legally recognized* parents and their childrearing decisions from undue interference by the government or private parties. What BLAG fails to acknowledge is that this

protection from undue interference applies to all legal parents—biological and non-biological.

Contrary to BLAG's claims, federal law and decisions of this Court recognize, support and encourage legal recognition of parent-child relationships between children and adults who are not biologically related. Further, this Court has made clear that laws may not discriminate against children based on the circumstances of their birth.

A. State and Federal Laws Do Not Privilege or Prefer Biological Parentage.

While amici agree that security and stability for children are vital interests, BLAG treats the federal government's interest in supporting marriage as a secure and stable setting for raising children as being equivalent to a purported interest in privileging the families of two *biologically* related parents and their children. (*See* BLAG Br. 48 ("Therefore, when government offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children, it rationally furthers its legitimate interest in promoting this type of family structure in a way that extending similar regulation to other relationships would not").) This emphasis on biological parenting is not consistent with federal or state laws or policies affecting marriage, parentage, or child welfare.

Federal law generally references and incorporates state family and parentage law.[20] As this Court unanimously explained in *Astrue* v. *Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2030 (2012), "a biological parent is not necessarily a child's parent under [state] law."

For example, all 50 states presume that a husband is a child's legal parent. *See*, *e.g.*, June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 220 (2011) ("All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband, and many limit the circumstances in which it can be rebutted." (footnotes omitted)). And this Court has held that a state may conclude that a husband is a child's father even over the objection of the child's involved biological father. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 131–32 (1989).

In addition to the traditional presumption of parentage based on marriage, there are many other

---

[20] *See*, *e.g.*, 42 U.S.C. § 416(h)(2)(A) (Social Security Act looks to state law to determine whether individual is a "child" of the insured wage-earner); 8 U.S.C. § 1101(b)(1)(C) ("a child legitimated under the law of the child's residence or domicile" included within definition of "child" for purposes of immigration and nationality law); *see also* Memorandum from the Deputy Assistant Att'y Gen. on Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act (Oct. 17, 2007) (DOMA does not prevent the non-biological child of a partner in a Vermont Civil Union from receiving child's insurance benefits).

circumstances under which a person who is not genetically related to a child may be the child's legal parent under state law. For example, "[state] laws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion." *Astrue*, 132 S. Ct. at 2030. Most states confer legal parentage on spouses who use assisted reproduction with genetic material provided by others.[21] Additionally, both the original and the revised Uniform Parentage Act ("UPA") recognize multiple bases for establishing legal parentage independent of a biological or genetic connection between parent and child, or a parent's marital status. Rather, parentage can depend on some combination of an individual's intent to parent and his or her actual performance of parental responsibilities. UNIF. PARENTAGE ACT § 102, cmt., § 201 (amended 2002).[22]

---

[21] "[T]he establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law." *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 286 (Cal. Ct. App. 1998); *see also*, *e.g.*, CAL. FAM. CODE § 7613(a); N.Y. DOM. REL. LAW § 73; *Laura WW* v. *Peter WW*, 856 N.Y.S.2d 258 (N.Y. App. Div. 2008). *See also generally* Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 34–35 (2009); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples*, 39 FAM. L. Q. 683 (2005); Courtney G. Joslin, *Protecting Children (?): Marriage, Gender and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

[22] The UPA has "four separate definitions of 'father' . . . to account for the permutations of a man who may be so classified." UNIF. PARENTAGE ACT § 102, cmt. (amended 2002).

Another means for establishing legal parentage between a child and an individual who is not biologically related to the child is, of course, adoption. Every state has laws facilitating adoption by individuals who are not a child's biological parents. *See* ADOPTION LAW & PRACTICE, at ch. 1 (J.H. Hollinger ed. 1988 & Supp. 2011).[23] Adoptive parents have all of the same rights and obligations as any other legal parent, including biological legal parents. *Id.* at ch. 1. Not only are adopted children eligible for many federal benefits,[24] the federal government also actively *supports* adoption and assisted reproduction through a variety of laws, policies and spending measures that directly contradict BLAG's claim that the federal government favors biological parentage.

Thus, under state law there are a range of circumstances under which a biological parent may not be recognized as a child's legal parent. BLAG's contrary description is misleading and incorrect. For

---

[23] No state bars lesbian or gay individuals from adopting children. COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:10, at 1 (2012).

[24] *See*, *e.g.*, 42 U.S.C. § 416(e) (Social Security benefits); 5 U.S.C. § 8441(4) (federal employee survivor annuities); 5 U.S.C. § 9001(5)(C) (federal employee insurance benefits); 26 U.S.C. § 152(f)(1) (income tax); 38 U.S.C. § 101(4)(A) (veteran survivor benefits); 37 U.S.C. § 401(b) (military pay and allowances); 10 U.S.C. § 1072(6)(B) (military medical and dental care); Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181517.

example, BLAG argues that "when both biological parents want to raise their child, the law has long recognized a distinct preference for the child to be raised by those biological parents." (BLAG Br. 47).[25] In addition to being an inaccurate description of state parentage law, this Court on numerous occasions has upheld States' decisions *not* to privilege biology over all other factors. This Court has stressed the importance to children of established and stable parent-child relationships, even when those relationships are not premised on biology.

For example, in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Court upheld against a biological father's challenge California's presumption that a husband is the legal parent of a child born to his wife. California's solicitude for the integrity of the mother's existing marriage was so strong that it was permissible for the state to deny the involved biological father standing even to have

---

[25] Notably, although BLAG's entire argument hinges on this proposition, it has no direct support for it. (*See* BLAG Br. 47 (relying exclusively on one *cf.* citation).) Opinions accepting BLAG's arguments have relied upon inaccurate descriptions of the law in this area. *See*, *e.g.*, *Windsor* v. *United States*, 699 F.3d 169, 207 (2d Cir. 2012) (Straub, J., dissenting) (citing *Michael H.* for the proposition that "biological family units are afforded additional protections under our nation's laws").

A more accurate description of the relevance of biology to legal parentage can be found in the Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl at 34–36, in *Adoptive Couple* v. *Baby Girl*, No. 12-399 (Feb. 19, 2013) (explaining that a child's biological parent is not necessarily the child's legal parent).

his parentage adjudicated.[26] *Id.* at 114, 129–31. In other words, this Court affirmed the state's decision to allow the marital relationship to trump the relationship between the child and her biological father.

The *Michael H.* case is far from the only one in which this Court rejected a biological parent's claim of entitlement to parental rights. For example, *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978), held that a biological father who had not sought custody of his child was not entitled to block the proposed adoption of the child by the custodial mother's spouse, particularly because the adoption would "give full recognition to a family unit already in existence, a result desired by all concerned" except the biological father. *Id.*

In *Lehr* v. *Robertson*, 463 U.S. 248, 262 (1983), this Court held that, at least in some circumstances, it is permissible for a State to deny biological fathers even the right to be heard in an adoption action that would sever any potential parental rights. As this Court explained, "the mere existence of a biological link does not merit . . . constitutional protection." *Id.* Biological fatherhood provides a man the opportunity to "develop a relationship with his offspring," but if he fails to "accept some measure of

---

[26] At the time, the relevant statute did not even permit the biological father standing to bring a parentage action. *Michael H.*, 491 U.S. at 113 ("Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. The presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances.").

responsibility for the child's future," he is not entitled to exercise parental rights. *Id.*

In fact, rather than emphasizing biology over all other factors, the decisions of this Court repeatedly have recognized the importance of familial relationships that derive from "the intimacy of daily association." *Lehr*, 463 U.S. at 261 (quoting *Smith* v. *Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)).

BLAG incorrectly claims that *Santosky* v. *Kramer*, 455 U.S. 745 (1982), and *Smith*, 431 U.S. at 816, support its assertion that there is a preference in favor of biological parenthood. Neither case, however, involved or considered whether biological parents are preferable to other legal parents. Instead, both cases illustrate this Court's longstanding concern for the rights of a child's legal parents against unwarranted government intrusion; the fact that in both cases the parents who were facing a potentially permanent separation from their children were biological parents was not material to this Court's analysis.

Santosky addressed the standard of proof that must be applied to terminate parental rights. While this Court did use the phrases "natural parent" and "natural child," 455 U.S. at 747–48, these phrases are terms of art that can refer to "legal parents" and "legal children." It is common to use the terms in this way. For example, the original Uniform Parentage Act uses the term "natural" to refer to any legal parent who is not an adoptive parent. *See*, *e.g.*, UNIF. PARENTAGE ACT § 4 (1973) (providing that one means of establishing that one is a "natural father"

is by demonstrating that one has held out the child as one's "natural child"); *id.* § 5 (providing that a husband will be considered a child's "natural father" if he consented to his wife's insemination).[27] Notably, the holding in *Santosky* applies equally to all legal parents, regardless of their biological connection or lack thereof to the child. To terminate a *legal parent's* rights, a state must prove that the parent is "unfit" by at least clear and convincing evidence. *See*, *e.g.*, *In re G.S.R.*, 72 Cal. Rptr. 3d 398, 400 (Cal. Ct. App. 2008); CAL. WELF. & INST. CODE § 361 ("clear and convincing evidence" is required for the court to find child should be removed from physical custody of parents or guardian).

Similarly, in *Smith*, the Court used the phrase "natural parent" as a term of art to refer to the class of legal biological parents in that case who had not had their parental rights terminated. 431 U.S. at 827. In *Smith*, a class of foster parents sued to challenge the procedures that allowed the State to remove children from their foster homes.[28] This Court noted that the State had created the foster parent system to respond to situations where

---

[27] *See also Chatterjee* v. *King*, 280 P.3d 283, 293 (N.M. 2012) ("'[N]atural' and 'biological' are not synonymous terms as used in the New Mexico UPA.").

[28] As this Court noted in *Smith*, foster parents are in a decidedly different position from legal parents—biological or not. From the outset, foster parents partner with the state to temporarily care for children with the understanding that the children will hopefully be returned to their "natural," that is legal, parents. 431 U.S. at 823–24.

"natural parents" are having difficulty caring for their children without the assistance of State child welfare agencies. *Id.* at 824–25. But, of course, the foster parent system is available whenever any legal parents—*biological*, *adoptive or presumptive*—cannot adequately care for their children.

B. The Federal Government Seeks to Provide Stability for All Families—Regardless of Their Biological Connection.

While it is true that the federal government seeks to provide stability for families, there is no basis for any claim that the federal government specially promotes or protects families with biological children. To the contrary, federal law seeks to help parents—biological and non-biological—care for their children.

Many married opposite-sex couples use adoption and assisted reproduction to have children, and they, as well as married opposite-sex couples with no children, have access to federal marital protections.[29] Federal laws and policies care about children who are created, not about how they are created.

---

[29] 60,190 infants were born with the use of assisted reproduction technology in 2009. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY REPORT 3 (2009). In 2010, more than 1.5 million children lived with adoptive parents. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, C2010BR-14, HOUSEHOLDS AND FAMILIES: 2010, 2 (Apr. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

Myriad federal programs provide benefits to children. As explained above, these federal programs draw upon state determinations of parentage that are not necessarily based on a biological relationship between parent and child. In addition, when these federal programs explicitly define "child," they routinely include and extend benefits to adopted children.[30]

The federal government also actively *supports* adoption and assisted reproduction through a variety of laws, policies and spending measures. *See*, *e.g.*, 42 U.S.C. § 670 (foster care and adoption assistance); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing timelines on states for moving children from foster care to adoption); Multiethnic Placement Act of 1994, Pub. L. No. 103-382, H.R. 6 (codified in scattered sections of 42 U.S.C.) (prohibiting states from delaying or denying adoptive placements on the basis of race, color or national origin). Federal benefits extend to children of married and unmarried couples who adopt. The federal tax code promotes adoption and assisted reproduction, including by creating subsidies for adoptive parents of children with special needs, tax credits for adoption-related expenses, and exclusions for employer-paid adoption expenses; by allowing the costs of *in vitro* fertilization to be deducted from income; and by defining an adopted child or a child conceived using assisted reproduction as dependents for purposes of the dependency exemptions. *See* 26

---

[30] *See* note 24, *supra*.

U.S.C. § 23 (formerly 26 U.S.C. § 36C); 26 U.S.C. §§ 137, 151–152; INTERNAL REV. SERV., PUBL'N. 502: MEDICAL AND DENTAL EXPENSES 8 (2012). The federal government extends these adoption benefits to the children of same-sex couples. It strains credulity to argue that the federal government disfavors these parent-child relationships.

The federal government also has affirmatively sought to extend critical protections to another group of non-biological children: stepchildren. Throughout the history of our country, many children were raised in families with only one biological parent, including when that parent remarried following divorce or the death of a spouse.[31] A review of federal programs reveals a long-standing concern about protecting these children and their families. *See*, *e.g.*, Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 446 (1995) ("[M]ost federal programs assume that residential stepparents support their stepchildren and that these children are eligible for benefits"); Joslin, *supra* note 24.

In addition to explicitly including adopted children and stepchildren, federal programs that benefit children generally also use state family and

---

[31] Historically, the death of a parent was not uncommon. For example, between 1915 and 1933, there were more than 6 maternal deaths for every 1000 births—a significant risk when many women had multiple children. *See* U.S. PUB. HEALTH SERV., VITAL STATISTICS, RATES IN THE UNITED STATES 1900–1940, 620 & tbl. 36 (1947). In 1900, men aged 25–44 died at a rate of roughly 1% per year. *See id.* at 161 & tbl. 5.

parentage law as a means of establishing eligibility.[32] And, as described above, under state law, a person may be considered the "child" of a biologically unrelated adult. Federal law generally applies the same rules, protections, and obligations regardless of whether the parent-child relationship is based on a biological connection.

For example, federal law establishes guidelines setting child support amounts, and requires the states to adopt several mechanisms to improve the enforcement of child support obligations, including wage garnishment and license revocation. *See*, *e.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.); Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228. Here, as in many other areas, federal law does not define who is a parent, but rather requires states to establish systems to determine parentage and enforce child support obligations. 42 U.S.C. § 654. These federal guidelines and enforcement requirements apply in all child support cases, regardless of whether the children have a biological connection to their parents.

Other federal laws help ensure stability in child custody and support decisions by mandating interstate recognition and enforcement of state custody and support orders. Like the laws described

---

[32] *See* note 20, *supra*.

above, the protections of these statutes are not limited to biologically related parents and children. *See*, *e.g.*, 28 U.S.C. § 1738A(b) (under Parental Kidnapping Protection Act, "child" defined as "a person under the age of eighteen"; "contestant" defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child"); 28 U.S.C. § 1738B(b) (under Full Faith and Credit for Child Support Orders Act, "'contestant' means— (A) a person (including a parent) who— (i) claims a right to receive child support; (ii) is a party to a proceeding that may result in the issuance of a child support order; or (iii) is under a child support order. . . ."). These statutes, like most federal statutes, accept and incorporate each state's own parentage determinations.

BLAG erroneously claims that the federal government provides marital benefits to protect and encourage the formation of families of opposite-sex adults and their children created through unassisted biological procreation. (BLAG Br. 21.) Federal law and policy demonstrate a commitment to protect the stability and security of all families, whether or not children and their parents are biologically connected. DOMA is a glaring exception to federal law's longstanding recognition that all children are equally deserving of stability and support.

III. This Court Has Rejected Differential Treatment of Children Based on the Circumstances of Their Birth.

BLAG claims that the government has an interest in treating families that consist of, or potentially could consist of, children and their

married biological parents better than other families. This implicitly suggests that it is legitimate to treat children born to married biological parents more favorably than other children.

Yet, what BLAG suggests is a legitimate interest is directly counter to a series of cases holding that the equal protection clause does not permit disparate treatment of children based on the circumstances of their birth. As the Court explained in *Weber* v. *Aetna Casualty & Surety Company*:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. . . . [N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. 164, 175 (1972).

Denying the children of same-sex married couples federal legal protections in an attempt to influence the future reproductive behavior of heterosexual adults is impermissible. Just as it is "invidious to discriminate" against illegitimate children raised by an unwed mother, *Levy* v. *Louisiana*, 391 U.S. 68, 72 (1968), it is equally impermissible to deny children access to federal benefits and protections because of the circumstances of their birth to, or adoption by, married same-sex couples. This kind of

discrimination cannot survive equal protection review.

IV. DOMA Undermines Child Welfare Interests.

A. DOMA Has No Rational Connection to the Asserted Goal of Encouraging Heterosexuals to Have Children Within Marriage.

BLAG argues that DOMA furthers the government's interest in encouraging opposite-sex couples who can accidentally procreate to marry. (BLAG Br. 21, 44–47.) Recognizing the marriages of same-sex couples, it is argued, would undermine this interest. Assuming *arguendo* that this is a permissible government interest, the Second Circuit (and other courts) correctly recognized that excluding married same-sex couples from all federal marital protections and responsibilities does nothing to further that interest. *See*, *e.g.*, *Windsor*, 699 F.3d at 187–88; *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14–15 (1st Cir. 2012); *Pedersen* v. *Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 338–39 (D. Conn. 2012). As a preliminary matter, the same-sex spouses who are being denied federal marital benefits are *already married*; DOMA does not invalidate their marriages or prevent additional same-sex couples from marrying or raising children.[33] Thus, it is utterly implausible to

---

[33] In Massachusetts, where same-sex couples began marrying in 2003, marriage rates have remained consistent, starting at 5.6% in 2003, peaking at 6.5% in 2004, and ending at 5.5% in 2011. CTRS. FOR DISEASE CONTROL AND PREVENTION, MARRIAGE RATES BY STATE: 1990, 1995, AND 1999–2011,

think that denying these validly married couples federal benefits in any way affects the decisions of opposite-sex couples to marry or procreate. Any imagined impact on opposite-sex couples from seeing married same-sex couples around them has already occurred.

Moreover, DOMA does not create new substantive rights or protections for already-married opposite-sex couples, or provide any incentive to opposite-sex couples to marry. The myriad federal protections enjoyed by married opposite-sex couples existed before DOMA was enacted and are unchanged by DOMA. Any asserted or implied connection between withholding federal legal rights from married same-sex couples and an increased likelihood that heterosexual couples who have accidentally procreated will marry is illogical and unfounded. *See Windsor*, 699 F.3d at 188 n.6; *Perry* v. *Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012); *Massachusetts*, 682 F.3d at 14–15; *Pedersen*, 881 F. Supp. 2d at 339.

As the First Circuit has held, there is no "demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening . . . heterosexual marriage." *Massachusetts*, 682 F.3d at 15. DOMA was not

---

http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf. Massachusetts also had the third-lowest divorce rate among the states in 2011. CTS. FOR DISEASE CONTROL AND PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999–2011, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf.

aimed at influencing the behavior of heterosexual couples, and "does not affect in any way" the incentives they face. *Windsor*, 699 F.3d at 188. DOMA was intended to deny same-sex married couples recognition of their marriages and the protections that would follow for them and their families. BLAG's argument that DOMA promotes responsible procreation by heterosexuals is a charade that must be rejected.

B. BLAG's Claim That Opposite-Sex Couples Are Better Parents Than Married Same-Sex Couples Lacks Any Footing in Reality.

BLAG claims that "common sense" provides a sufficient basis for the federal government, through DOMA, to favor married opposite-sex parents over married same-sex parents. (BLAG Br. 48; *see id.* at 47.) But even under rational basis review, "wholly unsubstantiated assumptions" are an insufficient basis upon which to sustain a law. *E.g.*, *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 535–36 (1973).

The scientific consensus resulting from decades of peer-reviewed social science, psychological, and child development research shows that children raised by same-sex couples fare as well as children raised by opposite-sex couples. (*See* Br. for the United States 41–42; *see generally* Joint Appendix ("JA"), Michael Lamb Aff. ("Lamb Aff.") 314–335 (research demonstrating comparable parenting methods among same-sex and opposite-sex couples).) The factors predicting healthy child and adolescent adjustment do not turn on the gender of the parents. It is the relationship of the parents to one another, their mutual commitment to their

child's well-being and the social and economic resources available to the family that are determinative of the child's well-being. (*See generally* Lamb Aff.)

Thus, any connection between supporting optimal childrearing and excluding married same-sex couples from federal marital protections is "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

C. DOMA Undermines the Well-Being of Children.

In the end, it is irrational, puzzling and sad that BLAG points to the protection of children to support DOMA's constitutionality. "DOMA is inimical to its stated purpose of protecting children." *Pedersen*, 881 F. Supp. 2d at 338. DOMA does not provide a single protection for a single child, but undermines the vital federal interest in the welfare of *all* children by depriving the children of married same-sex couples of "governmental services and benefits desirable, if not necessary, to their physical and emotional wellbeing and development." *Id.* All children, whether conceived intentionally or accidentally, through unassisted biological procreation or through other means, can benefit from federal recognition of their parents' marriages and the supports that come with it.[34] BLAG's arguments simply lack any connection to reality.

---

[34] *See* Brief for Petitioner at 37, *Hollingsworth* v. *Perry*, No. 12-144 (Jan. 22, 2013) (noting the "undisputed truth that

DOMA affects the children of same-sex marriages by limiting resources that would be available to their families if their parents' marriages were recognized, such as spousal health insurance benefits and pension protections. *See id.* at 338–39. For example, because of DOMA, a same-sex married couple may have to pay thousands of additional dollars in taxes if one spouse receives health insurance benefits through the other spouse's employment.[35] This is money that is no longer available to cover other family expenses. DOMA also makes it more complicated for these children to receive benefits under federal law.

Finally, DOMA hurts children of married same-sex couples by sending the message that their families are inferior. (*See* JA, Anne Peplau Aff. 253–77 (DOMA perpetuates stigma against same-sex couples).)

Withholding federal marital protections from married same-sex couples "will not make children of opposite-sex marriages more secure." *Goodridge*, 798 N.E.2d at 964; *see In re Marriage Cases*, 183 P.3d at 433. To the contrary, denying federal marital protections to married same-sex couples will "prevent children of same-sex couples from enjoying the immeasurable advantages that flow" from marriage. *Goodridge*, 798 N.E.2d at 964. As the

---

children suffer when procreation and childrearing take place outside of stable family units.").

[35] Treas. Reg. § 1.106-1; *see also* JANEMARIE MULVEY, CONG. RESEARCH SERV., TAX BENEFITS FOR HEALTH INSURANCE AND EXPENSES: OVERVIEW OF CURRENT LAW 1 (2011).

California Supreme Court indicated in *In re Marriage Cases*, "a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples." 183 P.3d at 433. In 2010, approximately 115,000 same-sex couples (44,000 of which were married) reported having one or more children. *See* DAPHNE LOFQUIST, U.S. CENSUS BUREAU, ACSBR/10-03, SAME SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS 2–3 (Sept. 2011).

Because the procreation and childrearing interests invoked by BLAG have no "footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and are not plausibly furthered by the exclusion of same-sex married couples from existing federal marital protections, DOMA "seems inexplicable by anything other than animus towards the class it affects." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996).

CONCLUSION

BLAG attempts to justify DOMA by singling out the one intrinsic difference between married same-sex and many opposite-sex couples—the possibility of unassisted biological procreation—and claiming that the essential purpose of marriage rests on that difference. Amici have shown that this argument is contradicted by history, law, policy and logic. Moreover, DOMA does not promote responsible procreation or optimal childrearing by opposite-sex couples because DOMA changes nothing

for them or their children. Instead, DOMA undermines the government's compelling interest in the welfare of all children by categorically excluding a class of married parents and their children from the important protections Congress provides other married couples and their children. Amici submit that DOMA is not rationally related to any legitimate governmental interest concerning procreation or child welfare, and ask this Court to affirm the ruling below.

Respectfully submitted,

KENDALL BRILL & KLIEGER LLP
Laura W. Brill
Meaghan L. Field

Courtney Joslin
Professor of Law
UC Davis School of Law

Joan Heifetz Hollinger
John and Elizabeth Boalt
Lecturer-in-Residence
UC Berkeley School of Law

SULLIVAN & CROMWELL LLP
H. Rodgin Cohen
Sharon L. Nelles*
William. H. Wagener
Garrard R. Beeney
Mitchell S. Eitel
Heather H. Volik
Diana G. Iskelov

Katharine Silbaugh
Professor of Law and
Law Alumni Scholar
BU School of Law

Attorneys for Amici Curiae Family and Child Welfare Law Professors

Dated: March 1, 2013

APPENDIX

APPENDIX

SUSAN FRELICH APPLETON
Lemma Barkeloo & Phoebe Couzins Professor of Law
Israel Treiman Faculty Fellow for 2012-2013
Washington University School of Law

CARLOS A. BALL
Professor of Law
Judge Frederick Lacey Scholar
Rutgers School of Law – Newark

ELIZABETH BARTHOLET
Morris Wasserstein Public Interest Professor of Law
Faculty Director, Child Advocacy Program
Harvard Law School

BRIAN BIX
Frederick W. Thomas Professor of Law and Philosophy
University of Minnesota Law School

CYNTHIA G. BOWMAN
Dorothea S. Clarke Professor of Law
Cornell Law School

PENELOPE E. BRYAN
Dean and Vice President
Professor of Law
Whittier Law School

NAOMI R. CAHN
Harold H. Greene
Professor of Law
George Washington
University Law School

MARION G. CRAIN
Vice Provost, Wiley B.
Rutledge Professor of
Law
Director, Center for the
Interdisciplinary Study
of Work & Social Capital
Washington University
Law School

PEGGY COOPER DAVIS
John S. R. Shad
Professor of Lawyering
and Ethics
Director, Experimental
Learning Lab
New York University
School of Law

NANCY E. DOWD
David H. Levin Chair in
Family Law
Director, Center on
Children & Families
University of Florida
Frederic G. Levin College
of Law

LINDA H. ELROD
Richard S. Righter
Distinguished Professor
of Law
Director, Children and
Family Law Center
Washburn University
School of Law

MARTHA ERTMAN
Carole & Hanan Sibel
Research Professor of
Law
University of Maryland
Francis King Carey
School of Law

MARTHA A. FINEMAN
Robert W. Woodruff
Professor of Law
Founding Director,
Feminism and Legal
Theory Project
Director, Vulnerability
and the Human
Condition Initiative
Emory Law School

DEBORAH L. FORMAN
Professor of Law
J. Allen Cook & Mary
Schalling Cook
Children's Law Scholar
Whittier Law School

JOANNA L. GROSSMAN
Professor of Law
Hofstra Law School

JOAN HEIFETZ HOLLINGER
John and Elizabeth Boalt
Lecturer-In-Residence
Director, Child Advocacy
Program
University of California
Berkeley School Of Law

LISA IKEMOTO
Professor of Law
University of California
Davis School of Law

MELANIE B. JACOBS
Professor of Law
Michigan State
University
College of Law

COURTNEY G. JOSLIN
Professor of Law
University of California
Davis School of Law

HERMA HILL KAY
Barbara Nachtrieb
Armstrong Professor of
Law
University of California
Berkeley School of Law

LAURA T. KESSLER
Professor of Law
University of Utah
S.J. Quinney College of Law

SUZANNE A. KIM
Professor of Law
Judge Denny Chin Scholar
Rutgers School of Law – Newark

CHARLES P. KINDREGAN
Professor of Law
Suffolk University Law School

KRISTINE S. KNAPLUND
Professor of Law
Pepperdine University School of Law

HOLNING S. LAU
Associate Professor of Law
University of North Carolina School of Law

MAYA MANIAN
Professor of Law
University of San Francisco School of Law

NANCY G. MAXWELL
Professor of Law
Washburn University School of Law

LINDA C. MCCLAIN
Professor of Law
Paul M. Siskind Research Scholar
Boston University School of Law

ANTHONY MILLER
Professor of Law
Pepperdine University School of Law

MELISSA E. MURRAY
Professor of Law
University of California Berkeley School of Law

DOUGLAS NEJAIME
Associate Professor of Law
Loyola Law School

DOROTHY E. ROBERTS
George A. Weiss University Professor of Law and Sociology
Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights
University of Pennsylvania Law School

KERMIT ROOSEVELT
Professor of Law
University of Pennsylvania Law School

LAURA A. ROSENBURY
Professor of Law
Washington University School of Law

SHELLEY R. SAXER
Professor of Law
Pepperdine University School of Law

JULIE SHAPIRO
Professor of Law
Faculty Fellow, Fred T. Korematsu Center For Law and Equality
Seattle University School of Law

KATHARINE B. SILBAUGH
Professor of Law
Law Alumni Scholar
Boston University School of Law

EDWARD STEIN
Vice Dean
Professor of Law
Director, Gertrud Mainzer Program in Family Law, Policy, and Bioethics
Yeshiva University
Benjamin N. Cardozo School of Law

MICHAEL S. WALD
Jackson Eli Reynolds Professor of Law, Emeritus
Stanford Law School

RHONDA WASSERMAN
Professor of Law
University of Pittsburgh School of Law

DEBORAH WIDISS
Associate Professor of Law
Indiana University Maurer School of Law

BARBARA BENNETT WOODHOUSE
L.Q.C. Lamar Professor of Law
Director of the Child Rights Project
Emory University