No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* FORMER SENATORS BILL BRADLEY, TOM DASCHLE, CHRISTOPHER J. DODD, AND ALAN K. SIMPSON ON THE MERITS IN SUPPORT OF RESPONDENT WINDSOR

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INTEREST OF *AMICI CURIAE*[1]

In 1996, as United States Senators, we voted in favor of the Defense of Marriage Act ("DOMA"). Much has changed since then. As Senators, and then as citizens, we have watched over the past seventeen years as the assumptions that led to the passage of DOMA have proven unfounded and as the nation's understanding of what equality requires has evolved. That experience has convinced us that DOMA is unconstitutional—a statute badly out of step not only with emerging realities, but with America's enduring commitment to equal protection of the law.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or his counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Legislation is not a science, grounded in timeless, immutable truths. It is, instead, often premised on beliefs about the world and the Constitution that are proven unfounded by later experience. As our nation progresses toward the more perfect union of our Founders' aspirations, we sometimes find that laws that once seemed constitutional, necessary, and fair have grown incompatible with our understanding of the world and with our national conceptions of decency, dignity, and equality. The Defense of Marriage Act ("DOMA") is such a law, and this Court should now hold it unconstitutional.

DOMA is a reflection of the era of its enactment. At the time, the world had no experience with gay marriage, and the debate over its legal recognition was still in its infancy. In that time of uncertainty, DOMA enjoyed broad support, but for reasons that varied widely. Some who supported it fervently opposed discrimination on the basis of sexual orientation in other areas. They pushed for protection against discrimination toward gays and lesbians in employment, adoption, and the military. They nonetheless supported DOMA's stated purpose of leaving the debate on gay marriage to develop in the states. And they believed that passing DOMA would defuse a movement to enact a constitutional amendment banning gay marriage, which would have ended the debate for a generation or more.

Others backed it out of opposition to any government ever recognizing gay marriages. Some feared the consequences of granting legal recognition to same-sex marriages. They believed state recognition of gay marriages would have pernicious

effects on traditional marriage, children, and our communities. Others acted out of simple hostility towards homosexuality, an animus toward gays and lesbians, or a willingness to exploit such feelings for political gain.

In the last seventeen years, much has changed, and for the better. Gay Americans and their families are now much more common and visible—in our communities, schools, and houses of worship, as well as in our business, government, and popular culture. While our progress toward a more tolerant society has been uneven, we increasingly have come to accept, even to embrace, same-sex families. And several states have recognized same-sex marriages.

That experience has taught us—and social scientists have confirmed—that the original justifications for DOMA can no longer be credited today. Gay families have proven stable, healthy environments for children and valuable members of our communities. There is no evidence that extending legal recognition to same-sex marriages has discouraged heterosexual marriage or encouraged fathers to abandon their children. And states have been able to recognize the civil institution of same-sex marriage without impinging on the rights of religious bodies to define the sacrament of marriage according to their beliefs. The only real purpose DOMA now serves is to stigmatize gays and lesbians, by singling out for federal disapproval their otherwise lawful marriages.

We now understand that our constitutional commitment to equality does not tolerate such discrimination. When DOMA was enacted, there was little serious discussion whether the statute violated

the Equal Protection clause. A decade earlier, this Court had condoned the criminalization of homosexual relationships in *Bowers v. Hardwick*. It was implausible to think that the government could brand gays and lesbians criminals, yet was constitutionally required to recognize gay marriages. But this Court has since overruled *Bowers*, and recognized that laws designed to express moral disapproval of homosexuality are inconsistent with our constitutional commitment to equality.

To be sure, marriage occupies a special status in our society. Marriage is simultaneously an intensely personal commitment, a foundational social institution, a matter of deep religious conviction, and a legal classification upon which hundreds of civil rights and civic obligations depend. Many Americans have had difficulty overcoming the traditional understanding of the word "marriage" as encompassing only opposite-sex couples, even while fully embracing the vital need for equal rights for gays and lesbians elsewhere. Some supported civil unions conferring the full incidents of marriage on gay couples, but believed that "marriage" was somehow different in a way that required it to be reserved only to heterosexual couples. But we now realize that it is precisely *because* the institution of marriage is so important that its legal aspects must not be exempt from the reach of the Constitution's commitment to equality. For the government to discriminate with regard to such a fundamental privilege is inconsistent with the principles on which our country was founded.

Ordinarily this Court should be hesitant to strike down a statute passed by Congress and signed by the

President. But it is ultimately the role of this Court to ensure that our laws respect our constitutional commitment to equal protection for all. The Court did not wait for the political process to desegregate the schools, or to repeal laws forbidding mixed race marriage. It did not delay justice to women subject to discriminatory laws founded on outdated assumptions. Nor has the Court shied away from its constitutional duty when faced with laws grounded in homophobia and animus toward gays. The Court should not hesitate to do its duty in this case either.

ARGUMENT

As DOMA's defenders note, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform."[2] DOMA, like all federal statutes, was passed by Congress and signed by the President. But while the Court should not ignore that our political representatives also take an oath to uphold the Constitution, "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[3]

DOMA is an especially poor candidate for any claim of deference to the constitutional judgment of the political braches. It was enacted hastily, with little independent consideration of its constitutionality, against the backdrop of a constitutional jurisprudence this Court has since abandoned. It was premised in large part on fears that subsequent experience has proven unfounded. And it effects a discrimination that we now have come to recognize as incompatible with our constitutional commitment to equal treatment under the law.

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[2] Bipartisan Legal Advocacy Group Br. 22 [hereinafter BLAG Br.] (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985)).

[3] *Zivotofsky ex rel Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

I. DOMA Was Premised Largely On Fear And Speculation, With Little Independent Consideration Of Its Constitutionality.

DOMA was proposed in response to a Hawaii Supreme Court decision that left Hawaii seemingly poised to recognize same-sex marriage.[4] At the time, the consequences of such a step—on other states, on the federal government, and on the nation as a whole—were unknown. No state had yet legalized same-sex marriage. In fact, gay and lesbian couples could not legally marry anywhere in the world. Many feared that one court in one state could require national recognition of same-sex marriages conducted in that state, including for purposes of many federal programs.

In response to those fears, Congress enacted DOMA in September 1996. Section 2 allowed a state to refuse to recognize same-sex marriages performed in other states.[5] Section 3, the provision challenged in this case, defined marriage for purposes of federal law as "between one man and one woman."[6] The statute therefore withholds from gay families a broad range of federal benefits that are ordinarily bestowed on married couples, even to same-sex couples legally married under the laws of their home state.

The statute enjoyed broad bipartisan support, but the reasons for that support varied widely. Some supported DOMA even while staunchly opposing

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[4] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[5] 28 U.S.C. § 1738C.

[6] 1 U.S.C. § 7.

discrimination against gays in employment, adoption, military service, and other spheres. Some believed that DOMA was necessary to allay fears that a single state's recognition of same-sex marriage could automatically extend to all other states through the Full Faith and Credit Clause. And they believed that enacting DOMA would eliminate the possibility of a federal constitutional amendment banning same-sex marriage—an outcome that would have terminated any further debate about same-sex marriage, potentially for generations. At the same time, even for many who generally opposed sexual orientation discrimination, the traditional conception of marriage was so engrained that it was difficult to see the true nature of the discrimination DOMA wrought.

Others supported DOMA for very different reasons, voicing an open hostility toward gays and lesbians that was regrettably common in public discourse at the time. The House Report declared that "Civil laws that permit only heterosexual marriage reflect . . . . both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[7] On the floor of the House, a Congressman asserted that "homosexuality is immoral, that it is based on perversion, [and] that it is based on lust."[8] Same-sex marriage, others claimed, "legitimize[s] unnatural

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[7] H.R. Rep. No. 104-664, at 15-16 (1996) (footnote omitted).

[8] 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

and immoral behavior."[9] For them, DOMA was a way of stigmatizing those they viewed as outside the boundaries of our greater community.

Others acted out of fear. For example, some worried that same-sex marriages would be harmful to children[10] or would undermine traditional families.[11] Some worried that legal recognition of same-sex marriage could interfere with the traditional prerogative of religious groups to define marriage according to their customs and beliefs. Some claimed that recognizing same-sex marriage would strain the federal budget.

Congress enacted DOMA in this environment with uncharacteristic haste: in less than five months, DOMA went from an obscure idea to a federal law. Congress held only a single day of hearings, with little examination of the constitutionality of the discrimination inherent in Section 3.[12] The

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[9] 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith).

[10] *See, e.g.*, *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Rep. Canady, Chairman, H. Subcomm. on the Constitution) ("[H]eterosexual marriage provides the ideal structure within which to beget and raise children.").

[11] The House Report declared that DOMA responded to the "orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers." H.R. Rep. No. 104–664, at 2-3.

[12] The constitutional discussion that took place focused almost exclusively on whether DOMA contravened principles of federalism, not on whether Section 3 of DOMA violated the

prevailing understanding at the time was that *Bowers v. Hardwick*[13] – which rejected a constitutional challenge to state convictions of two gay men for engaging in private intimate conduct – conclusively established the constitutionality of discrimination on the basis of sexual orientation.[14]

Equal Protection clause. *See The Defense Of Marriage Act: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 2, 23 (1996) [hereinafter *Senate Hearing*] (testimony of Professor Wardle) (stating that "the primary issue facing the committee today is whether Congress has the authority to enact [DOMA]" consistent with federalism principles, and only briefly discussing the equal protection argument); *id.* at 44 n.1 (statement of Professor Cass Sunstein) (explaining that he will "focus throughout on section 2" and summarily stating his belief that Section 3 is constitutional); *id*. at 56-59 (letter from Professor Michael McConnell) ("The argument that the proposed statute would violate the Equal Protection Clause requires little comment.").

[13] 478 U.S. 186 (1986).

[14] *See* H.R. Rep. No. 104-664, at 32-33 (relying on *Bowers* to reach a "certain" conclusion that DOMA was constitutional). Indeed, in light of *Bowers*, there was little serious discussion of constitutional limitations on discrimination against gays in the years preceding the enactment of DOMA. There was no legal scholarship discussing classifications based on sexual orientation. The first casebook on sexuality and the law was not published until 1997. William B. Rubenstein, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317, 326 (2004) (citing SEXUALITY, GENDER, AND THE LAW (William N. Eskridge, Jr. & Nan D. Hunter eds., 1997)). William Rubenstein, now a law professor at Harvard, once described a futile search he conducted in the 1980s of the school's library – "where no subject was too obscure for its own shelf" – for materials about gay people. *Id.* at 318. "[T]he absence of legal materials about my life," recalled Rubenstein, "was deafening." *Id.*

For that reason, the Office of Legislative Affairs at the Department of Justice concluded without further analysis that DOMA "would be sustained as constitutional if challenged in court."[15]

II. Developments Since 1996 Have Eroded DOMA's Justifications.

Time is a remarkable teacher. It tests our assumptions and forces us to confront unexamined beliefs that all too often stand in the way of our progress towards the ideals on which the nation was founded. With the benefit of time and experience, we can now see that the understandings on which DOMA was premised have not survived our nation's increased knowledge about same-sex families or our modern understanding of what equality requires.

A. Time And Experience Have Proven The Fears That Led To DOMA Unfounded.

1. Many of the fears that led to the passage of DOMA were based on nothing more than speculation. In 1996, the nation had no experience with same-sex marriage. And, indeed, many had little experience with the gay community or gay families, many of whom were understandably reluctant to speak publicly about themselves and their relationships at

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[15] *Senate Hearing*, *supra* note 12, at 2 (letter from Andrew Fois, Assistant Att'y Gen.). Although *Romer v. Evans*, 517 U.S. 620 (1996), had recently been decided, few understood its significance at the time. *See* n.38, *infra.*

a time when discrimination and open hostility toward homosexuality was more common and accepted.

We have come a long way since then. Now, seventeen years later, gay men and women have become much more visible. Nearly 80% of Americans now know a gay relative, friend, or co-worker.[16] Gay individuals and gay families are increasingly prominent on TV, in the movies, and in the news. These changes are having a real effect: knowledge, understanding, and acceptance are gradually but inexorably replacing ignorance, fear, and hostility.

We also no longer need to speculate about the consequences of recognizing same-sex marriage. Since 1996, nine states and the District of Columbia have legalized gay marriage, and several other states have allowed civil unions between same-sex couples. As of 2010, the Census reported that 130,000 same-sex couples were married.[17] Another 515,000 same-sex couples led households.[18] There are now more than 100,000 same-sex couples with children.[19]

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[16] *See Poll: Attitudes Toward Gays Changing Fast*, USA Today (December 5, 2012), http://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/.

[17] Martin O'Connell & Sarah Feliz, *Same-sex Couple Household Statistics from the 2010 Census* 26 tbl.E (SEHSD Working Paper Number 2011-26, Sept. 27, 2011), *available at* http://www.census.gov/hhes/samesex/. These numbers are likely even higher today given that the Census figures were collected before New York legalized same-sex marriage.

[18] *Id.*

[19] *See Same-Sex Unmarried Partner or Spouse Households*

Indeed, a recent Gallup poll indicates that lesbian, gay, bisexual, and transgender women as a group are as likely as heterosexual women to raise a child.[20]

2. In light of this experience, the justifications offered for DOMA's discrimination have fallen by the wayside one by one.

We have learned, for example, that the recognition of gay marriage does not undermine families. We know now that gays and lesbians form stable, long-lasting relationships.[21] We have learned that gay parents are equally as capable as heterosexual parents of raising children that are healthy, successful, and well-adjusted.[22] There is no evidence that recognizing gay marriage discourages

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by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey, Gallup, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Jan. 22, 2013).

[20] Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, Gallup Politics (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

[21] *See, e.g.*, Lawrence A. Kurdek, *Lesbian and Gay Couples*, *in Lesbian, Gay, and Bisexual Identities over the Lifespan: Psychological Perspectives* 243, 243 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

[22] *See* Charlotte J. Patterson & Paul D. Hastings, *Socialization in the Context of Family Diversity*, *in Handbook of Socialization: Theory and Research* 328, 339-43 (Joan E. Grusec & Paul D. Hastings eds., 2007). Courts have recognized this proposition as well. *See, e.g.*, *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

traditional heterosexual marriage and childrearing. We have also learned that governmental recognition of same-sex marriage has not forced religious institutions to officiate over marriages inconsistent with their beliefs.

Indeed, gays and lesbians have strengthened, not harmed, the institutions that embrace them. In business, many major Fortune 500 companies – including, for example, Chevron, Bank of America, J.P. Morgan, and Lockheed Martin – welcome gay employees and their families on equal footing, providing equal benefits to same-sex couples.[23] And the number increases each year.[24] Gays and lesbians who now openly serve in the military, teach in our schools, and represent us in government are making our nation safer, smarter, and wiser.

In short, the suggestion that our country's vital institutions need protection from gay families has been thoroughly discredited by our national experience.

3. We have also come to recognize that DOMA actually undermines the federalism principles it purported to serve.

Many supported DOMA as a way of leaving same-sex marriage to the states, which have traditionally defined marriage in our constitutional

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[23] *See* Human Rights Campaign Foundation, *Corporate Equality Index 2013* 25, 45-48 (2012), *available at* www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf.

[24] *Id*.

structure.[25] But as Representative Bob Barr, DOMA's author, cogently acknowledged in a 2009 editorial advocating for the repeal of the law,

> DOMA is not working out as planned. . . . I have concluded that DOMA is neither meeting the principles of federalism it was supposed to, nor is its impact limited to federal law. In effect, DOMA's language reflects one-way federalism: It protects only those states that don't want to accept a same-sex marriage granted by another state.[26]

For example, under DOMA, the federal government has threatened to withhold Medicaid funding from states that extend Medicaid benefits to lawfully married same-sex couples.[27] Far from empowering states to recognize same-sex marriage or not as they see fit, DOMA penalizes states that decline to adopt the 1996 Congress's view of marriage as an institution between one man and one woman.

4. DOMA likewise has not served the federal interests it purported to protect. Although the statute was promoted as a way to preserve federal funds, when the Congressional Budget Office did the math in 2004, it determined that DOMA actually

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[25] *See* H.R. Rep. No. 104-664, at 16-17.

[26] Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times (Jan. 5, 2009), http://www.latimes.com/news/opinion/commentary/la-oe-barr5-2009jan05,0,1855836.story.

[27] *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 242-43 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

costs the government about $1 billion annually.[28] For instance, by allowing same-sex couples to avoid the so-called "marriage penalty," DOMA materially lowers federal tax revenue.

DOMA has harmed the federal government in other unexpected ways as well. The Director of the U.S. Office of Personnel Management has explained that by denying spousal benefits to same-sex couples, DOMA "undermines the Federal Government's ability to recruit and retain the Nation's best workers."[29] That is hardly surprising, given that in many critical areas – including, for example, high-tech positions vital to our national security – the government must compete with the major corporations that offer equivalent benefits for same-sex and opposite-sex couples.[30] DOMA has particularly harmful consequences for the men and women in our military, whose same-sex spouses are denied basic benefits (such as on-base medical care) and respect (including recognition as a spouse at their partners' military funerals) afforded to all other

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[28] *See* Douglas Holtz-Eakin, Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1 (2004), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

[29] *H.R. 2517, Domestic Partnership Benefits and Obligations Act of 2009: Hearing Before the Subcomm. on Fed. Workforce, Postal Service, & D.C. of the Comm. on Oversight and Gov't Reform*, 111th Cong. 51 (2009) (statement of John Berry, Director, U.S. Office of Personnel Mgmt.).

[30] *See* Human Rights Campaign Foundation, *Corporate Equality Index 2013*, *supra* note 23, at 24-25

military families.[31] This discrimination directly "impairs military readiness, unit cohesion, and soldier retention."[32]

DOMA also undermines other important federal laws, including, for example, anti-nepotism statutes,[33] judicial recusal rules,[34] and gift bans imposed on senators and their spouses.[35] Under DOMA, the law that prohibits a straight government official from giving a government job to his wife, does not apply to a gay official who gives the same job to his same-sex spouse.

B. Legal Developments Have Swept Away DOMA's Constitutional Foundations.

The past seventeen years have also seen the erosion of DOMA's constitutional underpinnings, including a transformation of this Court's treatment of laws that impair the rights of gay and lesbian Americans.

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[31] *See* Mark Thompson, *The Battle of Fort Bragg*, Time Magazine, Feb. 4, 2013, at 10 (noting same-sex spouse of soldier killed in combat in Afghanistan was denied the traditional presentment of the flag that covered her partner's coffin and "was treated as if she didn't exist.").

[32] Daniel Pasek, *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 Harv. L. & Pol'y Rev. 459, 459 (2012).

[33] *See* 5 U.S.C. § 3110; 5 U.S.C. § 2302(b)(7); 28 U.S.C. § 631(b).

[34] *See* 28 U.S.C. § 455.

[35] *See* 2 U.S.C. § 31-2(a).

The American concept of equality "is not shackled to the political theory of a particular era."[36] When this Court repudiated the widely accepted view that racial segregation was compatible with equal protection, it was not because the Constitution had changed, but because our understanding of the world and of the nature of equality had evolved.[37] We finally recognized that our commitment to equality was fundamentally incompatible with the government dictating that some among us were unworthy of participating in the fundamental institutions of society on equal footing with the rest.

Our generation has seen a similarly profound shift in our understanding of the Constitution's protection against discrimination on the basis of sexual orientation. DOMA was enacted against the backdrop of *Bowers*.[38] The reasoning and rhetoric of the decision condoned using the power of the government to express disapproval of, and even to

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[36] *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

[37] *See Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

[38] Although *Romer v. Evans*, 517 U.S. 620 (1996), was decided a few months before DOMA was enacted, few understood its full import at the time, particular given that the majority in *Romer* never mentioned *Bowers*. *See* H.R. Rep. No. 104-664, at 31-33; *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

punish, the physical expression of intimacy between same-sex couples.[39]

In the years after DOMA was enacted, this Court repudiated that constitutional decision and the worldview it represented. In *Romer v. Evans*[40] and *Lawrence v. Texas*,[41] the Court recognized that a government committed to liberty and equality cannot use the awesome power of the law to single out an unpopular group for disapproval, imposing legal harm on its members for who they are and whom they chose to love.

This new constitutional understanding reflects an emerging social consensus. The open hostility toward homosexuality that was common in the DOMA debates is being replaced by a recognition that sexual orientation discrimination is incompatible with our nation's core principles of equality. Today, 63% of Americans agree that discrimination based on sexual orientation is a serious problem.[42] At the same time, the American definition of marriage – not what marriage means but who it is for – is broader and more inclusive than ever before. Fifty-three percent of Americans support gay marriage, up from 27% in 1996.[43] A growing

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[39] *See Bowers*, 478 U.S. at 192-96.

[40] 517 U.S. 620 (1996).

[41] 539 U.S. 558 (2003).

[42] *Gay and Lesbian Rights*, Gallup, http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx (last visited Jan. 22, 2013).

[43] *Id.* The two most common reasons offered for this view are that all Americans should have equal rights (32%) and that

number of religious denominations have come to accept legal recognition of gay marriages, and some have embraced it as within their religious tradition.[44] Moreover, though DOMA enjoyed wide bipartisan support in 1996, the current President and many members of Congress – including some who voted for DOMA in 1996 – now oppose DOMA's federal definition of marriage and believe that the law is unconstitutional.[45]

III. This Court Should Strike Down DOMA.

Sometimes experience shows "that laws once thought necessary and proper in fact serve only to oppress."[46] So it is with DOMA. Like this Court's

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individuals are entitled to their personal choice as to whom they marry (32%). *Id.*

[44] *See Religious Groups' Official Positions on Same-Sex Marriage*, Pew Forum (Dec. 7, 2012), http://www.pewforum.org/gay-marriage-and-homosexuality/religious-groups-official-positions-on-same-sex-marriage.aspx.

[45] *See* Charlie Savage & Sheryl Gay Stolbery, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. Times (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all&_r=0; Brief of Members of the U.S. House of Representatives – Including Objecting Members of the Bipartisan Legal Advisory Group, Representatives Nancy Pelosi and Steny H. Hoyer – as Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance, *Windsor v. United States*, 699 F.3d 169 (2012) (Nos. 12-2335, 12-2435), 2012 WL 4338882, at *1 ("Some *amici* voted against . . . [DOMA] . . . while others voted for it; still others were not in Congress when DOMA was enacted. But all believe, today, that Section 3 of DOMA . . . lacks a rational relationship to any legitimate federal purpose and accordingly is unconstitutional.").

[46] *Lawrence*, 539 U.S. at 579.

regrettable decision in *Bowers*, the opinion DOMA's supporters would have this Court write cannot be reconciled with our constitutional commitments now, and would not withstand the judgment of history.

1. "[O]ur laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation," and "family relationships."[47] Such choices are "central to personal dignity and autonomy" and form the core of the "liberty protected by the Fourteenth Amendment."[48] When the government legislates on the basis of those private decisions, when it makes hundreds of legal rights and obligations turn on a citizen's most intimate choices, it is compelled by the Constitution to treat all of its citizens with equal dignity. If Congress is to discriminate among state-recognized marriages – accepting the judgment of some states while disregarding others' – such discrimination must rest on substantial and legitimate grounds, not on fear and speculation that is at odds with actual experience.

As a result, contrary to the claims of DOMA's defenders, what we have learned from real world experiences in the years since DOMA's passage is not only relevant, but critical to deciding whether the discrimination the statute visits upon thousands of decent American families is constitutionally justifiable. And our experience over the past decades

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[47] *Id*. at 574.

[48] *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

has shown that the fears upon which DOMA was premised have proven unfounded. The only function the statute truly serves today is to express moral disapproval of an individual's choice to make a lifelong commitment to another person of the same sex, and to disrespect a state's decision to give those marriage vows legal recognition. Such discrimination – whether premised in hatred and hostility,[49] or simple "want of careful, rational reflection"[50] – has no place in our constitutional system.

2. We recognize that some believe that marriage is different. It is probably no accident that marriage was one of the last strongholds of racial discrimination, lingering decades after this Court had declared that racial discrimination was unconstitutional in other areas of civic life.[51] We all recognize that marriage is a special institution. It is an intensely personal commitment between two people, a profoundly private decision into which the government of a free people should not intrude. At the same time, it is one of our bedrock social institutions. And it is a sacrament subject to the diverse religious traditions that our Constitution

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[49] *See Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

[50] *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

[51] *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

protects from government interference. But it is also a civil, legal status bearing important consequences in many areas of civic life.

For too long, we drew the conclusion that because marriage is so special, discrimination that would be intolerable in any other context is acceptable when deciding who can enjoy the legal benefits of this civil institution. In the past decades, however, we have come to realize that precisely because marriage *is* special, we must not exclude civil marriage from the reach of our commitment to equal treatment under the law. Our respect for individual liberty demands that every American be allowed to decide for himself or herself whom to marry. Our respect for the family requires extending the government benefits that foster this fundamental social institution to all families. And while the Constitution preserves the religious definition of marriage for our religious institutions, our respect for the Constitution's guarantee of equality under the law requires that we extend the legal benefits of marriage to every married couple, gay or straight. To decree that a particular group of people cannot avail themselves of such a fundamental societal institution is to label those people second-class citizens – a result our Constitution does not permit.

3. DOMA's supporters urge this Court to defer to the democratic process, allowing for "compromise and way-stations" along the road to recognizing the equal

rights of gays and lesbians.[52] That plea misconceives this Court's role.

Time and again, the Court has been required to enforce constitutional principles despite lingering opposition from some quarters. The Court did not wait for the "compromise and way-stations" of the democratic process to resolve the problem of racial segregation.[53] It did not leave the equal rights of women to politicians, even though it recognized the many victories that women had achieved through the political process.[54] It did not wait for states to repeal statutes that outlawed mixed-race marriages[55] or permitted the execution of the young or the mentally retarded before declaring those practices inconsistent with our national charter.[56] And, in recent times, the Court has not hesitated to enforce the equal protection rights of gays and lesbians when legislators have failed to repeal laws premised on hostility and unfounded fears.[57]

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[52] BLAG Br. 22 ("[T]he democratic process allows compromise and way-stations, whereas constitutionalizing an issue yields a one-size-fits-all solution . . . .").

[53] *See Brown*, 347 U.S. at 495.

[54] *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973).

[55] *See Loving*, 388 U.S. at 12.

[56] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

[57] *See Lawrence*, 539 U.S. at 578-79; *Romer*, 517 U.S. at 633-35.

The history of this nation is a long march toward a more diverse and inclusive democracy. We know the direction of that journey, we know its destination, but we also know we are not there yet. Regrettably, gay Americans still face widespread discrimination in their everyday lives – in the workplace, in schools and universities, in the political arena. And discrimination can linger in the law long after it has ceased to define us as a society. Our legislative process can allow minority views to prevent the repeal of legislation that no longer reflects contemporary constitutional values. While outdated legislation remains in force, ordinary people like Edie Windsor suffer. And when our citizens come to this Court seeking relief from that suffering, it is this Court's enduring obligation to vindicate their constitutional right to liberty and equality.

CONCLUSION

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

Respectfully submitted,

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