No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE HONORABLE JOHN K. OLSON IN SUPPORT OF RESPONDENT ADDRESSING THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... *i*

TABLE OF AUTHORITIES ..... *v*

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

A. The History of Discrimination Against Homosexuals Is Ancient, Pervasive, Violent, Abusive, and Ongoing 6

1. The History of Discrimination Against Homosexuals Is One of Violent Criminalization 6

2. Discrimination Has Persisted Since the Class Became Identifiable 7

3. Discriminatory Violence Against Homosexuals Continues 10

B. The Legislative History of DOMA Reveals that It Is an Outgrowth of, and Perpetuates, Prejudice Against Homosexuals 13

1. DOMA Arose To Stifle a Nascent Effort in Hawaii To Recognize Marriage Equality 15

TABLE OF CONTENTS
(continued)

Page

2. DOMA Was Designed To Discourage Marriage Equality 16

3. In Considering DOMA, Sponsoring Legislators Depicted Homosexuality as Immoral and Aberrant, and Same-Sex Marriage as a Threat to the Survival of the Nation 17

4. In Considering DOMA, Sponsoring Legislators Analogized Same-Sex Marriage to Polygamy, Incest, Bestiality, and Pedophilia 18

5. The House Report Itself Identifies the Discriminatory Animus Behind the Legislation 20

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated DOMA Has Doomed Other Invidiously Discriminatory Legislation 21

1. The Grounds Used To Justify DOMA Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes 22

TABLE OF CONTENTS
(continued)

Page

2. The Grounds Used To Justify DOMA Track the Invidious Grounds Used To Justify Discrimination Against Women 25

3. The Grounds Used To Justify DOMA Are Substantially the Same as Those Used To Justify Discrimination Against Illegitimate Children 27

4. The Grounds Used To Justify DOMA Are as Pretextual as Those Used To Justify Discrimination Against Aliens 29

D. Given the Reality that DOMA Embodies Invidious Discrimination, It Should Be Subject to Intermediate Scrutiny 30

1. Homosexuals Have Suffered a History of Discrimination..... 34

2. Sexual Orientation Is an Immutable Characteristic..... 34

3. Homosexuals Lack Significant Political Power 36

TABLE OF CONTENTS
(continued)

Page

4. Sexual Orientation Has No Relation to an Individual's Ability To Contribute to Society 38

E. Animus Toward a Class, as Revealed in DOMA's Legislative History, Can Never Serve a Legitimate, Important, or Compelling Interest 39

1. DOMA Does Nothing To Legitimately Defend or Nurture the Institution of Traditional, Heterosexual Marriage 40

2. Tradition, Alone, Cannot Save DOMA 43

3. DOMA Does Not Protect State Sovereignty 43

4. The Goal of Conserving Government Resources Cannot Properly Shelter Discriminatory Treatment 44

5. DOMA Creates Administrative Burdens and Destroys Uniformity 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Able v. United States,
968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998) 6, 7

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 15

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No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996) 15

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir. 1989) 32

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347 U.S. 497 (1954) 30

Boutilier v. INS,
363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967) 9

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483 U.S. 587 (1987) 3, 33, 34

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478 U.S. 186 (1986) 24, 32

TABLE OF AUTHORITIES
(continued)

Page

Bradwell v. Illinois,
83 U.S. 130 (1872) 25

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) ..... *passim*

Clark v. Jeter,
486 U.S. 456 (1988) 34

Eggers v. Olson,
231 P. 483 (Okla. 1924) 22

Frontiero v. Richardson,
411 U.S. 677 (1973) 37

Graham v. Richardson,
403 U.S. 365 (1971) 44

Green v. State,
58 Ala. 190 (1877) 23

High Tech Gays v. Def. Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990) 32

J.E.B. v. Alabama,
511 U.S. 127 (1994) 32, 37

Kerrigan v. Comm'r of Pub. Health,
957 A.2d 407 (Conn. 2008) 3, 37

TABLE OF AUTHORITIES
(continued)

Page

Kinney v. Commonwealth,
71 Va. 858 (1878) 23

Lalli v. Lalli,
439 U.S. 259 (1978) 27

Lawrence v. Texas,
539 U.S. 558 (2003) 7, 32

Levy v. Louisiana,
391 U.S. 68 (1968) 28

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192 So. 2d 193 (La. Ct. App. 1966) 27

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388 U.S. 1 (1967) 22

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427 U.S. 495 (1976) 28

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881 F. Supp. 2d 294
(D. Conn. 2012) 3, 7, 8, 9, 10

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10 S.W. 305 (Tenn. 1889) 23

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704 F. Supp. 2d 921 (N.D. Cal. 2010) 10

TABLE OF AUTHORITIES
(continued)

Page

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457 U.S. 202 (1982) 2, 30, 31, 36

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 36

Romer v. Evans,
517 U.S. 620 (1996) 33

Rowland v. Mad River Local Sch. Dist.,
470 U.S. 1009 (1985) 6

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411 U.S. 1 (1973) 28

Scott v. State,
39 Ga. 321 (1869) 24

Sosna v. Iowa,
419 U.S. 393 (1975) 42

Stanton v. Stanton,
517 P.2d 1010 (Utah 1974), *rev'd*,
421 U.S. 7 (1975) 26

State v. Bell,
66 Tenn. 9 (1872) 18

Sugarman v. Dougall,
413 U.S. 634 (1973) 29

TABLE OF AUTHORITIES
(continued)

Page

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334 U.S. 410 (1948) 29, 30

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 5, 39

United States v. Virginia,
518 U.S. 515 (1996) 4, 32, 34, 38, 40

Watkins v. United States Army,
875 F. 2d 699 (9th Cir. 1989) 43

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 27

STATUTES

1 U.S.C. § 7 2

10 U.S.C. § 1062 42

26 U.S.C § 2(b)(2)(B) 42

26 U.S.C. § 7448(a)(8)(B) 42

38 U.S.C. § 101(3) 42

LEGISLATIVE MATERIALS

2 CONG. REC. 4342 (1874) 26

142 CONG. REC. 16,969 (1996) 5, 20

TABLE OF AUTHORITIES
(continued)

Page

142 CONG. REC. 16,971 (1996) 18, 19

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Defense of Marriage Act: Hearing Before the Sub. Comm. on the Constitution of the Comm. on the Judiciary of the House of Representative on H.R. 3396, 104th Cong. 176 (1996) 18

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TABLE OF AUTHORITIES
(continued)

Page

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OTHER AUTHORITIES

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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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(continued)

Page

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92 COLUM. L. REV. 1431 (1992) 11

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52 VA. L. REV. 1189 (1966) 22

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*,
96 COLUM. L. REV. 1753 (1996) 11

INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Honorable John Karl Olson, a United States Bankruptcy Judge. In November 2010, Judge Olson married G. Steven Fender in the Commonwealth of Massachusetts. On December 1, 2010, Judge Olson filled out and submitted AO Form 162, Election to Participate in the Judicial Survivors' Annuities System ("JSAS"). Judge Olson named Steven as his spouse on this form and also designated Steven as his husband and 100% beneficiary on the related Designation of Beneficiary Judicial Survivors' Annuities System Form.

Initially, the Administrative Office of the United States Courts ("AO") accepted Judge Olson's designations and began deducting the required premiums from his paycheck. Thereafter, however, the AO sent Judge Olson a letter stating that "the governing law does not currently permit your enrollment in JSAS based upon a same-sex marriage." The letter continued, "[t]his

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Petitioner's blanket consent has been filed with the Court, and a copy of Respondent's consent is filed herewith.

interpretation is consistent with the 1996 'Defense of Marriage Act ["DOMA"],' 1 U.S.C. § 7 …[and] we must interpret the statute to preclude an opportunity to elect participation in JSAS based on a same-sex marriage, and to preclude survivors of same-sex marriages from qualifying for a JSAS annuity." The letter advised Judge Olson that the AO had cancelled his JSAS election, and the AO returned his premium payments. DOMA is the only reason the AO gave for rejecting Judge Olson's JSAS benefit for Steven. Judge Olson has a direct and personal interest in the outcome of this case.

In addition to addressing the history of discrimination against homosexuals, the distinct contribution of this brief is to demonstrate the discriminatory origins and rationalizations for DOMA in comparison with the substantially similar discriminatory origins and rationalizations for a variety of other unconstitutional legislation, namely various anti-miscegenation statutes and other laws discriminating against women, aliens, and illegitimate children. In this way, DOMA may be placed in proper context, and its origins and rationalizations understood for what they truly are.

SUMMARY OF THE ARGUMENT

The Equal Protection Clause mandates that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). While the general rule is that a sta-

tute satisfies equal protection if it has a rational basis, where a statute categorizes on the basis of certain "suspect" or "quasi-suspect" classes, courts apply heightened scrutiny and require the government to demonstrate that the legislation furthers an important or compelling government interest. This Court has enumerated four factors that determine if a class is subject to heightened scrutiny: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals within the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or is politically powerless, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)); and (4) whether the characteristic distinguishing the group "bears [any] relation to ability to perform or contribute to society." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *see also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (explaining that factors (1) and (3) are mandatory, and (2) and (4) are optional).

An examination of these four factors in relation to sexual orientation makes clear that homosexuals are a suspect or quasi-suspect class and that the Second Circuit appropriately subjected DOMA to intermediate scrutiny. In particular, homosexuals have been the victims of a dehumanizing history of discrimination that dates back to at least the Middle Ages. *Pedersen v. OPM*, 881 F. Supp. 2d 294, 317 (D. Conn.

2012). Discrimination against homosexuals only increased as individuals became more open about their sexual orientation, and the history of discrimination is one that is marked by violent hate crimes and brutal harassment. This long history of discrimination, together with the fact that the group is a minority that lacks political power, establishes that DOMA must be subject to intermediate scrutiny. Moreover, sexual orientation satisfies the other factors this Court looks to in deciding whether to apply intermediate scrutiny: homosexuality is well-recognized as an immutable characteristic; and homosexuality has no bearing on an individual's ability to contribute to society.

Where, as here, intermediate scrutiny is applicable, Congress must, at a minimum, provide an "exceedingly persuasive" justification that the legislation "serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Critically, the justification must be "genuine" and must not have been "invented post hoc in response to litigation." *Id.* Congress set forth four "governmental interests" that are allegedly served by DOMA: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending the traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce govern-

ment resources. Additionally, the Second Circuit found that certain statements in the House Report implicate a fifth interest in enforcing uniformity in the distribution of federal benefits. Supp. App. 24a. None of these justifications is rationally related to a legitimate government interest, let alone substantially related to an important interest.

Furthermore, legislation that "rest[s] on irrational prejudice," *Cleburne*, 473 U.S. at 450, or "a bare congressional desire to harm a politically unpopular group," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), cannot survive any level of scrutiny, let alone intermediate scrutiny. An examination of the legislative history of DOMA demonstrates that it is precisely the kind of prejudicial legislation that cannot be tolerated under equal protection. Far from furthering an important government interest, DOMA was motivated by a belief that the "law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based." 142 CONG. REC. 16,969 (1996) (statement of Rep. Canady). Opponents of interracial marriage, women's rights, and the rights of aliens and illegitimate children once defended discriminatory laws on prejudicial grounds strikingly similar to those used to defend DOMA. These laws are now universally recognized as historical errors that violate equal protection, and DOMA should share their fate.

ARGUMENT

A. The History of Discrimination Against Homosexuals Is Ancient, Pervasive, Violent, Abusive, and Ongoing.

As the Second Circuit held below, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." Supp. App. 16a; *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("homosexuals have historically been the object of pernicious and sustained hostility…"). That conclusion, however, is an understatement. In order to avoid minimizing or trivializing the suffering of the minority that is now before the Court, it is important to consider carefully the breadth and scope of the persecution of homosexuals that began before this Country's founding and continues to this day.

1. The History of Discrimination Against Homosexuals Is One of Violent Criminalization.

The "virulent hostility" toward homosexuals dates back to at least the second half of the twelfth century. *Able v. United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998). By the Middle Ages, "homosexuality became more and more associated with heresy," and laws were passed which "imposed death by burning on ho-

mosexual men." *Id.* (citing JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 281 (1980)).

The earliest English laws forbidding homosexual conduct, including a 1533 statute that criminalized sodomy, were based on ancient Judeo-Christian prohibitions. *Pedersen*, 881 F. Supp. 2d at 315. The American colonies followed the English tradition, *id.*, upholding the so-called "Levitical Mandate," which pronounced that "[i]f a man also lie with mankind, as he lieth with a woman, both of them shall have committed an abomination; they shall surely be put to death." William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 687 (2011). The historic criminalization of homosexual conduct in America, beginning with the Massachusetts Bay Colony in 1641, *Pedersen,* 881 F. Supp. 2d at 315, and lasting until this Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), constitutes "telling proof of animus and discrimination against homosexuals in this country…." Supp. App. 16a.

2. Discrimination Has Persisted Since the Class Became Identifiable.

Historians generally agree that the conceptualization of homosexuals as a class began in the nineteenth century and coincided with individuals becoming more open about their sexual

identity. *E.g.*, Eskridge, *supra*, at 685; *Pedersen*, 881 F. Supp. 2d at 315-16 (explaining that conceptions of homosexual identity emerged in the late nineteenth century "as gay Americans moved into cities and began tentatively stepping out of the closet"). Coextensive with the emergence of this new class, society's disapproval of homosexual conduct evolved into government discrimination against homosexuals themselves. *Id.*; *see also* Eskridge, *supra*, at 689 ("Between 1921 and 1961, state and federal governments adopted hundreds of statutes imposing civil disabilities on 'homosexuals and other sex perverts,' to use the terminology of the era."). A particularly hostile account of discrimination is contained in an infamous 1950 Congressional report investigating federal government employment of homosexuals. SUBCOMM. ON INVESTIGATIONS TO COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 81-241 (1950) (the "Report"). In the Report, the subcommittee stated that "homosexuals are perverts who may be broadly defined as 'persons of either sex who as adults engage in sexual activities with persons of the same sex.'" *Id.* at 2.

The Report warned that "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices," *id.* at 4, and that "[o]ne homosexual can pollute a Government office." *Id.* at 4. The subcommittee concluded that homosexuals were unsuited for

employment in the federal government because "persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust." *Id.* at 19. Tellingly, the Report recognized that homosexuals were "looked upon as outcasts by society generally." *Id.* at 3. The idea that homosexuals were "sex perverts" and unfit for federal employment was given a Presidential seal of approval in the form of an Executive Order from President Eisenhower in 1953. *Pedersen,* 881 F. Supp. 2d at 316 (citing Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953), which added "sexual perversion" as a ground for investigation and dismissal from federal employment).

Contemporaneous Congressional enactments such as the Immigration and Nationality Act of 1952 refused to allow homosexuals to enter the Country on account of their "psychopathic" personalities. *Boutilier v. INS*, 363 F.2d 488, 493-94 (2d Cir. 1966), *aff'd*, 387 U.S. 118, 120 (1967) (Congress considered homosexuals "mental[] defectives" and included them in the term "psychopathic personality"). Moreover, discrimination against homosexuals as a class was not limited to the federal government; state and local governments share equally in this "long history." *Pedersen*, 881 F. Supp. 2d at 317 (citing to evidence of discrimination against gays and lesbians in public employment; child custodial and visitation rights; the ability to associate freely;

and legislative efforts to repeal laws that protect homosexuals from discrimination).

3. Discriminatory Violence Against Homosexuals Continues.

The history of discrimination against homosexuals has long been marked by violence and they "continue to be among the most frequent victims of all reported hate crimes." *Pedersen*, 881 F. Supp. 2d at 317 (citing H.R. REP. NO. 111-86, at 10 (2009)). In *Perry v. Schwarzenegger*, the court cited evidence showing that from 2004 to 2008, between 246 and 283 hate crime events motivated by sexual orientation bias occurred each year and accounted for between 17% and 20% of all hate crimes in the state of California. 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010). According to the FBI's 2011 Hate Crime Statistics, 20.8% of the hate crimes committed in 2011 were motivated by a sexual orientation bias.[2]

Moreover, hate crimes against homosexuals have been particularly violent and brutal. Reports have found that "'attacks against gay men were the most heinous and brut-

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[2] *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2011 Hate Crime Statistics (Dec. 10, 2012), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2011-hate-crime-statistics.

al…encountered,'" which "'frequently involved torture, cutting, mutilation, and beating," and "often d[id] not stop at killing the victim…." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1824-25 (1996) (citation omitted); *see also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462-64 (1992).

Studies also show that lesbian, gay, bisexual, and transgender ("LGBT") students continue to face physical and verbal abuse at alarming levels. The latest report of the Gay, Lesbian, and Straight Education Network's biennial National School Climate Survey (the "GLSEN Survey") showed that in 2011, a shocking 81.9% of LGBT students surveyed were verbally harassed because of their sexual orientation, 38.3% were physically harassed because of their sexual orientation, and 18.3% were physically assaulted because of their sexual orientation.[3]

The majority of these students did not report the harassment. For example, an 8th grade student in Idaho did not report the abuse "[b]ecause those people that did harass me threatened to either make my life hell (which

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[3] *See* GLSEN Survey at 24-25, *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/002/2105-1.pdf.

they were already doing) or to kill me." GLSEN Survey at 30.

Discrimination and abuse inflicted on homosexual students has contributed to a tragic trend of youth suicide. Brandon Elizares was an openly gay high school sophomore in El Paso, Texas, who came out about his sexuality in 2010.[4] On June 2, 2012, unable to withstand the bullying he endured because of his sexual orientation, Brandon took his own life. He left his family a suicide note, which said: "My name is Brandon Elizares and I couldn't make it. I love you guys with all my heart. I am sorry but that I felt terrible because I had to hide under my skin."[5] Brandon's suicide is a tragically common response to the kind of discriminatory abuse frequently inflicted upon homosexual youths.

BLAG and others essentially urge the Court to ignore the unpleasant historical and contemporary details outlined above. The reason why this history is particularly pressing, however, is that—as the ensuing discussion reveals—

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[4] Adrianna M. Chavez, *El Paso Gay Teen Commits Suicide After Being Bulled*, EL PASO TIMES, *available at* http://www.elpasotimes.com/ci_20847745/.

[5] Daniel Borunda, *Memorial Held for Gay El Paso Teen Who Committed Suicide After Being Bullied*, EL PASO TIMES, *available at* http://www.elpasotimes.com/ci_20869646/.

DOMA is entirely a product of it and actively perpetuates it in the same manner that anti-miscegenation laws were a product of and perpetuated illicit racial bias, and legislation discriminating against women, aliens, and illegitimate children arose out of and perpetuated their own discredited forms of bigotry. In addition, ignoring the details of the relevant history in a case such as this would unavoidably trivialize its victims. Just as the Court has not done so in evaluating discriminatory bias in other areas, it should not do so here.

B. The Legislative History of DOMA Reveals that It Is an Outgrowth of, and Perpetuates, Prejudice Against Homosexuals.

On the surface, DOMA was intended to advance four goals: "(1) defending and nurturing the institution of traditional heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." H.R. REP. 104-664, at 12 (1996). As discussed below, however, goals (1), (3), and (4) are entirely illusory—DOMA in fact does none of these things. It provides no legitimate additional benefits to heterosexual couples; it denigrates the democratic ability of the States to define for themselves what constitutes marriage; and it only increases governmental administrative burdens by mandating exclusionary

practices at the federal level to deny benefits and recognition to legally married same-sex couples. Rather, what is clear from the pejorative language used to describe homosexuals in the congressional record is that DOMA was primarily concerned with only the second goal—the defense of "traditional notions of morality." What this embodies, of course, is the overtly discriminatory notion that homosexuals are inherently immoral—a view that permeates the commentary in the legislative record. In particular, the record vilifies the struggle for marriage equality as an "orchestrated legal assault." *Id*. at 2-3. To any student of history, of course, this characterization will sound entirely familiar: nearly the same thing was said sixty years ago in opposition to efforts to eliminate racial segregation.

Today, BLAG does not ask the Court to agree that defending traditional notions of morality or promoting heterosexuality are legitimate government interests that DOMA serves.[6] But BLAG cannot ignore the severe prejudice that DOMA embodies and perpetuates. In short, DOMA's legislative history shows that DOMA is an intentionally and illicitly discriminatory statute.

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[6] *See* Pet. App. 172 n.4.

1. DOMA Arose To Stifle a Nascent Effort in Hawaii To Recognize Marriage Equality.

DOMA arose as a congressional reaction to a May 1993 judgment of the Hawaiian Supreme Court. The judgment presumed that the state's refusal to issue marriage licenses to same-sex couples violated the Hawaiian Constitution. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). The Hawaiian Supreme Court remanded the matter to the lower court for trial. *Id.* at 68.

Pending trial, Congress hurried to enact DOMA in an effort to discourage the Hawaiian judiciary from "foist[ing] the newly-coined institution of homosexual 'marriage' upon an unwilling Hawaiian public." H.R. REP. NO. 104-664, at 6 (1996). On September 21, 1996, DOMA was signed into law. Shortly thereafter, on December 3, 1996, the Hawaiian trial court handed down its judgment in favor of the petitioning same-sex couples. *See Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Ct. App. Dec. 3, 1996). Subsequently, however, no marriage licenses were issued to same-sex couples in Hawaii because the judgment was stayed pending appeal, and in the interim, Hawaii amended its Constitution to permit its legislature to define marriage as between a man and a woman (which it did), thereby removing the plaintiffs' legal challenge to the State's marriage laws.

2. DOMA Was Designed To Discourage Marriage Equality.

The report of the House Judiciary Committee (the "House Report") outlines the "Committee's concerns that motivated [DOMA]." H.R. REP. NO. 104-664, at 3 (1996). It states that DOMA was a response to a perceived "legal assault against traditional heterosexual marriage laws" by gay rights groups. *Id*. at 4. The report warns: "[t]he gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex 'marriage.'" *Id*. at 7.

The report strongly urges the passage of DOMA as a means to prevent "gay rights groups and gay men and lesbians across the country [from]…tak[ing] advantage of the Hawaii victory." *Id* at 7, 17. It states in unequivocal terms that "the Committee does not believe that passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process." *Id*. at 12.

3. In Considering DOMA, Sponsoring Legislators Depicted Homosexuality as Immoral and Aberrant, and Same-Sex Marriage as a Threat to the Survival of the Nation.

Consistent with the tone of the House Report, the floor debates reveal additional discriminatory animus of peculiar dimensions. Senator Byrd characterized the "drive for same-sex marriage" as "an effort to make a sneak attack on society by encoding this aberrant behavior in legal form…" 142 CONG. REC. S10,110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). Senator Lott spoke of "threatening possibilities" for the country should it accept same-sex marriage. *Id*. at S10,101 (statement of Sen. Lott). Senator Byrd even argued that same-sex marriages could cause America to decline, stating:

> Indeed, as history teaches us too often in the past, when cultures waxed casual about the uniqueness and sanctity of the marriage commitment between men and women, those cultures have been shown to be in decline. This was particularly true in the ancient world in Greece, and more particularly, in Rome.

Id. at S10,109 (statement of Sen. Byrd).

In related fashion, Congressman Coburn insisted that "[t]he fact is, no society…has lived

through the transition to homosexuality and the perversion which it lives [sic] and what it brought forth." 142 CONG. REC. 16,972 (1996) (statement of Rep. Coburn). In the same vein, Lynn D. Wardle, an expert consulted by the House Judiciary Committee, advised that federal recognition of same-sex marriage could "weaken and severely undermine the cohesiveness of (if not begin the dismemberment of) the union." *Defense of Marriage Act: Hearing Before the Sub. Comm. on the Constitution of the Comm. on the Judiciary of the House of Representatives on H.R. 3396*, 104th Cong. 176 (1996) (statement of Prof. Lynn Wardle). These and similar comments reveal fierce prejudice toward homosexuals, undoubtedly a "politically unpopular group." *Cleburne*, 473 U.S. at 446-47.

4. In Considering DOMA, Sponsoring Legislators Analogized Same-Sex Marriage to Polygamy, Incest, Bestiality, and Pedophilia.

Like the debates over the various anti-miscegenation laws, the congressional debates on DOMA were punctuated with warnings that acceptance of same-sex marriage would open the floodgates to polygamy, incest, bestiality, and pedophilia. *See State v. Bell*, 66 Tenn. 9 (1872) (warning that permitting inter-racial marriage would lead to "the father living with his daughter, the son with the mother"); 142 CONG. REC. 16,971 (1996) (statement of Rep. Largent); *id.* at

16,974 (statement of Rep. Talent). This misinformation was clearly intended to "appeal to [Congress's] worst fears and emotions" by "fan[ning] the flames of intolerance and prejudice." *Id.* at 16,978 (statement of Rep. Waxman).

Legislators warned that alteration of the traditional concept of marriage would start the country on a slippery slope toward eventually permitting unions between any odd combination, including "adult incestuous marriages." *Id.* at 16,974 (statement of Rep. Talent). Representative Largent asked rhetorically: "[w]hat logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child or any other odd combination that we want to have?...and it doesn't even have to be limited to human beings, by the way. I mean it could be anything." *Id.* at 16,971 (statement of Rep. Largent).

By linking marriage equality to polygamy, incest, bestiality, and pedophilia, these comments explicitly and intentionally trivialized and denigrated same-sex unions. *See also* 142 CONG. REC. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth) (characterizing marriage equality as "just another means of securing government benefits"). In doing so, these and similar comments served only to heap moral condemnation on homosexual relationships. These views were summed up by Representative Canady when he opened the House of Representatives

debate on DOMA by stating that, ultimately, the "law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based. That is why we are here today." 142 CONG. REC. 16,969 (1996) (statement of Rep. Canady).

5. The House Report Itself Identifies the Discriminatory Animus Behind the Legislation.

The House Report identifies an intense disapproval of homosexuality as the fundamental rationale for DOMA. It states:

> Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional…morality. …[DOMA] serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

H.R. REP. NO. 104-664, at 15-16 (1996). In similar fashion, Representative Coburn embellished this stereotypical disapproval with his own unfortunate stereotype of homosexuals as largely promiscuous. 142 CONG. REC. 16,972 (1996) (statement of Rep. Coburn). He summarized:

"[t]he real debate is about homosexuality and whether or not we sanction homosexuality in this country." *Id.*; *see also id*. ("We hear about diversity, but we do not hear about perversity, and I think that we should not be afraid to talk about the very issues that are at the core of this.").

In sum, the legislative record is transparent: DOMA was enacted as an intentionally and illicitly discriminatory statute.

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated DOMA Has Doomed Other Invidiously Discriminatory Legislation.

For over a century, opponents of interracial marriage, women's rights, and the rights of aliens and illegitimate children have defended discriminatory laws on grounds strikingly similar to those used to justify DOMA in 1996 and today. Indeed, in language that could have been pulled wholesale from the anti-miscegenation case law, Henry Hyde, the Chairman of the House Judiciary Committee, stated during the Subcommittee markup of DOMA: "[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people…feel ought to be illegitimate.…And in so doing…put[s] a stamp of approval…on a union that many people…think is immoral." H.R. REP. NO. 104-664, at 16 (1996). Just as these grounds hold no water in the areas

of interracial marriage, women's rights, and the rights of aliens and illegitimate children, they hold no water here.

1. The Grounds Used To Justify DOMA Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes.

DOMA is just the most recent example of a statute ostensibly based on traditional, majoritarian morality, but whose true origins spring from invidious discriminatory intent. The anti-miscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), are classic examples of this type of legislation.

In 1691, Virginia passed the first anti-miscegenation law to prevent "abominable mixture and spurious issue." Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191 & n.17 (1966) (quoting 3 LAWS OF VA. 86-87 (Hening 1823)). Nearly two centuries later, Senator James Doolittle justified treating interracial marriage as "criminal" on the ground that "natural instinct revolts at it as wrong." CONG. GLOBE, 37TH CONG., 2d Sess., app. 84 (1862). Similarly, in *Eggers v. Olson*, the court derided the "amalgamation of the races" as "unnatural, [and] always productive of deplorable results." 231 P. 483, 484 (Okla. 1924) (citation

omitted); *see also Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889) (stating that the penal statutes criminalizing interracial marriage represented the "very pronounced convictions of the people…as to the demoralization and debauchery involved in such alliances"); *Kinney v. Commonwealth*, 71 Va. 858, 865-66 (1878) (similarly rationalizing criminal ban on interracial marriage).

These invidious majoritarian "moral" sentiments used to justify anti-miscegenation laws are substantially indistinguishable from those used to justify DOMA. Indeed, the parallels are uncanny. The DOMA House Report contends that DOMA is necessary to defend and nurture the institution of traditional marriage. H.R. REP. NO. 104-664, at 15 (1996). Similarly, over a century ago in *Green v. State*, the court justified a ban on interracial marriage on the same terms:

> It is through the marriage relation that the *homes* of a people are created…. These homes, in which the virtues are most cultivated and happiness most abounds, are the true…nurseries of States.

58 Ala. 190, 194 (1877). The House Report essentially co-opts this very view, citing traditional marriage as "the best guaranty of that reverent morality which is the source of all beneficent progress." H.R. REP. NO. 104-664, at 12 (1996)

(quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

BLAG, relying on "presumptions" and "common sense," echoes these arguments. BLAG Br. at 47-48. And just as BLAG invokes stereotypical observations of "human experience" to sanctify DOMA, *id.* at 47, so too did the court in *Scott v. State* in condemning interracial unions: "[o]ur daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race." 39 Ga. 321, 323 (1869).

As Justice Blackmun noted in his dissent in *Bowers v. Hardwick*, the Court's "prior cases make…abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 478 U.S. 186, 216 (1986) (Blackmun, J., dissenting). Nor can any "practical" rationale based on "common sense" of the kind that BLAG offers legitimate DOMA's discriminatory intent. *See* BLAG Br. at 47.

2. The Grounds Used To Justify DOMA Track the Invidious Grounds Used To Justify Discrimination Against Women.

As noted, justifications for DOMA appearing in the legislative record include (1) to protect the institution of marriage and the "traditional" family unit, (2) to comport with moral tradition, and (3) to promote the superiority of heterosexuality.[7] Courts and legislative bodies have similarly sought to justify the disparate treatment of women based on notions of the "traditional family" and fear that the family unit would disintegrate if that "tradition" were altered, as well as sexist beliefs that men are more suited for civil roles outside the home.

In 1872, Justice Bradley remarked that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). He further opined that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life…." *Id.* Justice Bradley was not alone in

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[7] *E.g.*, H.R. REP. NO. 104-664, at 7 n.21, 13, 15 n.53 (1996).

his thinking. When debating women's suffrage, members of the House and Senate also voiced the opinion that a woman's place in society was strictly limited to the domestic sphere. In 1874, in opposing a proposed amendment to extend the right of suffrage to women in the Pembina Territory (today, North Dakota), Senator Bayard stated:

> Under the operation of this amendment what will become of the family[?]…You will no longer have that healthful and necessary subordination of wife to husband…I can see in this proposition for female suffrage the end of all that home-life and education which are the best nursery for a nation's virtue.

2 CONG. REC. 4342 (1874).

Such views have long been discredited as legitimate grounds for disparity of gender treatment. *See Stanton v. Stanton*, 517 P.2d 1010, 1012-13 (Utah 1974), *rev'd*, 421 U.S. 7, 17-18 (1975) (holding that statute setting out disparate age for majority for men and women based on "traditional" gender roles could not survive an equal protection attack). Yet essentially the same justifications are being offered in support of DOMA. They are as transparently invalid in the context of marriage equality as they are in the context of gender equality.

3. The Grounds Used To Justify DOMA Are Substantially the Same as Those Used To Justify Discrimination Against Illegitimate Children.

Under the common law, illegitimate children were considered *filii nullius*, "sons of nobody," and thus denied, *inter alia*, rights of inheritance. There was no doubt that the status of illegitimacy reflected "society's condemnation of irresponsible liaisons beyond the bonds of marriage." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *see also* Susan E. Satava, *Comment: Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 933-39 (1996) (providing a history of the persecution of illegitimate children).

Historically, the classification of children as illegitimate was justified "as a means of encouraging legitimate family relationships." *Lalli v. Lalli*, 439 U.S. 259, 267 (1978). Consequently, statutes were enacted (and upheld) on the belief that denying illegitimate children certain rights, *e.g.*, the right to recover for the wrongful deaths of their mothers, would promote the general welfare by discouraging the "bringing [of] children into the world out of wedlock." *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1966).

On appeal, this Court reversed, striking down a statute that discriminated on the basis of legitimacy as a violation of equal protection. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). Extension of equal treatment to illegitimate children began with the "premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being." *Id.* at 70. From there, recognition of these children as a suspect class began to evolve. Justice Powell noted in *San Antonio Independent School District v. Rodriguez* that the immutable trait of illegitimacy bears all the traditional indicia of suspectness: "[s]tatus of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations." 411 U.S. 1, 109 (1973); *see also Matthews v. Lucas*, 427 U.S. 495, 505 (1976).

Once again, the parallels with DOMA are uncanny. Just as a legislature's desire to promote child-rearing within the confines of a traditional marriage cannot justify discriminatory treatment against illegitimate children, it likewise cannot justify discriminatory treatment against homosexuals.

4. The Grounds Used To Justify DOMA Are as Pretextual as Those Used To Justify Discrimination Against Aliens.

Although BLAG offers a variety of alternative explanations for DOMA, the Court should reject these as pretextual for the same reason the Court rejected as pretextual various superficial justifications offered to legitimate invidious discrimination against aliens. *See*, *e.g.*, *Sugarman v. Dougall*, 413 U.S. 634, 642-43 (1973); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

In *Takahashi*, the Court struck down a California statute prohibiting the issuance of fishing licenses to "any 'person ineligible to citizenship.'" 334 U.S. at 413. California argued that the law was passed "solely as a fish conservation measure" intended to reduce the number of fishermen, starting first with aliens who had "no community interest in the fish owned in the State." *Id*. at 418. But the Court had no trouble "unbutton[ing] the seemingly innocent words of [the statute] to discover beneath them the very negation of all the ideals of the equal protection clause." *Id*. at 427 (Murphy, J., concurring). As the trial court noted, Japanese aliens were "the only aliens ineligible to citizenship who engaged in commercial fishing…in California" at the time the statute was passed. *Id*. at 426.

Recognizing this history of discrimination against Japanese aliens, Justice Murphy described the statute as "but one more manifestation of the anti-Japanese fever" in California. *Id.* at 422. Further, he viewed California's alleged "conservation" justification as simply "a thin veil used to conceal a purpose being too transparent"—discrimination against persons of Japanese ancestry which had "no relation whatever to any constitutionally cognizable interest of California." *Id.* at 426-27.

As in *Takahashi*, the Court should ignore the veil BLAG seeks to spread over DOMA. BLAG's justifications should be viewed for what they truly are: pretextual recitations of manufactured legitimacy.

D. Given the Reality that DOMA Embodies Invidious Discrimination, It Should Be Subject to Intermediate Scrutiny.

The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." Made applicable to the federal government through the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), equal protection requires "that 'all persons similarly circumstanced shall be treated alike.'" *Plyler*, 457 U.S. at 216 (*quoting F. S. Royster Guano Co. v.*

Virginia, 253 U.S. 412, 415 (1920)). In determining whether a statute that distinguishes between two classes of people satisfies equal protection, the "general rule" is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

This "rational basis" rule, however, does not apply where a statute classifies on the basis of certain "suspect" or "quasi-suspect" classifications that "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," and "tend to be irrelevant to any proper legislative goal." *Plyler*, 457 U.S. at 218 n.14. Suspect classifications based on factors such as race, alienage, or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and therefore "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440. Classifications based on "quasi-suspect" classes such as gender and illegitimacy "generally provide[] no sensible ground for differential treatment" and will be upheld only if found to be "substantially related to a sufficiently important governmental interest." *Id.* at 440-41. In such cases, the burden is on the government to demonstrate an "exceedingly persuasive" justification for the classi-

fication that is "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. Classifications violate equal protection where they are based on "archaic and overbroad generalizations" or "outdated misconceptions" concerning a class. *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (internal quotations omitted).

BLAG argues that rational basis review is appropriate for classifications based on sexual orientation and that the Second Circuit's decision to the contrary "is truly an outlier." BLAG Br. 50. Many of the cases BLAG cites, however, predate this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* BLAG Br. 13 n.4. *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld a Georgia statute making sodomy a criminal offense. Prior to *Lawrence*, courts relied on *Bowers* in holding that sexual orientation could not be a basis for heightened scrutiny because "[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *see also High Tech Gays v. Def. Indus. Sec. Clearance Office,* 895 F.2d 563 (9th Cir. 1990). Following *Lawrence*, these decisions are no longer sound.

Moreover, none of the cases BLAG cites conduct an analysis of the appropriate level of scrutiny applicable to sexual orientation based on the factors this Court has enumerated as relevant to such a determination: (1) whether the particular group has suffered a history of discrimination; (2) whether individuals within the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or politically powerless, *Bowen*, 483 U.S. at 602-03 (*citing Lyng v. Castillo*, 477 U.S. 635, 638 (1986)); and (4) whether the characteristic distinguishing the group "bears [any] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 441.

While this Court has yet to establish the appropriate level of scrutiny to apply to a classification based on sexual orientation,[8] consideration of the determining factors makes clear that such classifications should be subject to at least

[8] BLAG mischaracterizes this Court's decisions by stating that the Court "has gone out of its way to apply rational basis review" to classifications based on sexual orientation. BLAG Br. 25. Only once did this Court apply rational basis to an equal protection challenge based on sexual orientation, *Romer v. Evans*, 517 U.S. 620 (1996), and in that case, the Court had no need to consider any level of scrutiny aside from rational basis, finding that the amendment "fails, indeed defies, *even this conventional inquiry*." *Id.* at 632 (emphasis added).

intermediate scrutiny. In particular, the history of discrimination against homosexuals mirrors that suffered by other suspect and quasi-suspect classes and warrants the application of intermediate scrutiny to statutes that classify based on sexual orientation. Thus, to satisfy equal protection, it must be demonstrated, at a minimum, that DOMA is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

1. Homosexuals Have Suffered a History of Discrimination.

As discussed above, the history of discrimination against homosexuals is both severe and well documented.

2. Sexual Orientation Is an Immutable Characteristic.

This Court has established that legislation distinguishing between classes based on an immutable characteristic determined solely by the accident of birth is properly subject to heightened scrutiny. *Virginia*, 518 U.S. at 533-34; *Bowen*, 283 U.S. at 602-03. BLAG argues that sexual orientation is not the kind of immutable characteristic for which intermediate scrutiny should be applied because "[i]t is defined by a propensity to engage in a certain kind of conduct," the cause of which "is not understood by science." BLAG Br. 55. Sexual orientation,

however, is not, as BLAG maintains, "synonymous with sexual activity or sexual behavior." Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1828 (June 2004), *available at* http://pediatrics.aappublications.org/content/113/6/1827.full.html. A person's sexual orientation reflects that "individual's pattern of physical and emotional arousal toward other persons," rather than a course of conduct. *Id.* at 1827.

Moreover, BLAG's claim that "for at least some, sexual orientation is a fluid characteristic capable of changing over a person's lifetime," BLAG Br. 55, is belied by the fact that "the significant majority of adults exhibit a consistent and enduring sexual orientation." Joint Appendix ("JA") 262, Expert Aff. of Letitia Anne Peplau, Ph.D. ("Peplau Aff.") ¶ 23 (citing Chandra, A. Mosher, et al., *Sexual Behavior, Sexual Attraction and Sexual Identity in the United States: Data from the 2006-2008 Survey of Family Growth*, National Health Statistics Reports, No. 36 U.S. Centers for Disease Control (March 3, 2011)). While it is true that the cause of sexual orientation is still unknown, most experts in the field of psychology agree that sexual orientation is not a choice. *See* Frankowski, *supra*, at 1828; Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, SEXUALITY RES. & SOC. POL'Y 7:176-200 (2010). In fact, while a small

minority of people may experience changes in their sexual orientation over the course of their lives, studies show that "enduring change to an individual's sexual orientation is uncommon," and efforts to change an individual's sexual orientation produce harmful effects, including depression, anxiety, and suicidal tendencies. AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 2-3 (2009).

3. Homosexuals Lack Significant Political Power.

Although the fact that a group is "a 'discrete and insular minority'…has never been invoked in [this Court's] decisions as a prerequisite" to applying heightened scrutiny, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978), this Court has at times also found heightened scrutiny to be warranted where legislation distinguishes a class of people that "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler*, 457 at 216 n.14 (quoting *San Antonio Indep. Sch. Dist.,* 411 U.S. at 28). Because homosexuals "do not possess a meaningful degree of political power, and are politically vulnerable," JA397, Expert Aff. of Gary Segura, Ph.D. ¶ 9, this factor weighs in favor of applying

intermediate scrutiny to an equal protection analysis of DOMA.

BLAG argues that "the political power of gays and lesbians has increased exponentially" in the last twenty years. BLAG Br. 51. In spite of this allegedly increased support, however, only nine states and the District of Columbia currently allow same-sex marriage, compared with 37 states that have either enacted a state statute or constitutional provision banning it. *See Defining Marriage: Defense of Marriage Acts and Same Sex Marriage Laws*, National Conference of State Legislatures ("NCSL"), *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.

Moreover, that the political power of homosexuals may have increased in recent years clearly does not prevent that class from being suspect or quasi-suspect. *See Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (finding gender to be a quasi-suspect class and noting that while "the position of women in America has improved markedly in recent decades...women still face pervasive, though at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena"); *cf. J.E.B.*, 511 U.S. at 136; *Kerrigan*, 947 A.2d at 456 (citing United States Census Bureau, *Democratic Trends in the 20th Century* A-9 (November 2002)).

4. Sexual Orientation Has No Relation to an Individual's Ability To Contribute to Society.

This Court has established that heightened scrutiny is warranted where a characteristic bears no relation to ability to contribute to society, but nonetheless is used to "den[y]…full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Virginia*, 511 U.S. at 532. BLAG does not dispute that "being gay or lesbian has no inherent association with a person's ability to participate in or contribute to society," or that homosexuals are "as capable as heterosexuals of leading a happy, healthy and productive life.…[and] of doing well in their jobs and of excelling in school." JA267-68, Peplau Aff. ¶ 29. Instead, BLAG argues that DOMA should be subject only to rational basis review because homosexuals have the "distinguishing characteristic" of "engag[ing] in relationships that do not produce unplanned and unintended offspring." BLAG Br. 54.

That same-sex couples do not have unplanned pregnancies in no way constitutes the type of "distinguishing characteristics relevant to interests the State has authority to implement" that affect a group's ability to contribute to society. *Cleburne*, 473 U.S. at 441. As BLAG concedes, there is nothing about a person's sexual

orientation that impacts his or her ability to function in or contribute to everyday life and society as a whole.

E. Animus Toward a Class, as Revealed in DOMA's Legislative History, Can Never Serve a Legitimate, Important, or Compelling Interest.

Congress did not enact DOMA to serve an important or compelling government interest, but rather as a knee-jerk reaction grounded in prejudice and animosity toward homosexuals. Legislation such as this, that "rest[s] on irrational prejudice," cannot survive any level of scrutiny, let alone intermediate scrutiny. *Cleburne*, 473 U.S. at 450. But under even the more lenient rational basis level of review, this Court has held that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Moreno*, 413 U.S. at 534.

As noted above, Congress identified four "governmental interests" allegedly served by DOMA: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce govern-

ment resources."[9] Additionally, the Second Circuit found that certain statements in the House Report implicate a fifth interest in enforcing uniformity in the distribution of federal benefits. Supp. App. 24a. Any other interests advanced by BLAG or its *amici* are not found in the legislative history and are therefore "post-hoc" justifications that are irrelevant under intermediate scrutiny. *Virginia*, 518 U.S. at 533. Moreover, none of the considerations actually identified in the legislative history are related to a legitimate government interest, let alone substantially related to an important government interest, and thus do not survive *any* level of scrutiny.

1. DOMA Does Nothing To Legitimately Defend or Nurture the Institution of Traditional, Heterosexual Marriage.

Even assuming, *arguendo*, that the federal government could have a legitimate interest in providing benefits to heterosexual couples in order to incentivize them to get married, thus creating allegedly ideal circumstances for responsible procreation and childrearing, DOMA does not advance this interest because it does not provide a single benefit to heterosexual

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[9] H.R. REP. NO. 104-664, at 12 (1996).

couples.[10] Any federal incentive for heterosexual couples to get married is the product of other statutes, most of which pre-date DOMA and would have continued to provide the same incentives in the absence of DOMA. The sole effect of DOMA is to preclude married gay couples from receiving the same benefits as married straight couples, and DOMA's supporters have never provided a logical explanation how excluding homosexual couples somehow incentivizes heterosexual couples to get married.

Moreover, the suggestion that the government provides marriage benefits for the purpose of encouraging childrearing in the context of a traditional marriage is dubious since the government continues to provide benefits even to marital relationships that do not fit this paradigm. For example, the IRS considers couples in the following relationships to be married (and thus able to file joint tax returns): (1) couples living together in a common law marriage recog-

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[10] In addition, numerous studies dispute the suggestion that heterosexual marriages provide a better environment for child development than homosexual marriages. *See e.g.,* Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOL. 607, 614 (2006); Canadian Psychological Association, *Marriage of Same-Sex Couples – 2006 Position Statement*, at 2, *available at* http://www.cpa.ca/cpasite/userfiles/Documents/Practice_Page/Marriage_SameSex_Couples_PositionStatement.pdf.

nized either in the state where they now live or in the state where the common law marriage was formed; (2) couples who are married but live apart; and (3) couples separated under an interlocutory, but not final, decree of divorce.[11] *See* Dep't of the Treasury, *Internal Revenue Service Publication 17: Tax Guide 2012*, at 20. Additionally, numerous federal laws provide benefits to "surviving" spouses, but explicitly condition the benefits on the surviving spouse *remaining unmarried*.[12] And of course, married couples do not lose their federal marital benefits when they opt to relinquish their children for adoption or undergo surgical procedures resulting in sterilization, nor are they required to pass a fertility test prior to getting married.

The sudden and unprecedented federal interest in regulating marriage and procreation is suspicious.[13] In any event, because DOMA does not actually provide any legitimate benefits to

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[11] The IRS also refuses to recognize marriages where one of the spouses is a nonresident alien at any point during a taxable year, even though such relationships could still provide for responsible procreation and childrearing. 26 U.S.C § 2(b)(2)(B).

[12] *See, e.g.,* 10 U.S.C. § 1062; 26 U.S.C. § 7448(a)(8)(B); 38 U.S.C. § 101(3).

[13] *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States").

heterosexual couples by excluding homosexuals, this cannot serve as a legitimate basis to sustain the statute.

2. Tradition, Alone, Cannot Save DOMA.

The purpose of the Equal Protection Clause is "not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities." *Watkins v. United States Army*, 875 F.2d 699, 718 (9th Cir. 1989) (emphasis in original) (Norris, J., concurring). BLAG has appropriately abandoned "tradition" as a defense of DOMA.

3. DOMA Does Not Protect State Sovereignty.

BLAG argues that the federal government has an interest in preserving each "sovereign's" ability to define marriage and, in doing so, effectively seeks to place the federal government on equal footing with the States in marriage regulation. BLAG Br. 30. But this argument begs the question whether the federal government has any interest in defining marriage in the first place. Such an interest certainly is not recognized in any court decision or statute, and the federal government never invoked it in the more than 220 years preceding DOMA's enactment.

In any event, DOMA does not actually advance the preservation of sovereignty—it undermines it by refusing to honor the decisions of those States that have recognized same-sex marriages. This only serves to underscore the discriminatory animus of the statute.

4. The Goal of Conserving Government Resources Cannot Properly Shelter Discriminatory Treatment.

Bestowing benefits on one group while denying them to others *always* conserves resources, and thus cannot be used to justify discriminatory treatment. *See Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("[A] concern for fiscal integrity is [not a] compelling…justification for [a] questioned classification"). Indeed, as the District Court aptly recognized, such a justification could not even satisfy rational basis review. Pet. App. 21a-22a.

5. DOMA Creates Administrative Burdens and Destroys Uniformity.

The only "uniformity" DOMA promotes is discriminatory bias against homosexuals. BLAG maintains that this discrimination is desirable because without DOMA, "same-sex couples would lose (or gain) federal marital status simply by moving between states with different marriage policies on recognition of same-sex mar-

riages." BLAG Br. 33. This problem, however, is entirely illusory.

Consider, for example, the way the IRS treats common-law marriages. For tax purposes, a couple is considered married if they are "living together in a common law marriage that is recognized in the state where [they] now live *or in the state where the common law marriage began*." Dep't of the Treasury, *Internal Revenue Service Publication 17: Tax Guide 2012*, at 20 (emphasis added). As long as the marriage was valid when formed, then at least for federal purposes, that marriage stays valid even if the couple moves. There is no reason why homosexual marriage could not be treated the same way.[14]

In addition, DOMA actually *increases* administrative burdens. Under DOMA, proof of marriage is no longer sufficient to demonstrate an entitlement to marital benefits. DOMA requires the government to take the additional step of determining whether the couple is heterosexual or homosexual. Consequently, DOMA does not rationally reduce administrative costs.

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[14] This practice, which the government already uses for common law marriages, would also alleviate BLAG's concerns regarding the need for "complex choice-of-law" determinations. BLAG Br. 34.

CONCLUSION

DOMA is an edifice of bigotry that cannot stand. For all of the foregoing reasons, as well as those offered by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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