No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH S. WINDSOR, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT EDITH S. WINDSOR ADDRESSING THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THIS COURT DOES NOT NEED TO RESOLVE QUESTIONS ABOUT "TIERED SCRUTINY" IN THIS CASE 5

II. EVEN IN RATIONAL-BASIS CASES, THIS COURT ROUTINELY EXAMINES FACTS AND REJECTS MADE-UP JUSTIFICATIONS FOR GOVERNMENT ACTIONS 9

A. This Court considers facts indicating a lack of connection between the classification and a plausible rational basis offered in support of it 10

B. This Court considers facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit 13

C. This Court considers facts indicating that a statutory classification seeks to advance an illegitimate government interest 15

D. This Court does not contrive imaginary rationales for government actions 16

TABLE OF CONTENTS – Continued

Page

E. These principles apply to all rational-basis cases 20

CONCLUSION.. 24

TABLE OF AUTHORITIES

Page

CASES

Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336 (1989) ... 13, 14

Armour v. City of Indianapolis, ___ U.S. ___, 132 S. Ct. 2073 (June 4, 2012) ... 18

Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) ... 13

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) ... 5, 6, 12, 15, 17

City of Indianapolis v. Armour, 946 N.E.2d 553 (Ind. 2011) ... 18

Craig v. Boren, 429 U.S. 190 (1976) ... 6

FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) ... 18, 20, 21, 22

Fuentes v. Shevin, 407 U.S. 67 (1972) ... 19

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ... 19

Heller v. Doe, 509 U.S. 312 (1993) ... 23, 24

Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1985) ... 15

James v. Strange, 407 U.S. 128 (1972) ... 14

Korematsu v. United States, 323 U.S. 214 (1944) ... 6

Lawrence v. Texas, 539 U.S. 558 (2003) ... 15

Lindsey v. Normet, 405 U.S. 56 (1972) ... 14

TABLE OF AUTHORITIES – Continued

Page

Loving v. Virginia, 388 U.S. 1 (1967)............................6

Mayer v. Chicago, 404 U.S. 189 (1971).......................13

Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985)....... 15

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)..8, 16, 22

Plyler v. Doe, 457 U.S. 202 (1982)..............................13

Quinn v. Millsap, 491 U.S. 95 (1989).........................12

Reed v. Reed, 404 U.S. 71 (1971)................................14

Romer v. Evans, 517 U.S. 620 (1996).........6, 15, 16, 23

Turner v. Fouche, 396 U.S. 346 (1970).......................13

United States v. Bayshore Assocs., Inc., 934 F.2d 1391 (6th Cir. 1991) 19

United States v. Carolene Products Co., 304 U.S. 144 (1938)..5, 17

United States v. Pisani, No. 98-298, 1998 U.S. Dist. LEXIS 11637 (S.D.N.Y. July 30, 1998)..........19

U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)..13, 15

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)......8, 16

Williams v. Vermont, 472 U.S. 14 (1985)....................12

Willowbrook v. Olech, 528 U.S. 562 (2000)..................6

Zobel v. Williams, 457 U.S. 55 (1982)......10, 11, 12, 15

CODES AND STATUTES

Defense of Marriage Act, § 3, 1 U.S.C. § 7............1, 24

TABLE OF AUTHORITIES – Continued

Page

OTHER PUBLICATIONS

Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004)....................6

Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).........15

Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491 (2011)....................5

Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984)....................6

Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002)....................6

Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008)....................6

Judge Definition, Merriam-Webster.com, www.merriam-webster.com/dictionary/judge (last visited February 27, 2013)....................8

INTEREST OF THE AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit, public-interest law firm that litigates in support of greater judicial protection for individual rights, including rights that are not presently deemed fundamental and that are therefore subject to rational-basis review. As part of this advocacy, IJ defends individual rights in contexts that have not been accorded "heightened" scrutiny and therefore has an interest in ensuring that lower courts properly apply this Court's rational-basis jurisprudence. The Institute is filing this brief in support of Respondent Edith Windsor.

All parties in this case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

Thus far, the debate over the constitutionality of Section 3 of the Defense of Marriage Act has largely revolved around this Court's tiered-scrutiny jurisprudence and how it applies to laws that treat gays and

[1] Counsels of record have consented to the filing of this brief. Amicus has given the parties timely notice of its intention to file in this matter and has provided the parties with an electronic copy of this filing. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than amicus curiae Institute for Justice, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

lesbians differently from heterosexuals. In its opinion below, the Second Circuit concluded that laws singling out gays and lesbians for differential treatment must be reviewed with intermediate scrutiny. Supp. App. 15a. Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG) maintains that this was incorrect, and that these laws should be reviewed only with rational-basis scrutiny. Br. on the Merits for Resp. BLAG at 24-28. And with regard to the rational-basis test, there is further debate among the parties and amici over which of two purported versions of the rational-basis test applies, with some briefs arguing that this Court should apply a rational-basis standard with "bite," and others arguing that this Court should embrace a version of "rational basis" review that, in practice, amounts to nothing more than "the government always wins."

This brief argues that this debate is unnecessary. This Court does not need to create another ad hoc category of intermediate scrutiny in order to resolve this case. Nor does this Court need to decide which of the multiple supposed versions of the rational-basis test applies to Respondent Edith Windsor's claims because that question is based on a false premise. There is only one rational-basis test: the test this Court actually applies when adjudicating rational-basis cases. Notwithstanding some extravagant *dicta* about how deferential this test is, it remains a real test – one that requires this Court, in keeping with its judicial role, to look at actual facts and to reject

implausible rationales for government action. Simply put, there exists no standard of review under which the federal courts are required to abandon their core function as *judges* – no standard of review under which they must close their eyes to facts or accept fanciful justifications for unequal treatment.

To be sure, there exists a great deal of *dicta*, heavily cited by BLAG and its amici, emphasizing the deferential nature of the rational-basis test. But that *dicta*, taken seriously, describes a test that is so utterly supine, so divorced from reality, that plaintiffs could never possibly win. That does not describe this Court's rational-basis jurisprudence: Since 1970, this Court has issued nearly 20 separate rational-basis decisions in favor of the plaintiffs. Careful analysis of these cases shows that this Court consistently looks to actual facts in deciding cases under rational-basis review, and consistently refuses to fabricate post hoc justifications for differential treatment. The result is a deferential but real form of judicial review, under which government classifications are required to bear an actual, factually plausible relationship to a legitimate government end.

In other words, the lower court correctly found that there was no factually plausible basis for the distinction the federal government is drawing. It was incorrect, however, in assuming it could only reach this conclusion by applying heightened scrutiny. Instead, it should have applied the real rational-basis test – the one that can actually be squared with the holdings of all this Court's rational-basis opinions,

including those where the plaintiffs have won. Applying *that* rational-basis test, as it actually exists in this Court's precedents, the Second Circuit's decision must be affirmed.

ARGUMENT

The parties and amici on both sides of this case have largely proceeded from the assumption that, to decide this case, this Court must first determine whether the Section Three of the Defense of Marriage Act is subject to "heightened" or merely "rational-basis" scrutiny. These arguments assume that the only way to uphold the lower court's decision in this case is to take facts seriously, and they further assume that the only way to take facts seriously is to apply some heightened form of judicial scrutiny. This last assumption is wrong.

As an initial matter, this Court's adventures into "tiered" scrutiny – in which it accords some people and some laws more or less serious standards of review – have yielded, at best, mixed results. Whatever its historical pedigree, "tiered" scrutiny has ultimately failed to provide a solid justification for this Court's decisions in various cases, and it has required this Court to explicitly relegate certain classes of citizens to a deliberately diminished standard of review. In order to resolve this case, however, this Court need not delve into the depths of its tiered-scrutiny jurisprudence. Instead, it merely needs to

recognize what has always been true: that, under *any* standard of review, it takes facts seriously. It therefore can engage directly with the substantive arguments made by Respondent Windsor and her amici without needing to wrestle with the thorny question of whether laws that discriminate against state-recognized same-sex marriages are more or less like laws that discriminate on the basis of race, or educational attainment, or any other characteristic. In all of those cases, this Court would engage seriously with the facts. It can and should do the same here.

I. THIS COURT DOES NOT NEED TO RESOLVE QUESTIONS ABOUT "TIERED SCRUTINY" IN THIS CASE.

For decades, this Court has struggled with the layers of "tiered scrutiny" bequeathed to it in a single footnote of *United States v. Carolene Products Co.*[2] The results of that struggle have attracted criticism from members of this Court and from the legal academy.[3] Under the evolving jurisprudence of these

[2] 304 U.S. 144, 152 n.4 (1938).

[3] *See*, *e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., joined by Burger, C.J.) ("I have never been persuaded that these so-called 'standards' [or tiered scrutiny] adequately explain the decisional process."); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 491 (2011) ("[A]s currently practiced . . . , the tiered scrutiny formulation of substantive due process is illusory. It is followed only in easy

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"tiers," some Americans – women, racial minorities, the foreign-born – have found themselves beneficiaries of heightened judicial protections.[4] Others – homosexuals, people with mental retardation, or the simply politically powerless – have not.[5] There is

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cases, and abandoned in hard ones."); Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (criticizing the method by which the post-*Carolene Products* Court has decided which standard of tiered scrutiny applies in cases involving alleged "fundamental" rights); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 980 (2004) ("Tiered scrutiny has always had a somewhat artificial air of precision to it, because the criteria for sorting classifications and liberties into the appropriate bins has been flexible (to put it charitably), or so amorphous as to approach the illusory (to phrase it cynically)."); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 954 (2002) ("[E]xisting accounts of equal protection leave the decision whether to treat a classification as suspect – and most other decisions as well – to almost completely unguided normative judgment."); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 182 (1984) ("At this point in American constitutional history, it is fair to say that the multilevel system of judicial review has outlived its usefulness.").

[4] *See Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender discrimination subject to intermediate scrutiny); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that racial discrimination subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that discrimination on basis of national origin subject to strict scrutiny).

[5] *See Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding that discrimination against a "class of one" is reviewed with rational-basis scrutiny); *Romer v. Evans*, 517 U.S. 620 (1996) (same, discrimination against homosexuals); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (same, discrimination against the mentally disabled).

nothing in the Constitution demanding this state of affairs, and there is little if anything in this Court's jurisprudence suggesting that these disparities represent principled distinctions among groups. The system of tiered scrutiny, whatever its intentions, has obscured more than it has illuminated. It has subjected millions of Americans – all of whom are admittedly the victims of unequal treatment at the hands of their government – to a deliberately reduced standard of judicial care.

Despite the widely acknowledged limitations of this doctrine, the parties and many amici urge this Court to dive back into thorny questions of which categories of Americans deserve which level of constitutional protection.[6] This Court need not do so. Resolving this case does not require the Court to fix – or exacerbate – any of the problems with its tiered-scrutiny jurisprudence.

The fight over whether to apply "intermediate" or "rational-basis" scrutiny in this case is largely a misplaced fight about the role that facts should play in determining the outcome of this case. May this Court consider facts in making its decision? Must this Court credit imaginary, fanciful, or implausible justifications for the government's actions? The implicit assumption in all the arguments about intermediate

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[6] *See*, *e.g.*, Br. on the Merits of Resp. Bipartisan Legal Advisory Group at 24-28, 49-59; Br. of the United States on the Merits at 18-36.

scrutiny and rational-basis scrutiny is that the answers to these questions vary depending on the standard of review that applies. But the simple truth is this: This Court *always* considers facts, regardless of the standard of review.[7] This Court *never* credits wholly imaginary justifications, regardless of the standard of review.

The debates over standard of review obscure the fact that this Court – consistent with its judicial obligations; consistent with the very definition of "judging"[8] – always strives to base its decisions in reality, not fantasy. Whatever may be said for the merits or demerits of applying intermediate (or strict) scrutiny in this case, this Court does not need heightened scrutiny to take facts seriously.

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[7] *See*, *e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (internal quotation marks and citation omitted); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

[8] *Cf. Judge Definition*, Merriam-Webster.com, www.merriam-webster.com/dictionary/judge (last visited February 27, 2013) ("to form an opinion based about through careful weighing of evidence and testing of premises").

II. EVEN IN RATIONAL-BASIS CASES, THIS COURT ROUTINELY EXAMINES FACTS AND REJECTS MADE-UP JUSTIFICATIONS FOR GOVERNMENT ACTIONS.

The reason this Court does not need to answer the standard-of-review question to resolve this case is that facts always matter, regardless of the applicable standard of review. Despite some broad statements in *dicta* over the years, this Court's actual holdings in rational-basis cases consistently show that the rational-basis test, while deferential, does not require the Court to turn a blind eye to facts, nor does it require the Court to blindly accept implausible after-the-fact justifications for unequal treatment.

Facts matter in all constitutional cases, even those decided under the rational-basis test. As explained below, analysis of this Courts rational-basis caselaw demonstrates at least three categories of fact that this Court routinely considers: facts indicating a lack of connection between a statutory classification and the rational basis offered to support it; facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit; and facts indicating that the classification seeks to advance an illegitimate government end. And, importantly, in conducting this analysis, this Court strives to evaluate the government's actual ends; it does not simply fabricate its own hypothetical justifications for a defendant's actions.

This is the analysis performed by this Court in every rational-basis case; even when rational-basis plaintiffs ultimately lose, the Court nonetheless weighs facts and actual justifications in reaching its conclusions.

A. This Court considers facts indicating a lack of connection between the classification and a plausible rational basis offered in support of it.

A statutory classification will fail rational-basis review when there is no logical connection between the classification and the government interest (or interests) proffered in support of it. In such circumstances, invalidation of the classification is appropriate – deference to legislatures notwithstanding – because an utter absence of logic renders a statutory scheme arbitrary. The authority to legislate, whether exercised by Congress or a village council, has never been understood to include the power to legislate arbitrarily.

A clear illustration of this principle is found in *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982). *Zobel* involved an equal-protection challenge to an Alaska program that distributed oil revenue each year to citizens based on the length of their state residency. For every year of Alaska residency since 1959, residents were entitled to one share of the dividends of the state's oil fund. *Id.* at 56-57. In other words, people who had moved to Alaska earlier would receive

a special windfall payment – forever. A group of latter-day Alaskans brought suit, alleging that this permanent classification between bona fide residents violated the Equal Protection Clause. *Id.* at 57-58.

Alaska proffered two possible rationales in defense of its unequal treatment of earlier and later residents that the Court rejected on logical grounds. The State argued that the windfall of oil money to earlier residents: (1) encouraged others to move to sparsely populated Alaska; and (2) gave residents a stake in the prudent management of oil reserves. *Id.* at 61.[9]

The Supreme Court held that neither reason provided any logical support for the law. *Id.* at 62. First, if the goal were to encourage *new* people to move to Alaska, it was illogical to distribute oil money under a scheme that awarded far more money to long-term residents than newcomers. *See id*. A prospective policy of rewarding all Alaskans going forward from 1980 would have been logical, but not retrospectively rewarding residents based on the duration of their pre-1980 residency. Second, if the goal were to preserve resources going forward, a prospective policy of making all residents stakeholders would have been rational, but not a backwards-looking distinction

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[9] The State also asserted that the distinction served "to reward citizens for past contributions" to the State, which the Supreme Court had previously held was not in itself a legitimate state interest. *Id.* at 63.

based on past residency. *See id*. at 62-63. In other words, the government's *asserted* interests were entirely prospective (it wanted to encourage new people to come to Alaska) but, in fact, its chosen classification was entirely retrospective (it was based on people's actions before 1980). The Supreme Court invalidated the classification because it rejected this fundamental logical disconnect between what Alaska said it was trying to accomplish and the distinction it was actually drawing.

The no-logical-connection principle is also evidently at work in other rational-basis decisions of this Court. In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), for example, this Court acknowledged that a home's being too big could be a valid reason for denying a permit, but found no logical connection between that principle and the City's actions because the facts in the case showed that homes of identical size were routinely granted permits. *Id.* at 449. Similarly, in *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985), the State of Vermont asserted its legitimate interest in encouraging Vermont residents to purchase cars within the state, but this Court found no logical connection between that interest and the State's attempt to levy a tax on a car purchased out of state before its owner had even moved to Vermont. *Id.* at 24-25.[10]

[10] *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (finding no logical connection between an individual's actual ability to

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B. This Court considers facts indicating that the harm caused by the classification vastly outweighs any plausible public benefit.

This Court also rejects statutory classifications where the government's proffered justifications – such as saving money – are so wildly out of proportion with the harm caused by the classification that no rational legislator would countenance them. In *Plyler v. Doe*, for example, the government asserted that denying public education to the children of illegal immigrants could help save government funds, which the Court rejected as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates. 457 U.S. 202, 230 (1982).

This Court applied similar principles in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488

understand politics and an individual's ownership or non-ownership of land); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding no logical connection between stimulating the agricultural economy and the realistic consequences of providing food stamps only to households containing people who are related to one another); *Mayer v. Chicago*, 404 U.S. 189, 196 (1971) (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (finding no logical connection between fitness for political office and property ownership).

U.S. 336 (1989). In *Allegheny*, the government used the most recent purchase price of land to assess property taxes, but because some property had not changed hands for decades this resulted in recent purchasers paying taxes as much as 35 times more than neighbors who had purchased long ago. *Id.* at 340-41. The county argued that, as a general proposition, purchase price was the most precise measure of property value, and that the wild disparities that resulted in some circumstances should be accepted as a necessary evil. *Id.* at 343. This Court, however, rightly refused to allow the county to impose gross disparities simply because doing so was in some vague sense easier for county officials. *Id.* at 345-46. Thus, the mere fact that some small benefits (like modest cost savings) could plausibly be attributed to an unequal classification will not save it from invalidation if it achieves those small benefits at the price of imposing grossly disproportionate burdens.[11]

[11] *See also James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicts on debtors); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

C. This Court considers facts indicating that a statutory classification seeks to advance an illegitimate government interest.

Finally, this Court rejects statutory classifications that seek to advance illegitimate ends like animus or sheer favoritism (or hostility) for its own sake. The constitutional impermissibility of this kind of naked, unjustified preference is well illustrated in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). In that case, this Court held that the government could not justify withholding benefits from households made up of unrelated people on the basis of a general animus towards "hippies." *Id.* at 534. In other words, government must justify its classifications by pointing to something beyond a simple desire to make that classification – it may not simply treat people worse for the sheer sake of treating those people badly.[12] *Cf.* Cass R. Sunstein, *Naked Preferences and*

[12] *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding no legitimate interest in criminalizing consensual adult homosexual acts); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (finding no legitimate interest in anti-gay animus); *Cleburne*, 473 U.S. at 448 (rejecting sheer dislike of people with mental retardation as legitimate government interests); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (finding no legitimate interest in creating different classes of bona fide residents); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (finding no legitimate interest in discriminating against out-of-state companies); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding no legitimate interest in creating permanent classes of bona fide residents).

the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984) (coining the term "naked preference" to describe "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

D. This Court does not contrive imaginary rationales for government actions.

In applying the principles laid out above, this Court routinely looks at and weighs record evidence. This means, for example, that it accepts proffered rational bases only if it is factually plausible that the suggested rationale could actually have motivated the action in question. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they "could not have been a goal of the legislation." (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)). Similarly, where evidence is available, the Court will rely on actual evidence, not mere speculation, to determine whether there is a

logical connection between the government's action and an asserted rational basis. *See, e.g., Cleburne*, 473 U.S. at 449 (citing district court's post-trial findings of fact, as well as appellate court's reliance on those findings of fact, to evaluate factual plausibility of asserted government interest).

The willingness to examine evidence in the above cases is in no way anomalous. Indeed, even in its earliest articulations of the test, this Court has always recognized its core responsibility to take seriously a plaintiff's evidence disproving a purported rational basis. *See*, *e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (internal citations omitted)).

An important corollary to this principle is that the Court does not actually permit rational bases to be fabricated out of whole cloth on appeal. Notwithstanding dicta about upholding classifications based on "any conceivable basis," in none of the Court's rational-basis decisions has its decision hinged on a rationale devised out of whole cloth by an appellate judge. Instead, the Court (when deciding in favor of a government defendant) has always been able to point to a rational basis of which the parties were aware –

or, at minimum, clearly should have been aware. *Cf. FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 317 (1993) (suggesting that Congress could have rationally adopted the explanation articulated by the FCC for its prior administrative scheme in passing a law that tracked these earlier regulations).

Indeed, even where the opportunity to fabricate a justification for government action is squarely presented, this Court declines. In last term's *Armour v. City of Indianapolis*, this Court faced an Equal Protection challenge to the City of Indianapolis's decision to impose different sewer-tax burdens on certain of its residents. The Indiana Supreme Court, in upholding the city's actions, hypothesized a theoretically plausible (but wholly fabricated) justification for the government's actions: perhaps, it speculated, the property owners who paid lower taxes were, for some reason not apparent from the record, actually poorer than the property owners who paid higher taxes. *See City of Indianapolis v. Armour*, 946 N.E.2d 553, 562-63 (Ind. 2011). Every member of this Court rightly ignored this fact-free speculation from the lower court – instead, this Court's analysis focused solely on whether the justifications actually advanced by the government could be squared with the facts actually in the record. *See generally Armour v. City of Indianapolis*, ___ U.S. ___, 132 S. Ct. 2073 (June 4, 2012).

And there is good reason that this Court does not actually uphold laws based on the post hoc speculation of appellate judges: doing so would present serious due-process concerns. The central meaning of

due process, as this Court has stressed for over a century, is that parties are entitled to notice and a meaningful opportunity to be heard. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). And, as lower courts have had repeated occasion to point out, litigation by surprise is not a meaningful opportunity to be heard. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (noting that a defendant must have notice of the nature of a proceeding to which he is subject); *United States v. Pisani*, No. 98-298, 1998 U.S. Dist. LEXIS 11637, at *2-*3 (S.D.N.Y. July 30, 1998) ("[T]o avoid unfair surprise and accord defendant due process, the Government is directed to furnish to defense counsel . . . a binding particularization of the facts and theories that the Government will rely on at trial to prove venue on the tax charges." (citation omitted)).

Allowing classifications to be upheld based on explanations first invented at the appellate level would fly in the face of these bedrock principles. To be sure, the government is entitled to rely on a rational basis that is not directly supported by record evidence (provided that basis is not undermined or shown to be implausible by record evidence), and the government is similarly entitled to rely on a rational basis that may not have actually been the subjective motivation of each individual legislator. But plaintiffs are entitled to introduce evidence demonstrating a lack of rational connection between a challenged classification and the government interest it allegedly

advances, and allowing new post hoc justifications to be fabricated on appeal would make it impossible for even the most conscientious of plaintiffs to build a complete record on summary judgment.

In short, facts matter in rational-basis cases, and rational-basis plaintiffs are allowed to introduce evidence to show courts what those facts are. Because of this, this Court has always evaluated the classifications before it in light of the possible rational bases actually articulated by (or reasonably attributable to) the government, rather than in light of any conceivable justification that could be imagined by an appellate judge.

E. These principles apply to all rational-basis cases.

Even in rational-basis cases where the government wins, this Court does not depart from the principles outlined above. Rather, the basic truths of the rational-basis test are consistently applied in all this Court's rational-basis cases.

Even in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) – arguably the most-cited case for the basic proposition that rational-basis analysis is extremely deferential – the Court did not base its decision on wholesale conjecture. Instead, it relied on policy goals articulated by the government and examined the underlying logic of the government's actions.

The plaintiffs in *Beach Communications* had challenged the exemption from cable-television regulations of facilities that provided service to one or more buildings under common ownership without using a public right-of-way. *Id.* at 309. The Court identified two rational bases for this distinction. Most importantly, it identified the policy statement articulated by the FCC, which first promulgated the exemption in regulations before it was adopted by Congress, which had justified the exemption by contending that commonly owned facilities of this sort would tend to be smaller and therefore less in need of regulation. *Id.* at 317. Importantly, the plaintiff-respondents in that case did not refute the underlying factual premises of this distinction – and, indeed, expressly acknowledged that commonly owned facilities (where a single owner would have the incentive to advocate on behalf of his tenants to an outside cable provider) might need less regulation. *Id.* at 318-19. The fact that these premises were plausible – or, in the Court's phrasing, "arguable" – was enough to support a logical connection between the government's classification and the interests it had identified. *Id.* at 320.[13]

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[13] As an alternative possible rational basis, the Court added in a single paragraph that cable distribution across buildings without a common owner could also have been justified by a concern about monopoly power, since the first owner to purchase a satellite dish would be able to connect nearby buildings for only the cost of connecting wire, and nearby owners would be unable to compete without making the hefty investment in a

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To be sure, this Court's opinion in *Beach Communications* is the source of some of the most sweeping *dicta* about the rational-basis test, most notably for its statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. But, read in context, this statement merely stands for the uncontroversial proposition that courts will not engage in factual investigation of what "actually motivated" a legislature or require the government to meet an affirmative evidentiary burden "explaining the distinction on the record." *Id.* (internal citations and quotation marks omitted). It does not purport to invalidate the line of cases reaffirming that courts can and should examine facts and evidence in rational-basis cases, even if the burden of providing that evidence is entirely on the plaintiffs. Indeed, the Court cited *Minnesota v. Clover Leaf Creamery Co.* without finding it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation . . . ." 449 U.S. at 463 n.7 (internal quotation marks and citation omitted); *cf. Beach Commc'ns*, 508 U.S. at 315 (citing *Clover Leaf Creamery*, 449 U.S. at 464). And, indeed, in the wake of *Beach Communications*, this Court has continued to examine facts in the rational-basis context.

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dish of their own. *Id.* at 319-20. This alternative, however, was *dicta* and not essential to the Court's core holding.

See, e.g., Romer v. Evans, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served.").

The disagreement between the Court and Justice Souter's dissenting opinion in *Heller v. Doe*, 509 U.S. 312 (1993) is also instructive. In that case, the Court upheld Kentucky's rules under which a person with mental retardation could be involuntarily committed based on "clear and convincing evidence" while a mentally ill person could only be committed based on a showing "beyond a reasonable doubt." *Id.* at 315. The Court upheld this distinction, accepting Kentucky's argument that mental retardation (unlike mental illness) is a developmental disability that becomes evident in childhood, and that it imposed the lower burden of proof because there was less risk of erroneously committing someone for mental retardation than for mental illness. *Id.* at 322. Justice Souter dissented, arguing that the Court was misunderstanding the "principal object in setting burdens of proof," which was not just to avoid error but to balance all the relevant interests at stake in a hearing. *Id.* at 339-40 (Souter, J., dissenting).

This dispute further clarifies what the rational-basis test is – and is not. The dissenting opinion in *Heller* erred because it disputed the legislature's *ends*, and, unless the ends the legislature is pursuing

are illegitimate, this Court does not substitute its own policy judgment for a legislature's. Since Kentucky's policy was to use burdens of proof to equalize the risks of erroneous confinement (rather than to use them as part of a broader balancing test) and since its "basic premise that mental retardation is easier to diagnose than is mental illness ha[d] a sufficient basis in fact," the state's classification survived rational-basis scrutiny. *Id.* at 322; *see also id.* at 322 n.1.

The opinions in *Heller v. Doe*, therefore, illustrate the Court's principled approach to the rational-basis test. Because the test is deferential, the Court did not second-guess Kentucky's policy judgments – it accepted the State's end goal of equalizing the risk of erroneous confinement. In doing so, however, the Court examined the facts to see whether the premises underlying the State's actions were plausible *and* the Court evaluated whether the State's actions were logical in light of its asserted ends. Sometimes applying these principles yields a victory for the government; sometimes it does not. But the Court consistently applies the same meaningful test in every case.

CONCLUSION

Even under this Court's most deferential standard of review, Section 3 of DOMA can survive only if this Court is able to identify a factually plausible rational basis for it that does not violate any of the principles discussed above. While the lower court

correctly discerned the absence of such a rational basis, it incorrectly assumed it was only allowed to make such a factual determination if it was allowed to apply intermediate scrutiny. Because facts matter under any level of scrutiny, the lower court's judgment should be affirmed.

Respectfully submitted,

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