To be argued by Roberta A. Kaplan

12-2335-cv(L),

12-2435 (Con)

United States Court of Appeals
for the
Second Circuit

EDITH SCHLAIN WINDSOR, IN HER OFFICIAL CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER,
Plaintiff-Appellee,

-v.-

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant,

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE

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PRELIMINARY STATEMENT

This appeal presents a single, vitally important question: does the Defense of Marriage Act ("DOMA"), which overrides the federal government's traditional deference to state determinations of marriage, unconstitutionally discriminate against married same-sex couples? Plaintiff-Appellee Edith S. Windsor, who lost her spouse after more than four decades together, only to be faced with a $363,000 federal estate tax bill, contends the federal government's refusal to recognize her marriage denies her equal protection of the law. The District Court (Jones, J.) agreed, noting that even under the lowest standard of rational basis review, DOMA "does not pass constitutional muster." JA-1001.[1]

The District Court was far from alone in this view. Over the past two years, nearly every district or circuit court to have considered the constitutionality of Section 3 of DOMA has found it to be unconstitutional. *See Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Pedersen* v. *Office of Pers. Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012); *Golinski* v. *U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Dragovich* v. *U.S. Dep't of Treasury*, No. 4:10-cv-01564-CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012). *See also In re Balas*, 449 B.R.

[1] Citations in the form of "JA__" refer to pages in the Joint Appendix. Citations in the form of "BLAG Br. __" refer to pages in the opening brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG"), and "U.S. Br. __" refer to pages in the United States' opening brief.

567 (Bankr. C.D. Cal. 2011). And the United States has taken the significant step of refusing to defend the constitutionality of DOMA in this or any court, although it continues to enforce the statute. JA-51-56; U.S. Br. 5-6.

DOMA was unprecedented. Never before had the federal government refused to defer to a state law determination on a class of citizens who are married. And DOMA's impact is sweeping: by defining marriage for purposes of federal law to exclude gay men and lesbians, DOMA denies married same-sex couples access to programs and benefits under more than 1,000 federal laws and regulations.

As the Supreme Court has explained, "'if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that'" laws that serve only "'to harm a politically unpopular group'" do not further a "'*legitimate* governmental interest'" and therefore are unconstitutional. *Romer* v. *Evans*, 517 U.S. 620, 634 (1996) (quoting *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original). The only objective DOMA serves is to disadvantage and stigmatize lesbians and gay men. Thus, as the District Court correctly held, DOMA fails to logically further any legitimate governmental objective.

COUNTERSTATEMENT OF FACTS

A. Edie and Thea

Years before the modern gay rights movement began, at a time when lesbians and gay men risked losing their families, friends and even their livelihoods if their sexual orientation became known, Plaintiff-Appellee Edith S. Windsor ("Edie") and her late spouse Thea Spyer ("Thea") fell in love, became engaged, and embarked upon a relationship that would last until Thea's death forty-four years later.

The depth, commitment and longevity of Edie and Thea's marriage are all the more remarkable given the circumstances in which they arose. Growing up in the 1940s and 1950s, Edie did not believe that it was possible for her to live openly as a lesbian. As a result, when Edie was in college and her brother's best friend asked her to marry him, she accepted, due to the overwhelming social pressure not to be "queer."[2]

After that marriage failed and Edie was pursuing a Master's Degree in mathematics at NYU, the threat of disclosure and harassment forced gay men and

[2] Only months into their marriage, Edie told her husband that it was not fair to him for them to remain married and the two divorced amicably. JA-946 at ¶¶ 14-16. Ironically, BLAG below offered Edie's first marriage as "evidence" that Edie had a "choice" about being gay. Intervenor-Def.'s Mem. Opposing Summ. J. at 12 n.4, *Windsor* v. *United States,* No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011), ECF No. 50. To the contrary, the failure of Edie's first brief marriage makes it clear that Edie did not have a "choice" about being gay.

lesbians to live important parts of their lives "underground." Indeed, while working as a computer programmer for the Atomic Energy Commission to support herself through graduate school, Edie rightly feared that she would lose her job if she were asked about her sexual orientation during an interview by the FBI. JA-946-47 at ¶¶ 19-22.[3]

In 1963, Edie met Thea at a restaurant in Greenwich Village that was one of the few places where lesbians were welcome. JA-200 at ¶ 5. Edie and Thea later began their relationship during a weekend on Long Island in 1965. After that weekend, when Thea asked Edie what she wanted from their relationship, Edie's response was simple: "Not much. I'd like to date for a year. And if that goes the way it is now, I think I'd like to be engaged, say for a year. And if it still feels this goofy joyous, I'd like us to spend the rest of our lives together." JA-201 at ¶ 9.

Two years later, in 1967, Thea asked Edie to marry her. Of course, at the time, not only could they not legally marry, but the prospect of their being able to do so in the foreseeable future was nonexistent. Edie, who was then working at IBM, feared what would happen if their relationship was "outed." So, instead of an engagement ring, Thea proposed to Edie with a circular diamond brooch in

[3] At the time, federal law prohibited companies which had contracts with the federal government from employing gay men or lesbians. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953); JA-544-45 at ¶¶ 45-46. Fortunately for Edie, the FBI never asked her that question. JA-948 at ¶ 23.

order that Edie would not face questions at the office about her fiancée. JA-201 at ¶ 10.

Thea and Edie's life together was full of the joy, heartache and sorrow that any couple faces. They worked, traveled, paid their taxes, entertained friends, and were active in their community. JA-202 at ¶ 14. Edie became a highly successful computer programmer at IBM, achieving the highest technical rank at the company. JA-199-200 at ¶ 4. Thea worked as a clinical psychologist seeing patients in her private practice. JA-213. In 1968, they bought a small summer cottage together on Long Island. Ten years later, they bought an apartment in New York City.

In 1977, twelve years after their relationship began, Edie and Thea were faced with terrible news: Thea was diagnosed with multiple sclerosis, or MS, a disease of the central nervous system that causes irreversible neurological damage and often paralysis. As Edie later explained, the diagnosis "happened to both of us." Edie supported Thea as her disability increased—first requiring a cane, then crutches, then a manual wheelchair, then a motorized wheelchair that Thea could operate with her one usable hand. Thea adapted and perservered with each stage of her disease, continuing to see patients until the day she died. JA-202 at ¶¶ 15-17.

By 2007, Thea's health had deteriorated to the point that it became clear that she would not live long enough for she and Edie to have the opportunity to marry in New York, as they had long hoped.[4] Thus, joined by a physician and five friends, Thea, then 75, and Edie, then 77, traveled to Toronto, Canada, where they were married at the airport hotel (so Thea could access it by wheelchair).[5] They spent their last two years together as a married couple before Thea died on February 5, 2009. Weeks after Thea's death, Edie, in her grief, was hospitalized from a severe heart attack and received a diagnosis of stress cardiomyopathy, or "broken heart syndrome."

B. Thea's Estate

Thea's will was admitted to probate by the Surrogate's Court of New York County. Thea's entire estate was left for Edie and Edie was appointed executor.

Under 26 U.S.C. § 2056(a) (Supp. 2010), "the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed

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[4] Sadly, Thea did not live to see New York pass its law permitting civil marriages for same-sex couples, which occurred on June 24, 2011. 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

[5] BLAG's accusation that Edie and Thea "took no actions" to have their marriage recognized while Thea was alive, BLAG Br. 2, is curious since there was and is no such process available in New York.

from the decedent to his surviving spouse." Congress enacted this unlimited marital deduction to eliminate the "widow's tax," on surviving spouses who were "subject to estate taxes even though the property remains within the marital unit." H.R. Rep. No. 97-201, at 159 (1981); *see also* S. Rep. No. 97-144, at 127 (1981).

Whether a couple is married for purposes of applying the estate tax marital deduction depends on whether the couple is considered validly married under the law of the state of the decedent's domicile at the time of death. *See, e.g.*, *Estate of Goldwater* v. *Comm'r*, 539 F.2d 878 (2d Cir. 1976). However, while New York recognized Edie and Thea's marriage, *see, e.g.*, *In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011), the federal government did not because of DOMA. Consequently, Thea's estate owed $363,053.00 in federal estate tax, which Edie paid in her capacity as executor.

It is undisputed that if Thea had been a man, the marital exemption would have applied and her estate's federal tax bill would have been $0. BLAG's Am. Resp. to Pls.' First Req. for Admiss. at 1, *Windsor* v. *United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. Aug. 1, 2011).

C. The Instant Lawsuit

1. Procedural History

This lawsuit was filed on November 9, 2010. The Amended Complaint seeks a refund of the federal estate tax levied on and paid by Thea's

estate, a declaration that Section 3 of DOMA violates the equal protection guarantee secured by the Fifth Amendment to the United States Constitution, and an injunction barring the United States from continuing to discriminate against Edie by treating Thea's estate differently from similarly situated estates of decedents married to persons of the opposite sex. JA-40.

2. The Evidentiary Record

Five distinguished scientists and historians submitted affidavits on behalf of Ms. Windsor in the District Court. Each was deposed and offered qualified, expert testimony concerning the factors that courts use in determining either the appropriate level of scrutiny to apply in an equal protection challenge or whether the discrimination at issue is constitutional. *See* Peplau Aff., JA-305-24 (sexual orientation, which is "immutable," not inherently associated with the ability to contribute to society); Cott Aff., JA-350-70 (states have long varied in how they define marriage); Lamb Aff., JA-387-404 (sexual orientation does not affect one's ability to parent); Chauncey Aff., JA-526-569 (gay people have been subject to widespread and significant discrimination); Segura Aff., JA-582-616 (gay people do not possess meaningful degree of political power).

Despite having the opportunity below to submit its own expert testimony or other competent evidence, BLAG did not so much as offer a single affidavit from a single witness. Instead, BLAG merely cited various books and

articles it claims support its positions, but the relevance and reliability of those citations as to the propositions asserted are questionable at best. For example, BLAG cited multiple articles by Professor Lisa Diamond for the proposition that people "choose" to be gay. In an affidavit subsequently submitted to the Court, however, Professor Diamond explained that BLAG "misconstrue[d]," "distort[ed]" and "completely misrepresented" her research. JA-837-38 at ¶ 4.

3. The District Court Order

On June 6, 2012, Judge Jones denied BLAG's motion to dismiss and granted Ms. Windsor's motion for summary judgment. JA-985. Holding that Section 3 of DOMA is unconstitutional, the District Court awarded judgment to Ms. Windsor in the amount of $363,053, plus interest. JA-1011.

Judge Jones concluded that it was unnecessary to decide whether heightened scrutiny should apply to classifications based on sexual orientation because "DOMA's section 3 does not pass constitutional muster" even under rational basis review, the lowest level of scrutiny for equal protection analysis. JA-1001. Observing that the First Circuit had recently applied a "more searching form" of rational basis review, the court concluded that DOMA was unconstitutional applying "established principles" of equal protection. As the District Court correctly recognized, "at a minimum, this Court must 'insist on knowing the relation between the classification adopted and the object to be

attained' . . . . [and] the government's asserted interests [must be] legitimate." JA-1000-01 (citing *Romer*, 517 U.S. at 632).

The District Court then considered, and rejected under the rational basis standard, each of the justifications offered by BLAG as well as those offered by Congress when it passed DOMA in 1996.

SUMMARY OF ARGUMENT

The appropriate level of judicial scrutiny for laws like DOMA that discriminate against lesbians and gay men is an open question in this Circuit. Because all of the factors governing whether heightened scrutiny should apply are satisfied here, a more searching level of review is proper. Even BLAG does not contend that DOMA satisfies any form of heightened scrutiny.

However, even under rational basis scrutiny, DOMA is unconstitutional. As the District Court correctly held, after considering "every conceivable basis which might support [the statute]," not one of them constitutes a constitutional exercise of Congressional authority. JA-1002 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320-21 (1993)).

Nor does the Supreme Court's summary dismissal in *Baker* v. *Nelson* provide any support for the constitutionality of DOMA. There is also no legitimate basis to question Ms. Windsor's standing. New York law is clear that the State recognizes her marriage; every New York court and each of the Appellate

Divisions to address the question (including the First Department, where Ms. Windsor lives) has concluded that Canadian marriages between same-sex couples prior to 2011 are, and were at the time of Thea's death, valid under New York law. New York's passage of legislation granting marriage to same-sex couples in 2011 removes any basis to re-examine that question now.

ARGUMENT

I.

WHAT DOMA IS AND WHAT IT DOES

Citing cases such as *F.C.C.* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993) and *Johnson* v. *Robison*, 415 U.S. 361 (1974), BLAG seeks to defend DOMA by arguing that it is nothing more than an ordinary "line-drawing" statute analogous to a statute that pertains to cable television franchise requirements or one that establishes a system of veteran's benefits. BLAG Br. 37-38, 50-51. As discussed below, both the text and history of DOMA make it clear that this fundamentally mischaracterizes DOMA. Unlike true "line-drawing statutes," DOMA does not provide a single benefit to anyone. Rather, what DOMA does is *define* marriage to exclude married same-sex couples from the rights, privileges and obligations the federal government affords to all other married couples.

DOMA was enacted in 1996 as a direct response to the decision of the Hawaii Supreme Court in *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993), which was

poised to make Hawaii the first state in the country to permit same-sex couples to marry. H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (the "House Report"). The House Report explained that DOMA responded to "the 'orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups'" in Hawaii. *Pedersen*, 2012 WL 3113883, at *2-3 (citations omitted).

As Justice Kennedy has explained, "[p]rejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). While it may be the case that many of the lawmakers enacting DOMA were not motivated by a conscious desire to harm lesbians and gay men, or a deliberate bias toward them, it cannot be disputed that the only effect of the law was to single out this group for disparate treatment. That is precisely the sort of "prejudice" to which Justice Kennedy referred. In other words, whatever was in the hearts and minds of the lawmakers, DOMA is a discriminatory statute.

To be sure, the floor debate on DOMA includes statements of overt bias. Members of Congress called homosexuality "immoral," "depraved,"

"unnatural," "based on perversion," and "an attack on God's principles." *See, e.g.*, H.R. Rep. No. 104-664, at 15-16 (1996) ("Civil laws that permit only heterosexual marriage reflect . . . both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."); 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn) ("What [people in Oklahoma] believe is, is that homosexuality is immoral, that it is based on perversion, that it is based on lust."); 142 Cong. Rec. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith) ("Same-sex 'marriages' . . . legitimize unnatural and immoral behavior.").

Throughout its brief, BLAG attempts to highlight more "neutral" comments from legislators such as Senator Lieberman in support of heterosexual marriage. *See*, *e.g.*, BLAG Br. 10-11 (DOMA "affirms another basic American *mainstream* value…" (emphasis added)). While BLAG may be correct that these lawmakers intended no malice, the statements themselves—and more fundamentally the resulting statute—implicitly suggest at the very least an "insensitivity" or instinct "to guard against people who appear to be different." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[6]

[6] Many of the same legislators BLAG references as having made "neutral" statements also made statements evincing more explicit bias. *See, e.g.*,142 Cong. Rec. S10110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd) ("The drive for same-sex marriage is, in effect, an effort to make a sneak attack on society by encoding this aberrant behavior in legal form.");142 Cong. Rec.

And although BLAG asserts that DOMA is simply an example of Congress "exercising caution," BLAG Br. 39, the procedural record with respect to DOMA's passage was anything but "cautious." Despite DOMA's broad and far-reaching impact, "none of the testimony [in Congress] concerned DOMA's effects on the numerous federal programs at issue." *Massachusetts*, 682 F.3d at 13. "Congress did not hear testimony from agency heads about the effect of DOMA on federal programs, or from historians, economists, or specialists in family or child welfare." *Golinski*, 824 F. Supp. 2d at 980. Indeed, the House rejected a proposed amendment that would have required the General Accounting Office to analyze the law's budgetary impact. 142 Cong. Rec. 7503-05 (daily ed. July 12, 1996).[7] This legislative history, rather than supporting BLAG's purported "caution" rationale, instead reinforces that DOMA was passed with "want of careful, rational reflection" of its vast discriminatory impact. *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring).

H7441 (daily ed. July 11, 1996) (statement of Rep. Canady) ("Our law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships . . .").

[7] Indeed, Senator Byrd pointed out the following: "How much is it going to cost the Federal Government if the definition of 'spouse' is changed? . . . I know I do not have any reliable estimate of what such a change would mean, but then, I do not know of anyone who does." 142 Cong. Rec. S10111 (daily ed. Sept. 10, 1996).

DOMA also represents a stark departure from the federal government's 200 years of deference to state definitions of marriage. The House Report itself acknowledged that "[t]he determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664 at 3. BLAG cannot point to a single example, other than DOMA, where the federal government supplied a comprehensive federal definition of marriage. JA-1009 (noting that counsel for BLAG conceded that its "research hasn't shown that there are historical examples [where] Congress has legislated on behalf of the federal government in the area of domestic relations").[8]

Yet Section 3 of DOMA for the first time defines the words "marriage" and "spouse" for purposes of all federal law, limiting those words to legal unions between a man and a woman. 1 U.S.C. § 7 (codifying Section 3 of DOMA). Besides impacting the payment of federal estate tax, DOMA also affects, among other things, the filing of joint tax returns, *Gill* v. *Office of Pers. Mgmt.*,

[8] BLAG asserts, BLAG Br. 6, that Congress has "a long history of supplying federal marital definitions." But the smattering of statutes BLAG has identified do not broadly define marriage, they merely provide additional statutory anti-fraud or other requirements relevant "to the particular program or personnel involved." *Massachusetts*, 682 F.3d at 12; s*ee, e.g.*, I.R.C. § 2(b)(2) (imposing additional tax-related requirements to be considered "married" or "spouse," without defining those terms); I.R.C. § 7703 (same); 42 U.S.C. § 416 (clarifying that state court of domicile determines marital status; adding qualifying conditions); 42 U.S.C. § 1382c(d)(2) (extending benefits to additional class of needy people by treating them as married); 8 U.S.C. § 1186a(b)(1) (imposing additional requirement that qualifying marriage not be fraudulently entered).

699 F. Supp. 2d 374, 383 (D. Mass. 2010), *aff'd sub nom*. *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), bankruptcy petitions, *In re Balas*, 449 B.R. at 569, long-term care insurance benefits, *Dragovich*, 2012 WL 1909603, at *1, access to health insurance, *Golinski*, 824 F. Supp. 2d at 974; *Gill*, 699 F. Supp. 2d at 379; *Pedersen*, 2012 WL 3113883, at *2, and Social Security benefits, *Gill*, 699 F. Supp. 2d at 382. "The impact of DOMA's definition of marriage is vast, estimated to affect at least 1,138 federal laws and regulations and to deprive an estimated 100,000 legally married same-sex couples of the benefits afforded to married couples under such federal laws and regulations." *Pedersen*, 2012 WL 3113883, at *4 (footnotes and citations omitted).

Prior to DOMA, "Congress has never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Massachusetts*, 682 F.3d at 12. State marriage laws have long varied on issues such as recognition of common law marriage, the age of consent to marry, the degree of consanguinity permitted, interracial marriage and grounds for divorce. JA-358-64 at ¶¶ 31-64. Despite these differences, the federal government always "fully embraced these variations and inconsistencies in state marriage laws," even though many involved "similarly politically-charged, protracted, and fluid debates at the state level." *Gill*, 699 F. Supp. 2d at 391-92. *See also Ensminger* v. *Comm'r*, 610 F.2d 189, 191 (4th Cir. 1979). There was "no precedent . . . for

DOMA's sweeping general 'federal' definition of marriage for all federal statues and programs." *Massachusetts*, 682 F.3d at 12; *accord* JA-1007; *Golinski*, 824 F. Supp. 2d at 1000. In fact, federalism concerns aside, defining a term for the entirety of the United States code is uncommon. In 1996, when DOMA was passed, no new definitions had been added to the Dictionary Act, and the existing definitions had not been amended, for nearly half a century. *See* Act of Oct. 31, 1951, ch. 655, § 1, 65 Stat. 710 (substituting "used" for "use" in fourth clause after opening clause of 1 U.S.C. § 1).

II.

DOMA SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY

Most statutes classify for one purpose or another and do not for this reason alone offend the concept of equal protection. But in certain circumstances, such as when a classification singles out for differential treatment a group that has historically been discriminated against on the basis of characteristics that have nothing to do with the ability to succeed in society, the Supreme Court has held that courts should look more closely. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985). In those circumstances, courts require the government to justify its desire to discriminate with a substantial or compelling governmental objective. *Id*. As explained below, distinctions based on sexual orientation such as exist in DOMA satisfy all of the triggers for such judicial skepticism. And again,

even BLAG does not assert that if some form of heightened scrutiny applies, DOMA can possibly be defended on any ground.[9]

A. Lack of Second Circuit Precedent

This Circuit has not yet addressed the appropriate level of scrutiny for laws that discriminate on the basis of sexual orientation. *Able* v. *United States*, 155 F.3d 628, 632 (2d Cir. 1998). While acknowledging that this is an open question, BLAG Br. 24-26, BLAG urges this Circuit to follow the prior decisions of other circuits that have concluded (erroneously) that sexual orientation classifications trigger only rational basis review. *Id*. at 24.

But these decisions are not valid precedent. Almost every decision cited by BLAG explicitly relied on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court held that state laws criminalizing sodomy did not violate the Due Process Clause of the Fourteenth Amendment, and none of them applied the factors the Court has identified as relevant to whether heightened scrutiny applies.[10] Since *Bowers* "was not correct when it was decided," *Lawrence* v.

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[9] Because being gay or lesbian has nothing to do with an individual's ability to succeed in society, strict scrutiny is the appropriate form of heightened scrutiny to apply to sexual orientation discrimination. *See, e.g.*, *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom. Perry* v. *Brown*, 671 F.3d 1052 (9th Cir. 2012). However, the question of whether to apply strict or intermediate scrutiny is immaterial since DOMA cannot withstand either form of scrutiny.

[10] For example, in one of the first post-*Bowers* decisions, the D.C. Circuit stated that: "If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court

Texas, 539 U.S. 558, 578 (2003), the cases that relied on *Bowers* should be rejected by this Court. *Pedersen*, 2012 WL 3113883, at *15-16; U.S. Br. 33-34. *See also* Br. of Amici Curiae 29 Pub. Interest & Legal Serv. Orgs. (analyzing existing heightened-scrutiny precedents).

B. Sexual Orientation Discrimination Requires Heightened Scrutiny

Under the Supreme Court's test for determining whether a legislative classification should be subject to heightened scrutiny, the essential criteria are that: "(1) the group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to perform or contribute to society." *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 426 (Conn. 2008) (citations omitted); *see also United States* v. *Virginia*, 518 U.S. 515, 532-33 (1996); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam). Courts may also consider (3) whether the characteristic that defines the group is immutable or "so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change [it] . . . in order to avoid discriminatory treatment," *In re*

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to conclude that state sponsored discrimination against the class is invidious." *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). On that basis, that court and many others simply dispensed with the heightened scrutiny analysis altogether.

Marriage Cases, 183 P.3d 384, 442 (Cal. 2008);[11] and (4) whether the group is a relatively politically powerless minority, *Bowen* v. *Gilliard*, 483 U.S. 587, 602-03 (1987); *Lyng*, 477 U.S. at 638, although these two factors are not required, *see Golinski*, 824 F. Supp. 2d at 983; *Kerrigan*, 957 A.2d at 426.[12]

"No single factor . . . is dispositive." *Golinski*, 824 F. Supp. 2d at 983 (citing *Murgia*, 427 U.S. at 321 (Marshall, J., dissenting)). The existence of any one of these factors can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment," *City of Cleburne*, 473 U.S. at 440, or is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Applying these factors, there can be little question that DOMA should be subject to heightened scrutiny.

1. History of Discrimination

The history of discrimination that lesbians and gay men have suffered at the hands of both governmental and private actors is painfully clear. *See Rowland* v. *Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014-15 (1985) (Brennan

[11] *See also Able* v. *United States*, 968 F. Supp. 850, 863-64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998).

[12] For this reason, it is telling that BLAG begins its analysis with a recitation of gay and lesbians' supposed political power. BLAG Br. 27-29.

and Marshall, JJ., dissenting from denial of writ of certiorari); *Golinski*, 824 F. Supp. 2d at 985-86; *Pedersen*, 2012 WL 3113883, at *20-21. To Ms. Windsor's knowledge, no court has ever concluded otherwise. Fifteen years ago, a district court explained that "[w]hile social and political tolerance of homosexuality is increasing, gay men and lesbians have endured a long history of discrimination, both official and private." *Able*, 968 F. Supp. at 854.

Thus, for example, all federal agencies were prohibited from hiring lesbians and gay men after World War II (a ban that lasted until 1975), and the federal government engaged in surveillance to purge supposed "homosexuals" from the federal civil service. JA-543-547 at ¶¶ 42-50; U.S. Br. 18-19. Campaigns have spread false stereotypes of lesbians and gay men as child molesters and unfit parents—stereotypes that linger to this day. JA-553-55 at ¶¶ 66-72. Until 2003, states were able to "demean [lesbians' and gay men's] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578. Today, lesbians and gay men continue to face the ever-present threat of anti-gay violence. JA-563-65 at ¶¶ 94-96; BLAG Objections and Resp. to Pls.' First Req. for Admiss. at 4-5, *Windsor* v. *United States*, No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y. July 8, 2011), ECF No. 51 (admitting that lesbians and gay men have been and continue to be subjected to violence).

Edie's own life provides concrete examples of this discrimination. As described above, as a graduate student in the 1950's, Edie feared losing her job if the FBI learned that she was a lesbian. Later, when IBM hired Edie, it was violating federal law (albeit unintentionally) because, as a federal contractor, it was barred from employing a lesbian. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

BLAG does not dispute this history. Instead, BLAG argues that discrimination against homosexuals was "relatively short-lived" and ostensibly a "product of the twentieth century." BLAG Br. 32. But "BLAG's [statement] that antigay discrimination is 'unique and relatively short-lived' is clearly taken out of context. . . . [W]hat was 'unique and relatively short-lived' was the fact that it was not until the twentieth century that laws that discriminated against homosexuality were for the first time conceptualized in terms of status or identity as opposed to conduct." *Pedersen*, 2012 WL 3113883, at *18 (citations omitted); *see also* JA-534 at ¶ 21.[13]

[13] It also makes no sense to assert that the discrimination that even BLAG concedes occurred is insufficient to warrant heightened scrutiny because it is only recently that gay people began to live openly in society. The history of discrimination prong of the suspect classification test requires only that the characteristic has been used to discriminate invidiously in the past, not that it has been used to discriminate since the beginning of recorded time.

2. Ability to Perform or Contribute to Society

Classifications based on a "characteristic" that "frequently bears no relation to ability to perform or contribute to society" further reinforce the need for heightened scrutiny. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973); *accord City of Cleburne*, 473 U.S. at 440-42; *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976). If the characteristic does not predict performance, the government generally should not be relying on it in order to discriminate among citizens. For this reason, this factor "has played a critical and decisive role" in determining whether a classification should receive heightened scrutiny. *Pedersen*, 2012 WL 3113883, at *22.

Because sexual orientation has nothing to do with "'impairment in judgment, stability, reliability, or general social or vocational capabilities,'" JA-317 at ¶ 30 (quoting Am. Psychiatric Ass'n, *Position Statement On Homosexuality and Civil Rights*, 131 Am. J. Psychiatry No. 4, 497 (1974)), "being gay or lesbian has no inherent association with a person's ability to participate in or contribute to society," JA-316 at ¶ 29. Indeed, an individual's ability to be a judge, a doctor or a software programmer is clearly not affected by being gay or lesbian. *See* JA-316-17 at ¶ 29. "[T]he military's contemporaneous recognition of the long history of valiant honorable service of homosexual servicemen and women attests to the fact

that homosexuals have made the ultimate contribution to society." *Pedersen*, 2012 WL 3113883, at *21.[14]

BLAG cryptically argues that this factor cuts against heightened scrutiny because whether a married couple is heterosexual or homosexual purportedly implicates a government interest in "steering procreation into marriage." BLAG Br. 29 (citations omitted). But even if this issue were somehow relevant to whether there is a rational basis for DOMA, it clearly has nothing to do with "the question of whether homosexuals have the ability to contribute to society." *Pedersen*, 2012 WL 3113883, at *21.

3. Defining or Immutable Characteristic

When legislation burdens individuals on the basis of a core trait that they cannot or should not have to change, that burden provides another reason for courts to look more closely at such classifications. *Golinski*, 824 F. Supp. 2d at 986. To the extent this factor is relevant, *Pedersen*, 2012 WL 3113883, at *23, the Supreme Court has recognized that a defining characteristic need not be absolutely unchangeable to form the basis of a suspect classification. *See, e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (classifications based on alienage subject to

[14] To the extent the BLAG is arguing that gay people are somehow impaired in their ability to contribute to society because they are not always biologically related to their children, that argument is fallacious. After all, would anyone seriously contend that the many thousands of straight couples who adopt children because of infertility or who use assisted reproductive technologies are impaired in their ability to contribute to society?

strict scrutiny); *see also City of Cleburne*, 473 U.S. at 442-43 & n.10 (relevance of immutability). Few (if any) of the suspect classifications identified by the Supreme Court are truly "immutable" in the strictest sense of the word—people can convert religions,[15] aliens can become naturalized, and some people can "pass" as being of a different race or national origin. *See Pedersen*, 2012 WL 3113883, at *29 (citations omitted).

In any event, there is "a growing scientific consensus [that] accepts that sexual orientation is a characteristic that is immutable." JA-53; *see also* JA-311-16 at ¶¶ 19-28.[16] Few people today would contend that people can change their orientation. *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to*

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[15] BLAG's argument that sexual orientation does not merit heightened scrutiny because it is not determined at birth is wholly inconsistent with the fact that classifications based on religion have long been treated as worthy of strict scrutiny, and religion is not solely an accident of birth. To the extent Amici suggest that the source of heightened scrutiny for religion is the Free Exercise Clause, Br. of Amicus Frederick Douglass Foundation at 4 n.2, the Supreme Court has clarified in the context of an equal protection challenge that classifications "drawn upon . . . race, *religion*, or alienage" require more than rational basis review. *See City of New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976) (emphasis added).

[16] As for BLAG's contentions as to the "fluidity" of women's sexuality, BLAG Br. 31, Professor Lisa Diamond, the leading expert on women's sexuality, who was originally *cited by BLAG* in opposition to Ms. Windsor's motion for summary judgment, definitively answered the question as follows: "If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes." JA-964 at ¶ 10.

Sexual Orientation, at v (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf; *cf. Watkins* v. *U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) ("Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation.").

Indeed, courts that have considered the issue since *Lawrence* have recognized that "a person's sexual orientation is so fundamental to one's identity that a person should not be required to abandon it." *Golinski*, 824 F. Supp. 2d at 987; *see also Able*, 968 F. Supp. at 863-64. "Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity . . . an individual should not be required to abandon it. To hold otherwise would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity." *Pedersen*, 2012 WL 3113883, at *29.

Although BLAG has asserted that there is no such thing as a "class" of gay men and lesbians because academics in the field do not uniformly agree upon the definition of terms like "gay" or "lesbian," BLAG Br. 31-32, this contradicts reality. When a colleague, relative or friend says that he is gay, is it credible to argue that it is impossible to know what that person is talking about? *See, e.g.*, *Pedersen*, 2012 WL 3113883, at *24 ("the colloquial understanding of each of these terms readily describe a class that is defined by same-sex attraction and sexual behavior"). And when DOMA was passed in 1996, the legislative

record was replete with references to lesbians and gay men. *See, e.g.*, 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) ("*Homosexuals* and *lesbians* boast that they are close to realizing their goal—legitimizing their behavior." (emphasis added)).

4. Political Power

Although political disadvantage is not a necessary factor for heightened scrutiny, *Pedersen*, 2012 WL 3113883, at *29-31, to the extent the inability to redress a group's grievances politically is relevant, lesbians and gay men are clearly a minority and frequently lack the political power to defend themselves against a hostile majority. JA-585-615 at ¶¶ 9-85.

Although BLAG builds its argument on a list of relatively recent legislative protections for gay people, the Supreme Court has applied heightened scrutiny to groups that had achieved far greater legislative progress than lesbians and gay men have today. JA-613-615 at ¶¶ 81-85. By the time the Supreme Court concluded that sex-based classifications required intermediate judicial scrutiny, for example, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *Frontiero*, 411 U.S. at 687-88. By contrast, there is no federal ban on sexual orientation discrimination in employment, housing or public accommodations, and 29 states have no such protections either. JA-591, 594 at ¶¶ 29, 33. As political power has been defined by the Supreme Court,

lesbians and gay men do not have it. *Pedersen*, 2012 WL 3113883, at *35; *Golinski*, 824 F. Supp. 2d at 987 n.7.

It is undisputed that gay rights opponents have aggressively used state ballot initiatives and referenda to pass discriminatory laws or amend state constitutions to overturn or pre-emptively deny lesbians and gay men important protections in the context of employment, their relationships or the ability to adopt or foster children. *See, e.g.*, *Romer*, 517 U.S. at 623-24; JA-595-96 at ¶¶ 36-38 (expert testimony detailing these initiatives); *Perry* v. *Brown*, 671 F.3d 1052, 1063-64 (9th Cir. 2012) (describing California's Proposition 8). This extraordinary and repeated use of majoritarian "direct democracy" has been mobilized against lesbians and gay men more than against any other group, which vividly illustrates the inability of gay people to protect themselves politically. JA-598 at ¶ 43; Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. Journal of Political Sci., No. 1, 245, 257 (Jan. 1997).

That there have been some recent political gains does not alter this analysis. JA-587 at ¶¶ 15-17; JA-593-4 at ¶ 32. "The evidence offered by BLAG . . . does not establish that gay men and lesbians have sufficient political power to bring a prompt end to the prejudice and discrimination perpetrated against them through traditional political means." *Pedersen*, 2012 WL 3113883, at *32. As for BLAG's contention that "gays and lesbians are one of the most influential, best-

connected, best-funded" groups, BLAG Br. 28, "BLAG has failed to demonstrate that the alleged 'gay corporate power' [or] the ability of gay men and lesbians to raise money . . . has actually translated into an ability to imminently end discrimination, prejudice and to prevent unfavorable outcomes." *Pedersen*, 2012 WL 3113883, at *34.

III.

DOMA FAILS RATIONAL BASIS REVIEW

Numerous courts, including the District Court below, have now held that DOMA's denial of federal marital protections to same-sex couples fails rational basis review. *See* JA-1001; *Massachusetts*, 682 F.3d at 15; *Dragovich*, 2012 WL 1909603, at *14; *Pedersen*, 2012 WL 3113883, at *35; *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009); *In re Balas*, 449 B.R. at 579. Yet, BLAG continues to insist that DOMA "easily passes rational basis review." BLAG Br. 36. As discussed below, and as the District Court properly held, this contention is not correct.

BLAG now asserts six purported justifications for DOMA: (1) "maintaining a uniform federal definition of marriage," BLAG Br. 39; (2) "preserving the public fisc and previous legislative judgments," BLAG Br. 43; (3) acting with "caution," BLAG Br. 45; (4) "focus[ing] on opposite-sex couples in subsidizing the begetting and raising of children," BLAG Br. 51;

(5) "encourag[ing] and subsidiz[ing] the raising of children by their own biological mothers and fathers," BLAG Br. 53; and (6) "encourag[ing] childrearing in a setting with both a mother and a father," BLAG Br. 55. BLAG divides these "interests" into two groups: (1) "uniquely federal interests;" and (2) supposedly "common federal-state interests." BLAG's "uniquely federal" interests fail because not one of them actually provides any explanation for DOMA's discrimination—they simply restate what DOMA does. In other words, "uniformity," "history," "caution" and "tradition" are simply other ways of saying that denying married same-sex couples federal marital protections is permissible because same-sex couples have traditionally been denied those protections. Equal protection, however, requires more than that—it requires some *independent* justification for the discrimination. *See Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an *independent* and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." (emphasis added)).

BLAG's "common federal-state interests," on the other hand, all of which concern marriage and procreation, are not actually advanced by DOMA itself, which does not give straight married couples any protections at all. As numerous courts have now held, any alleged federal interest in encouraging straight couples to marry or in encouraging "responsible procreation" by straight

couples, whether or not legitimate, has no logical connection to what DOMA actually does—deny federal benefits to gay couples who are already married. *See* JA-1004-05; *Massachusetts*, 682 F.3d at 14-15; *Golinski*, 824 F. Supp. 2d at 992-93; *Dragovich*, 2012 WL 1909603, at *13-14; *Pedersen*, 2012 WL 3113883, at *39-41. After all, it is the states, not the federal government, who decide whether or not to allow same-sex couples to marry. And the three states in this Circuit have already made that decision. N.Y. Dom. Rel. Law § 10-a (McKinney 2011); Conn. Gen. Stat. § 46b-20 (West 2009); Vt. Stat. Ann. tit. 15 § 8 (West 2009). As a matter of logic, denying federal protections to already married same-sex couples cannot incentivize straight couples to do anything at all. JA-1005.

A. The Applicable Standard

The existing equal protection rational basis case law can be understood in two ways: either as applying a "more searching" form of review in certain circumstances, or as applying one singular constitutional rational basis standard to all situations. The Supreme Court has at times stated that it applies a single rational basis standard in all of its cases. *See, e.g.*, *Heller*, 509 U.S. at 321. Indeed, the District Court below stated that it applied "established principles" of equal protection, rather than any form of enhanced review, in reaching its conclusion here. JA-1001. By contrast, some courts, including the First Circuit, have suggested that the Supreme Court jurisprudence can be read as sometimes

employing a more searching form of review in certain circumstances. Nevertheless, whether termed "more searching review," or traditional rational basis review, the same existing case law compels the same result: DOMA clearly violates equal protection.

1. "Traditional" Rational Basis Review

Although "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," *Romer*, 517 U.S. at 631, rational basis review is not "toothless," *Mathews* v. *De Castro,* 429 U.S. 181, 185 (1976). Even under the rational basis standard, classifications must still bear a rational relationship to some legitimate government objective. *Heller*, 509 U.S. at 320. Thus while it is true that courts must accept Congress's generalizations "even when there is an imperfect fit between means and ends," *id.* at 321, courts nevertheless "insist on knowing the relation between the classification adopted and the object to be attained," since this is what "gives substance to the Equal Protection Clause," *Romer*, 517 U.S. at 632.

Contrary to BLAG's assertions, BLAG Br. 36-38, rational basis is not a judicial "rubber stamp." A court must seek "assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216. Where, as here, the "purported justifications" make "no sense" or the justifications, even if legitimate, cannot be credited as plausible, the law fails

rational basis review. *See Garrett*, 531 U.S. at 366 n.4. "By requiring that the classification bear a rational relationship to an *independent and legitimate* legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633 (emphasis added). In other words, if the law's classification and its purpose are the same, the law constitutes an impermissible "classification of persons undertaken for its own sake." *Id.* at 635.

In addition, "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." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); *see also United States* v. *Then,* 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) ("constitutional arguments that were unavailing in the past may not be foreclosed in the future" based on changes in knowledge). In other words, where the line drawn by legislation does not "find some footing in the realities of the subject addressed by the legislation," the classification is unconstitutional. *Heller*, 509 U.S. at 321.

2. "More Searching" Rational Basis Review

Some courts have concluded that, in certain contexts, this rational basis standard is applied with a "closer than usual" look at the government's justifications. *Massachusetts*, 682 F.3d at 11-12. As this Circuit and others have

noted, "the usually deferential 'rational basis' test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination." *Then*, 56 F.3d at 468 (Calabresi, J., concurring) (citations omitted); *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

The First Circuit interpreted the same line of Supreme Court cases as employing a "more careful assessment" of a challenged law's justifications "than the light scrutiny offered by conventional basis rational review" when, as with DOMA, "courts have had reason to be concerned about possible discrimination." *Massachusetts*, 682 F.3d at 11 (citation omitted). In the First Circuit's view, the Supreme Court gave closer scrutiny to the laws at issue in *Romer* (sexual orientation discrimination), *City of Cleburne* (discrimination against people with mental disabilities), and *Moreno* (discrimination against unrelated households), because of the "nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered"—all of which it found to be comparable to DOMA. *Id.* at 10.

In such cases, the extreme deference accorded to ordinary economic legislation is inappropriate and the Supreme Court has "both intensified scrutiny of

purported justifications" and "limited the permissible justifications." *Id.* This Court has made a similar observation: "[t]he analysis set forth in *Romer*, *Cleburne Living Ctr.*, and *Palmore* differed from traditional rational basis review because it forced the government to justify its discrimination. Moreover, the Court did not simply defer to the government; it scrutinized the justifications offered by the government to determine whether they were rational." *Able*, 155 F.3d at 634.

Here, the statements made by the legislators in favor of DOMA reinforce the need for a more searching form of judicial review. While "prejudice" against gay people may not fairly account for the views of all who voted for DOMA in 1996, even those legislators who spoke only of the sanctity of "traditional marriage" were implicitly "insensitiv[e]" to the lives of "people who appear[ed] to be different . . . from [themselves]." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

The unprecedented nature of DOMA's intrusion into an area of traditional state concern is another reason for courts to apply a more searching form of rational basis review. There is no legitimate justification for DOMA's remarkable shift in the federal system. Although BLAG attempts to argue that DOMA serves a need for uniformity, it does not, and cannot, explain why now, and at no other time in our country's history, and in no other aspect of marriage, such uniformity would be required. As the Supreme Court has recognized,

sometimes "'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)); *see also Romer*, 517 U.S. at 633 (novel legislative classifications require "careful consideration to determine whether they are obnoxious to the [C]onstitution" (citation omitted)).

Certainly, DOMA's unprecedented nature bespeaks its deeper constitutional infirmities. In recognition of this departure from historical precedent, the First Circuit also found that "a closer examination" of DOMA's justifications "is uniquely reinforced by federalism concerns." *Massachusetts*, 682 F.3d at 13; *see also United States* v. *Morrison*, 529 U.S. 598, 615-16 (2000) (expressing concern for a federal law's intrusion into "family law" including "marriage, divorce, and childrearing"); *United States* v. *Lopez*, 514 U.S. 549, 564 (1995).

Whether the Court chooses to look at these cases as part of a "traditional" or "more searching" form of rational basis review, DOMA violates equal protection.

B. BLAG's "Uniquely Federal" Justifications

1. Caution

BLAG asserts that DOMA can be justified as rationally related to the federal interest in acting with "caution in facing the unknown consequences of a novel redefinition of a foundational social institution." BLAG Br. 45.

The District Court properly rejected this argument because "the decision of whether same-sex couples can marry is left to the states." JA-1003. As a result, "whatever the 'social consequences' of [marriage for same-sex couples] ultimately may be, DOMA has not, and cannot, forestall them." JA-1004. Thus, "DOMA does not, strictly speaking, 'preserve the institution of marriage as one between a man and a woman.'" JA-1003. Rather than "maintaining the traditional definition of marriage," BLAG Br. 47, DOMA creates a "federal definition of marriage," JA-1003.[17] In any event, preserving or changing the institution of marriage is properly the role of the state governments, not the federal government. JA-1008-09.

Moreover, "Congress's putative interest in 'caution' seems, in substance, no different than an interest in nurturing the traditional institution of

[17] Contrary to BLAG's suggestion, the District Court did not hold that "maintaining the traditional definition of marriage" was a legitimate independent justification for DOMA. *Cf.* BLAG Br. 47-48. Instead, Judge Jones observed that "an interest in maintaining the traditional institution of marriage, *when coupled with other legitimate interests*, could be a sound reason for a legislative classification." JA-1002 n.3 (emphasis added).

marriage"—both amount to an argument that Congress was entitled to discriminate because it had previously done so. JA-1002. Any attempt to maintain or extend the status quo cannot itself provide the rational basis for a legal classification. *Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Romer*, 517 U.S. at 633 (holding that a classification and its justification must be independent of each other). After all, this same "go slow" argument could have been (and indeed was) made against extending rights to, for example, African-Americans. *See, e.g.*, *Watson* v. *City of Memphis*, 373 U.S. 526, 535-36 (1963).

As discussed above, the legislative history demonstrates that DOMA was anything but "a cautious legislative step." *Dragovich*, 2012 WL 1909603, at *11; *see also Massachusetts*, 682 F.3d at 15 ("the statute was not framed as a temporary time-out; and it has no expiration date"). And DOMA abandoned the true status quo which was, and always has been, that marriage is defined by the states.

2. Conserving the Public Fisc

Nor can DOMA be justified by a Congressional desire to "preserv[e] the public fisc." BLAG Br. 43. As the District Court noted, "[a]n interest in conserving the public fisc alone . . . 'can hardly justify the classification used in allocating those resources.'" JA-1009 (quoting *Plyler*, 457 U.S. at 227).

It is insufficient to assert that excluding a class of people from federal benefits will result in saving money. If BLAG were correct, the government could deny benefits to couples who married on odd days of the week, for example. Such a distinction would undoubtedly save money, but it would not provide a legitimate justification under the rational basis test. As the Chief Justice recently explained: "administrative considerations could not justify . . . an unfair system in which a city arbitrarily allocate[s] taxes among a few citizens while forgiving many others on the ground that it is *cheaper* and easier to collect taxes from a few people than from many." *Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2087 (2012) (Roberts, C.J., dissenting) (emphasis added and internal quotations omitted); *see also Gill*, 699 F. Supp. 2d at 390 (holding that "a concern for the preservation of resources standing alone" does not itself justify the classification used to distribute those resources (quoting *Plyler*, 457 U.S. at 227)). For this reason, as other courts have noted, "even crediting cost-savings as a conceivable policy goal, groups selected to bear the burden . . . must be rationally, not arbitrarily, chosen." *Dragovich*, 2012 WL 1909603, at *11; *see also Levenson*, 587 F.3d at 933; *Golinski*, 824 F. Supp. 2d at 994-95.[18]

[18] The First Circuit, while stating that it might not be totally irrational to believe DOMA might save the government money, concluded that a desire to save costs without more could not explain DOMA's discrimination against "a historically disadvantaged group." *Massachusetts*, 682 F.3d at 14.

Finally, in light of subsequent Congressional findings, the suggestion that DOMA might conserve federal government resources is not grounded in factual reality. Indeed, "the Congressional Budget Office has opined that federal recognition of same-sex marriage would result in a net benefit to the federal treasury." *Dragovich*, 2012 WL 1909603, at *11.[19] Equally significant, as noted above, Congress did not ask and apparently did not care about the fiscal impact of DOMA, even when Senator Byrd pointed out the glaring lack of knowledge concerning the consequences of this sweeping change in federal law. *See* 142 Cong. Rec. S10110-11 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). Thus, any attempt to justify DOMA as a cost-saving measure "is plainly not grounded in rational speculation, particularly where, as is the case here, . . . no meaningful effort was made to ascertain [DOMA's] fiscal impact." *Pedersen*, 2012 WL 3113883, at *45; *see also Carolene Prods. Co.*, 304 U.S. at 153 (showing that presumed facts do not exist is relevant to the constitutionality of a statute); *Then*, 56 F.3d at 467 (Calabresi, J., concurring).

[19] *See The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 1, Cong. Budget Office (June 21, 2004), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

3. "Uniformity"

BLAG asserts that Congress could have legitimately chosen to exclude same-sex couples from the federal marital protections in order to achieve a federal interest in uniform treatment of federal benefits.

The District Court rightly described this argument as "misleading" because the only uniformity that the federal government had ever previously sought with respect to marriage was a uniform respect for state marriage laws, whatever they might say and however they might differ. JA-1007.

Both prior to and since the enactment of DOMA there has always been significant inconsistency in federal marital benefits precisely because of the federal government's deference to the states' determinations of who can marry. This is so because state eligibility requirements for marriage have varied widely from state to state throughout our country's history and they continue to do so. *Pedersen*, 2012 WL 3113883, at *48; JA-352 at § 8. Despite these differences, the federal government always "fully embraced these variations and inconsistencies in state marriage laws," even though many involved "similarly politically-charged, protracted, and fluid debates at the state level." *Gill*, 699 F. Supp. 2d at 391-92. *See also Ensminger*, 610 F.2d at 191. "Congress has never purported to lay down a general code defining marriage or purporting to bind the states to such a regime." *Massachusetts*, 682 F.3d at 12. Instead, because of this variation in state laws,

federal law has always looked to state law to determine whether any couple is married. *Cf. Astrue* v. *Caputo*, 132 S. Ct. 2021, 2031 (2012) ("Reference to state law to determine an applicant's status as a 'child' is anything but anomalous.").[20]

In light of this widespread variation in state marriage laws and the consequent existing lack of uniformity of treatment of couples at the federal level, BLAG's asserted need for "uniformity" does not provide a rational basis for DOMA's discrimination against married same-sex couples. *See, e.g.*, *Garrett*, 531 U.S. at 366 n.4 (a law will fail rational basis review where the "purported justifications . . . made no sense in light of how the city treated other groups similarly situated in relevant respects").

Moreover, rather than foster uniformity, DOMA establishes two tiers of marriages in states like New York, Vermont or Connecticut that permit same-sex couples to marry. "DOMA seems to inject complexity into an otherwise straightforward administrative task by sundering the class of state-sanctioned marriages into two, those that are valid for federal purposes and those that are not." *Gill*, 699 F. Supp. 2d at 395; *see also* Br. of City of New York, et al., as Amici Curiae in Support of Pet. at 6, *Windsor* v. *United States*, No. 12-63 ("DOMA

[20] The District Court held that federalism principles prevented the federal government from adopting its own sweeping definitional criteria for which marriages would be considered valid for all federal purposes, JA-1008-09, not that the federal government could not impose restrictions on marriage for the purpose of specific federal programs, BLAG Br. 43.

imposes on the City of New York the burden of compliance and cost associated with a dual system of benefits for its married employees."). In other words, it obviously makes no sense to suggest, as BLAG does, that some plausible interest in "uniformity" justifies treating Edie and Thea like an unmarried same-sex couple from Alabama or Michigan, rather than like a married couple from New York, where they actually lived.

As for BLAG's suggestion that DOMA is necessary to further uniformity if a married same-sex couple moves to another state, BLAG Br. 40, the problem that BLAG posits Congress was trying to fix—married couples losing or gaining federal benefits simply by moving to another state—already exists with respect to certain federal programs for married straight couples whose marriages (such as marriages between first cousins or a couple not properly divorced) are recognized in one state, but not another. Social Security Ruling ("SSR") 63-20 (first cousins); SSR 84-18 (divorce); *see also* 42 U.S.C. § 416(h)(1)(A)(i) (marriage for Social Security benefits based on law of state where couple resides at time of application); 38 C.F.R. § 3.1(j) (same for veterans' benefits); 29 C.F.R. § 825.113 (same for Family and Medical Leave Act). Thus, a claim that uniformity was suddenly required only for marriages of same-sex couples is "impossible to credit." *Romer*, 517 U.S. at 635.

C. BLAG's "Common Federal-State Interests"

BLAG describes its next set of justifications as "common federal-state interests." These purported interests all relate to either encouraging or discouraging gay or straight couples to marry or have children. BLAG ignores the fact that, as the District Court concluded, "DOMA has no direct impact on heterosexual couples at all" and thus no significant "ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married." JA-1005.

First and foremost, DOMA cannot plausibly be said to advance any of these purported "joint federal-state interests" (really, state interests in the context of DOMA). The decision whether to allow same-sex couples to marry has already been made by the states of New York, Connecticut and Vermont. *See* N.Y. Dom. Rel. Law § 10-a (McKinney 2011); Conn. Gen. Stat. § 46b-20 (West 2009); Vt. Stat. Ann. tit. 15 § 8 (West 2009). In the 12 months since New York's marriage law went into effect, more than 10,000 same-sex couples were married across the State and more than 9% of the marriages in New York City were between same-sex couples. Br. of City of N.Y. in Support of Pet. at 2, 5, *Windsor* v. *United States*, No. 12-63 (S. Ct. July 24, 2012). There are an estimated 130,000 married same-sex couples in the United States today. *Census Bureau Releases Estimates of Same-Sex Married Couples*, U.S. Census Bureau (Sept. 27, 2011),

http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html. As the District Court noted, and as BLAG conceded below, DOMA does not and cannot interfere with the decisions of same-sex couples to enter into a marital relationship. JA-1003.

The same is true with respect to gay parents: DOMA has no impact on whether a gay couple can or will adopt or have children. *See, e.g.*, *Pedersen*, 2012 WL 3113883, at *40 ("DOMA does not alter or restrict the ability of same-sex couples to adopt children, a right conferred by state law."); *Massachusetts*, 682 F.3d at 14 ("DOMA cannot preclude same sex couples . . . from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners."); JA-1006. To the extent BLAG is arguing that DOMA can be justified as intending to deter same-sex couples from having children, that would present a different, insurmountable constitutional problem. *Pedersen*, 2012 WL 3113883, at *43; *see also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (fundamental right to decide "whether to bear or beget a child").

Nor does DOMA do the opposite: it is irrational to assume that denying benefits to married same-sex couples would have any impact on whether straight couples marry or have children who are biologically related to both parents.

> DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless,

> unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. . . . This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.

Massachusetts, 682 F.3d at 14-15 (citations omitted); *see also Dragovich*, 2012 WL 1909603, at *13.

In its brief (at 50-51), BLAG relies heavily on the case of *Johnson* v. *Robison*, 415 U.S. 361 (1974), which involved a statute that created a benefit for veterans who had been drafted and who had served in the military, but denied the benefit to those who had been drafted but served as conscientious objectors. The Court reasoned that granting benefits only to those who served in the military could rationally be believed to help compensate for the special hardships of active military service. As the Supreme Court explained in that case, if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." *Id.* at 383. The Ninth Circuit, however, rejected an argument about *Johnson* that is directly analogous to the one that BLAG is making here:

> Proponents contend that California need not extend marriage to same-sex couples when the State's interest in responsible procreation would not be advanced by doing so, even if the interest would not be harmed, either. . . .

> But . . . the question is whether there is a legitimate governmental interest in *withdrawing* access to federal [benefits] from same-sex couples. . . . *Johnson* concerns decisions not to add to a legislative scheme a group that is unnecessary to the purposes of that scheme, but [the law at issue] *subtracted* a disfavored group from a scheme.

Perry, 671 F.3d at 1087. Thus, *Johnson* would only be relevant if DOMA granted protections to married straight couples, but denied them to married gay couples. As discussed above, DOMA does not provide a single benefit to anyone.

Because none of the supposed "joint federal-state interests" are rationally furthered by DOMA, Ms. Windsor respectfully suggests that the Court need not address whether or not these purported interests are legitimate in the context of deciding the constitutionality of DOMA. *See Cleburne*, 473 U.S. at 446; *Soto-Lopez* v. *New York City Civil Serv. Comm'n*, 755 F.2d 266, 276 (2d Cir. 1985). As a result, this Court's analysis can and should end here. *See, e.g.*, *Massachusetts*, 682 F.3d at 14-15; *Pedersen*, 2012 WL 3113883, at *41; *Dragovich*, 2012 WL 1909603, at *14. In the event, however, that the Court goes on to consider the "procreation" issues on the "merits," what is clear is that DOMA actually harms the interests of children.

With respect to children, what DOMA does is "inflict[] significant and undeniable harm upon [married gay] couples and their children by depriving them of a host of federal marital benefits and protections." *Pedersen*, 2012 WL

3113883, at *40. BLAG does not deny this, but asserts that the harm can be justified to encourage heterosexual parenting. BLAG Br. 51-56. First, BLAG can establish no benefit to the children of heterosexual couples that flows from harming the children of same sex couples. Second, and more fundamentally, the implied inferiority of gay couples as parents has no factual basis in reality. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 983.

Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008), *aff'd sub nom. In re Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010); *Howard* v. *Child Welfare Agency Rev. Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *5-6, 8 (Ark. Cir. Ct. Dec. 29, 2004), *aff'd sub nom. Dep't of Human Servs.* v. *Howard*, 238 S.W.3d 1 (Ark. 2006). As Ms. Windsor's uncontradicted expert Dr. Michael Lamb testified, there is an overwhelming scientific consensus, based on decades of peer-reviewed scientific research, that children raised by lesbian or gay parents are just as well-adjusted as those raised by heterosexual parents. JA-397-402 at ¶¶ 28-37.

While BLAG does not deny that same-sex couples can and do successfully raise children, it disingenuously asserts that "[d]ispute has recently erupted over whether . . . the outcomes of children raised by same-sex couples are

similar to those of children raised by their biological parents." BLAG Br. 54 n.26.[21] BLAG's amici similarly point to a single recent study by a sociologist named Mark Regnerus.[22] That study, however, did not compare children "raised by" same-sex couples with those raised by their straight biological parents. Instead, the study compared children raised by their biological parents with children who self-reported that one of their parents had a same-sex relationship of any duration (*i.e.*, "one night stands"). The Regnerus study did not compare stable straight households with stable gay households; indeed only two of the 248 children in the study were raised by a committed same-sex couple for a substantial portion of their childhood, the others spent little or no time in the presence of gay parents at all. The Regenerus study therefore does nothing to disturb the longstanding consensus that children raised by committed same-sex couples are as well-adjusted as children raised by committed straight couples.[23]

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[21] Significantly, while given every opportunity to do so, BLAG offered no expert to rebut Dr. Lamb.

[22] Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?*, 41Social Sci. Res. 752-70 (2012).

[23] A recent internal audit has concluded the study "never should have been published" because of these flaws, and identified undisclosed conflicts of interest in the peer review process. *See* Tom Bartlett, *Controversial Gay-Parenting Study Is Severely Flawed, Journal's Audit Finds*, Chron. of Higher Educ. Percolator Blog, (July 26, 2012 10:57 PM), http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255; Br. of Amici Curiae Amer. Psychological Ass'n, et al. (discussing the social research and Regnerus study in detail).

D. Remaining Congressional Justifications

Congress's remaining justifications for DOMA ((1) defending the traditional institution of heterosexual marriage; (2) promoting heterosexuality; (3) protecting democratic self-governance; and (4) promoting a moral disapproval of homosexuality) also lack a rational basis. *See* H.R. Rep. No. 104-664, at 12-18 (1996).

Defending heterosexual marriage, and the related interest in "promoting heterosexuality," are in no way plausibly served by DOMA's denial of federal protections to married gay couples. As the District Court noted, lesbians and gay men are not about to become heterosexual or marry opposite sex partners,[24] nor is it plausible to believe that straight couples might decide to marry merely because of DOMA. JA-1004 n.4.

And, of course, Section 3 of DOMA does not promote democratic self-governance, but rather interferes with the determinations of marriage eligibility made by elected state representatives in New York, Vermont and Connecticut. *See, e.g.*, JA-653-56; Brief of State Petitioners on Medicaid at 25,

[24] The Supreme Court has rejected the distinction between identity and same-sex "conduct." *See, e.g.*, *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual."); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

Florida v. *U.S. Dep't of Health & Human Servs.*, No. 11-400 (S. Ct. Jan. 10, 2012) ("Because our federal system preserves the integrity, dignity, and residual sovereignty of the States, States must retain the ability to make meaningful choices about what policies to adopt and how to implement them.") (citations omitted).

Finally, although DOMA does in fact promote disapproval of gay men and lesbians, the "exclusion of same-sex marriages from both federal recognition and receipt of federal marital benefits as an effort to reinforce principles of morality does not withstand rational basis review." *Pedersen*, 2012 WL 3113883, at *44. Although "disapproval is not always the product of animus, but in fact 'may also be the product of longstanding, sincerely held private beliefs,'" *id.* (quoting *Perry*, 671 F.3d at 1093), "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," *Moreno*, 413 U.S. at 534.[25]

[25] BLAG's argument that the Court should leave determination of this issue to the legislative process is one that is often made in the context of litigation concerning the constitutional rights of minority groups, particularly gay people. But this Court bears a responsibility to interpret what the Constitution means in the context of an unconstitutional law, which DOMA plainly is. *See Marbury* v. *Madison*, 5 U.S. 137, 177-78 (1803).

IV.

***BAKER* v. *NELSON* IS NOT BINDING**

Summary dispositions are considered to be "a 'rather slender reed' on which to rest future decisions," *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 203 n.21 (1996) (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983)), because they "provide[] little guidance" for subsequent disputes, *Green Party of Conn.* v. *Garfield*, 616 F.3d 213, 225 (2d Cir. 2010), and do not "have the same precedential value . . . as does an opinion . . . on the merits," *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

For this reason, the District Court, along with at least six other courts to have considered the issue, held that a challenge to the constitutionality of DOMA is not controlled by *Baker*. JA-993-94; *see also Massachusetts*, 682 F.3d at 8; *Pedersen*, 2012 WL 3113883, at *10-11; *Golinski*, 824 F. Supp. 2d at 982 n.5; *Dragovich*, 2012 WL 1909603, at *6-7; *Smelt* v. *Cnty. of Orange*, 374 F. Supp. 2d 861, 872-74 (C.D. Cal. 2005), *vacated in part on other grounds*, 447 F.3d 673 (9th Cir. 2006); *In re Kandu*, 315 B.R. 123, 135-38 (Bankr. W.D. Wash. 2004).[26] As described below, these decisions were manifestly correct.

[26] The Ninth Circuit in *Perry*, although addressing a very different question from the one presented here, similarly concluded that the question in that case was not controlled by *Baker*. 671 F.3d at 1082 n.14.

In *Baker*, a same-sex couple seeking the right to marry challenged a Minnesota law that limited marriage to opposite-sex couples, on the grounds that it violated due process and discriminated on the basis of sex. *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971). The Minnesota Supreme Court, applying rational basis review, upheld the statute because it found the right to marry without regard to sex was not fundamental, and because classifying who can marry based on sex was not "irrational or invidious discrimination." *Id*. at 186-87. The Supreme Court, which was required to accept the couple's appeal of that ruling under its since-repealed mandatory appellate jurisdiction, summarily dismissed the appeal for "want of a substantial federal question." *Baker* v. *Nelson*, 409 U.S. 810 (1972).

The precedential effect of a summary dismissal for want of a substantial federal question is extremely narrow. Summary dispositions are treated as binding only with regard to "'the precise issues presented and necessarily decided' by the dismissal." *Alexander* v. *Cahill*, 598 F.3d 79, 89 n.7 (2d Cir. 2010) (quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977)). For these reasons, as the *Pedersen* court concluded, "[t]he Second Circuit has eschewed the application of *Baker* advocated by BLAG." *Pedersen*, 2012 WL 3113883, at *11.

As the cases cited above have concluded, this instant case clearly does not present the same question presented in *Baker*. "DOMA . . . does not prohibit a

state from authorizing or forbidding same-sex marriage, as was the case in *Baker*." *Id*.

Moreover, even if *Baker* had some precedential value for DOMA (which it does not), reliance on it still would be inappropriate because subsequent doctrinal developments over the last forty years have extinguished any precedential force it had when it was decided. *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975); *see also Delta Air Lines, Inc.* v. *Kramarsky*, 666 F.2d 21, 23 (2d Cir. 1981), *aff'd in part and vacated in part on other grounds*, 463 U.S. 85 (1983). There can be no legitimate dispute that the Supreme Court's jurisprudence with respect to sexual orientation has changed dramatically since *Baker*. Indeed, at the time that *Bowers* v. *Hardwick* was decided fourteen years after *Baker*, "24 States and the District of Columbia continue[d] to provide criminal penalties for sodomy performed in private and between consenting adults." 478 U.S. at 193-94; *see also Lawrence*, 539 U.S. at 578-79 (striking down criminal sodomy law and finding fundamental right to privacy protects gay and straight people equally). The Supreme Court now recognizes that sex-based classifications require heightened scrutiny, *Frontiero*, 411 U.S. at 688; that a bare desire to harm gay people cannot constitute a legitimate government interest, *Romer*, 517 U.S. at 634-35; and that lesbian and gay individuals have the same liberty interest in private family relationships as heterosexuals, *Lawrence*, 539 U.S. at 578.

V.

MS. WINDSOR HAS STANDING

Contrary to BLAG's assertions, as explained by the New York Attorney General, "New York has long recognized as valid same-sex marriages that were solemnized under the laws of other States or nations, such as plaintiff Edith Windsor's Canadian marriage to Thea Spyer." JA-646. The District Court correctly noted that every New York appellate court to have addressed the issue had recognized marriages of same-sex couples validly performed in another state or country well before the passage of the Marriage Equality Act in 2011. JA-992 (citing *In re Estate of Ranftle*, 81 A.D.3d 566; *Lewis* v. *N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (3d Dep't 2009), *aff'd on other grounds sub nom. Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009); *Martinez* v. *Cnty. of Monroe*, 50 A.D.3d 189 (4th Dep't 2008)).[27]

This is hardly surprising. The New York courts applied the black letter test of marriage recognition under New York common law—namely, that an out-of-state marriage, even if it could not be performed in New York, "must" be recognized as valid in New York in the absence of two well-recognized exceptions: (1) the marriage violates an express statutory intent to void such a

[27] Further, "all three statewide elected executive officials—the Governor, the Attorney General, and the Comptroller—had endorsed the recognition of Windsor's marriage" by 2009. JA-991. *See also Godfrey*,13 N.Y.3d at 368 n.3; *Dickerson* v. *Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010).

marriage, *Lewis*, 60 A.D.3d at 219 (citing *Van Voorhis* v. *Brintnall*, 86 N.Y. 18, 34-35 (1881); *In re Peart*, 277 A.D. 61, 70 (1st Dep't 1950)); or (2) "an aspect of the out-of-state marriage is *abhorrent* to New York public policy, such as incest or polygamy," *Lewis*, 60 A.D.3d at 219 (emphasis added) (citations omitted). Applying this test in other contexts, the New York courts have recognized marriages between an uncle and his half-niece, common law marriages, and marriages of two individuals under the age of 18, none of which could have been validly performed in New York. *See Martinez*, 50 A.D.3d at 191-92 (citing cases).

There is no reason to believe that the New York Court of Appeals would reach a different result. Indeed, when offered the opportunity to address the question, the Court of Appeals declined, leaving "nothing to cast doubt on the uniform lower court authority recognizing the validity of same-sex marriages." JA-992-93; *see also Godfrey* v. *Spano*, 13 N.Y.3d at 377; *Debra H.* v. *Janice R.*, 14 N.Y.3d 576, 600-01 (2010) (recognizing validity of Vermont civil union for purposes of establishing presumption of parentage).

Despite this unanimity, BLAG now asks this Court to certify to the New York Court of Appeals whether out-of-state marriages were recognized in New York as of the time of Thea's death in 2009. BLAG Br. 13-14. BLAG's request should be denied.

New York law and Second Circuit Local Rule § 27.2 permit this Court to certify to the New York Court of Appeals "determinative questions of New York law [that] are involved in a cause pending before [us] for which no controlling precedent of the Court of Appeals exists." N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a). This Court has explained that certification is appropriate "where state law is not clear and state courts have had little opportunity to interpret it," or "where the question is likely to recur." *State Farm Mut. Auto. Ins. Co*. v. *Mallela,* 372 F.3d 500, 505 (2d Cir. 2004) (citations omitted). Neither of these circumstances is present here.

It is well-settled that in the absence of a New York Court of Appeals decision on an issue of state law, this Court will look "to the decisions of the Appellate Division of the New York Supreme Court." *Rosenberg* v. *MetLife, Inc.*, 453 F.3d 122, 125 (2d Cir. 2006); *accord Statharos* v. *N.Y. City Taxi & Limo. Comm'n,* 198 F.3d 317, 321 (2d Cir. 1999). Where, as here, there is unanimity in state appellate caselaw, there is no support for labeling the issue "unsettled."[28]

[28] Contrary to BLAG's suggestion, BLAG Br. 18, the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 7 N.Y.3d 338 (2006), did not address whether New York recognized valid out-of-state marriages of same-sex couples, but rather involved a state constitutional challenge to New York's denial of marriage licenses to same-sex couples. While the court began its opinion by stating that the "New York Constitution does not compel *recognition* of marriages between members of the same sex," *id.* at 356 (emphasis added), the remainder of the decision addresses only whether New York must allow such couples to marry.

Moreover, certification would be inappropriate here given that New York's marriage equality law now allows same-sex couples to marry in New York and confirms prior precedent regarding marriages from other states. As a result, there is virtually no reason to expect that this question will ever recur. *Cf. Mark A. Varrichio & Assocs.* v. *Chicago Ins. Co.*, 312 F.3d 544, 550 (2d Cir. 2002) (certification warranted where question "is not only important and unsettled, but is also recurring"); *Grabois* v. *Jones*, 88 N.Y.2d 254, 255 (1996) (denying certification where issue unlikely to recur).

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellee respectfully requests that the Court affirm the District Court Judgment below.

Dated: August 31, 2012
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

The undersigned counsel for Plaintiff-Appellee Edith Schlain Windsor certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 13,859 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

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