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Title: Sexual Orientation, Discrimination, and Suspect Classifications: The Case for Applying Heightened Scrutiny to *United States v. Windsor*
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Abstract:

On December 7, 2012, the Supreme Court of the United States granted cert in the case *United States v. Windsor*, a case involving the Bipartisan Legal Action Group of the House of Representatives and Edith Windsor, the widow of Thea Spyer. At issue in the case is whether or not Section 3 of the Defense of Marriage Act ("DOMA"), which defines marriage as the legal union between a husband and a wife, violates the Fifth Amendment's guarantee of equal protection to same-sex spouses. In the past, the Supreme Court has applied rational basis scrutiny to laws that discriminate based on sexual orientation. However, the Court of Appeals for the Second Circuit ruled that DOMA is unconstitutional based on heightened judicial scrutiny. In the form of an amicus curiae, or "friend of the court," brief, this capstone explores the argument for the Supreme Court to also apply heightened scrutiny to *United States v. Windsor.*

This amicus brief contends that rational basis scrutiny is insufficient when evaluating the constitutionality of laws that classify individuals based on their sexual orientation. Instead, this amicus brief argues that the Supreme Court should apply a higher level of judicial scrutiny called intermediate scrutiny to classifications on the basis of sexual orientation based on four criteria: the history of discrimination faced by the LGBT community; sexual orientation's immutability; the LGBT community's weakened access to political power; and the lack of a relationship between sexual orientation and the ability to contribute to society. Using the Supreme Court's decisions in past equal protection cases, as well as psychological, sociological, and legal research on sexual orientation and judicial scrutiny, this amicus brief submits that the Supreme Court should affirm the Second Circuit's decision that Section 3 of DOMA is unconstitutional by applying heightened scrutiny to this case. Consequently, the courts should apply heightened scrutiny to all laws that discriminate on the basis of sexual orientation.

No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

EDITH SCHLAIN WINDSOR,
RESPONDENT.

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

BRIEF OF ELIZABETH M. RADEMACHER AS *AMICUS CURIAE* ON THE MERITS IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Elizabeth M. Rademacher is a student at American University's School of Public Affairs pursuing a Bachelor of Arts in Law and Society and a minor in Psychology. She plans to graduate in May 2013. In August 2013 she will matriculate at the William & Mary Marshall-Wythe School of Law, where she will be a Juris Doctor candidate and begin a research fellowship at the Institute of Bill of Rights Law.

Rademacher has devoted her undergraduate studies to researching and understanding constitutional law and civil rights issues. She has taken anthropology courses on sex and gender, as well as several courses on constitutional legal history, gender and the law, and discrimination. Additionally, in 2012 Rademacher served as an intern to the Human Rights Campaign, the largest non-profit organization dedicated to the civil rights of America's lesbian, gay, bisexual, and transgender (LGBT) population. Currently, her undergraduate research focuses on sexual orientation and equal protection under the law.

As a student dedicated to researching the constitutional guarantee of equal protection and advocating for civil rights issues, including LGBT issues, Rademacher has a substantial interest in the issues before this Court. Rademacher believes her expertise and perspective on the LGBT community

may help the Court more fully understand the impact of the federal government's lack of recognition of same-sex couples under the Defense of Marriage Act ("DOMA"). Furthermore, Rademacher believes her research may help the Court understand why discrimination on the basis of sexual orientation triggers heightened scrutiny review based on the impact of DOMA.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Second Circuit that declared Section 3 of the Defense of Marriage Act ("Section 3") unconstitutional should be upheld. The Second Circuit was correct to uphold the decision of the District Court for the Southern District of New York that Section 3 violated Edith Schlain Windsor's guarantee of equal protection under the Fifth Amendment, and the respondent should receive a tax refund from the government.

Windsor and her wife, Thea Spyer, were married in Toronto, Canada, in 2007 after a forty-two year engagement. Residents of New York, Windsor and Spyer had been engaged since 1965 but were unable to marry legally in the United States at the time because they were a same-sex lesbian couple. Sadly, Spyer died in 2009, and Windsor inherited her wife's estate. Although New York recognized same-sex marriages performed in other jurisdictions at the time of Spyer's death, Windsor was forced to pay federal estate taxes on her inheritance of Spyer's estate amounting to over $363,000.

If not for Section 3 of DOMA, which does not recognize same-sex marriages legally recognized by the States, Windsor would not have paid any estate taxes on her inheritance. On November 9, 2010, Windsor brought a suit against the United States seeking a refund of the federal estate taxes and a declaration that Section 3 of DOMA violated equal protection. On February 23, 2011, the Executive Branch issued a statement that it had determined that classifications based on sexual orientation should be subject to heightened scrutiny and that it would not defend Section 3's constitutionality in court.

On April 18, 2011, Paul Clement of the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") filed a motion to intervene in the case to defend DOMA's constitutionality, which the Executive Branch did not oppose. On June 24, 2011, Windsor filed a motion for summary judgment, arguing that Section 3 ought to be subjected to heightened scrutiny, while BLAG filed a motion on August 1, 2011, to dismiss Windsor's motion. On June 24, 2012, the District Court ruled that Section 3 violated equal protection under the Fifth Amendment.

Section 3 creates a federal definition of marriage that recognizes only the legal unions of spouses of the opposite sex, regardless of whether or not spouses are legally married under the laws of the state in which they live. In its decision, the District Court applied rational basis scrutiny to Section 3, stating that the District Court was "not inclined" to determine whether or not sexual orientation constituted a suspect classification. The District Court ruled in Windsor's favor, stating that that the

government had no legitimate interest in harming a politically unpopular group. See *Windsor v. United States*, 833 F. Supp. 2d 394.

On October 18, 2012, the Second Circuit upheld the District Court's ruling. Unlike the District Court, however, the Second Circuit subjected Section 3 to heightened scrutiny review and determined that sexual orientation constituted a quasi-suspect classification. The court ruled that Section 3 violated equal protection by classifying couples based on their sexual orientation and that Section 3 had no substantial relationship to an important government interest. See *Windsor v. United States,* 699 F.3d 169. This Court should reaffirm the Second Circuit's decision and treat sexual orientation as a quasi-suspect class based on a variety of characteristics of gays and lesbians. As such, the Court should subject Section 3 to heightened scrutiny.

Section 3 might be brief, but its effects are broad and negatively influence several areas of same-sex couples' lives. Because of Section 3 of DOMA, same-sex married couples are denied 1,138 different federal benefits and protections that opposite-sex couples are entitled to. See *An Overview of Federal Rights and Protections Granted to Married Couples*, HRC.org (2013).

There are several categories of federal law with benefits or protections that are contingent on marital status, including laws about Social Security, pensions, taxes, immigration, health care, and military benefits. Because of the wording of Section 3, same-sex spouses are often not entitled to federal survivorship benefits for Social Security and pensions. They are denied time off to care for sick or

injured same-sex spouses and ineligible for tax deductions and joint filing privileges that opposite-sex married couples enjoy. Despite recent changes in the Department of Defense's military benefits program for military spouses, same-sex military spouses still do not have access to military housing allowances or TRICARE, and pathways to citizenship for the same-sex foreign spouses of American citizens are obstructed. These examples, while only a small sampling of the various federal benefits that same-sex couples are denied because of Section 3, illustrate how DOMA unfairly impacts same-sex couples and their families solely on the basis of their sexual orientation.

The unequal impact of DOMA on same-sex married couples is undeniable and discriminatory. Section 3 violates equal protection by classifying married couples on the basis of their sexual orientation. Based on certain characteristics that gay and lesbian couples possess, sexual orientation should be treated as a quasi-suspect qualification.

While they have not faced a history of discrimination that is as invidious or extensive as the discrimination faced by other suspect groups over time, the LGBT community has faced discrimination since the colonists arrived in America centuries ago. Since the seventeenth century there have been laws that criminalized acts of sodomy and homosexual sexual contact, and in the twentieth century there was an increase in legislation that specifically demonized people based on sexual orientation. This discrimination continues today and reinforces the notion that people ought to be treated differently based on sexual orientation alone.

There is also a consensus among the psychological community that sexual orientation is a deeply engrained characteristic that is not subject to change. Although it has been argued that homosexuality is a matter of personal choice, research has shown that sexual orientation is not simply a matter of personal preference and it is highly resistant to change. Based on these qualities, sexual orientation should be considered an immutable characteristic.

In addition, although the LGBT community has gained some access to political power in the past few decades, it still remains a politically weakened group based on sexual orientation. Although the LGBT community has recently achieved some political successes, such as ballot measures to legalize same-sex marriage in certain states, a group's political success is not necessarily the same thing as a group's ability to protect itself from discrimination. Based on the history of discrimination that they have faced, the LGBT community still faces considerable prejudice and animus, and its access to political power remains compromised.

Last, sexual orientation is not a characteristic that inhibits gays and lesbians from contributing to society. Although BLAG has argued that homosexuality inhibits same-sex couples' ability to properly raise families, sociological research has found that parents' sexual orientation makes little or no difference as to whether or not children develop in a healthy way. In fact, research overwhelmingly suggests that children of same-sex couples fare just as well in life as children of opposite-sex couples.

Based on these four criteria, this Court should consider classifications based on sexual orientation quasi-suspect and, consequently, Section 3 should be subject to heightened judicial scrutiny. Under heightened scrutiny review, the government must show that a law is substantially related to an important government interest. However, none of the justifications that BLAG has given for DOMA can survive this level of review.

BLAG has argued that Section 3 of DOMA is necessary to create a national, uniform definition of marriage. However, Section 3's wording does little to create unity based on different states' laws on same-sex marriage. Furthermore, Section 3 does not define any other aspects of marriage such as sanguinity, the age of consent, or divorce. Furthermore, the government has traditionally deferred to the States to make their own laws regarding marriage and arguably has no interest in creating a uniform definition of marriage.

In addition, BLAG justifies DOMA by arguing that it protects the fisc by preserving the federal government's limited monetary resources. However, the need to conserve money alone is not an important, persuasive enough government interest to justify widespread discrimination based on sexual orientation.

BLAG has also cited the need to preserve the traditional understanding of marriage as a reason to uphold DOMA's constitutionality. The desire to uphold tradition, however, is a poor justification for upholding discriminatory legislation based on past precedent. Furthermore, Section 3 of DOMA does nothing to make same-sex marriage illegal; it simply denies federal benefits to same-sex couples. For this

reason, Section 3 is not substantially related to this government interest.

Finally, BLAG has argued that Section 3 encourages responsible procreation because same-sex couples are not capable of producing biological children naturally and because heterosexual families are optimal for parenting children. While the government might have an interest in encouraging responsible procreation, DOMA does nothing to encourage opposite-sex couples to procreate. It simply denies federal benefits to same-sex couples based on their sexual orientation.

For these reasons, this Court should affirm the decision of the Second Circuit and strike down Section 3 of DOMA as unconstitutional based on equal protection grounds. Rational basis review, while appropriate for evaluating violations of certain groups' guarantee to equal protection, is not appropriate in this case. Based on the characteristics of gays and lesbians in same-sex marriages, sexual orientation constitutes a quasi-suspect class. Consequently, because DOMA discriminates on the basis of sexual orientation, it should be subject to heightened scrutiny.

ARGUMENT

Section 3 of the Defense of Marriage Act reads, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only

to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

While Section 3 is brief, its effects on gay and lesbian married couples, a minority group, are broad and sweeping. Section 3 has an unequal impact on legally married same-sex couples based on the kinds of legal protections to which they have access. Furthermore, Section 3 classifies same-sex couples in a discriminatory way, and doing so has no substantial relationship to any important government interest. This legislation seemingly justifies discrimination on the basis of sexual orientation and unfairly impacts legally married same-sex couples.

Based on the principles of equal protection, discrimination based on sexual orientation ought to be subject to heightened levels of judicial scrutiny. Due to its discriminatory impact on same-sex married couples and because it classifies them based on their sexual orientation, Section 3 triggers this heightened scrutiny and fails to pass muster.

I. BY TREATING LEGALLY MARRIED COUPLES DIFFERENTLY ON THE BASIS OF SEXUAL ORIENTATION, SECTION 3 OF DOMA HAS A DISCRIMINATORY IMPACT ON GAY AND LESBIAN SPOUSES

Equal protection requires the government to treat similarly situated persons alike. See *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). By defining a spouse only as a person of the opposite sex, Section 3 of DOMA creates a definition of marriage that excludes same-sex gay

and lesbian couples but not opposite-sex couples. Although these couples may be legally married under the laws of their states and situated similarly to their heterosexual counterparts, the federal definition of marriage in DOMA excludes these couples from the various federal protections and responsibilities given to opposite-sex married couples.

Because the federal definition of marriage in Section 3 does not recognize their marriages as legal unions, gay and lesbian couples are negatively affected by this definition in several ways. The purpose of Section 3 is to prevent gay and lesbian couples from receiving the same federal benefits that opposite-sex couples receive, and by doing so, Section 3 prevents gay and lesbian couples from being able to provide for each other and their families in the same way. In particular, it adversely impacts same-sex couples' access to military, health care, retirement, and tax benefits. Section 3 also creates difficulties in the realm of immigration in ways that do not affect opposite-sex married couples . See Brief for Amicus Curiae American Bar Association, 5 (March 2013).

1. *Military Benefits*

There are approximately 5,600 active-duty service members, 3,400 National Guard and Reserve members, and 8,000 veterans who are expected to apply for military benefits for their same-sex spouses in 2013. See Thom Shanker, *Partners of Gays in Service Are Granted Some Benefits,* NYTimes.com (11 Feb. 2013). The American government has historically recognized military personnel for the sacrifices they make for their country by providing a

variety of benefits and services for those men and women and their families. See, e.g., U.S. Dep't of Veterans Affairs, Federal Benefits for Veterans, Dependents and Survivors (2012). Spouses of gay military personnel and veterans, however, are prohibited from enjoying many of the benefits given to opposite-sex spouses of military personnel.

While the Department of Defense has decided to extend some of these benefits to same-sex military spouses, such as access to recreational facilities on military bases and joint duty assignments for military couples, there are more than 100 spousal benefits that same-sex spouses do not receive because of Section 3. See Ernesto Londoño, *Pentagon to Extend Certain Benefits to Same-Sex Spouses*, WashingtonPost.com (5 Feb. 2013).

Among the benefits that same-sex spouses are ineligible for are health insurance, housing allowances, and survivorship benefits that spouses receive when a service member dies. See 38 U.S.C. § 1311. Same-sex spouses are not covered under TRICARE, the military's subsidized health care system, and may not be able to receive a monthly stipend from the military in the event of their spouses' deaths. *Ibid.* Other benefits related to on-base housing, burials, and overseas sponsorship are further complicated by the definition of marriage in Section 3. As a result, same-sex spouses do not receive the same financial protections that opposite-sex spouses do.

2. *Health Care Benefits*

There are several federal laws in place that enable married couples to care for one another's

health in the event of injury or illness. However, same-sex spouses of federal and private sector employees are barred from receiving many of the benefits that opposite-sex spouses receive because of Section 3 of DOMA.

The Family and Medical Leave Act ("FMLA") allows employees of certain companies to take 12 weeks of unpaid leave to care for an ill spouse without fearing repercussions from their employers. See 5 U.S.C. § 6382(a)(1)(C); 29 U.S.C. § 2612(a)(1)(C). However, Section 3 prevents same-sex married couples from using FMLA leave when their spouses are seriously ill. See *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294.

As a result, same-sex spouses may not be able to request time off to care for a sick spouse without the fear of being fired by their employers. Same-sex married couples also cannot list their spouses on federal health and vision plans. See *Pedersen*, 881 F. Supp. 2d 294. If these spouses do not have their own employer-provided insurance, they are either forced to purchase individual policies, which often cost more than employer-provided insurance, or remain uninsured. See Mark W. Stanton, Agency for Healthcare Research & Quality, "Employer-Sponsored Health Insurance: Trends in Cost and Access," *Research in Action*, 2 (Sept. 2004).

Same-sex spouses who work for private companies that extend health care benefits to same-sex spouses are impacted by Section 3 as well. The federal government encourages private employers to give employees health insurance by exempting this form of compensation from taxation. Opposite-sex spouses covered by a spouse's insurance policy are not taxed on the value of that insurance coverage.

However, because of Section 3, the federal government treats the value of a same-sex spouse's insurance coverage as taxable compensation. The average employee married to a same-sex spouse pays approximately $1,069 more per year in taxes than an employee married to an opposite-sex spouse. See M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* (2007).

Furthermore, Section 3 disqualifies same-sex spouses from receiving federal protection under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Under COBRA, when an employee loses his or her job, his or her family is guaranteed up to 18 months of continued employer-sponsored health coverage. If an employee dies, his or her family is guaranteed up to 36 months of coverage. 29 U.S.C. §§ 1161-1163. However, COBRA's protections do not extend to same-sex spouses of these employees, leaving them immediately vulnerable in the event of a spouse's death or unemployment if they are covered under the same insurance policy.

3. *Retirement*

To plan for retirement, married couples often rely on using pensions and Social Security benefits to ensure a financially stable future that provides for both spouses. See Brief for Amicus Curiae American Bar Association, 14 (March 2013). For instance, according to the Social Security Administration, over half of all married elderly couples who receive Social Security payments rely on those payments for over half of their income. See Social Security Administration, Fact Sheet (2012).

Section 3, however, limits the number of resources which married same-sex couples can use to plan for their retirement by limiting the survivorship rights of same-sex spouses. Survivorship benefits exist to prevent widows and widowers from being cut off from sources of income in the event of a spouse's death. Section 3 restricts these benefits to opposite-sex spouses and leaves same-sex spouses unprotected. See *An Overview of Federal Rights and Protections Granted to Married Couples,* HRC.org (2013).

Widows and widowers receive survivorship rights to spouse's monthly Social Security benefits. See 42 U.S.C. § 402(e)-(f), (i). However, same-sex spouses are prevented from collecting a deceased spouse's Social Security benefits under Section 3. For elderly couples that rely heavily on Social Security benefits as a source of income, this is a particularly pressing problem in the event of a spouse's death.

The Employee Retirement Income Security Act ("ERISA") guarantees that spouses will receive survivorship rights to their spouses' pensions if their spouse dies. However, married same-sex couples are not provided with this protection for similar reasons and do not receive survivorship rights to same-sex spouse's pensions. See 26 U.S.C. § 401(a)(11); 29 U.S.C. § 1055(d)-(e). As a result, if a same-sex couple plans to rely on one spouse's pension during retirement, the other spouse is left vulnerable.

4. *Taxes*

Because the federal government does not recognize gay and lesbian couples' marriages, it creates a considerable economic burden on same-sex

couples in terms of tax payments. For instance, same-sex married couples have significant difficulty filing federal income taxes because they must file under two different statuses. In the majority of states that recognize same-sex marriages, married same-sex couples must file their state and local taxes jointly. However, federal law forbids them from doing so, hence they must also file income taxes as single individuals. See Brief of Amicus Curiae American Bar Association, 21 (March 2013).

Because these couples are unable to file their federal income taxes as legally recognized married couples, they pay as much as $6,000 more than they would have to if they were opposite-sex spouses. See Blake Ellis, *Same-Sex Spouses Lose Big on Taxes,* CNN Money.com (31 Dec. 2011). In addition, same-sex married couples cannot combine their income and deductions for lower federal tax rates. *Ibid.* Instead of filing as a married couple, the same-sex spouse who earns a higher salary must file as the "head of household," which subjects that spouse to lower standard tax deductions than for deductions for married couples filing jointly. *Id.*

In addition, the federal government gives heterosexual married couples an unlimited exemption from the federal gift tax. See 26 U.S.C. § 2523. However, the federal government views transfers of more than $14,000 in value between gay and lesbian married spouses as "gifts" under the federal gift tax because of Section 3. As a result, these "gifts" must be reported to the Internal Revenue Service ("IRS"), despite the fact that opposite-sex married couples receive an unlimited exemption from the federal gift tax.

Federal law exempts property that passes to an American surviving spouse from federal taxes. See 26 U.S.C. § 2056(a). As evidenced by the respondent in this case, Section 3 does not exempt same-sex spouses from paying these same taxes. In this case, Edith Windsor had to pay more than $363,000 to the federal government after the death of Thea Spyer, her spouse, in 2009. Had Windsor's spouse been a man, none of her property would have been subject to estate taxes.

5. *Immigration*

Immigration law in the United States is based on federal regulations, which means that Section 3 poses significant obstacles to binational same-sex married couples. See Brief for Amicus Curiae American Bar Association, 17 (March 2013). Under the Immigration and Nationality Act, the federal government allows foreign nationals who marry American citizens to apply for permanent resident status in the United States as part of a pathway to citizenship for spouses. See Immigration and Nationality Act, Pub. L. No. 82-414, ch. 2, § 319, 66 Stat. 163, 244-45 (1952) (codified as amended at 8 U.S.C. § 1430(a)).

Section 3 denies this route to citizenship to same-sex married couples. For this reason, the federal government has the power to separate binational same-sex couples, despite the fact that they are legally married under state law. See, e.g., Michael Martinez, *Gay Married Immigrant Fights Deportation in California*, CNN.com (23 March 2012). Furthermore, if both spouses are foreign nationals, Section 3 creates a new set of obstacles.

For instance, spouses of foreign nationals granted asylum in the United States are automatically entitled to asylum, but same-sex spouses are not given this protection. See 8 U.S.C. § 1158(b)(3)(A).

II. BECAUSE SEXUAL ORIENTATION CONSTITUTES A QUASI-SUSPECT CLASS BASED ON CERTAIN CHARACTERISTICS OF GAYS AND LESBIANS, SECTION 3 OF DOMA MUST BE SUBJECT TO HEIGHTENED SCRUTINY

The wording of Section 3 of DOMA has a clearly discriminatory impact on legally married gay and lesbian couples. By depriving these legally married couples of several important federal benefits, regardless of whether same-sex marriage is legal in the states in which they live, DOMA unfairly disadvantages same-sex married couples. This discrimination is based on sexual orientation. Sexual orientation ought to be regarded as a quasi-suspect legal classification based on certain characteristics that gay and lesbian individuals have.

These characteristics include a history of discrimination, *Bowen v. Gilliard,* 483 U.S. 587, 602 (1987); the immutability of sexual orientation, *Bowen, supra.* at 602; the weakened political power possessed by the LGBT community, *Cleburne,* 473 *supra.* at 440-41; and the fact that homosexuality does not inhibit gay and lesbian individuals from contributing meaningfully to society, *Ibid.*

Based on the combined weight of all of these characteristics, gay and lesbian spouses should be treated as a quasi-suspect class. While the LGBT community has not faced a history of discrimination

that is as severe as the discrimination faced by certain suspect groups, such as African Americans, they have nevertheless been treated and continue to be treated in a discriminatory manner. In this way, classifications based on sexual orientation can be compared to classifications based on gender. See *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718 (1982). For this reason, sexual orientation constitutes a quasi-suspect classification. Since gay and lesbian married couples are part of this class, challenges to their equal protection under the law must be subject to heightened scrutiny.

1. *History of discrimination*

In the United States, homosexual individuals have experienced a history of discrimination on the basis of their sexual orientation. Throughout the twentieth century, gay and lesbian individuals have been subjected to unequal treatment from a multitude of legal that are sweeping in breadth, but these kinds of laws have existed for centuries. See Brief for Amicus Curiae Organization of American Historians, 6 (Feb. 2013).

Since the colonists settled in America in the seventeenth century, laws against sodomy or "buggery" have existed based on the wording of biblical passages from Leviticus. See Jonathan Ned Katz, *Gay/Lesbian Almanac*, 76-78 (1983). For example, the Puritans condemned "unnatural uncleanness when men with men commit filthiness, and women with women." Richard Godbeer, "The Cry of Sodom: Discourse, Intercourse, and Desire in Colonial New England," 52 *William & Mary Q.* 259, 259, 264-265 (1995).

As American cities grew larger, gay and lesbian populations grew and became more visible to the communities in which they lived, resulting in a spike in prosecution against sodomy towards the end of the nineteenth century. See Jonathan Ned Katz, *The Invention of Heterosexuality,* 10 (1995). In the early twentieth century, anti-vice groups like the Watch and Ward Society and the Society for the Suppression of Vice worked closely with metropolitan police departments to arrest men who were suspected of homosexual activity, as well as to increase police surveillance of bars, restaurants, and other locales frequented by gay men. Police forces began charging people with vagrancy, lewdness, and disorderly conduct for even being near a place that was frequented by homosexuals. See Brief Amicus Curiae Organization of American Historians, 10 (Feb. 2013).

Throughout the nineteenth and twentieth century, homosexuality was regarded as a disease or mental defect. Doctors often associated a lack of conformity with traditional gender norms with "sexual inversion," and until 1973 the *Diagnostic and Statistical Manual of Mental Disorders* listed homosexuality as a mental illness. George Chauncey, *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance,* 58-59 (1983). This classification gave authority to the idea that gays and lesbians were inferior and could be treated in a discriminatory manner. See Brief of Amicus Curiae Organization of American Historians, 8-9 (Feb. 2013).

For example, after World War II ended, a Senate subcommittee conducted special investigations on the "employment of homosexuals

and other perverts" in the federal government under the direction of Sen. Joseph McCarthy. *Ibid,* 13. States and local governments made their own efforts to investigate and fire gay employees, and homosexuals arrested for certain sexual acts could be deemed "sexual deviants" and forced to undergo psychiatric evaluations. *Ibid.*

When the Gay Rights Movement emerged in the late 1960s and into the 1970s and 1980s, anti-gay rights activists were equally vocal in their backlash against this movement. For example, Anita Bryant's "Save Our Children" campaign demonized homosexuals and argued that homosexual teachers were child molesters who preyed on young students. Several states banned adoption by gay couples during this era as a result. Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America,* 291- 304 (1999).

Despite some recent legal progress and changes in social attitudes over time, gay and lesbian individuals are still subjected to discrimination based on their sexual orientation and continue to suffer from the stigmatizing effects of this discrimination. In twenty-nine states it is still legal to be fired from a job on the basis of sexual orientation. See *Employment Laws & Policies,* HRC.org (June 2012). In thirty-eight states, same-sex marriage is explicitly legally prohibited. See *Statewide Marriage Prohibitions*, HRC.org (Dec. 2012). Only in the past decade have laws criminalizing homosexual sodomy been overturned. See *Lawrence v. Texas,* 539 U.S. 558 (2003).

The young LGBT community is coming of age in a nation where they still face condemnation and

discrimination. A 2001 study found that gay and lesbian students are twice as likely to be depressed or attempt suicide than heterosexual students. Stephen T. Russell & Kara Joyner, "Adolescent Sexual Orientation and Suicide Risk," 91 *American Journal of Public Health,* 1276-1278 (2001). It is not difficult to understand LGBT students' feelings of despair and isolation in schools when a climate of hostility towards the LGBT community exists in federal law and institutions across the country.

Although perhaps not as overt or severe as the discrimination that has been aimed at certain suspect classes, including racial and religious minorities, the government has sanctioned discrimination against homosexuality throughout the United States' history, and laws like DOMA continue to prevent gay and lesbian couples from living the same way that heterosexual individuals do.

Section 3 of DOMA reinforces the notion that homosexuals *ought* to be treated unequally. In fact, the House Judiciary Committee report on DOMA states, "Congress decided to reflect and honor a collective moral judgment and to express moral disapproval of homosexuality." This "collective moral judgment" is the result of the culmination of a history of discrimination based on sexual orientation. See Andrew Rosenthal, *Infected by Animus*, NY Times.com (28 March 2013).

2. *Immutability*

In order to determine whether or not homosexuality constitutes a suspect class, it is necessary to consider whether or not homosexuality is an "obvious, immutable, or distinguishing

characteristic" that defines it as a "discrete group." See *Bowen, supra.* at 602. Although BLAG has argued that homosexuality is a choice and therefore not immutable, there is a large volume of research that suggests that sexual orientation is not a simple matter of personal preference. According to the American Psychological Association, "Homosexuality is a normal expression of human sexuality, is generally not chosen, and is highly resistant to change." See Brief of Amicus Curiae American Psychological Association, 7 (Feb. 2013).

According to a survey of 662 self-identified lesbian, gay, and bisexual adults, 88% of gay men and 68% of lesbians reported feeling that they had no choice in their sexual orientation. See G. Herek et al., "Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample," 7 *Sexuality Research & Social Policy,* 176 (2010). While BLAG has argued that homosexuality is a matter of choice, they provide no credible evidence to support this claim.

Moreover, based on a clinical review of gay "conversion" therapies that attempt to change an individual's sexual orientation from homosexual to heterosexual, several psychologists have found that these therapies are unlikely to succeed and potentially very damaging because sexual orientation is deeply engrained and has biological roots. See Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009).

3. *Weakened access to political power*

In order to protect itself from discrimination, it is necessary for the LGBT community to have access to political power. Although the LGBT community has gained more access to political power during the past few decades, it still remains politically weakened. Despite recent political successes, such as successful campaigns to legalize same-sex marriage in a handful of states, gays and lesbians still do not have full access to political power. See *Windsor,* 699 F.3d 169.

Political power is not just about political success. The essence of political power is a group's ability to protect itself from discrimination, which is not necessarily the same thing as achieving political success. For instance, in 1973 this Court ruled that although women had recently made significant political accomplishments, sex-based classifications still had to be subjected to heightened scrutiny because women were vastly underrepresented in all three branches of government. See *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

The same argument can be made about the political power of gays and lesbians today, especially because they still face insidious discrimination in the political arena. If the LGBT community had greater access to political power, surely there would not be so many laws and policies that negatively affect people based on their sexual orientation. For instance, in addition to the restrictions on various federal benefits for same-sex spouses, there are also laws that allow employment discrimination based on sexual orientation and laws forbidding adoptions by gay and lesbian couples. See *LGBT Rights*, ACLU.com (2013).

There are only six openly gay and bisexual members in the 113th Congress, and yet six is considered a historic high number. See Jeremy M. Peters, *Openly Gay, and Openly Welcomed in Congress*, NYTimes.com (13 Jan. 2013). This small number is perhaps attributable to past discrimination against federal employees on the basis of sexual orientation, as well as a sense of hostility against homosexuals throughout history that inhibits them from openly participating in the kind of political work that helps to protect them from discrimination by the majority.

4. *No relation to ability to contribute to society*

The last prong of the test to determine whether or not a group is a suspect or quasi-suspect class is whether or not the class characteristic "frequently bears a relation to ability to perform or contribute to society." See *Cleburne*, 473 U.S. at 440-41. Although certain characteristics, like mental disability or age, are related to the ability to contribute to society over time, sexual orientation is a characteristic that bears no relation on one's ability to perform or contribute to society.

BLAG has argued that same-sex married couples have a diminished capability of procreating and raising children because of their sexual orientation. However, over a quarter of all gay households in the United States are currently raising children through adoption, surrogacy, or other methods, which is comparable to fifty percent of heterosexual households currently raising children. See Peggy Drexler, *The Kids Are All Right: Gay*

Parents Raising Children, HuffingtonPost.com (23 May 2012).

Furthermore, there is overwhelming evidence that these children are just as healthy as children raised by heterosexual parents, and that both groups of children had similar levels of achievement and overall wellbeing. According to researchers, responsible, committed parenting is more important than the sexual orientation of parents. See, e.g., Claire McCarthy, *Why Backing Same-Sex Marriage Is Good for Children*, BostonGlobe.com (25 March 2013).

The American Sociological Association has stated that there is a clear consensus among social science researchers: "Children of same-sex parents fare just as well as children of opposite-sex parents" so long as their families are stable units with adequate socioeconomic resources. See Brief of Amicus Curiae American Sociological Association, 6 (Feb. 2013). Contrary to BLAG's arguments, sexual orientation does not inhibit the ability to raise healthy children and bears no relationship to gay and lesbian couples' ability to contribute to society.

III. SECTION 3 OF DOMA TRIGGERS HEIGHTENED SCRUTINY REVIEW AND FAILS BECAUSE IT IS NOT SUBSTANTIALLY RELATED TO IMPORTANT GOVERNMENT INTERESTS

Section 3 of DOMA has a clearly unfair and unequal impact on gay and lesbian married couples. This unequal treatment, which is based on sexual orientation, is a violation of the Fifth Amendment's

guarantees of equal protection. Section 3 and other laws that discriminate against same-sex married couples on the basis of sexual orientation must be evaluated using heightened scrutiny, because this kind of discrimination meets the criteria that have been established for the use of heightened scrutiny review. There is a history of discrimination on the basis of sexual orientation; sexual orientation is an immutable characteristic; the LGBT community continues to have weakened access to political power; and sexual orientation is not related to a person's ability to contribute to society.

In order to determine whether or not Section 3 fails to survive heightened scrutiny review by the Court, the statute must fail to be substantially related to an important government interest. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988). To be substantially related, an interest must be exceedingly persuasive. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724).

In its defense of Section 3, BLAG has argued that Section 3 is related to unique federal interests, including creating a consistent definition of marriage, protecting the fisc, and preserving the traditional understanding of marriage as a foundational social institution, as well as to an interest in encouraging responsible procreation. See *Windsor*, 699 F.3d 169 at 180. However, Section 3 fails to survive heightened scrutiny review because it does not substantially relate to any of these interests. Instead, Section 3 only reinforces the notion that discrimination based on sexual

orientation is permissible and ought to be encouraged.

1. *Creating a consistent definition of marriage*

The effects of Section 3 are broad and far-reaching. Despite BLAG's arguments, Section 3 of DOMA does less to create uniformity in marriage than it does to create a lack of consistency regarding marriage laws across the States. Section 3 only addresses the federal definition of marriage itself. It does not create uniform federal definitions of any terms related to marriage, including the minimum age to marry, divorce, or consanguinity, which the States define differently. Although the federal government might have originally had an interest in the convenience of creating a uniform definition of marriage, DOMA undercuts administrative consistency across the States by leaving these other aspects of States' laws untouched. See *Windsor,* 699 F.3d 169.

Because of DOMA, the federal government must determine which states' definitions of marriage are entitled to federal protection and which ones are not. The purpose of Section 3 of DOMA is to ensure that same-sex married couples lose the same federal benefits throughout the United States. However, what is unusual about BLAG's interest in creating a federal uniform definition of marriage is that marriage has been traditionally regarded as "a virtually exclusive province of the States." See *Sosna v. Iowa,* 419 U.S. 393, 404 (1975).

The Second Circuit rightly noted that since the creation of the Constitution, the States have had full authority over regulating marriages and divorces.

Because the federal government has historically deferred to the States on the issue of marriage, the lack of precedent for federal intrusion in the definition of marriage alone is reason to look on Section 3 with some suspicion. See *Windsor,* 699 F.3d 169.

DOMA is a "breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity." *Id.* As a result, BLAG's argument that Section 3 is substantially related to the government's interest in creating uniformity in marriage is not exceedingly persuasive.

2. *Protecting the fisc*

Congress argues that DOMA will help to conserve federal resources by limiting which couples receive federal marital benefits. While it is indeed important for the government to carefully manage its resources, the government cannot treat similar people dissimilarly for the sake of administrative convenience or saving costs. The Court has previously ruled, "[T]he saving of welfare costs cannot justify an otherwise invidious classification." *Graham v. Richardson*, 403 U.S. 365, 375 (1971).

As a consequence of DOMA, none of the same-sex married couples in the United States are entitled to the various federal benefits to which opposite-sex couples are entitled, including military, health care, retirement, and tax benefits. Section 3 excludes an entire class of people from receiving these benefits for the purpose of conserving federal resources,

which in itself is not a proper justification for this kind of classification.

BLAG has argued that DOMA is unique because it does not withdraw federal benefits from same-sex couples but instead prevents the extension of those benefits to same-sex couples. See *Windsor,* 699 F.3d 169. However, DOMA can be considered a withdrawal of benefits based on its sweeping effects. Before DOMA's passage, the federal government recognized all marriages that were legal under state law; since its passage, the federal government has been able to deny that federal recognition to same-sex marriages. See *Windsor,* 699 F.3d 169. Because of its discriminatory nature, Section 3 of DOMA is not substantially related to protecting the fisc.

3. *Upholding a traditional understanding of marriage*

Another justification for DOMA, according to BLAG, is that this legislation helps to preserve the understanding of traditional marriages. However, past attempts to justify discriminatory laws based on upholding tradition have been rejected by this Court. For instance, attempts to justify criminalizing interracial marriage based on a tradition of racial segregation in Virginia were not persuasive to the Court. See *Loving v. Virginia,* 388 U.S. 1, 11 (1967).

Additionally, the use of anti-sodomy legislation based on a tradition of disapproval of so-called deviant sexual conduct in Texas was ruled unconstitutional on due process grounds in 2002. See *Lawrence, supra.* at 577-78. The argument that Section 3's purpose is to uphold some kind of

traditional idea of marriage is not a persuasive one in light of the Court's past rejection of this argument in cases involving marriage and sexual orientation.

Moreover, the desire to preserve tradition is not a sufficient reason to uphold laws that forbid that practice, regardless of whether or not people view the practice as immoral or non-traditional. "'The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history not tradition could save a law prohibiting miscengenation from constitutional attack.'" See *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting.).

Furthermore, as the Second Circuit has pointed out in its ruling, Section 3 of DOMA does not *forbid* same-sex married couples from marrying; it only denies them the federal benefits that opposite-sex married couples are entitled to by defining marriage as between opposite sex spouses. Individual states' laws permit same-sex couples to marry. For this reason, DOMA itself does not actually preserve any traditional definition of marriage. See *Windsor,* 699 F.3d 169. Instead, DOMA treats legally married same-sex couples differently from opposite-sex couples on the federal level due to moral objections to the practice of same-sex marriage.

For these reasons, the government's interest in preserving the traditional definition of marriage is not sufficiently persuasive enough to withstand heightened scrutiny, and DOMA is not substantially related to this interest because it does not actually preserve a traditional understanding of marriage.

4. *Encouraging responsible procreation*

The last justification BLAG provides for DOMA is that DOMA furthers three goals of encouraging responsible childbearing: it subsidizes procreation because only opposite-sex couples can procreate naturally; it subsidizes biological parenting for the same reason; and it aids in creating an optimal parenting arrangement between a mother and a father.

Whether or not the three goals that BLAG offers as justification are persuasive or not, they all "have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way." See *Windsor,* 699 F.3d 169. DOMA only denies federal benefits to same-sex couples and their families; it does not extend new benefits to opposite-sex couples and their families, so the incentives for opposite-sex couples to marry and procreate have remained the same since DOMA was enacted. While promoting procreation can be an important government interest, DOMA itself is not substantially related to these goals.

Furthermore, although BLAG argues that DOMA aids in creating the so-called "optimal" parenting arrangement between a husband and a wife, research shows that the optimal parenting arrangement for children is a stable one, not necessarily a heterosexual one. Research indicates that children who are raised by same-sex parents fare just as well as children who are raised in heterosexual households. See John Corvino, *Debating Same-Sex Marriage*, 44-50 (2012). The most important factor for healthy childhood development

is that families are low-conflict and stable over time. *Ibid.*

Moreover, couples that fall short of this optimal parenting ideal are allowed to marry, as they ought to be. Research suggests that single-parent families, stepparent families, and cohabiting-parent families are not as stable as two-parent families, and children perhaps fare less well in these families over time as a result. However, these kinds of families are still permitted to form. The federal government recognizes the marriages of poor people, people without college degrees, people in rural areas, and even convicted felons serving prison sentences, even though children that are produced from these unions might perhaps be disadvantaged due to a lack of support, stability, and security. *Ibid,* 49.

These marriages are far from optimal and yet Section 3 of DOMA does nothing to discourage them. These couples can marry and procreate or not procreate and receive federal benefits, regardless of how optimal the parenting arrangement is, because marriage is an expression of "emotional support and public commitment." See *Turner v. Safley,* 482 U.S. 78, 95 (1972). It is one of the "basic civil rights of man." See *Loving, supra.* at 12. Section 3 chooses to single out same-sex marriages as invalid based on the sexual orientation of the spouses. In light of these facts, BLAG's claim that Section 3 encourages responsible procreation by promoting optimal parenting conditions is misleading and unpersuasive.

In sum, Section 3 of DOMA's classification of same-sex spouses based on their sexual orientation does not have any significantly persuasive, substantial relation to important government

interests and cannot survive heightened scrutiny review.

CONCLUSION

Elizabeth Rademacher respectfully submits that the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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