No. 12-307

# In the Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

EDITH SCHLAIN WINDSOR

AND

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

*Respondents.*

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

## BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF REVERSAL ON THE MERITS

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## QUESTIONS PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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## INTEREST OF *AMICUS CURIAE*

*Amicus curiae* Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended traditional American values, including

[1] *Amicus* files this brief with the consent by all parties; the federal parties lodged blanket letters of consent with the Clerk, and *amicus* has lodged Ms. Windsor's written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

traditional marriage, defined as the union of husband and wife. In furtherance of that interest, Eagle Forum has participated as *amicus curiae* in various appellate proceedings on same-sex marriage. In addition, Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement against the Equal Rights Amendment in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that the plaintiff here attempts to import into the Fifth Amendment (and thus the coextensive Fourteenth Amendment). For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

## STATEMENT OF THE CASE

This litigation asks this Court to decide whether the federal Constitution requires state and federal governments to treat same-sex relationships the same as traditional husband-wife marriage. The Court's answer will resolve several important questions beyond the fate of §3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, that the plaintiff, Edith Windsor, challenges here. This Court's decision also will determine the fate of §2 of DOMA, 28 U.S.C. §1738C, which implements congressional authority under the Full Faith and Credit Clause to address the full faith and credit that the states owe to same-sex marriages from other states. U.S. CONST. art. IV, §1 ("Congress may by general laws prescribe the manner in which [State acts] shall be proved, and the effect thereof"). Finally, this Court's decision will determine the fate of state laws in the forty-one states that recognize and privilege sex-based relationships, such as those

between husband and wife, mother and child, or father and child.

In 1996, Congress saw this juncture approaching, initially from a state-law challenge in Hawaii. Congress premised DOMA on four governmental interests: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources. H.R.Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. With regard to the first interest, Congress tied the interest in husband-wife marriage to procreation and childrearing:

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a *deep and abiding interest in encouraging responsible procreation and child-rearing*. Simply put, government has an interest in marriage because it has an interest in children.

*Id.* at 13, *reprinted at* 1996 U.S.C.C.A.N. at 2917 (emphasis added). With respect to the third interest (*i.e.,* state sovereignty and democratic self-governance), Congress sought both to avert judges' "re-defin[ing] the scope of federal legislation, as well as legislation throughout the other forty-nine states" by declaring a state-law right to marry and "to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage." *Id.* at 17-18,

*reprinted at* 1996 U.S.C.C.A.N. at 2921-22. Congress enacted DOMA with broad bipartisan support in the House and the Senate, and President Clinton signed it. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

One hundred and fifty five years ago, this Court unfortunately held that a property right created only by Missouri law was nonetheless entitled to federal constitutional recognition and protection in every state. *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), *abrogated by* U.S. CONST. amend XIII, XIV.[2] As a result, no state or territory could enforce its own laws prohibiting slavery. As Abraham Lincoln recognized, the pro-slavery arguments at the time focused on narrow complaints by the Slave States, but nonetheless sought at bottom to compel Free States to recognize slavery:

> I am also aware they have not, as yet, in terms, demanded the overthrow of our Free-State Constitutions.... [W]hen all these other sayings shall have been silenced, the overthrow of these Constitutions will be demanded, and nothing be left to resist the demand. It is nothing to the contrary, that they do not demand the whole of this just now. Demanding what they do, *and for the reason they do,* they can voluntarily stop nowhere short of this consummation. Holding, as they do, that slavery is morally

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[2] As this Court recognized in *Washington v. Glucksberg,* 521 U.S. 702, 758-59 (1997), *Dred Scott* invalidated the Missouri Compromise based on a Fifth Amendment argument on property rights.

> right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing.

Abraham Lincoln, Cooper Union Address (Feb. 27, 1860), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS at 612 (John G. Nicolay & John Hay eds. 1907) (emphasis added). Ironically, DOMA's opponents now rely on the very Civil War Amendments that overturned *Dred Scott* to seek to compel the United States and forty-one other states to recognize the same-sex marriage regimes of a few states.

Forty years ago, *Baker v. Nelson,* 409 U.S. 810 (1972), presented this Court with essentially the same question presented here – namely, whether the federal Constitution provides a right to same-sex marriage – which the Court emphatically answered in the negative by dismissing "for want of a substantial federal question" a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from the Minnesota Supreme Court's decision in *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). In the intervening years, similar claims were routinely dismissed by federal courts under *Baker*.[3]

Thirty years ago, this Nation finally rejected the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"), which proposed to add language to the Constitution that *might* have provided a basis

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[3] *See Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870-71 (8th Cir. 2006); *Wilson v. Ake,* 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005); *Adams v. Howerton,* 486 F.Supp. 1119, 1122 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982).

for the claims here. *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (ERA's extended ratification period expired in 1982). Moreover, the American people rejected the ERA in large part because of a well-founded fear that ERA would lead to the very result demanded by Windsor here. *Amicus* Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported Windsor's claim – compels this Court to reject her claim.

There matters stood until two federal district courts upheld claims similar to those rejected in *Baker,* giving remarkably short shrift to this Court's definitive ruling.[4] One of those cases, *Perry,* is presently before this Court in No. 12-144. Perhaps sensing a shift in political – if not legal – momentum, four other federal district courts recently upheld similar claims, and others have been docketed.[5] One of those four cases is before the Court in this case.

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[4] *Perry v. Schwarzenegger,* 702 F.Supp.2d 1132 (N.D. Cal. 2010), *aff'd sub nom Perry v. Brown,* 671 F.3d 1052, 1082 (9th Cir. 2012), *on writ of cert. sub nom Hollingsworth v. Perry,* No. 12-144 (U.S.); *Gill v. OPM,* 699 F.Supp.2d 374 (D. Mass. 2010), *aff'd sub nom Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012), *petition for cert. pending sub nom Bipartisan Legal Advisory Group of the United States House of Representatives v. Gill,* Nos. 12-13, 12-15, 12-97 (U.S.).

[5] *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y.), *aff'd* 699 F.3d 169, 176 (2d Cir. 2012), *on writ of cert.,* No. 12-307 (U.S.); *Dragovich v. U.S. Dept. of Treasury,* 872 F.Supp.2d 944, 951-53 (N.D. Cal. 2012); *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968, 983 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Management,* __ F.Supp.2d __, 2012 WL 3113883, 10-11 (D. Conn. 2012); *but see Jackson v. Abercrombie,* __ F.Supp.2d __, 2012 WL 3255201, 1 (D.Haw.

Against this backdrop, *amicus* Eagle Forum respectfully asks this Court to heed President Lincoln's and history's rejection of *Dred Scott,* as well as the American People's rejection of the ERA by affirming the rule of law that was necessarily decided in *Baker*. That rule requires reversal of the decisions below and dismissal of similar claims pending in this and other federal courts for failure to state a claim on which relief can be granted.

## STATEMENT OF FACTS

The facts related to the parties' circumstances are not in dispute. *Amicus* Eagle Forum adopts the facts as stated in the brief filed by the Bipartisan Legal Advisory Group of the United States House of Representatives (hereinafter, the "House"). House Br. at 14-15. In summary, in 2007, Windsor and her same-sex partner travelled to and were married in Ontario, Canada, when their state of domicile (New York) did not recognize same-sex marriages. The partner died in 2009, when New York had not yet formally recognized same-sex marriage. As the sole beneficiary in her partner's will, Windsor paid approximately $360,000 more in federal taxes than she would have paid if federal law recognized her Canadian marriage. Windsor now seeks to recover the additional taxes paid on the theory that New York would have recognized the marriage at the time her partner died and that DOMA §3 violates the Equal Protection component of the Fifth Amendment.

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2012) (relying on *Baker* to uphold husband-wife marriage in Hawaii); *Sevcik v. Sandoval,* __ F.Supp.2d __, 2012 WL 5989662, 5 (D.Nev. 2012) (same in Nevada).

## SUMMARY OF ARGUMENT

Congress's main purpose in enacting §3 was the same as its purpose in enacting §2 – namely to protect each state's marriage laws by isolating any redefinition of marriage to only the particular state or states that voluntarily chose it, thereby preventing one state's redefinition of marriage from being exported to other states against their will. As such, this case involves not just DOMA §3, but also DOMA §2; not just federal law, but also state law; not just Ms. Windsor's tax treatment, but all of the legal incidents, rights, privileges, duties, obligations, and immunities of all married people in every state.

History and logic both reveal that the arguably narrow focus of Windsor's claims – a federal tax refund under DOMA §3 – does not narrow the issues that this Court will resolve. Instead, both because the same legal reasoning applies equally to DOMA §2 and state marriage laws (Section I.A, *infra*) and because the practical weight of federal recognition will destabilize state marriage laws as a practical matter (Section I.B, *infra*), ruling for Windsor here will mandate same-sex marriage nationwide. DOMA §3 does not seek to overturn the state-law aspects of state-law marriage; as such, contrary to the claims of advocates for same-sex marriage, that section falls well within the power of Congress to adopt for federal policy and purposes and thus is permissible under the Tenth Amendment (Section I.C, *infra*).

With respect to requiring same-sex marriage under Equal Protection principles, *Baker* already has rejected that, which the lower courts must follow until this Court overturns it (Section II.A, *infra*). In

deciding whether to create new rights under the Constitution, this Court should act deferentially to the states and the People who adopted the Constitution, analogously to the presumption against preemption in disputes between federal and state laws. Here, for example, the states who adopted the Fifth Amendment – on which Windsor bases her suit – criminalized sodomy, which strongly suggests that those states did not intend to mandate same-sex marriage on the Federal Government and states (Section II.B, *infra*). In any event, DOMA's husband-wife definition of marriage survives scrutiny under Equal Protection review (Section II.C, *infra*).

## ARGUMENT

### I. THIS CASE CONCERNS NOT ONLY THE FATE OF DOMA BUT ALSO THE FATE OF MARRIAGE IN ALL STATES

This litigation presents the exceedingly important issues not only of overturning an Act of Congress, but also of overturning the laws of the forty-one states with husband-wife definitions of marriage. First, as a legal matter, any rule of federal constitutional law that compels overturning DOMA §3's federal marriage definition necessarily also compels overturning DOMA §2 and any husband-wife definitions of marriage under state law. Second, even if that result did not flow as a matter of constitutional law, the mere *fact* of federal recognition of same-sex marriage would quickly make it impossible for any state to enforce its own marriage laws.

Particularly where the claimed right was in no way conveyed by the People to the Judiciary to dispense,[6] such rights belong in the political arena:

> people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts – and may legislate accordingly.

*Lawrence v. Texas,* 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). Indeed, this "Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 125 (1992). "[E]xtending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). Although congressional social engineering often proves disastrous even for the intended beneficiaries, *see generally,* Charles A. Murray,

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[6] Sodomy was a criminal offense in the thirteen states that first ratified the Bill of Rights and all but five of the thirty-seven states that first ratified the Fourteenth Amendment. *Bowers v. Hardwick,* 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds, Lawrence,* 539 U.S. at 578. Rather than convey to this Court the power to compel the states to allow same-sex marriage, the People reserved that power to the states. U.S. CONST. amend. X.

LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) ("[w]e are not social engineers") (Thomas, J., concurring). This Court should decline the invitation to impose a brave new world of family law on this Nation.

### A. Windsor's Legal Reasoning Applies Equally to All State Marriage Laws

If accepted by this Court with respect to DOMA §3 and federal recognition of same-sex marriages, the reasoning pressed by Windsor and relied on by the Second Circuit also will undermine DOMA §2 and any state laws that limit marriage to husband-wife marriage. This case is *not,* therefore, limited to federal recognition of valid state-law marriages.

Windsor's Equal-Protection arguments, together with the equivalent principles of the Fourteenth Amendment for the states,[7] would ensure that overturning DOMA §3 would quickly spread same-sex marriage to all fifty states. Specifically, if this Court were to hold that DOMA §3 has no rational basis (or otherwise violates Equal Protection), that same holding would apply to every other husband-wife definition of marriage because those definitions all rely on the same core principle that legislatures

[7] The Fifth Amendment Due Process Clause's equal-protection component is equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Any decision under the Fifth Amendment applies equally to the states under the Fourteenth Amendment, and vice versa.

may rationally view husband-wife marriage to support responsible procreation and childrearing. *See, e.g., Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011) (rational basis lacking for Arizona's denying state-employee benefits to same-sex unmarried couples); *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012) (rational basis lacking for California's husband-wife definition of marriage). Unless legislatures – here, the federal Congress – rationally may encourage husband-wife marriage, not only DOMA §3 but also DOMA §2 and the laws of forty-one states will fall.

As Justice Scalia explained, the same arguments used to attack anti-sodomy laws arguably apply to husband-wife marriage laws. *Lawrence,* 539 U.S. at 601-05 (Scalia, J., dissenting). To ensure its legitimacy as an arbiter – not author – of our laws, this Court must extricate itself from this slippery slope:

> But the Court then found itself on the fabled slippery slope that Justice Holmes's aphorism about history and logic warned about: one logical proposition detached from history leads to another, until the Court produces a result that bears no resemblance to the America that we know.

*Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr,* 518 U.S. 668, 695-96 (1996) (Scalia, J., dissenting). As President Lincoln explained, the issue hinges not only on the current demands against federal regulation of slavery in the federal territories but also on the reasons used to make those demands: "they can voluntarily stop nowhere

short" of "demand[ing] the overthrow of our Free-State Constitutions." Lincoln, Cooper Union Address, *supra.* Nor is it incongruous to raise *Dred Scott* here.

In his criticism of *Dred Scott* and the Democrats' support of that decision, Lincoln and the Republicans relied on – and Judge Douglas and the Democrats avoided – the precise issue of federal regulation of marriage:

> But in all this, it is very plain the Judge evades the only question the Republicans have ever pressed upon the Democracy in regard to Utah. That question the Judge well knows to be this: "If the people of Utah shall peacefully form a State Constitution tolerating polygamy, will the Democracy admit them into the Union?" There is nothing in the United States Constitution or law against polygamy; and why is it not a part of the Judge's "sacred right of self-government" for that people to have it, or rather to keep it, if they choose?

Lincoln, Speech on the *Dred Scott* Decision (June 26, 1857), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS at 226-27. No less than the pro-slavery advocates of the 1850s, the same-sex marriage advocates of our time seek to impose their views not only on the Federal Government but also on every state in the Union.

Given "[t]he tendency of a principle to expand itself to the limit of its logic," *Glucksberg,* 521 U.S. at 733 n.23 (*quoting* Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1932)), this Court must tread cautiously and describe carefully when expounding substantive Due-Process rights outside

the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. *Amicus* Eagle Forum respectfully submits that the Justices of this Court should heed President Lincoln and Justices Cardozo and Scalia if any Justice believes that this Court can hold for Windsor here without at the same time overturning the husband-wife marriage laws of forty-one states.

To be sure, "[t]he sky d[oes] not fall after" every step down a slippery slope, and a "modest [further descent might] augur[] no deluge." *Arkansas Game and Fish Comm'n v. U.S.,* 133 S.Ct. 511, 521 (2012). Indeed, "[j]udges and lawyers live on the slippery slope of analogies," knowing that "they are not supposed to ski it to the bottom." *Buckley v. Am. Constitutional Law Foundation, Inc.,* 525 U.S. 182, 195 n.16 (1999) (*quoting* Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990)); *Williams v. Florida,* 399 U.S. 78, 92 n.28 (1970) (the slippery-slope argument "suffers somewhat as soon as one recognizes that he can get off … before he reaches the bottom"). Thus, the *Lawrence* majority and Justice O'Connor opined that that decision did not force the recognition of same-sex marriage. *Lawrence,* 539 U.S. at 578 (majority); *id.* at 585 (O'Connor, J., concurring in the judgment). Giving the *Lawrence* majority its due, in the words of the *Williams* Court, it is time to get off the slopes for any Justice who wishes to preserve the right of sovereign states to maintain a husband-wife definition of marriage.

### B. As a Practical Matter, Rejecting DOMA Would Spread Same-Sex Marriage Nationwide

Although Windsor and her allies often seek to minimize the issues at stake in challenging DOMA §3, the impact of the Second Circuit's decision – and of any decision by this Court to affirm that decision – simply is not limited to Windsor's tax liability or even a relatively few couples in New York and a few other states. The question of whom society allows to marry does not affect only the wedding couple.

Even without the direct force of law, federal employees with federally recognized, same-sex marriages from a few states will spread across the Nation when they are re-posted, transferred, or simply move. They will take with them not only their federal recognition, but also various property rights such as pensions, as well as child-custody issues. When they move to states that do not recognize same-sex marriages, they will raise countless substantive and procedural issues, as well as the sheer weight of practical problems that the differing legal regimes will present.

These issues posed by same-sex couples will arise when federally regulated persons such as federal employees and contractors either (a) move from one of the few same-sex marriage states to a state with a husband-wife definition of marriage, or (b) visit same-sex marriage jurisdictions (like Windsor here) while domiciled in states with a husband-wife definition of marriage. The latter category will require still further litigation to determine DOMA's application to such "destination marriages" by non-

domiciliaries. Whenever federal law recognizes a marriage that state law does not, the conflicts that the differing regimes pose will be magnified.

With respect to children and custody, states that do not recognize same-sex parents or adoptions will necessarily run up against barriers when federal employees and contractors raise federally recognized custody-related issues in state custody disputes. As such, the persons and entities affected by this Court's decision will include not only the married adults and the states but also the extended family members. *See, e.g., In re Marriage of J.B. and H.B.,* 326 S.W.3d 654, 670 (Tex. Ct. App. 2010) (denying state-court jurisdiction for same-sex divorce proceedings in state that does not recognize same-sex marriage); *Kern v. Taney,* 11 Pa. D.&C 5th 558, 576 (Pa. Com. Pl. 2010) (same); *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 459 (Vt. 2006) (custody dispute between biological mother and former same-sex partner to a civil union).

States have developed family law to seek – as imperfectly as they can – the best interests of both society and family members. For example, a common presumption for a child born within a marriage is that the husband is the father. *See, e.g.,* CAL. FAMILY CODE §7611(a) ("man is presumed to be the natural father of a child if … he and the child's natural mother are or have been married to each other and the child is born during the marriage"). Although these presumptions typically are plausible even when not true, society has fashioned them to

maximize children's chances of being raised in a nuclear family.[8]

Same-sex marriage wrests these presumptions from their moorings. For example, the California appellate courts could not resolve the dueling presumptions between a presumed (and biological) father versus a female presumed-parent (and divorcing spouse), after the biological mother was imprisoned for the attempted murder of the allegedly abusive same-sex spouse, who lived with the child for only three weeks. *In re M.C.,* 195 Cal.App.4th 197, 222-23 (Cal. Ct. App. 2011). States that voluntarily adopt same-sex marriage agree to struggle through these necessary revisions to family law and the implications for all involved, including the children, fathers outside a same-sex marriage, and grandparents. This Court should neither federalize these issues nor thrust them on states that do not adopt them voluntarily.

Together with its companion clause in DOMA §2, DOMA §3 seeks to prevent the same-sex marriage experiments in a few states from impinging on the sovereignty of the forty-plus other states by imposing these burdens on states that do not undertake them voluntarily.

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[8] California has applied these presumptions outside of marriage to include male or female non-biological presumed parents when no other parent had a competing claim. *In re Nicholas H.,* 28 Cal.4th 56, 62-63 (Cal. 2002) (father); *Elisa B. v. Superior Court,* 37 Cal.4th 108, 120 (Cal. 2005) (mother).

### C. DOMA Falls Within Federal Power and Outside the Tenth Amendment

DOMA's opponents argue that federalism gives the Federal Government no role in family law, but DOMA does not attempt to set family law in the states that have adopted same-sex marriage. DOMA merely sets federal law for federal purposes and protects that states that wish to keep their husband-wife marriage laws from having same-sex marriage imposed on them by a handful of states. The federalism argument turns federalism on its head by trying to compel Federal Government and the several states to comply with one state's law.

To be sure, Congress heretofore *generally* has relied on state-law definitions of marriage for federal-law purposes. Indeed, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-94 (1890); *Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992) ("the domestic relations exception … divests the federal courts of power to issue divorce, alimony, and child custody decrees"). These general propositions cannot carry the weight that Windsor and her allies would place on them because DOMA §3 in no way undoes the family laws of a same-sex marriage state *in that state,* as would be required to violate the Tenth Amendment. *See, e.g., Printz v. U.S.,* 521 U.S. 898, 935 (1997); *New York v. U.S.,* 505 U.S. 144, 188 (1992). Instead, DOMA §3 defines marriage for *federal* purposes.

Moreover, it is simply wrong to argue that the Federal Government *always* has deferred to state or

territorial family law. The First Congress adopted and President Washington signed the Northwest Ordinance, 1 Stat. 51 (1789), which adopted English common law (including a husband-wife definition of marriage) for the Northwest Territories. Under President Lincoln, the Federal Government criminalized bigamy, which this Court upheld in *Reynolds v. U.S.,* 98 U.S. 145 (1879). More recently, numerous federal benefit programs, such as Social Security and the Employee Retirement Income Security Act, retain rights in divorced spouses after state law has terminated the marriage and *preempt* inconsistent state rules in the interest of national uniformity. *See, e.g., Egelhoff v. Egelhoff,* 532 U.S. 141, 147-48 (2001). Thus, where federal interests are implicated, Congress has readily acted in the zone of family law generally and marriage law particularly.

Indeed, this type of sporadic federal involvement is typical of federal programs: "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 727-28 (1979). Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) (internal quotation omitted). This Court should place no value on the relative inaction of prior Congresses, now that

Congress has reached its "different accommodation" in DOMA.[9]

While it is true that the Federal Government *generally* looked to state law to determine the validity of a marriage, a "person has no property, no vested interest, in any rule of the common law," [and t]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 88 n.32 (1978) (internal quotations and citations omitted); *New York Central R.R. Co. v. White,* 243 U.S. 188, 198 (1917). Moreover, because equitable estoppel principles do not apply to the Federal Government, *Office of Personnel Management v. Richmond,* 496 U.S. 414, 420-24 (1990), Windsor certainly cannot estop the Federal Government to continue its prior degree of relative inaction vis-à-vis a federal definition of marriage. Now that Congress has acted with federal law for federal programs, this Court cannot credibly order the *Federal* Government to follow *state* law.

In any event, DOMA opponents' federalism argument refutes itself. Individual states – here, New York – cannot impose their experiment in same-sex marriage on all states nationwide. And yet that is precisely what would happen when same-sex couples married in New York move or travel to a state that does not recognize their marriage. Such

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[9] Notwithstanding the typical resort to state law to provide undefined terms in federal programs, "[f]ederal law typically controls when [as here] the Federal Government is a party to a suit." *Boyle v. United Tech. Corp.,* 487 U.S. 500, 519 (1988).

couples will inevitably assert that the federal recognition they received in New York must follow them to their new state of residence, so that the same-sex couples would retain their status "even if they had been carried [to a state that did not recognize same-sex marriage] … with the intention of becoming a permanent resident." *Dred Scott,* 60 U.S. (19 How.) at 452. Federalism – and the state sovereignty inherent in it – does not allow one state to impose its views on either the Nation as a whole or the several states. To the extent that DOMA holds otherwise, the anti-DOMA argument would go, "an act of Congress which deprives a citizen of the United States of his [rights] merely because he came himself … into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." *Dred Scott,* 60 U.S. (19 How.) at 450. The Fifth Amendment does not support so broad a power on states to impose their will nationwide.

Although *amicus* Eagle Forum respectfully submits that government policies that favor husband-wife marriage reflect "the accumulated wisdom of several millennia of human experience," *Lofton v. Sec'y of Dept. of Children & Family Services,* 358 F.3d 804, 820 (11th Cir. 2004), the question is not whether the Justices of this Court agree. Rather, the question is one of power within our federalist system between the states and the Federal Government and also under the Separation of Powers between the Judiciary and Congress:

> Whether wisdom or unwisdom resides in the scheme of benefits set forth in [the

> Social Security Act], it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom.

*Flemming v. Nestor,* 363 U.S. 603, 611 (1960) (*quoting Helvering v. Davis,* 301 U.S. 619, 644 (1937)). It is well within the federal power and the congressional power to favor traditional husband-wife marriage in government programs and taxes.

## II. *BAKER* REMAINS BINDING ON LOWER COURTS, AND THIS COURT SHOULD AFFIRM *BAKER*

In *Baker,* this Court considered and rejected the concept that the federal Constitution included a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights, duties, and benefits that Minnesota conveyed to husband-wife marriages, and this Court dismissed the case for want of a substantial federal question. *Baker,* 409 U.S. at 810.

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court – and any lower courts confronted with a same-sex marriage claim – must review the jurisdictional statement filed in the Supreme Court and any other relevant aid to construction in order to ascertain what issues *Baker* "presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("lower courts are bound by summary decision by this Court 'until such time as the Court informs [them] that [they] are not'") (*quoting Doe v.*

*Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)). The *Baker* jurisdictional statement plainly presented, *Baker v. Nelson,* No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972), and *Baker* thus plainly decided, the question whether denying same-sex marriage violates the Constitution's equal-protection guarantees that Windsor here asserts, as well as the due-process and privacy claims that the *Baker* plaintiffs asserted.

To support their claim, the *Baker* plaintiffs appealed to the same constitutional principles – namely, equal protection, due process, and also privacy – that Windsor asserts. *Baker* therefore necessarily decided that there is no basis under federal equal protection or due process analysis to support any claim that a same-sex relationship deserves the same recognition, rights or benefits as husband-wife marriage. Moreover, as indicated in Section I.A, supra, these broad constitutional principles are the same in *Baker* (application for a state marriage license) as here (recognition of state-law marriages).

Given that *Baker* is controlling and on point for same-sex marriage issues, the lower federal courts have an obligation to follow that authority:

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

*Agostini,* 521 U.S. at 237 (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989), alteration in *Agostini*).

### A. No Post-*Baker* Decision Undermines *Baker* as the Controlling Authority

Although no Supreme Court decision undermines *Baker* sufficiently for the lower courts to reject its holding, Windsor claims that *Lawrence* and *Romer* render *Baker* non-controlling. *Lawrence* expressly disavows that result:

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

*Lawrence,* 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini.* Moreover, there is an obvious difference between criminalizing consensual and private adult behavior and requiring public and societal recognition, including monetary benefits from the federal fisc.

Similarly, the *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. Guaranteeing political rights to everyone under *Romer* in no way even correlates with how the Constitution lacks a constitutional right to same-sex marriage under *Baker.* As such, *Baker* remains good law that this Court can and should affirm.

The Second Circuit panel majority did not even attempt to dispute the holding of *Baker* under the rational-basis test, surrendering that position to Judge Straub's dissent. Instead, the panel majority posits that the advent of intermediate scrutiny for *other* classes of plaintiffs somehow undermines Baker for *this* class of plaintiffs. *Amicus* Eagle Forum respectfully submits that this represents the very type of "some other line of decisions" that "appears" to nullify "a precedent of this Court has direct application" to *this* case, which *Agostini* directs the lower courts to follow.

### B. The Constitution Is Deferential to the People's and States' Reserved Powers

While the "power to interpret the Constitution … remains in the Judiciary," *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997), the Constitution is not a blank check that a majority of this Court can wield to remake this Nation wholly devoid of the states' and the People's intent in generally worded provisions. The Court already has recognized the limits posed on using the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg,* 521 U.S. at 720-21. When faced with statutory text, the Court readily recognizes its role as arbiter, not author, of our laws:

> Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function to sit as a super-legislature and create

> statutory distinctions where none were intended.

*Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.,* 468 U.S. 137, 153 (1984) (interior quotations omitted). Similarly, when refereeing disputes between the Federal Government and the sovereign states, this Court does not presume federal preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) (emphasis added), "because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted); *cf.* H.R.Rep. No. 104-664, at 16, *reprinted at* 1996 U.S.C.C.A.N. at 2920 ("what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role"). *Amicus* Eagle Forum respectfully submits that the same respect – as well as respect for the People – requires solicitude in interpreting the Constitution.

Here, sodomy was a criminal offense in the original thirteen states that ratified the Bill of Rights and all but five of the thirty-seven states that first ratified the Fourteenth Amendment. *Bowers v. Hardwick,* 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds, Lawrence v. Texas,* 539 U.S. 558 (2003); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *215 (describing the common-law crime). It is simply not conceivable that those states understood Equal Protection to *require* the states

and the Federal Government to recognize same-sex marriage, most particularly under the Fifth Amendment that applies to the Federal Government.

Given that "[f]amily relations are a traditional area of state concern," *Moore v. Sims,* 442 U.S. 415, 435 (1979), *amicus* Eagle Forum respectfully submits that this Court should interpret the Constitution to allow states to retain their own definitions of marriage: "When the text … is susceptible of more than one plausible reading," this Court should "ordinarily accept the reading that disfavors" overturning the intent of those who enacted that text. *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). Mandating same-sex marriage on the Federal Government and nationwide in the states surely is not compelled by anything that this Nation ever intentionally adopted.

### C. This Court Should Affirm *Baker* under Any Level of Scrutiny

The recent appellate decisions weigh same-sex marriage under a variety of standards of review, *Perry,* 671 F.3d at 1089 (rational basis); *Massachusetts,* 682 F.3d at 10-11 (heightened rational basis); *Windsor,* 699 F.3d at 185-88 (intermediate scrutiny), but none of these would enable this Court to uphold the Second Circuit here.[10]

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[10] Strict scrutiny does not apply because same-sex marriage is not a fundamental right. Although husband-wife marriage unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has

Before addressing the rival levels of scrutiny here, *amicus* Eagle Forum first posits that the obvious differences between same-sex and opposite-sex couples with respect to procreation means that the two are different, not the same. Of course, "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison,* 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original); *cf. Jenness v. Fortson,* 403 U.S. 431, 442 (1971) ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike"). Such classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920); *accord Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Here, society's interest in husband-wife families that raise their biological children – the most stable basis for propagating society – provides the required linkage. While opposite-sex unmarried couples and same-sex married couples may resent society's preferences, they cannot deny them.

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never recognized the unrestricted right to marry *anyone*. Instead, the fundamental right recognized by this Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race.

### 1. DOMA Has a Rational Basis

A successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988). It is enough, for example, that Congress "rationally may have been considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992). Because "a legislative choice" like DOMA "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993), Windsor cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Unfortunately for Windsor, the data simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Windsor's burden to produce.

The fact that New York law may recognize other potential legal arrangements does not undermine the rationality of believing that children raised in a marriage by their biological mother and father may

have advantages over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

*Lofton,* 358 F.3d at 820. Although the typical rational-basis plaintiff has a difficult evidentiary burden, Windsor here faces an *impossible* burden. We are at least a generation away from the longitudinal studies that could purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Windsor and her allies *never* will be able to negative the value of traditional husband-wife families for childrearing, she cannot prevail when the data *required by her theory of the case* do not yet exist.

### 2. DOMA Has a Hyper-Rational Basis

After recognizing that the rational-basis test applies, *Massachusetts,* 682 F.3d at 10-11, then adopted a heightened form of rational-basis review under the perceived authority of *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985). To the extent that these cases establish a heightened rational-basis form of review, that review has no application here. Both *Moreno* and *Cleburne Living Center* involved as-applied challenges by plaintiffs

who were "collateral damage" to laws that could validly apply to their intended targets.

In *Moreno,* the Court reviewed amended criteria for food-stamp eligibility that excluded households of unrelated people – something Congress enacted to avoid supporting "hippie communes" – but which the Court found to deny equal protection to the poor. 413 U.S. at 537-38. The *Moreno* holding says nothing against denying benefits to the law's actual targets: namely, educated young adults, with access to family money, who had simply "tuned out" for a lark, and – even worse – who could remain eligible for food stamps by altering their living arrangements. *Id.*

In *Cleburne Living Center,* the Court recognized four then-current, IQ-based classifications of mental retardation and upheld an as-applied challenge to a zoning ordinance by a group home consisting of residents in only the upper two classifications, who had none of the potential dangers associated with patients in the lower classifications. 473 U.S. at 442 n.9, 449. Again, the *Cleburne Living Center* holding says nothing against requiring zoning approval for the ordinance's appropriate targets: namely, institutions that would serve special-needs patients.

To the extent that *Moreno* and *Cleburne Living Center* establish a heightened level of review, that review is available only to those collaterally impacted by a valid form of government regulation, not to those who represent the precise distinction that the regulation appropriately sought to advance:

> Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a

> public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

*Barbier v. Connolly,* 113 U.S. 27, 31-32 (1884); *Reed,* 404 U.S. at 75-76 ("the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways") (*citing Barbier*). Here, Windsor challenges not DOMA's collateral impacts, but DOMA's constitutionally valid primary goals.

### 3. DOMA Meets Intermediate Scrutiny

To meet intermediate scrutiny, discrimination must achieve "important governmental objectives," with the "discriminatory means… substantially related to [achieving such] objectives." *U.S. v. Virginia,* 518 U.S. 515, 533 (1996) (interior quotations omitted). The panel-majority concedes the former but disputes the latter in a single paragraph by arguing that DOMA does not favor husband-wife marriages in any way and thus cannot relate to achieving the favoring of such marriages.[11]

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[11] One straw-man argument used against the procreation-childrearing rationales is that allowing infertile opposite-sex couples to marry somehow disproves that those rationales motivate society to favor husband-wife marriage. Without strict scrutiny and its mandate for narrow tailoring to government interests, however, a classification does not violate Equal Protection simply because it is "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley,*

With all due respect to the panel majority, the slender reed on which they seek to overturn an institution "fundamental to our very existence and survival," *Loving,* 388 U.S. at 12, is breathtaking. The entire intellectual point of this litigation and the myriad companion cases is that society must treat same-sex marriages in the favored way that society treats husband-wife marriage.[12] The very existence of Windsor's claim recognizes favorable treatment that society confers upon husband-wife marriages, which Windsor seeks to eliminate:

> [W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

*Heckler v. Mathews,* 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Of course, taking away favorable treatment can occur by elevating Windsor's treatment or lowering husband-wife marriages' treatment. But taxation and other federal benefits are, in essence, a zero-sum game. If everyone's benefits go up, the value of the

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440 U.S. 93, 108 (1979) (interior quotations omitted). In any event, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Moreover, even childless marriages reinforce the family unit, which reinforces husband-wife marriage's procreation and childrearing rationales.

[12] Perhaps this litigation's focus on $360,000 in a deceased partners' estate robs this case of the vitality inherent in the issues presented.

dollar (and of the benefits) comes down. Favorable treatment is what society has conferred on husband-wife marriages, and this litigation provides clear evidence that the benefit is substantially related to the conceded governmental interest in favoring and encouraging husband-wife marriage.

## CONCLUSION

The Court should reverse the lower courts' decisions and remand with instructions to dismiss this litigation for failure to state a claim on which relief can be granted.

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