No. 12-307

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

WINDSOR, EDITH S., et. al.,

Respondents.

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

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Brief of Amicus Curiae Liberty Counsel in Support of Respondent Bipartisan Legal Advisory Group of the United States House of Representatives (Merits Brief)

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to traditional family values, including marriage, across the United States. Liberty Counsel has successfully defended the federal Defense of Marriage Act ("DOMA"), and has also defended various state DOMAs, and is presently involved in defending the definition of marriage against constitutional challenges in several jurisdictions. Liberty Counsel provided amicus curiae briefs in *Conaway v. Deane,* 932 A.3d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), and *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), and has been involved in approximately fifty DOMA cases. Liberty Counsel represented Campaign for California Families in *Smelt v.*

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[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

City of Orange, 447 F.3d 673 (9th Cir. 2006) and in its defense of California's law defining marriage as the union of one man and one woman. *In re Marriage Cases*, 143 Cal.App. 4th 873 (2006). Additionally, Liberty Counsel represented plaintiffs in several cases challenging recognition of same-sex marriages in New York, including *New Yorkers for Constitutional Freedoms v. N.Y. State Senate*, 98 A.D.3d 288 (N.Y. App. Div. 2012) and *Hebel v. West*, 25 A.D.3d 172 (N.Y. App. Div. 2005).

Liberty Counsel is committed to upholding the institution of marriage as defined for millennia – the union of one man and one woman – and to ensuring that the institution is not undermined. Liberty Counsel has developed a substantial body of information related to the importance of marriage as the fundamental social institution. Liberty Counsel respectfully submits this information to assist this Court in evaluating Respondent's claims.

SUMMARY OF ARGUMENT

The Second Circuit improperly determined that Respondent has Article III standing based upon an incorrect conclusion that Respondent was married under the laws of New York in 2009, and this Court should reject that conclusion. Respondent cannot establish concrete and particularized injury because she

was not married under New York law in 2009. New York did not recognize same-sex marriages in 2009, so Respondent could not then have been married under New York law. The Second Circuit's incorrect understanding of the law and public policy of New York led to its erroneously conclusion that Respondent had Article III standing. Because Respondent did not have a concrete and particularized injury, any decision rendered by this Court could not provide her any redress. Additionally, recognition of same-sex marriage is more appropriately left to the legislature, so Respondent cannot satisfy the additional prudential requirements of standing. Therefore, Respondent cannot establish standing, and this Court should dismiss her case.

Only those classifications that discriminate against a suspect or quasi-suspect class warrant heightened constitutional scrutiny. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, and therefore it should be analyzed using rational basis. Under this deferential standard, Section 3 of DOMA should be upheld because it is rationally related to numerous legitimate government interests. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of

children. Additionally, affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

ARGUMENT

I. THIS COURT SHOULD FOLLOW ITS LONG-STANDING INTERPRETATION OF ARTICLE III STANDING AND HOLD THAT RESPONDENT CANNOT ESTABLISH CONCRETE INJURY OR REDRESS FROM THIS COURT.

Federal courts have limited jurisdiction, requiring that any party filing a lawsuit must have standing to do so. The Second Circuit improperly determined that Respondent has standing based upon an incorrect assumption that Respondent was married under the laws of New York in 2009. This Court should dismiss Respondent's claims. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009. New York did not recognize same-sex marriages in 2009. The Second Circuit's incorrect understanding of the law of New York

caused it to erroneously conclude that Respondent had standing. Because Respondent did not have a concrete and particularized injury, any decision rendered by this Court could not provide any redress. Additionally, recognition of same-sex marriage is a topic more appropriately left to the legislature, so Respondent cannot satisfy the additional prudential requirements of standing. As such, Respondent cannot establish standing, and this Court should dismiss her case.

Article III limits the jurisdiction of federal courts to "cases" and "controversies" that arise under the Constitution, laws, and treaties of the United States. U.S. Const. art. III, § 2, cl. 1. This limitation requires that all parties seeking to bring a legal challenge in federal court must have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law . . . ." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-

or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560.

This Court has established the fundamental requirements of standing over a number of cases that were summarized and solidified in *Lujan*. "[O]ur cases have established that the irreducible constitutional minimum of standing consists of three elements." *Id.* "First the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* The second element of standing requires that there be a causal connection between the injury and the defendant's action. *Id.* Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561. Additionally, "the party invoking federal jurisdiction bears the burden of establishing these elements." *Id.*

A. The Second Circuit Improperly Determined That Respondent Had Article III Standing Based Upon An Incorrect Determination That Respondent Was Married Under New York Law In 2009.

Without addressing any of this Court's fundamental requirements of standing, the Second Circuit made the *ipse dixit* determination that Respondent had standing. The Second Circuit did not even mention the "irreducible constitutional minimum of standing." *See Windsor v. United States*, 669 F.3d 169, 176-78 (2d Cir. 2012). The court noted that the question of whether Respondent was married at the time of her partner's death in 2009 was decisive for this case, but determined that it could merely predict whether New York would have recognized a marriage that occurred outside of the jurisdiction of New York. *See id.* at 177.

The Second Circuit's "prediction" was in error. New York did not recognize same-sex marriage in 2009, and its highest court had declined to determine whether marriages solemnized outside of New York should be recognized within the state, explicitly stating that such a determination was for the legislature to make. Because Respondent's

marriage would not have been recognized in New York, she did not and cannot satisfy her burden to establish a concrete and particularized injury. "Since they are not merely pleading requirements but rather an *indispensable part of the plaintiff's case*, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561 (emphasis added). Respondent did not establish concrete injury below, and she cannot do so here. The decision below should therefore be reversed.

1. Respondent cannot establish concrete and particularized injury because she was not married under New York law in 2009.

For Respondent to establish that Section 3 of DOMA imposes a concrete and particularized injury upon her, she must establish that she and her partner were married at the time of her partner's death in 2009. "If the individuals are not married, then they do not suffer an immediate injury under DOMA and do not have standing to challenge it." *Smelt v. City of Orange*, 447 F.3d 673, 683-84 (9th Cir. 2006). Because Respondent was not married in a manner recognized by New York

law in 2009, she had no legally protectable interest in the federal marital deduction. *See* 26 U.S.C. § 2056. While Respondent was required to pay federal and state estate taxes upon her partner's death, she had no legal right to claim the marital deduction.

For purposes of federal law, Section 3 of DOMA limits the definition of "marriage" and "spouse" to marriages between one man and one woman. *See* 1 U.S.C. § 7. Because she had no legal right to claim the marital deduction, Respondent did not suffer any concrete and particularized injury by having to pay estate taxes. *Windsor*, 669 F.3d at 176. "That they might someday be married under the law of some state or ask for some federal benefit which they are denied is not enough." *Smelt*, 447 F.3d at 684.

Here, simply because New York later came to recognize same-sex marriage, Respondent cannot retroactively become a surviving spouse for purposes of the marital deduction when she was never legally considered a spouse under the law of New York. Upon her partner's death in 2009, her ability to be deemed a spouse or surviving spouse terminated. Public policy changes that occurred well *after* her partner's death are irrelevant to a determination of whether she qualifies as a surviving spouse for purposes of the marital deduction. As such, Respondent does not have standing.

a. New York did not recognize same-sex marriage in 2009.

In 2009, the year relevant for determining whether Respondent qualifies as a surviving spouse for purpose of 26 U.S.C. § 2056(a), New York's highest court declined to answer the question of whether New York law required recognition of marriages performed outside of New York. *See Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009). The court expressed its "hope that the Legislature will address this controversy; that it will listen and decide as wisely as it can; and that those unhappy with the result . . . will respect it as people in a democratic state should respect choices democratically made." *Id.* Several years earlier, New York's highest court stated that "the New York Constitution does not compel recognition of marriages between members of the same sex." *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006). "Whether such marriages should be recognized is a question to be addressed by the legislature," but noted that "the Domestic Relations Law limits marriage to opposite-sex couples." *Id.*

In 2009, New York's legislature also did not recognize same-sex marriages performed outside of New York. Despite the persistent efforts by those advocating for legalization of

same-sex marriage in New York, the legislature had consistently rejected all of those efforts.

In 2006, a number of bills were introduced to legalize same-sex marriage, *but none of them even made it out of committee*. *See id.* at 34 (Kaye, C.J., dissenting) (citing bills proposed in both the New York Senate and Assembly). By 2009, several more bills had been introduced, *but all were likewise rejected*. *See Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring) (citing proposed legislation from 2007 and 2009 that passed the New York Assembly, but was defeated in the New York Senate). "There is no basis to conclude that, when the Legislature adopted the Domestic Relations Law more than a century ago, it *contemplated* the possibility of same-sex marriage, much less intended to *authorize* it." *Hernandez*, 855 N.E.2d at 13-14 (Graffeo, J., concurring) (emphasis added). Given this legislative refusal to recognize same-sex marriage in New York and historical policy of only recognizing marriages between one man and one woman, the State's public policy in 2009 was clearly opposed to same-sex marriage.

b. The Second Circuit's incorrect understanding of the law and public policy of New York in 2009 caused it to erroneously conclude that Respondent had Article III standing.

In the absence of legislation or a decision from the New York Court of Appeals concerning New York's recognition of same-sex marriages solemnized outside of New York in 2009, the Second Circuit was left with two options: (1) certify the question to the New York Court of Appeals, or (2) predict what the state law was in 2009. *See Windsor*, 699 F.3d at 177 (citing *State Farm Mutual Auto. Ins. Co. v. Mallela*, 372 F.3d 500, 505 (2d Cir. 2004)). The Second Circuit chose the latter option and based its erroneous conclusion on three intermediate court decisions from New York. *Id.*

Two of those decisions from the intermediate courts were decided prior to 2009 and were available to the New York Court of Appeals when it declined to reach the question. *See id.* The Second Circuit relied on *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 566 (N.Y. App. Div. 2009), which was decided in

January of 2009, and *Martinez v. City of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008). The New York Court of Appeals declined to answer this question in *Godfrey v. Spano*, which was decided in November of 2009, over a year after one case and over ten months after the other case the Second Circuit cited. These cases therefore provide little insight into the policy of New York when the Court of Appeals specifically stated that it was for the legislature to make this decision, and not for the courts. *Godfrey*, 920 N.E.2d at 337.

The only other case cited by the Second Circuit to support its conclusion that in 2009 New York recognized same-sex marriages solemnized outside of New York provides little discussion of why such "marriages" were recognized in 2009 and simply assumes it to be true. *See In re Estate of Ranftle*, 81 A.D.3d 566 (N.Y. App. Div. 2011). The *Ranftle* court's only justification for recognizing same-sex "marriages" solemnized outside New York was its assumption that the failure of the legislature to authorize same-sex marriage cannot serve as a statement of public policy. *Id.* at 2. This rationale, however, ignores the fact that it was much more than a mere failure to enact such legislation, but an express *rejection* of such a policy on several occasions. *See Hernandez*, 855 N.E.2d at 34 (Kay, C.J., dissenting); *Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring). Certainly, express

rejections of such a policy serve as more than a mere failure to adopt the public policy that the court alleges existed in New York at the time, and arguably constitute emphatic pronouncements *against* such a radical change in policy.

Additionally, even assuming the Second Circuit's cited cases support its conclusion that in 2009 New York recognized same-sex marriages solemnized elsewhere, the rationales of the cases it cites are erroneous and cannot establish standing in this case. In the absence of legislation or judicial policy to the contrary, New York follows the common law marriage recognition rule, which "recognizes as valid a marriage considered valid in the place where celebrated." *Id.* at 338 (Ciparick, J., concurring). However, this marriage recognition rule has two prominent exceptions: (1) where the legislature expressly provides that a marriage performed outside of New York is invalid, or (2) where the marriage performed outside of New York is abhorrent to New York public policy. *Id.* at 338-39. The first exception does not apply because there is no statute expressly prohibiting the recognition of same-sex marriages performed outside of New York. *See, e.g.*, *Lewis*, 60 A.D.3d at 221.

The second exception, however, does apply, and therefore the argument that in 2009 New York would have recognized same-sex marriages performed outside of New York fails

because it was abhorrent to New York's public policy at that time. The cases relied upon by the Second Circuit to establish that out-of-state same-sex marriages would have been recognized in 2009 are all fundamentally flawed. The *Lewis* court stated that because there is no New York court precedent for striking down these marriages and no statute prohibiting the recognition of out-of-state same-sex marriages, then it was the public policy of New York to recognize them. *See Lewis*, 60 A.D.3d at 222.

In *Martinez*, the court noted that "[t]he Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York." *Martinez*, 50 A.D.3d at 193. The *Ranftle* court's decision rested on the same grounds. It noted that "the Legislature's failure to authorize same-sex couples to enter into marriage in New York or require recognition of validly performed out-of-state marriages cannot serve as an expression of public policy." *In re Estate of Ranftle*, 81 A.D.3d at 2.

The common and fatal flaw of each of these decisions is that they overlook a century of domestic relations laws in New York and conveniently ignore years of legislative rejection of the exact policy that the Second Circuit "predicted" was in existence in New York in 2009. It cannot be argued that there is

a lack of legislative direction on this point of public policy. The legislature of New York *expressly rejected* numerous proposals seeking to authorize same-sex marriage in the state. *Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting); *see also Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring).

The legislature is the policy making body of New York, not the judiciary. *See, e.g.*, *Sirkin v. Fourteenth St. Store*, 124 A.D. 384, 389, 108 N.Y.S. 830, 833-34 (1908) ("It being the province of the Legislature to declare the public policy of the state, it is the duty of the court to be guided thereby in administering the law."); *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 550, 132 N.E.2d 829, 836 (1956) ("It is within the competency of the Legislature to declare public policy in order to protect the public and the courts may not intrude in order to disregard the legislative determination and substitute one of their own."); *Matter of Natasha C.*, 80 N.Y.2d 678, 682-83, 609 N.E.2d 526, 528 (1993) ("it is for the Legislature, and not the courts, to make the necessary policy choices as to how best to address . . . problems").

The New York legislature expressly rejected many legislative proposals to authorize same-sex marriage, as shown above. Moreover, New York Domestic Relations Law had numerous examples of the State's public policy in existence at that time.

> Articles 2 and 3 of the Domestic Relations Law, which govern marriage, nowhere say in so many words that only people of different sexes may marry each other, but that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes. Domestic Relations Law § 12 provides that the 'parties may solemnly declare . . . that they take each other *as husband and wife*." Domestic Relations Law § 15(1)(a) requires town and city clerks to obtain specified information from "*the groom*" and "*the bride*." Domestic Relations Law § 5 prohibits certain marriages as incestuous, specifying opposite-sex combinations (brother and sister, uncle and niece, aunt and nephew), but not same-sex combinations. Domestic Relations Law § 50 says that the property of "*a married woman* . . . shall not be subject to *her husband's* control.

Hernandez, 855 N.E.2d at 6 (emphasis added).

The New York Court of Appeals also noted that the idea of same-sex marriage as a public policy is a relatively new phenomenon and that a court should not take lightly the

policies behind this tradition. *Id.* at 8. "The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Id.*

The cases cited by the Second Circuit ignore this important history and assert that because there is no statutory prohibition or express policy to the contrary, that same-sex marriages solemnized outside of New York would have been recognized in 2009. This ignores the explicit language of numerous statutory provisions declaring public policy to the contrary, nearly a decade of annual rejections of public policy proposals to authorize same-sex marriage, and centuries of tradition that recognized that marriage is between one man and one woman. It also impermissibly shifts the burden of proof from Respondent to the government.

"Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979). The same is true of New York courts interpreting legislative policy determinations consistent with the New York Constitution, which the New York Court of Appeals has determined does not mandate recognition of

same-sex marriage. *See Hernandez*, 855 N.E.2d at 5. Because the New York legislature had not adopted a policy recognizing same-sex marriages, the public policy of New York in 2009 was that marriage was between one man and one woman.

This determination of policy is bolstered by the fact that the New York legislature had explicitly rejected numerous attempts to redefine and revise the public policy of the state to include same-sex marriage. Because the domestic relations laws had since their inception limited marriage to one man and one woman, the recognition of same-sex marriages performed outside of New York would be abhorrent to this long-standing public policy. The Second Circuit therefore erred when it determined that judicial interpretations to the contrary constituted a sufficient basis upon which to "predict" that the public policy in New York in 2009 would have recognized same-sex marriages performed out of state.

Because the recognition would have been abhorrent to New York public policy in 2009, Respondent cannot establish that she was married in a manner recognized by New York in 2009. Respondent was not a spouse in 2009 and cannot subsequently become a surviving spouse for purposes of 26 U.S.C. § 2056 after New York changed its public policy in 2011. As such, she does not have standing to challenge Section 3 of DOMA, and this Court should

dismiss Respondent's challenge for want of jurisdiction.

2. Respondent did not have a Concrete and Particularized Injury because New York did not Recognize Same-sex Marriage; therefore any Decision by this Court would not Provide any Redress to her.

In addition to the requirement that Respondent establish a concrete and particularized injury, she was required to satisfy the element of redressability. "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Because Respondent cannot show that she had a concrete injury, no matter what determination is made by this Court, she cannot obtain the relief she seeks.

Respondent's potential for likely redress of injuries is not merely speculative in this case, which itself would be sufficient to defeat her claim, but it is *impossible* for her purported injuries to be redressed, as there is no injury. Respondent was not considered a spouse under New York law in 2009, and so did not qualify as a surviving spouse for purposes of the marital

deduction. Because she did not qualify as a surviving spouse, she was not entitled to the martial deduction on her partner's estate tax return. As such, Respondent has not and indeed cannot establish the third element of the irreducible constitutional minimum requirements of standing, and the decision below should be reversed.

3. Respondent did not and cannot Satisfy the Additional Prudential Requirements Necessary for Standing in Federal Court because the Issue of Same-sex Marriage is more Appropriate for a Legislative Determination.

"Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian*, 454 U.S. at 474. This Court has established a significant policy of "refrain[ing] from adjudicating abstract questions of wide public significance . . . most appropriately addressed in the representative branches." *Id.* at 475 (internal quotation marks omitted). Another prudential concern that this Court has required

is "that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* Here, as the New York Court of Appeals noted in *Godfrey* and *Hernandez*, the public policy question to be addressed is best left to a legislative determination and is not suitable for judicial overreach. *See Godfrey*, 920 N.E.2d at 337; *Hernandez*, 855 N.E.2d at 5.

When the determination of what New York's public policy was in 2009 is analyzed through the proper framework and focused on the legislature's determinations, the public policy becomes evident and *that policy did not recognize same-sex marriage*. On numerous occasions, dating back to 2003, the New York legislature explicitly rejected legislative proposals to recognize same-sex marriage in the state. *See Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting) (noting legislative proposals dating back to 2003 that were introduced but never even made it out of a committee hearing); *see also Godfrey*, 920 N.E.2d at 338 n.1 (Ciparick, J., concurring) (noting that a same-sex marriage authorization statute was passed in the Assembly in 2007 and 2009, but failed in the Senate and was never enacted).

Indeed, had New York's public policy recognized same-sex marriage in 2009, it would not have been necessary to enact legislation in 2011 authorizing same-sex marriage. *See* 2011

N.Y. Dom. Rel. § 10-a (McKinney 2011). Not only had the legislature rejected expansion of New York public policy to include same-sex marriage, but its centuries-old statutes provided express language recognizing only traditional marriage between one man and one woman. *Hernandez*, 855 N.E.2d at 6. The Second Circuit and the New York courts cited by the Second Circuit exceeded their authority by overriding the policy determinations of the New York legislature. Whether the policy was correct and whether the judges liked the public policy of New York in 2009 is of no consequence. "[F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. at 555. Here, the Second Circuit has violated this bedrock principle of federalism and separation of powers by attempting to insert its own policy determination contrary to that of the elected public policy makers authorized to reject a policy recognizing same-sex marriage in 2009. This Court should not permit such an *ultra vires* determination.

Because New York public policy is best determined by the legislature and same-sex marriage is an issue of important public policy, Respondent has not and cannot satisfy the prudential requirements of standing. The Second Circuit erred in taking an expanded

view of standing in this case, contrary to the precedents of this Court.

Respondent bears the burden of establishing her standing to bring this challenge. *Lujan*, 504 U.S. at 561. Respondent has failed to meet that burden. She did not and cannot satisfy the "irreducible constitutional minimum" requirements of standing, and she did not and cannot establish the prudential requirements of standing. As such, this Court should dismiss Respondent's challenge as non-justiciable.

II. SECTION 3 OF THE DEFENSE OF MARRIAGE ACT SHOULD BE ANALYZED UTILIZING RATIONAL BASIS SCRUTINY, WHICH IT EASILY SATIFIES.

Only those classifications that discriminate against a suspect or quasi-suspect class warrant heightened constitutional scrutiny. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, and therefore it should be analyzed using rational basis. Under this deferential standard of review, Section 3 of DOMA unquestionably should be upheld because it is rationally related to numerous legitimate government interests. Defining marriage as the union of one man and one woman is rationally related to the

government's interest in fostering the optimal environment for procreation and the rearing of children. Additionally, affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

"[A] classification neither involving a fundamental right nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). This strong presumption reveals that legislative classifications "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Id.* Regardless of what the Second Circuit thought about New York's public policy in 2009 or Congress's public policy articulated in Section 3 of DOMA, this law "must be upheld against an equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis* for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

"[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of*

New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Rational basis review is also consistent with the level of scrutiny that this Court has applied to legislative classifications on the basis of sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

Here, by applying heightened scrutiny to Congress's legislative enactments in DOMA, the Second Circuit violated these fundamental principles and substituted its own policy determination for that of the democratically elected majority in the legislature that enacted the challenged provision. The Second Circuit was without authority to make this substitution. Section 3 of DOMA does not discriminate on the basis of a suspect or quasi-suspect class, so rational basis review is the appropriate standard. Section 3 of DOMA satisfies this review.

A. Section 3 Of DOMA Does Not Discriminate On The Basis Of A Suspect Or Quasi-Suspect Class, And Therefore Should Be Reviewed Under Rational Basis.

Section 3 of DOMA does not discriminate against a suspect class. This Court long ago

articulated the test for determining whether a statute discriminates against a suspect class. It requires a showing that the statute (1) burdens a fundamental right; (2) burdens the democratic process; (3) discriminates on the basis of race, religion, or nationality; or (4) if prevailing prejudice against a discrete and insular minority curtails that minority's ability to take advantage of the political system. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Despite the long history of this test, this Court has only identified three suspect classifications: race, national ancestry and ethnic origin, and alienage. *See Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). This Court has never treated sexual orientation as a suspect class, and it should not do so now. Section 3 of DOMA does not infringe upon any fundamental right, because there is no fundamental right to homosexual marriage. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 721 (1997) (noting that fundamental rights are only those that are deeply rooted in the Nation's history and traditions and that are implicit in the concept of ordered liberty).

Certainly, Respondent cannot assert that there is a fundamental right to marry a member of the same-sex as it is not deeply rooted in the history of the Nation nor is it implicit in the concept of ordered liberty. Indeed, it is a relatively new concept that most

people who have ever lived never considered. *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (noting that "[u]ntil a few decades ago, it was an accepted truth for almost everyone that ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex"). It is also wholly foreign to American jurisprudence at the federal level.

Additionally, nothing about Section 3 of DOMA burdens the democratic process. Indeed, Section 3 of DOMA arose as part of the democratic process by which the Nation's elected representatives followed the will of the electorate in protecting the traditional definition of marriage. Additionally, it simply cannot be said nor does Respondent assert that Section 3 of DOMA discriminates on the basis of race, religion, or nationality. Finally, nothing in Section 3 of DOMA infringes upon homosexuals' right to engage in the political process. They remain free to vote, petition their government, and engage in First Amendment activities to try to persuade the electorate of their opinion concerning same-sex marriage. Section 3 of DOMA simply provides the definition for how the terms "marriage" and "spouse" will be construed for purposes of federal law. As such, it does not impede access to the political process. *Compare Romer v. Evans*, 517 U.S. 620, 624 (1996) (striking Colorado law which "prohibit[ed] all legislative,

executive or judicial action at any level of state or local government designed to protect the named class" of "homosexual persons or gays and lesbians").

The Second Circuit relied upon *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) to determine that sexual orientation is a quasi-suspect class and to support its determination that intermediate scrutiny applied to Respondent's challenge. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).[2] This determination was in error.

In *City of Cleburne*, this Court articulated the test for determining whether a statute discriminates against a quasi-suspect class, which requires (1) that the statute bears no relation to the group's ability to contribute to society; (2) if there remains widespread prejudice against the group; (3) if the group is presently shut out of the political process; and (4) if the statute discriminates on the basis of an immutable characteristic. *City of Cleburne*,

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[2] The Second Circuit basically conceded that Section 3 of DOMA would satisfy rational basis review. *See Windsor*, 699 F.3d at 181 ("Fortunately, no permutation of rational basis review is needed if heightened scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent, which explains why Section 3 of DOMA may withstand rational basis review.").

473 U.S. at 440-45. Similar to this Court's very limited recognition of suspect classifications, this Court has only found a quasi-suspect classification in two instances: gender and illegitimacy. *Woodward*, 871 F.2d at 1076. This Court should follow its precedent and resist the Second Circuit's attempt to expand the list of classifications deemed quasi-suspect.

Sexual orientation, unlike gender or race, is not "an immutable characteristic determined solely by accident at birth." *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1986). "Members of recognized suspect or quasi-suspect classes . . . exhibit immutable characteristics, whereas *homosexuality is primarily behavioral in nature*." *Woodward*, 871 F.2d at 1076 (emphasis added). Although scientists have studied homosexuality for many years, there is still no universally accepted definition of sexual orientation among professionals.

"Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (i.e., individual or group membership and affiliation, self labeling) *is fluid or has an indefinite outcome*." *See* American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, vii (2009), available at

www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (emphasis added). Additionally, "the recent research on sexual orientation identity diversity illustrates that sexual behavior, sexual attraction, and sexual orientation identity are labeled and expressed in many different ways, some of which are fluid." *Id.* at 14. If homosexuality is properly understood as a behavior or lifestyle choice and is well-recognized as fluid and evolving, then certainly it cannot be said to be immutable.

Section 3 of DOMA also does not discriminate in a manner unrelated to homosexuals' ability to contribute to society. By limiting, for purposes of federal law, the definition of marriage to those between one man and one woman, Congress was attempting to connect marriage to biological procreation. Certainly, homosexuals "cannot procreate simply by joinder of their different sexual being." *Windsor*, 699 F.3d at 199 (Straub, J., dissenting). While the particular details of marriage in a particular culture varies considerably, it always has something to do with creating a public sexual union between one man and one woman so that socially-valued children have both a mother and a father, and so society has the next generation it needs.

Essentially, the law presumes that a marriage will produce children and DOMA affords benefits on the basis of that presumption. That childbearing opportunities

inherent in the male/female marital union are occasionally unrealized (i.e., exceptions to the general pattern) does nothing to undermine the basis for the rule of recognition of the special status of traditional marriage. By affirming a particular kind of relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to encourage sufficient childbearing within marriage to reproduce the population. This Court has recognized that marriage plays an important role in "assuring that a biological parent-child relationship exists." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001). Congress's attempt to encourage that relationship bears on homosexuals' ability to contribute to the traditional biological parent-child relationship and is not merely intended to discriminate against them without cause.

The Second Circuit stated that this question hinges on "whether [homosexuals] have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. It cannot be gainsaid that when a group has the support of the entire Executive Branch of the United States, that such a group has the ability to politically protect themselves. Respondent cannot show that homosexuals are unable to politically protect themselves, and the Second Circuit was wrong to conclude otherwise.

Finally, homosexuals do not qualify as a quasi-suspect class because they are not shut out of the political process. As previously mentioned, they have significant political influence over the President and the Department of Justice. In a number of states, homosexuals have successfully persuaded the electorate that same-sex marriage should be permitted. The fact that they have not yet achieved such political support among the national electorate is insufficient to show that they have been entirely excluded from the political process. There is unquestionably a difference between unsuccessful political participation and total exclusion from the political process. Homosexuals have thus far been unsuccessful in persuading the majority of Americans that same-sex marriage should be permitted and recognized at the federal level. They have not been disenfranchised. Nothing in Section 3 of DOMA prevents them from exercising the franchise like all other individuals who qualify for that right. Section 3 of DOMA simply provides a definition of the terms "marriage" and "spouse" for purposes of federal law, and it does not in any way shut homosexuals out of the political process.

Section 3 of DOMA does not discriminate on the basis of a suspect class because Respondent does not satisfy the requirements of *Carolene Products*. Section 3 of DOMA does not discriminate on the basis of a quasi-suspect

class because Respondent cannot satisfy the requirements of *City of Cleburne*. The Second Circuit held that sexual orientation did qualify as a quasi-suspect class and applied intermediate scrutiny. *Windsor*, 669 F.3d at 181-85. That conclusion ignored this Court's substantial restraint in expanding the list of those categories that qualify as suspect or quasi-suspect. As such, it was in error and this Court should reject it.

B. Section 3 Of DOMA Satisfies Rational Basis.

Rational basis review is "a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. Significantly, this Court has noted that when "there are *plausible* reasons for Congress' action, our inquiry is at its end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (emphasis added). Under this extraordinarily deferential standard, Section 3 of DOMA must be upheld unless those opposing the legislation have satisfied their "burden to negative every *conceivable* basis which might support it." *Beach Commc'ns*, 508 U.S. at 315 (emphasis added).

The Second Circuit erred when it dawned its superlegislature regalia and substituted its judgment for that of the democratically elected representative body with the authority to enact a law defining marriage in a manner consistent

with the history and traditions of this Nation. Respondent simply cannot satisfy her burden to defeat every *conceivable* or *plausible* justification of Section 3 of DOMA because many of the justifications for this Section rise above the required level of legitimate and satisfy the much higher compelling interest standard.

1. Defining marriage as the union of one man and one woman is rationally related to the government's interest in fostering the optimal environment for procreation and the rearing of children.

Numerous courts have recognized that the state purpose of furthering procreation where both parents are present to raise the child is at least rational, *if not compelling*. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) ("state has a compelling interest in encouraging and fostering procreation of the race"); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409 U.S. 810 (1972) ("The institution of marriage as a union

of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis").

Justice O'Connor specifically noted that "preserving the traditional definition of marriage" is itself "a legitimate state interest." *See Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). She continued by stating that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of the law." *Id.* Section 3 of DOMA is certainly related to legitimate government interests. Not only is Section 3 rationally related to a *legitimate* government interest, but this Court has recently described two *important* governmental objectives that reinforce the link between marriage and procreation.

The first interest this Court articulated in *Nguyen* is the role of marriage in "assuring that a biological parent-child relationship exists." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 (2001). While admittedly less than perfect, marriage is the most reliable indicator (absent intrusive genetic testing) of a biological tie between parent and child. With the legal presumption of paternity under many state and federal laws, together with the marital expectations of monogamy and fidelity, marriage provides a basis for the legal and factual assumption that a married man is the father of his wife's child. Extending the definition of marriage to include same-sex

couples would not only fail to advance this important governmental interest, but would actively undermine the signaling function of marriage with respect to any real connection between marriage and biological parenting.

The second important governmental interest articulated in *Nguyen* "is the determination to ensure that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent." *Id.* at 64-65; *see Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 797 (2001). It is beyond question that Congress has an interest in fostering healthy familial relationships that provide a benefit to the public as a whole. Protecting the traditional definition of marriage advances this goal by ensuring that biological parents and children have the support of their government to foster those family ties.

Male gender identity and female gender identity are each uniquely important to a child's development. Accordingly, one significant justification for defining marriage as the union of one man and one woman is because children need a mother and a father. We live in a world demarcated by two genders, male and female. There is no third or intermediate category. Sex is binary. By striking down Section 3 of DOMA, this Court

will be making a powerful statement that our government no longer believes children deserve mothers and fathers. In effect, it would be saying: "Two fathers or two mothers are not only just as good as a mother and a father, they are just the same."

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and government, will certainly have a dramatic effect as the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers are formed. By destroying the traditional definition of marriage, the family structure will be dramatically transformed. Many boys will grow up without any positive male influence in their lives to show them what it means to be a man, and many girls will grow up without any female influence to show them what it means to be a lady.

The repercussions of this deconstruction of society are incalculable and will reshape, in a drastically negative way, the culture in which we live. Many children learn appropriate gender roles by having interaction with both their mother and their father and by seeing their mother and father interact with one another. By redefining marriage to state that this is not the family structure the federal

government wants to foster and encourage, this Court will be overturning centuries of historical understandings of the family and the home.

"[C]hildren appear most apt to succeed as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father." Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same-sex Relationships? Findings from the New Family Structures Study*, 41 Social Science Research 752, 766 (2012). Indeed, in this study, participants raised in same-sex households were more likely to fare worse on educational attainment, mental health needs, and economic stability. *Id.* at 763-64. "When compared with children who grew up in biologically intact, mother-father families, the children of women who reported a same-sex relationship look markedly different on numerous outcomes, *including many that are obviously suboptimal* (such as education, depression, employment status, or marijuana use)." *Id.* at 764 (emphasis added).

Regnerus concluded, based on the only large representative sample study to date that controlled for external variables, that the reason for the significant differences between children raised in traditional one man and one woman families as compared to homosexual parent families "is located not simply in parental sexual orientation but in successful

cross-sex relationship role modeling, or its absence or scarcity." *Id.* at 763. This study provides additional support for Congress's legitimate interest in defining marriage as it did in Section 3 of DOMA.

In fact, even many homosexuals recognize the need for and the importance of children having both a mother and a father present in the home. *See* Wendy Wright, *French Homosexuals Join Demonstration Against Gay Marriage*, Catholic Family & Human Rights Institute (Jan. 17, 2013), *available at* www.c-fam.org/fridayfax/volume-15/French-homosexuals-join-demonstration-against-gay-marriage.html. A prominent homosexual French politician protested France's proposed same-sex marriage bill, stating that "[t]he rights *of* children trump the right *to* children." *Id.* What he meant was that children deserve to be raised in a home with both a mother and a father, and he did not believe that same-sex marriage fostered this important and historical tradition.

Another prominent spokesman against the French same-sex marriage bill who was raised by two women stated "he suffered from the lack of a father, a daily presence, a character and a properly masculine example." *Id.* Obviously, when individuals raised in homes lacking the traditional and necessary components of a mother and a father recognize that it caused them harm, Congress has a

legitimate interest in fostering familial relationships that promote the beneficial role of the natural family. Indeed, this prominent French homosexual stated that permitting same-sex marriage would be "institutionalizing a situation that had scarred him considerably." *Id.* Given these reports, and the countless other examples that Regnerus wrote about in his study, Congress certainly had a legitimate interest in maintaining the traditional definition of marriage as between one man and one woman.

2. Affirming marriage as the union of one man and one woman for purposes of federal law is rationally related to the government's interest in memorializing social constructs and foundational concepts upon which statutory and common law are based.

This Court has long acknowledged that Congress has the authority to define the terms it uses in its statutes, including those excluding certain types of marriages from federal recognition. Indeed, the authority of Congress

to define marriage as one man and one woman for purposes of federal law has a long pedigree in this nation. In 1885, this Court upheld an act of Congress that prohibited polygamists and bigamists from voting or holding office in any United States territory. *See Murphy v. Ramsey*, 114 U.S. 15 (1885).

In affirming Congress's definition of marriage to exclude polygamists and bigamists, this Court explained:

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, *as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who

> are practically hostile to its attainment.

Id. at 45 (emphasis added).

This Court specifically affirmed Congress's authority to prohibit polygamy and bigamy because those relationships were inconsistent with the longstanding common law meaning of marriage as the union of one man and one woman. In 1888, this Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Reynolds v. United States*, 98 U.S. 145, 166 (1878), the Court acknowledged that the legal redefinition of marriage (in the context of polygamy) would significantly impact the social structure of the Nation, emphasizing the authority of the legislature to choose one form of marriage over another: "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166.

The cultural significance of redefining marriage is not limited to the context of polygamy. Throughout the history of Western civilization, and certainly since the founding of the United States more than 200 years ago, the marriage-based familial structure has provided

the basis of civil society, as parents infuse their own children with the education, values, and training necessary for continued self-government. Marriage is a normative social institution. Marriage is not primarily a way of expressing approval for an infinite variety of human affectional or sexual ties. Marriage is broader than just two people who have affection for one another. It impacts third-parties, namely children, and by extension, the rest of society. Marriage and natural family is the first form of government. It is therefore incumbent upon Congress to affirm natural marriage rather than deconstruct it. It is certainly beyond the constitutional purview of this Court to re-write the definition of marriage.

Changing this definition will have drastic and detrimental effects on society as a whole. Marriage is separated from other kinds of relationships by law and government as well as society because it is not merely a private, individual good, but a public, common good. Even people who do not marry depend on a healthy marriage culture in order to ensure a stable society and carry it into the next generation. Many courts continue to articulate this public understanding of the reasons for state involvement in marriage. *See, e.g.*, *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

When the natural definition of marriage as that between one man and one woman is revised to include other marriages, the state is left with precious little justification for laws limiting polygamy and polyamory (group marriage). Ultimately, there is no principled basis for recognizing same-sex marriage without simultaneously providing a basis for the legality of consensual polygamy and polyamory.

In sum, Congress could have rationally concluded that marriage is society's way of recognizing that the sexual union of one man and one woman is unique, and that government needs to support this union for the benefit of society and its children, or that marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and society. This conclusion is not only rational, but it based on centuries of historical traditions and customs, sociological studies, and common sense. If this Court does not dismiss this case, which it should, but instead reaches the merits, this Court should hold that no constitutional provision justifies striking down Section 3 of DOMA.

CONCLUSION

This Court should reverse the decision below and dismiss this case because Respondent lacks standing. If this Court should reach the merits, it should uphold Section 3 of DOMA.

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