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

REPLY BRIEF ON THE MERITS FOR RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.*

Edith Schlain Windsor was the plaintiff in the district court and an appellee in the court of appeals.

The United States of America was a defendant in the district court and an appellee and appellant in the court of appeals.

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* The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See*, *e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it, like the institution it represents, functions on a majoritarian basis when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

The many *amicus* briefs filed on both sides of this case amply demonstrate that the issue of same-sex marriage inspires strong feelings and passionate disagreement. But the parties' briefs underscore that the legal issue in this case actually is quite narrow. Even DOJ concedes that Section 3 of DOMA survives traditional rational basis review. And Ms. Windsor contends that DOMA fails rational basis review only by distorting the deferential nature of a form of review so forgiving that it has led to the invalidation of only a single federal statute by this Court. Applying conventional rational basis review, multiple rational bases support Congress' decision to clarify that the traditional definitions of "marriage" and "spouse" continue to apply for purposes of federal law only. DOMA respects the judgments of different states. It recognizes that some states can rationally choose to give full recognition to same-sex marriages, others can rationally embrace civil unions, and still others can rationally choose to retain the traditional definition. And as long as states retain the ability to choose among these various options, the federal sovereign surely has the ability to adopt the traditional and majority rule for federal law purposes.

Nor is there any basis for this Court to make sexual orientation the first new suspect class in forty years. Treating a group as a suspect class for equal protection purposes is, at bottom, a determination that by dint of a long history of official disenfranchisement or other obstacle, a group cannot protect its interests through the ordinary political processes. But gays and lesbians have made more progress through the ordinary political processes

more quickly than any other group in recent memory, both on the issue of marriage and more generally. The impressive array of *amici* supporting affirmance provides powerful testimony to the political clout of a group that has been remarkably and increasingly successful in accomplishing its goals through the political process.

None of this is to suggest that such political gains have been easy or uniform, but that is the nature of the political process. And when it comes to an issue as fast-moving and divisive as same-sex marriage, the political process has manifold advantages over constitutionalizing the issue. The political process requires advocates to persuade opponents, not label them bigots or dismiss their arguments as explicable only by animus. The political process allows the losing side to moderate its views and seek future compromises, instead of having its views harden. The political process permits compromises, like civil unions, and transition rules, instead of one-size-fits-all solutions with retroactive consequences. The political process is in the midst of dealing with this issue, with new developments seemingly every week. For example, just last week, in Colorado, the state that passed the amendment invalidated in *Romer v. Evans*, 517 U.S. 620 (1996), the legislature enacted a law authorizing civil unions. As Judge Straub correctly observed, this Court "can intervene in this robust debate only to cut it short." Supp. Pet. App. 83a. This Court should decline the invitation to cut this vital debate short, uphold DOMA as constitutional, and permit the citizens of this country to continue participating in working through this important issue.

I. DOMA Is Rationally Related To Numerous Legitimate Governmental Interests.

A. Sovereignty and Caution

In enacting DOMA, Congress ensured that the federal government and every state would have the right to define marriage for itself, and that no jurisdiction would be forced to recognize same-sex marriage just because another jurisdiction (or courts interpreting a distinct state constitution) did so. And in retaining the traditional definition of marriage for purposes of federal law only, Congress exercised the same sovereign prerogative that it preserved for every state. It rationally decided to clarify that the traditional definition would continue to apply as the uniform federal definition and thereby proceeded cautiously at the federal level while allowing each state to chart its own course within its own borders without dictating the outcome for other sovereigns. In short, DOMA allowed each state to operate as a laboratory of democracy, while preserving each sovereign's ability to make this sensitive determination for purposes of that sovereign's own law.

Ms. Windsor agrees (Windsor Br. 56)[1] that states, as sovereigns, should be allowed to define marriage, as her "home state of New York" has done to "allow gay couples to marry." And she concedes that "Congress has sovereign power to decide eligibility [for] federal programs and benefits." *Id.* Tellingly, she does not explain how it was irrational

[1] All citations herein to party briefs are to merits briefing.

for Congress to respect state sovereignty (by allowing New York and every other state to define marriage for itself) and to exercise its own sovereign power (by employing the traditional definition to determine eligibility for federal programs and benefits).[2]

DOJ likewise concedes (at 45) that "[i]t is, of course, true that the federal government has an interest in defining marriage for purposes of federal law." But DOJ suggests that such definitions, like all exercises of federal power, must comply with equal protection principles, and so the federal government obviously could not define marriage in a manner that violated *Loving v. Virginia*, 388 U.S. 1 (1967). But that is because no government—state, local, or federal—can define marriage inconsistently with *Loving*. There is no special disability on the federal government's exercise of its "interest in defining marriage for purposes of federal law." Thus, if states can continue to have the constitutional option to employ the traditional definition, there is no reason—and DOJ offers none—why the federal

[2] DOJ "does not challenge" DOMA's constitutionality under rational-basis review and "has previously defended Section 3" under that test. DOJ Br. 51-52. Its discussion of various interests supporting DOMA (*id*. at 38-51) is premised on the applicability of heightened scrutiny, and thus has little value if rational basis applies. DOJ also raises, without actually endorsing, the possibility that the Court could apply a heightened form of rational-basis inquiry. DOJ itself seems to recognize that three levels of scrutiny are enough, and its principal authority, Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), went out of its way to acknowledge the "legitimate state interest" in "preserving the traditional institution of marriage." *Id.* at 585.

government does not have the same option for purposes of federal law.

Both DOJ and Ms. Windsor suggest that Congress' stated interest in promoting "democratic self-governance" only explains Section 2 of DOMA. Not so. Sections 2 and 3 work together to ensure that no one sovereign's decision—whether through the legislature or the courts—will automatically dictate the decision of another sovereign through either full faith and credit principles or federal borrowing of state definitions. Section 2 primarily preserves the independent decision-making of states (and tribes and possessions), while Section 3 primarily preserves the ability of the federal government to employ its own definition. But both provisions promote "democratic self-governance" by preventing the automatic borrowing of redefinitions of marriage that Congress correctly anticipated would come first from unelected state judiciaries.

As to caution, Ms. Windsor does not argue that it was irrational for Congress to allow the states to experiment with same-sex marriage while preserving the traditional definition of marriage at the federal level. Instead, she argues that Congress was not cautious because "DOMA abandoned the uniform historic federal practice of deferring to the states in terms of marital status." Br. 57.

But that ignores the unique dynamic facing Congress when it enacted DOMA. Up until that point, the traditional definition had governed in every state and for all federal law purposes. Congress thus had no occasion to choose between adopting a uniform federal definition and deferring to

state definitions. But when Hawaii was poised to become the first jurisdiction in the United States to deviate from the traditional definition, there was nothing incautious about retaining the traditional definition as the federal definition while states began a process of experimentation. That approach was a rational exercise in caution and a rational approach to the issue given our system of dual sovereignty.

In all events, it is not true that Congress has always deferred to the states on marriage, *see* House Br. 4-9, and neither Ms. Windsor nor DOJ seriously argues that Congress must do so. To the contrary, both recognize that Congress has a legitimate interest in defining terms in federal statutes. What is true is that Congress has never—before 1996 or after—allowed federal law to depart from the traditional definition of marriage. Thus, DOMA maintained the relevant status quo ante, and was indeed an appropriately cautious response to the onset of state experimentation with redefining marriage.

B. Uniformity

In DOMA, Congress rationally chose to have a uniform federal rule that treated all same-sex couples the same, without regard to whether their state of residence recognizes same-sex marriage, civil unions or domestic partnerships, or employs the traditional definition. DOJ and Ms. Windsor suggest that Congress should have selected a different kind of uniformity—namely, a uniform rule of deference to the states' varying definitions of marriage. DOJ Br. 48-49; Windsor Br. 48-49. But if uniformity is a legitimate government interest (as DOMA's

opponents do not dispute), then what *kind* of uniformity to pursue is a choice constitutionally vested in Congress, not the judiciary.

As noted, Congress faced a unique dynamic in enacting DOMA. Previously, there was no tension between deferring to states and achieving nationwide uniformity in the basic definition of marriage. But when Congress could no longer obtain substantive uniformity by applying a uniform procedural rule of deference, there was nothing irrational about deciding substantive uniformity was more important. Ms. Windsor asserts (at 49) that she should be treated the same as any other widow in New York, and as far as the State of New York is concerned that is certainly true. But the federal sovereign has a unique interest in treating a survivor of a same-sex relationship in New York the same as a survivor of a same-sex relationship in Oklahoma. And DOMA rationally furthers that uniquely federal interest in nationwide uniformity.

Congress also has a rational interest in avoiding the difficult residency and choice-of-law determinations that federal agencies would have needed to make absent DOMA. Ms. Windsor dismisses such administrability concerns by suggesting (at 52) that it is obvious to everyone but the House that New York would have recognized a Canadian same-sex marriage in the years before it issued same-sex marriage licenses of its own. But the New York Court of Appeals viewed the question as difficult enough to reserve it as recently as November 2009 in *Godfrey v. Spano*, 920 N.E.2d 328 (2009), and whatever the answer to that recognition-

of-foreign-judgments question in New York, the answers to comparable questions remain opaque in other jurisdictions. Surely it is rational for Congress to employ an easily administrable rule that avoids the need for federal agencies to make state-law determinations difficult enough for state high courts to reserve.

None of this is to suggest that it would have been irrational for Congress to choose Ms. Windsor's preferred uniform rule of deference. But rational basis review means having choices, and Congress surely had discretion to choose between these two forms of uniformity.

Ms. Windsor does not seem to take issue with the notion that this substantive uniformity interest could rationally support a decision of a future Congress to adopt a uniform federal definition that includes all same-sex couples if a majority of states ultimately moves away from the traditional definition. But there is no reason that this interest in uniformity operates only in one direction. It bears emphasis that the traditional definition was the only definition at the time of DOMA's enactment and remains the rule in more than 80% of the jurisdictions. If and when that changes, Congress could rationally choose to adopt a different uniform federal rule, but that only underscores the validity of uniformity as a federal objective and the rationality of the choice Congress made in DOMA.

Finally, DOMA's opponents claim it is irrational for Congress to seek national uniformity in federal recognition of same-sex marriages, because it has not sought national uniformity in federal recognition of

first-cousin marriages, common-law marriages, or teenage marriages. DOJ Br. 48-49; Windsor Br. 50-51. But rational-basis review, as it must, leaves the legislature ample room to "select one phase of one field and apply a remedy there," particularly if it is "the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

This is particularly true when it comes to the federal interest in uniformity. Taken to its logical conclusion, Ms. Windsor's view would suggest that whenever Congress legislates it must fully displace conflicting state laws. But such a rule would be antithetical to both rational-basis review and notions of cooperative federalism. Congress may pursue a rational interest in uniformity by, for example, providing a uniform federal statute of limitation for a federal cause of action. Doing so for one statute does not somehow prevent Congress from borrowing the state statutes of limitations for a different statute. Certainly, there were rational reasons for Congress to place greater weight on uniformity when it came to same-sex marriage than first-cousin marriages, as evidenced by the much more robust political debate regarding the former.

C. Preserving Past Congressional Judgments, Providing Definitional Clarity, and Fiscal Prudence

Every federal statute on the books in 1996 reflected a congressional intent—either implicit or express—to use terms like marriage and spouse to refer only to opposite-sex couples. Congress knew to a certainty that the various legislative judgments

and compromises reflected in that array of statutory provisions were based on the traditional definition. It was thus eminently rational to preserve those past judgments.

Ms. Windsor suggests that an interest in preserving those past legislative judgments does not necessarily mean that those judgments were themselves rational. That is true, but it conflates two distinct questions. If no government can constitutionally employ the traditional definition for any purpose (or ever could), then there is obviously no exception for DOMA. But if the argument is instead that DOMA uniquely lacks a rational basis even though states and the federal government in pre-DOMA legislation were free to employ the traditional definition, then the fact that DOMA preserved the legislative intent and legislative compromises of prior Congresses—by adopting not just *a* uniform federal definition, but *the precise definition* that underlay every prior congressional reference to marriage—is a sufficient answer.

Ms. Windsor also complains that DOMA addresses over 1,000 statutes at once. But that simply reflects Congress' intent to adopt a definitional provision. By adopting a single definition that reaffirmed that there is a uniform federal definition of the terms "marriage" and "spouse" wherever they appear in federal law, Congress clarified the meaning of federal law and preempted countless questions that would have arisen in DOMA's absence. For example, without DOMA, there would be questions whether federal statutes that expressly incorporated the traditional

definition wholly apart from DOMA, *see* House Br. 5, would apply to same-sex married couples. Questions also would arise about the treatment of couples in state-sanctioned civil unions. DOMA avoided all those questions and clarified the meaning of marriage and spouse under federal law. Thus, DOMA is supported by the same rational basis that justifies any definitional provision in the U.S. Code: It rationally clarifies the meaning of the defined term. To demand more, or to complain that it applies comprehensively to all federal statutes and agencies, is to ignore Congress' manifest intent to adopt Section 3 as a definitional provision.

Congress likewise was rationally concerned with avoiding the uncertain and likely negative fiscal impact of redefining marriage. Indeed, whatever the ultimate net impact of DOMA on the overall federal budget, Congress could rationally choose to avoid the disparate impact on various federal programs, some of which benefit married couples (and therefore would face a budget shortfall if the definition were broadened) and some which involve the opposite dynamic.

Ms. Windsor and her *amici* assert that DOMA does not save money overall, and that saving money is not a legitimate government purpose without some further justification for how the savings are achieved. Windsor Br. 53-55. But as the House has explained and the First and Second Circuits have both recognized, these objections contradict established principles of rational-basis review. *See* House Br. 39-41 & n.8. In particular, while Ms. Windsor points out (at 53) that this Court has required some further

justification for the method of savings when government *withdraws* a benefit that it previously offered, the Court has found cost savings and caution sufficient justifications for not extending benefits to a group that never had previously been eligible. *Bowen v. Owens*, 476 U.S. 340, 347-48 (1986). DOMA plainly does the latter.[3]

D. The Rational Bases That Support States' Decisions to Adopt and Retain the Traditional Definition

The federal government has uniquely federal interests that provide a rational basis for DOMA. But by incorporating the definition long used by every state and still employed by the vast majority of states, DOMA is likewise supported by the rational bases that caused the states to adopt and retain the traditional definition. In other words, as long as the vast majority of states have not adopted a wholly irrational and unconstitutional definition, Congress acted rationally in clarifying that federal law reflects the same definition.

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[3] Ms. Windsor objects (at 54-55) to the House's observation that marriage penalties make people less likely to marry, but this has long been a concern with respect to opposite-sex couples. *E.g., Druker v. Comm'r*, 697 F.2d 46, 50 (2d Cir. 1982) (Friendly, J.). In other words, the House agrees with Ms. Windsor's observation (at 55) that "gay couples … marry for the same reasons straight couples do," and since Congress has long expressed concerns that "marriage penalties" imposed by federal tax and benefit programs might impact at least some couples' willingness to marry, it was rational to think that same-sex couples would not be wholly immune from such considerations.

There is no dispute that, unlike opposite-sex relationships, same-sex relationships do not have a propensity to produce children without advance planning, Windsor Br. 43-44, or that marriage creates a beneficial social structure for responsible procreation and childrearing. Those concessions are enough to give Congress a rational basis to treat same-sex and opposite-sex couples differently. DOMA's opponents resist that conclusion only by offering arguments that fundamentally misunderstand the deferential nature of rational-basis review.

First, DOMA's opponents challenge as irrational the long-held cultural judgment that a child's biological parents are, other things being equal, the child's natural and most suitable guardians. Ms. Windsor even claims (at 45) that current law does not recognize this principle. That is mistaken: Every state recognizes that a child ordinarily should be raised by his or her biological mother and father, if they are able and willing.

To be sure, children can be raised by their unmarried biological parents and married couples often raise children without a biological link. But none of that denies that marriage as an institution is linked to the unique tendency of opposite-sex couples to produce unintended offspring and the societal interest in providing a stable structure for raising such children. And to the extent that marriage is an answer to the procreative potential of opposite-sex relationships, it is not irrational to decline to extend it to same-sex couples who by definition do not have

the same propensity for their intimate acts to produce unplanned offspring.

Second, Ms. Windsor argues (at 41-42) that DOMA (i) operates solely to deny marital eligibility to same-sex couples, and therefore (ii) has no effect on procreation or childrearing by opposite-sex couples. The first part of this argument is simply incorrect: DOMA defines terms for purposes of federal law; it does not deny marital eligibility—which remains a matter of state law—to anyone. Moreover, the second part of Ms. Windsor's argument simply misses the point under equal-protection rational-basis review. What must have a rational basis is not the denial of benefits in the abstract, but the *difference* in treatment between same-sex and opposite-sex couples. A denial of veterans' benefits to civilian employees of the Defense Department who served during wartime is of no particular direct benefit to military veterans, but the distinction drawn is nonetheless rational. Under this Court's established precedents, the fact that opposite-sex couples implicate the state interests in procreation and childrearing in a unique way and to a unique degree is a rational basis for treating them differently. *E.g., Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Third, and finally, Ms. Windsor argues (at 36, 44) that the array of federal marital benefits and burdens is too broad for them all to relate to childrearing, or any rationale justifying the traditional definition of marriage. But that simply asks too much of a federal definitional provision. All parties agree that, as DOJ puts it (at 45), "the federal

government has an interest in defining marriage for purposes of federal law." In some circumstances, a federal program refers to marriage in the context of benefits that have a close nexus to childrearing, while in others the term is used to allocate different benefits or address different problems. But it is certainly rational for Congress to apply a single definition to the terms "marriage" and "spouse" wherever they appear in federal law.

* * *

At most, then, all that DOMA's opponents have demonstrated is that definitions of marriage eligibility (as with most definitions) involve a line-drawing process in which "every line drawn by a legislature leaves some out that might well have been included." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). For example, Ms. Windsor and her *amici* point out that certain disclosure laws may not reach same-sex spouses. But for purposes of such laws, it is equally anomalous that there is no coverage for a long-time live-in girlfriend of a Congressman, someone in a state-sanctioned civil union, and someone in a committed long-term same-sex relationship in a state with the traditional definition. Indeed, it might make more sense for a decade-long girlfriend to be covered than a newlywed, but so it goes with line-drawing. "[T]he Constitution does not require [government] to draw the perfect line nor even to draw a line superior to some other line it might have drawn." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012). "That exercise of discretion … is a legislative, not a judicial, function," not to be struck down unless arbitrary.

Belle Terre, 416 U.S. at 8; *see id.* n.10. DOMA plainly passes that test.

E. Alleged "Animus" Cannot Invalidate a Statute, Such as DOMA, Supported by Rational Bases.

Ms. Windsor—but not DOJ—quite remarkably appears to contend that DOMA fails rational-basis review even if it has a rational basis, because it was allegedly born of "animus." Br. 33, 35-36. But this Court's precedents hold otherwise.

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 383 (1968). Thus, while the Court has long recognized that discrimination purely for its own sake is not rational, under the established approach, constitutional review does not require a separate judicial inquiry into whether a law was motivated by "animus." Instead, only *after* the search for other rational bases for a law has been exhausted will the Court conclude that impermissible animus is the sole remaining explanation. Animus is thus a conclusion drawn from the unsuccessful search for rational bases, not a separate inquiry. Since the House has identified numerous rational bases for DOMA, the inquiry ends there.

In any event, as Ms. Windsor and her *amici* point out, many applications of DOMA actually benefit same-sex couples by exempting them from federal marriage penalties or other duties. DOMA's opponents treat this as evidence of its irrationality;

in fact, these applications establish only that DOMA would be an irrational means of implementing animus against gay people—which only underscores that something else, and something rational, was afoot.

II. This Court Should Not Make Sexual Orientation The First New Suspect Class In Four Decades.

All parties to this case agree that Section 3 should be analyzed as a sexual-orientation classification, and DOJ and Ms. Windsor argue that such classifications should be subjected to heightened scrutiny. (They make no other argument for heightened scrutiny.)

It is the longstanding law of this Court that race, alienage, and national origin are the suspect classes while sex and illegitimacy are quasi-suspect. For forty years, this Court has not added to this list. It has never put sexual orientation in either category despite multiple opportunities to do so. Eleven courts of appeals have applied rational basis review to sexual orientation, with a majority adopting or reaffirming that conclusion post-*Lawrence*; the court below is the *only one* to rule otherwise.

The four factors discussed by DOJ and Ms. Windsor only confirm that the suspect-class list should not be expanded in this case.

A. Gays and Lesbians Are Hardly Politically Powerless.

This Court's equal-protection jurisprudence has long recognized that the "political processes

ordinarily [are] to be relied upon to protect minorities," and that the incursion into democratic self-governance that comes with "more searching judicial inquiry" is appropriate only when those processes are "seriously" curtailed. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Thus, the most salient factor justifying heightened equal-protection review is whether the members of the proposed suspect class "are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). While "[a]ny minority can be said to be powerless to assert direct control over the legislature," that alone does not a suspect class make. *Id.*

Gay and lesbian interest groups clearly can attract the attention of lawmakers—to a remarkable degree. The briefing before this Court is testament to that ability. The President, Vice President, and Attorney General all support same-sex marriage and have urged this Court to find it required both at the federal level and in the states. *Amici* briefs opposing DOMA have been filed by 40% of all Senators and Representatives, including the Senate Majority Leader and House Minority Leader (*see Amici* Br. of 172 Members of U.S. House of Representatives and 40 U.S. Senators); by numerous former senior executive-branch officials of both political parties (*see* Br. of Donna Shalala, *et al.*); and by 15 states and the District of Columbia (*see* Br. for New York, *et al.*). Moreover, one of the two major political parties supports same-sex marriage in its platform; other *amici* opposing DOMA include a large group of the country's leading businesses (*see* Br. of 278

Employers, *et al.*), as well as the nation's largest labor organization (*see* Br. of AFL-CIO).

Ms. Windsor counters that gays and lesbians have uniquely had their rights put to public votes. But the critical point is not that such votes have occurred (which is merely evidence of the democratic process at work), but that gays and lesbians are increasingly prevailing at the ballot box, even in states like Maine, where they previously lost.

Unable to deny such substantial successes, DOMA's opponents suggest that the relevant benchmark is the political power of women at the time that sex was subjected to heightened scrutiny. But the political power of women is clearly an outlier in suspect-class analysis, as is perhaps most dramatically illustrated by the reality that women, unlike every other protected class, are a political majority. That benchmark would make nonsense of this Court's subsequent decisions that heightened scrutiny is unnecessary for the disabled or the elderly. *Cleburne*, 473 U.S. at 445; *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The Court's application of heightened scrutiny, despite the majority status and substantial achievements of women, was explained instead by over a century of official disenfranchisement that left the statute books littered with laws based on outdated stereotypes. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). As all concede, gays and lesbians (in common with other groups who have tried but failed to obtain the benefit of heightened scrutiny since *Frontiero*) have not been subject to such official disenfranchisement.

B. Sexual Orientation Is Relevant to Legitimate Governmental Interests.

Even DOMA's opponents concede that same-sex couples do not have the same propensity to produce unplanned and unintended offspring relative to opposite-sex couples. That basic distinction—and the biological reality that underlies it—provides a basis for governments to draw the kind of distinctions at issue in DOMA. *See* House Br. 44-48. The question is not whether gays and lesbians have an "ability to perform or contribute to society." DOJ Br. 27. Of course they do. But so do individuals with disabilities, the aged, the poor, and other groups that do not qualify as suspect classes. What is relevant is whether opposite-sex couples and same-sex couples are differently situated when it comes to things like their propensity to produce unplanned offspring. They are. And that provides a basis for the government to legislate in response to that difference in ways that do not implicate concerns triggering heightened scrutiny.

C. No Other Protected Class Is Defined With Reference to Conduct.

Unlike the recognized suspect classes, sexual orientation is defined by a tendency to engage in a particular kind of conduct. Ms. Windsor takes umbrage at this observation (at 28), but her own *amici* medical organizations agree that "it is only by acting with another person—or desiring to act—that individuals express their heterosexuality, homosexuality, or bisexuality." Br. of Am. Psych. Ass'n, *et al.* 11. Sexual orientation is thus unlike any of the recognized suspect classes.

Sexual orientation is also unlike other suspect classes (but like other groups not so recognized) in that it is not discernible at birth. Nor is it immutable in the same ways. In implicit recognition of this difference, DOJ goes so far as to question the continuing relevance of immutability and emphasizes instead that sexual orientation is "distinguishing." But that proves far too much. *Every* law that draws lines distinguishes between the groups on both sides of the line.

D. The Unique History of Discrimination

In describing the history of discrimination against gays and lesbians, DOJ and Ms. Windsor describe a world that is nearly unrecognizable today. DOJ Br. 23-26; Windsor Br. 20-21. For present purposes, the most remarkable fact about this history is how dramatically, and how quickly, things have changed. As Ms. Windsor's own expert historian states, "antigay discrimination … is a unique and relatively short-lived product of the twentieth century." George Chauncey, *Why Marriage?: The History Shaping Today's Debate Over Gay Equality* 14 (2004). In 2003, this Court could say that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter"—and nor could there be since "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century." *Lawrence*, 539 U.S. at 568.

And things have changed dramatically since *Lawrence* precisely because of *Lawrence*. *Lawrence* recognized that allowing "homosexual conduct [to be] made criminal by the law of the State" presented an

obstacle to eliminating discrimination on the basis of sexual orientation. 539 U.S. at 575 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). This Court eliminated that obstacle in *Lawrence*, which has allowed gays and lesbians to make remarkable strides in the political process in the decade since. *See* John Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, Washington Post, The Fix (Mar. 18, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/?wpisrc=al_comboNP_p (noting that public support for same-sex marriage has reached all-time high, reversing the percentages from a decade ago). There is no reason to remove those issues from the political process at the precise moment that the successes enabled by *Lawrence* are mounting.

E. In All Events, DOMA Satisfies Heightened Scrutiny.

Even if the Court were to add sexual orientation to the list of quasi-suspect classifications, DOMA should be upheld. As already noted, Congress responded to a unique dynamic in enacting DOMA. At the time of passage, every state retained the traditional definition, but Congress correctly perceived that things could change based on judicial decisions interpreting state constitutions. Preserving our unique system of dual sovereignty clearly constitutes an important government interest. In acting to preserve the ability of each sovereign in that system to define marriage for itself, Congress furthered that unique interest in a matter perfectly tailored to our federal system. Each state could

decide the issue, without any one state dominating the discussion through principles of full faith and credit. And the federal government preserved its ability to adopt the majority rule as its own, without simply borrowing the rule any state or state court chose to adopt. None of that reflects animus or irrationality. Instead, DOMA reflects an appropriate accommodation of a unique dynamic in our federal system.

III. This Court Should Leave The Definition Of Marriage To The Democratic Process.

This case poses basic questions regarding a foundational social institution and the rights of the American people. For many people on both sides of this debate, "these are not trivial concerns," but implicate instead "profound and deep convictions." *Lawrence*, 539 U.S. at 571. This case also presents a fundamental choice regarding whether such questions will be resolved through the democratic process—which is actively engaged on these issues—or instead through the courts. With an issue as fast-moving and divisive as same-sex marriage, the advantages of the political process are substantial. The democratic process requires opposing sides to attempt to persuade each other, to understand each other's positions, and perhaps, at least temporarily, to reach compromises that both sides can accept. A constitutional right to same-sex marriage, on the other hand, could be achieved only by marginalizing, as bigoted at worst or irrational at best, the "profound and deep convictions" of those who disagree.

It is no small matter to declare that the federal adoption of the traditional definition—the only definition our Country had ever known for over 220 years—is not just antiquated or imperfect, but wholly irrational. And declaring the firmly held views of many individuals and jurisdictions across the country (and across the world, *see* International Jurists *Amici* Br.) irrational and constitutionally verboten is likewise no small matter. Doing so based on an Equal Protection Clause that has co-existed with the traditional definition of marriage for nearly 150 years would be more difficult still.

The alternative is to allow a robust political debate in which proponents of same-sex marriage have made remarkable strides to continue. While that political debate will not result in uniform and retroactive results nationwide—at least not in the near term—that is inherent in the political process, especially in our federalist system. One state may fully recognize same-sex marriages, another may permit civil unions, and others may apply the traditional definition. The federal government, for its part, is free to adopt its own definition, but can also provide broader benefits to families (a term not defined in DOMA). If one group were permanently frozen out of this political process, through official disenfranchisement or some other obstacle, judicial intervention would be imperative. But that clearly is not the case here.

As this Court recognized in *Lawrence*, the Court's own decision in *Bowers* skewed the political process. But having removed that obstacle in *Lawrence* and returned the issues to an unskewed

political process, there is no cause to warp the robust political debate that has ensued by intervening to end it. This Court should recognize that DOMA satisfies rational basis review and allow the robust democratic debate over this issue to continue.

CONCLUSION

For the foregoing reasons, as well as those stated in the House's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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