No. _____

IN THE

Supreme Court of the United States

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,
Petitioner,

v.

THE UNITED STATES OF AMERICA
Respondent,

and

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES.
Respondent.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Does Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, which defines the term "marriage" for all purposes under federal law as "only a legal union between one man and one woman as husband and wife," deprive same-sex couples who are lawfully married under the laws of their states (such as New York) of the equal protection of the laws, as guaranteed by the Fifth Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

The petitioner is Edith Schlain Windsor, in her capacity as the executor of the estate of her late spouse, Thea Clara Spyer. Ms. Windsor was the plaintiff in the District Court and is the appellee in the Court of Appeals.

The United States of America was the defendant in the District Court and is an appellant in the Court of Appeals.

The Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") was the intervenor-defendant in the District Court and is the intervenor-appellant in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Edith ("Edie") Windsor, in her capacity as the executor of the estate of her late spouse, Thea Clara Spyer, respectfully petitions for a writ of certiorari before judgment to review a decision by the United States District Court for the Southern District of New York. The decision of the District Court is presently pending on appeal in the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the District Court for the Southern District of New York granting petitioner's motion for summary judgment and denying BLAG's motion to dismiss (Pet. App. a1-a21) is published at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the District Court was entered on June 6, 2012. Pet. App. a23-a24. Notices of appeal were filed on June 8, 2012 and June 14, 2012. Pet. App. a25-a30. The case is docketed in the Court of Appeals for the Second Circuit as Nos. 12-2335 and 12-2435. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(e).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, provides as follows:

> In determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage"

> means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Due Process Clause of the Fifth Amendment provides, in pertinent part, that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Other relevant statutory provisions are set forth in the Appendix to this petition. Pet. App., a47-a48.

STATEMENT OF THE CASE

The Defense of Marriage Act ("DOMA") provides that the words "marriage" and "spouse," when used in federal law and programs, are limited to legal unions between a man and a woman. Since its enactment in 1996, six states (New York, Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire), as well as the District of Columbia, have authorized marriages between same-sex couples.[1] Federal courts in three circuits have held

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[1] Maryland and Washington have authorized marriage for same-sex couples, but those laws have not yet gone into effect. *See* Civil Marriage Protection Act, 2012 Md. Laws Ch. 2 (H.B. 438); John Wagner, *Same-sex marriage headed to ballot in Md.*, Wash. Post, June 7, 2012, at B06; 2012 Wash. Legis. Serv. Referendum 74 (West); Laura L. Myers, *Gay marriage in Washington state blocked by proposed referendum*, Reuters (June 6, 2012), http://www.reuters.com/article/2012/06/06/us-usa-gaymarriage-washington-idUSBRE8551JE20120606.

that Section 3 of DOMA is unconstitutional under the equal protection component of the Fifth Amendment's due process clause. But they do not agree as to the rationale for the unconstitutionality of Section 3 of DOMA.

In *Massachusetts* v. *United States Department of Health & Human Services*, originally filed on July 8, 2009, and decided along with *Gill* v. *Office of Personnel Management*, the First Circuit held that DOMA was unconstitutional under a "more careful" or "rigor[ous]" form of rational basis review. 682 F.3d 1, 11 (1st Cir. 2012). On June 29, 2012, BLAG — the official legal advisory group for the House of Representatives, *see, e.g.*, Rule I.11, Rules of the House of Representatives, 103 Cong. (1993) — filed a petition for certiorari in that case. Nos. 12-13, 12-15. The Government then filed its own petition on July 3, 2012. *Id.*

In *Golinski* v. *United States Office of Personnel Management*, which began as an administrative proceeding by an employee of the federal court system in October 2008, the United States District Court for the Northern District of California held that strict scrutiny should be applied to DOMA because it discriminates on the basis of sexual orientation.[2] 824 F. Supp. 2d 968, 989-90

[2] The administrative complaint in *Golinski* was presented to Chief Judge Kozinski of the Ninth Circuit in his administrative capacity. Invoking the principle of constitutional avoidance, Chief Judge Kozinski interpreted the Federal Employee Health Benefits Act to permit the Office of Personnel Management ("OPM") to provide Golinski and her same-sex spouse the same benefits available to opposite-sex couples. *In re Golinski*, 587 F.3d 956, 958 (9th Cir. 2009). The DOJ advised OPM to deny Golinski's spouse benefits. *See* Joe Davidson, *OPM defies orders on same-sex benefits*, Wash. Post, Dec. 22, 2009, at A17.

(N.D. Cal. 2012). Under that standard, it held that DOMA was unconstitutional. *Id.* at 995. It also concluded that DOMA failed rational basis review. *Id.* at 1002. *Golinski* is currently on expedited appeal before the Ninth Circuit, Nos. 12-15409 and -0257, with oral argument scheduled to take place on September 10, 2012. On July 3, 2012, the Government filed a petition for a writ of certiorari before judgment in *Golinski*. No. 12-16.

In this case, petitioner filed suit in the United States District Court for the Southern District of New York. Applying only rational basis review, that court held that Section 3 of DOMA does not "pass constitutional muster." Pet. App. a13. Its decision is currently on expedited appeal to the Second Circuit, No. 12-2335, with oral argument currently scheduled to take place during the week of September 24, 2012.

1. The petitioner in this case is Edie Windsor, who recently celebrated her eighty-third birthday, and is the sole executor of the estate of her late spouse, Thea ("Thea") Clara Spyer. Edie and Thea first met in New York City in 1963. Despite the fact that there was virtually no foreseeable prospect for legal recognition of civil unions (not to mention marriage) between same-sex couples anywhere at the time, Edie and Thea became engaged to each other in

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When OPM did not comply with Chief Judge Kozinski's order, and after the District Court ruled it lacked jurisdiction to hear a mandamus action, Golinski filed an amended complaint, challenging the denial of benefits on both statutory and constitutional grounds. *Golinski* v. *United States Office of Personnel Management*, 824 F. Supp. 2d 968, 975 (N.D. Cal. 2012). The district court found Chief Judge Kozinski's statutory analysis "unpersuasive." *Id.* at 981 n.3. As a result, it went on to address the constitutional question that Chief Judge Kozinski had found unnecessary to address.

1967. They then spent the next forty-two years of their lives together, in both sickness and health.

In 1977, Thea was diagnosed with multiple sclerosis and she eventually became a paraplegic, confined to a wheelchair and requiring 24-hour care by Edie and a team of nurses. When Thea's doctors told them that Thea did not have much longer to live, Edie and Thea traveled to Toronto, Canada, and were legally married on May 22, 2007, a marriage that was recognized as valid under New York law.[3] Two years later, in 2009, Thea died. After Thea's

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[3] Every New York state appellate court to have considered the question has agreed that Canadian marriages between same-sex couples were valid under New York law since they were not "contrary" to the "prohibition" of either "natural law" or a New York statute. *In re Estate of Ranftle,* 81 A.D.3d 566, 566-67 (1st Dep't 2011) (recognizing 2008 Canadian marriage of a same-sex couple in connection with estate of deceased spouse); *see also Lewis* v. *New York State Dep't of Civ. Serv.*, 60 A.D.3d 216, 222-23 (3rd Dep't 2009) (upholding NYS insurance program's recognition of out-of-state marriages of same-sex couples), *aff'd on other grounds, Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009); *Martinez* v. *County of Monroe*, 50 A.D.3d 189, 193 (4th Dep't 2008) (recognizing 2004 Canadian marriage of a same-sex couple in case involving health care benefits). As the State of New York observed with respect to the validity of petitioner's 2007 Canadian marriage to Thea Spyer: "New York has long recognized as valid same-sex marriages that were solemnized under the laws of other States or nations . . . finding [such recognition] to have deep roots in New York's general principle of marriage recognition." Brief for the State of New York as Amicus Curiae in Support of the Plaintiff at 9, *Windsor* v. *United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-cv-8435).

death, Edie suffered a heart attack and was hospitalized with stress cardiomyopathy — an ailment known as "broken heart syndrome" — which caused irreversible damage to her heart.

Thea left her entire estate for the benefit of Edie, her surviving spouse. Although New York State recognized Edie and Thea's marriage, the federal government did not. Solely because of DOMA, the Government imposed more than $363,000 in federal estate tax on Thea's estate, significantly reducing Edie's inheritance and painfully reminding Edie while she was grieving the loss of her spouse that the Government considered them to be legal strangers. It is undisputed in the record that if Ms. Windsor had been married to a man, the marital exemption provided by federal law would have applied, *see* 26 U.S.C. § 2056(a), and her federal estate tax bill would have been $0.[4]

2. On November 9, 2010, petitioner filed suit in the United States District Court for the Southern District of New York seeking a declaration that Section 3 of DOMA violates the equal protection

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[4] New York State's estate tax was determined by reference to an estate's federal estate tax liability. *See* N.Y. Tax Law § 952(a). In the absence of DOMA, Thea's estate would not have been liable for any federal estate tax and thus no New York State estate tax would have been levied either. *See* N.Y. Tax Law § 961(3) (providing that a final federal determination "shall also determine the same issue for purposes of" New York State estate tax). But because of DOMA, Thea's estate was subject to a New York State estate tax of $275,528.22. Letter from N.Y. State Dep't of Taxation & Finance to Edith S. Windsor (June 2, 2010) (on file with petitioner).

guarantee secured by the Fifth Amendment to the United States Constitution and a refund of the federal estate tax levied on and paid by Thea's estate.

At the time petitioner filed suit, the Government took the position that DOMA must be defended and enforced.[5] As a result of petitioner's case and another case filed near the same time still pending in the district court, *Pedersen* v. *Office of Personnel Management*, No. 3:2010-cv-01750 (D. Conn.), the Government changed course.

On February 23, 2011, just prior to the time that a responsive pleading was due to be filed in Ms. Windsor's case, the President and the Attorney General of the United States announced that they would no longer defend DOMA in a letter from the Attorney General to the Speaker of the House. Pet. App. a35-a44.

In his letter, the Attorney General noted that prior suits challenging DOMA had arisen "in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review." Pet. App. a36. By contrast, petitioner's suit was filed in the Second Circuit, which had not then (and has not yet) resolved the level of scrutiny that applies to laws that discriminate based on sexual orientation. For that reason, the Attorney General explained, petitioner's case "requires the Department [of Justice] to take an affirmative position on the level of

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[5] Indeed, in the two other petitions for certiorari currently pending before this Court, the Government initially defended the unequal treatment of same-sex couples under DOMA.

scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue." *Id.* The Attorney General announced that the President and Attorney General had determined that heightened judicial scrutiny is the appropriate standard of review for government classifications based on sexual orientation and that, under that standard, Section 3 of DOMA is unconstitutional. Accordingly, the executive branch ceased to defend DOMA in petitioner's case. *Id.*

On April 18, 2011, in response to the Attorney General's announcement, BLAG filed a motion to intervene for the purpose of defending the constitutionality of Section 3 of DOMA. Ms. Windsor did not oppose BLAG's motion, which was subsequently granted. In light of concerns about Ms. Windsor's age and health, an expedited discovery and briefing schedule was established and cross-motions to dismiss and for summary judgment were submitted to the District Court on September 9 and September 15, 2011, respectively.

3. On June 6, 2012, the District Court denied BLAG's motion to dismiss and granted Ms. Windsor's motion for summary judgment. Pet. App. a1. It held that Section 3 of DOMA "is unconstitutional as applied" and awarded judgment to Ms. Windsor in the amount of $363,053, plus interest. Pet. App. a21.

In holding that DOMA violates the constitutional guarantee of equal protection, the court concluded that it was unnecessary to decide whether some form of heightened scrutiny should apply to classifications based on a person's sexual orientation because "DOMA's section 3 does not pass constitutional muster," even under the lowest form of rational basis review. Pet. App. a13. While

acknowledging that the United States Court of Appeals for the First Circuit in *Gill* had recently applied a "more searching form" of rational basis review, the court concluded that DOMA was unconstitutional applying "established principles" of equal protection, which it explained as follows: "[A]t a minimum, this Court must 'insist on knowing the relation between the classification adopted and the object to be attained' . . . . [and] the government's asserted interests must be legitimate." *Id.* (citing *Romer* v. *Evans*, 517 U.S. 620, 632 (1996)). The court then considered, and rejected under the rational basis standard, each of the justifications offered by BLAG as well as those by Congress when it passed DOMA in 1996.

First, the District Court rejected the assertion that DOMA advanced the interests of "caution" and "nurturing the traditional institution of marriage" because "the decision of whether same-sex couples can marry is left to the states." Pet. App. a15. As a result, "whatever the 'social consequences' of [same-sex marriage] ultimately may be, DOMA has not, and cannot, forestall them." *Id.* at a16.

Second, the District Court found it "impossible to credit [DOMA's] justification" of promoting childrearing and procreation within heterosexual marriages because "DOMA has no direct impact on heterosexual couples at all" and thus has no significant "ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married." *Id.* at a16-a17.

Third, the District Court described the claim that DOMA was necessary to ensure uniformity in the distribution of federal benefits as "misleading"

because the only uniformity that the federal government had ever previously sought was a uniform respect for state marriage laws, whatever they might say and however they might differ.[6] *Id.* at a19. In addition, the District Court noted that Congress had never attempted to impose uniformity on states in the area of domestic relations before DOMA and that to do so impinged upon "matters at the 'core' of the domestic relations law exclusively within the province of the states." *Id.* at a20.

Fourth, having concluded that there were no other legitimate governmental interests behind DOMA, the District Court rejected the argument that DOMA can be justified as a means of conserving government resources. While excluding any "arbitrarily chosen group of individuals from a government program" would have the effect of conserving the public fisc, the District Court concluded that such a congressional interest in economy, with no other rational basis to support it, does not suffice to explain the line drawn in DOMA. *Id.* at a20-a21.

Finally, the District Court also rejected BLAG's argument that this Court's prior dismissal for lack of a substantial federal question in *Baker* v. *Nelson*, 409 U.S. 810 (1972), foreclosed petitioner's claim. It observed that *Baker* presented a challenge to Minnesota's marriage law and thus did not

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[6] It is clear in the record that there are numerous differences in state marriage laws beyond the recognition *vel non* of marriages of same-sex couples. *See* Expert Affidavit of Nancy F. Cott, Ph.D. at ¶¶ 24-64, *Windsor* v. *United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-cv-8435).

"necessarily decide[ ] the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause." Pet. App. a8. Applying established law on the precedential effect of summary affirmances, the District Court therefore held that Ms. Windsor's claim was not foreclosed. *Id.*[7]

4. On June 8, 2012, BLAG filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit. The appeal was docketed on June 11, 2012, as No. 12-2335. In addition, the United States filed a notice of appeal on June 14, 2012, which was docketed on June 19, 2012, as No. 12-2435.

On June 13, 2012, Ms. Windsor filed a motion to expedite the appeal due to her age, health, and desire to see the constitutional claim of her spouse's estate resolved during her lifetime. As a result,

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[7] The District Court also rejected BLAG's argument that Ms. Windsor lacked standing to bring this lawsuit because of her Canadian marriage: "[S]ince [New York] State, through its executive agencies and appellate courts, uniformly recognized Windsor's same-sex marriage in the year that she paid the federal estate taxes, the Court finds that she has standing." Pet. App. a7. The Government agreed, stating that although New York law "restricted marriage to opposite-sex couples" in 2007, "New York has long recognized as valid same-sex marriages that were solemnized under the laws of other states or nations, such as Plaintiff Edith Windsor's Canadian marriage to Thea Spyer." Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss at 2, *Windsor* v. *United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-cv-8435) (citations omitted).

briefing in petitioner's case will be completed by September 14, 2012, with oral arguments currently scheduled for the week of September 24, 2012.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional national importance: the constitutionality of a statute, the Defense of Marriage Act ("DOMA"), that daily affects the lives of thousands of Americans. DOMA has been held unconstitutional by federal courts in three circuits. The Government has declined to defend its constitutionality, but continues to enforce the statute pending resolution by this Court. Thus, individuals like petitioner continue to suffer serious consequences from the Government's failure to recognize their lawfully solemnized marriages.

This case presents an appropriate vehicle for resolving the constitutionality of DOMA. The constitutional question was squarely presented and decided below. In light of the number of decisions and range of analysis presented in recently decided cases, the issue is ready for decision by this Court and no purpose would be served by further delay. Certiorari before judgment is therefore appropriate.

I. This Case Presents A Constitutional Question of Exceptional Importance.

All parties involved in litigating the constitutionality of DOMA agree: the question whether the Government can refuse to recognize marriages that are valid under state law is an issue of exceptional importance.

1. This Court has repeatedly held that decisions holding federal statutes unconstitutional warrant review. *See, e.g.*, *Holder* v. *Humanitarian*

Law Project, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 130 S. Ct. 1577 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Raich*, 545 U.S. 1, 9 (2005); *United States* v. *Booker*, 543 U.S. 220, 229 (2005); *United States* v. *Morrison*, 529 U.S. 598, 605 (2000). Indeed, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

2. As this case shows, state marriage laws interact with federal law in myriad ways. *See, e.g.*, *supra* note 6. DOMA marks the first time that Congress has sought to supplant state law as the source for determining the validity of a marriage. *See United States* v. *Lopez*, 514 U.S. 549, 564 (1995) (recognizing that "States historically have been sovereign" on matters of family law, including marriage). While "[l]egislative novelty is not necessarily fatal," sometimes "'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, No. 11-393 (June 28, 2012) (Roberts, C.J. at slip op. 18) (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (internal quotation marks omitted)).[8]

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[8] The federalism considerations would be different if there were a claim that a state's decision to recognize marriages of same-sex couples violated some independent constitutional norm, such as equal protection. No such claim has been made in this or any of the other DOMA cases, nor could it be.

3. It is undisputed that this case presents issues of fundamental national importance, the resolution of which will have wide-ranging effects extending far beyond the parties to this case. Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of interpreting all federal statutes and regulations. 1 U.S.C. § 7. DOMA thus "affects a thousand or more generic cross-references to marriage in myriad federal laws," most of which "operate to the disadvantage of same-sex married couples." *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012). And it has been estimated that there are well over 100,000 same-sex couples married under state law in the United States today. U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html.

Because the terms "marriage" and "spouse" are used in a large number and wide variety of federal laws, many thousands of married same-sex couples are treated differently from married heterosexual couples in a plethora of ways. For example, in addition to affecting the application of the federal estate tax to Ms. Spyer's estate, DOMA affects whether spouses can jointly file their taxes, *Gill* v. *Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 383 (D. Mass. 2010), *aff'd sub nom. Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), or bankruptcy petitions, *In re Balas*, 449 B.R. 567, 569 (Bankr. C.D. Cal. 2011). DOMA also governs whether spouses are entitled to a wide variety of benefits, including long-term care insurance benefits, *Dragovich* v. *United States Dep't of Treasury*, No. 10-01564 CW, 2012 WL 1909603, at

*1 (N.D. Cal. May 24, 2012), access to health care, *Golinski*, 824 F. Supp. 2d at 974; *Gill*, 699 F. Supp. 2d at 379-81; and social security benefits, *id.* at 382-83. This non-exhaustive list provides only a small sample of the broad array of the harmful effects of DOMA.

The impact of DOMA is felt most dramatically today in Ms. Windsor's home state of New York, which enacted civil marriage for same-sex couples on June 24, 2011. 2011 N.Y. Sess. Laws. Ch. 95. New York is by far the largest state in the nation to expressly authorize marriage for same-sex couples under state law. Between July 24, 2011 (when New York's marriage statute became effective), and June 30, 2012, at least 9,763 same-sex couples have received marriage licenses from New York State. In New York City alone, same-sex couples now represent more than nine percent of the total number of marriages performed. As a result of DOMA, however, the large number of New Yorkers already married in New York or previously married in other jurisdictions (including many thousands like Ms. Windsor) are being subjected to a form of second class citizenship where they are fully married for purposes of state, but not federal, law.

II. The Lower Federal Courts are in Significant Disarray Over the Constitutionality of DOMA.

1. While recent decisions in the federal courts have held DOMA unconstitutional, there remains "disarray" among the lower federal courts as to both the result and reasoning. This disarray warrants review. *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). The First Circuit, the Northern District of California, and the Southern District of New York have held that DOMA is unconstitutional, but three

other federal courts have upheld Section 3 under rational basis review. *See Lui* v. *Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011), ECF No. 38 (minute order upholding DOMA's constitutionality based on *Adams* v. *Howerton*, 673 F.2d 1036 (9th Cir. 1982)); *Wilson* v. *Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (upholding DOMA on rational basis review by finding it rationally related to "encouraging the raising of children in homes consisting of a married mother and father"); *In re Kandu*, 315 B.R. 123, 146-48 (Bankr. W.D. Wash. 2004) (finding DOMA constitutional under rational basis review because it plausibly advances legitimate interest in promoting child rearing by two biological parents).

2. Even courts that agree that DOMA is unconstitutional have reached that result through different legal frameworks. The First Circuit, in *Massachusetts* v. *United States Department of Health & Human Services*, concluded that the "competing formulas" of traditional rational basis analysis and heightened scrutiny were both "inadequate fully to describe governing precedent." 682 F.3d at 8. It therefore decided that "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review" was warranted. *Id.* at 11. Accordingly, the First Circuit "require[d] a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage." *Id.* at 8.

By contrast, the Northern District of California in *Golinski* v. *United States Office of Personnel Management* applied heightened scrutiny. 824 F. Supp. 2d at 989. Explaining that cases relying on the now-overturned *Bowers* v. *Hardwick*,

478 U.S. 186 (1986), were non-binding and unpersuasive, the court in *Golinski* wrote that "no federal appellate court has meaningfully examined the appropriate level of scrutiny to apply to gay men and lesbians," a question that "is still open." 824 F. Supp. 2d at 985. After examining each of the relevant factors identified by this Court, the District Court in *Golinski* held that heightened scrutiny was the appropriate standard of review for classifications based on sexual orientation. *Id.* at 985-90.

Finally, in this case, the court below applied standard rational basis review. Pet. App. a12-a13. It reached a conclusion that conflicts squarely with other courts applying rational basis review. *See Wilson*, 354 F. Supp. 2d at 1309; *In re Kandu*, 315 B.R. at 146-48.

The current situation is untenable. It simply cannot be the case that marriages of same-sex couples that are performed in or recognized by California, New York, and states within the First Circuit will be recognized by the Government and receive federal benefits, while the same federal benefits will be denied to same-sex couples married in Iowa and the District of Columbia.[9] Moreover, the fact that different federal courts are applying different standards of scrutiny to discrimination on

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[9] California has recognized the validity of the marriages of 18,000 same-sex couples performed prior to the effective date of Proposition 8, *see Strauss* v. *Horton*, 207 P.3d 48, 122 (Cal. 2009); Proposition 8 itself was held to violate the Fourteenth Amendment in *Perry* v. *Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012).

the basis of sexual orientation will have consequences in other situations well beyond DOMA.

III. This Case Presents An Excellent Vehicle For Resolving the Constitutionality of DOMA.

Given the breadth of DOMA, challenges to the constitutionality of DOMA have arisen in a variety of factual contexts, *see, e.g.*, *In re Balas*, 449 B.R. at 569 (bankruptcy); *Blesch* v. *Holder*, No. 1:12-cv-01578-CBA (E.D.N.Y. filed Apr. 2, 2012) (immigration); *Dragovich*, 2012 WL 1909603 (health benefits); *McLaughlin* v. *Panetta*, No. 1:11-cv-11905-RGS (D. Mass. filed Oct. 27, 2011) (military benefits), and procedural contexts, s*ee, e.g.*, *Golinski*, 824 F. Supp. 2d at 976 (mandamus); *Revelis* v. *Napolitano*, No. 1:11-cv-01991 (N.D. Ill. filed Mar. 23, 2011) (immigration removal case).

Ms. Windsor's case presents an excellent vehicle for resolving the constitutionality of DOMA. That issue was the sole issue before the court below and it was fully briefed and argued on summary judgment. There is no dispute as to the impact of DOMA: BLAG acknowledged that petitioner "has submitted documents that, if accurate, *establish the eligibility of Spyer's estate for the estate tax marital deduction* and that *the estate would not have been liable for federal estate tax*, if Spyer had been married to a surviving male U.S. citizen at the time of her death." *See* Pet. App. a46 (emphasis added).[10]

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[10] The "documents" to which BLAG referred consisted of the estate tax filing that Ms. Spyer's estate made to the Internal Revenue Service, which was produced to BLAG in discovery.

There are thus no procedural obstacles to resolving the question presented.

Moreover, this case presents one of the most consequential examples of how DOMA operates. Petitioner sought recoupment of a federal estate tax payment of more than $363,000. Payment of the federal estate tax by a surviving spouse is one of the most significant adverse impacts of DOMA since the amount owed, as was true in the case of Ms. Windsor, is typically quite substantial. *See* Internal Revenue Service, *Estate Tax Returns Filed in 2010, by Tax Status and Size of Gross Estate* (Oct. 3, 2011), http://www.irs.gov/pub/irs-soi/10es01fy.xls (showing that average federal estate tax paid by estates subject to federal estate tax is nearly $2 million, based on federal estate tax returns filed in 2010). Indeed, since the District Court's decision below, questions have arisen as to whether other surviving spouses in Ms. Windsor's situation should simply pay a very high, unconstitutional estate tax or file a protective claim. *See* Eva Rosenberg, *Ruling poses tax issues for same-sex couples*, Market Watch (July 10, 2012), http://articles.marketwatch.com/2012-07-10/finance/32613467_1.

Both the factual basis and procedural history of Ms. Windsor's case squarely and cleanly present the sole question at issue: is Section 3 of DOMA constitutional under the Fifth Amendment in discriminating against Ms. Windsor solely because she was married to a woman, instead of a man? Petitioner's case also illustrates the unfairness that can result from the interaction of DOMA and state law: New York's longstanding statute determined New York's state estate tax on the basis of federal treatment of an estate.

Because petitioner's case was decided on the basis of standard rationality review, this Court could affirm the decision below without reaching the question of whether a more stringent standard of review should apply when the Government discriminates on the basis of sexual orientation. While petitioner argued below in the alternative, and continues to believe that heightened scrutiny is appropriate, the decision below demonstrates convincingly that Section 3 of DOMA violates the Fifth Amendment regardless of what standard of review applies. Ms. Windsor's case is therefore an appropriate vehicle for the Court to evaluate the constitutionality of Section 3 of DOMA.

IV. Certiorari Before Judgment in the Court of Appeals Is Appropriate in This Case.

In light of the full ventilation of the legal arguments regarding the constitutionality of DOMA in the courts below and the huge impact DOMA has on the daily lives of same-sex couples who have legally married, there is no reason for this Court to delay its review.

It is well-established that petitioner, as the prevailing party at the District Court, is entitled to seek certiorari before judgment once the case is "in" the Court of Appeals. *See United States* v. *Nixon*, 418 U.S. 683, 692 (1974) (holding that the Supreme Court may grant a petition for a writ of certiorari to review any case that is "properly 'in' [a] Court of Appeals," even if a final judgment has not been entered by that court); *see also* Eugene Gressman et al., *Supreme Court Practice* 83-89 (9th ed. 2007). And as is the case here in connection with the pending petitions in *Gill* and *Golinski*, this Court has previously granted certiorari before judgment in

order to hear cases like the present one that raise issues similar or identical to issues raised in cases concurrently presented for this Court's review. *See, e.g.*, *United States* v. *Booker*, 543 U.S. 220, 229 (2005); *Gratz* v. *Bollinger*, 539 U.S. 244, 259-60 (2003); *Taylor* v. *McElroy*, 360 U.S. 709, 710 (1959); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

Ms. Windsor is 83 years old and suffers from a serious heart condition. Because the District Court's ruling is entitled to an automatic stay of enforcement, *see* 28 U.S.C. § 2414, Ms. Windsor cannot receive the benefit of its ruling in her favor as the executor of Ms. Spyer's estate pending appeal and any subsequent challenges. Ms. Windsor, not Ms. Windsor's estate, should receive the benefit to which the District Court has already ruled that she is entitled; the constitutional injury that has been inflicted on Ms. Windsor, as the executor of Ms. Spyer's estate and its sole beneficiary, should be remedied within her lifetime.[11]

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[11] As discussed above, *supra* note 4, Ms. Windsor is suffering a continuing injury due to the operation of DOMA because a New York statute prohibits a redetermination of Ms. Spyer's estate for purposes of New York estate tax liability unless and until a federal court order allowing the marital estate deduction has become final. N.Y. Tax Law § 961. Moreover, petitioner continues to suffer the dignitary harm of the Government's continuing refusal to recognize her marriage as equal to other legally valid marriages. *See, e.g.*, *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (discrimination "denigrates the dignity" of those it targets and is "practically a brand upon them, affixed by the law" (internal quotation marks omitted)); *Nguyen* v. *I.N.S.*, 533 U.S. 53, 83 (2001) (recognizing "the potential for injury . . . to personal dignity that inheres or

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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accompanies" sex-based classifications (internal quotation marks omitted)).

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July 16, 2012

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10 Civ. 8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA,
DEFENDANT

Filed: June 6, 2012

ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

This case arises from Plaintiff's constitutional challenge to section 3 of the Defense of Marriage Act ("DOMA"), the operation of which required Plaintiff to pay federal estate tax on her same-sex spouse's estate, a tax from which similarly situated heterosexual couples are exempt. Plaintiff claims that section 3 deprives her of the equal protection of the laws, as guaranteed by the Fifth Amendment to the United States Constitution. For the following reasons, Defendant-Intervenor's motion to dismiss is DENIED and Plaintiff's motion for summary judgment is GRANTED.

I. BACKGROUND

A. DOMA

DOMA was enacted and signed into law in 1996. The challenged provision, section 3, defines the terms "marriage" and "spouse" under federal law. It provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

In large part, DOMA was a reaction to the possibility that states would begin to recognize legally same-sex marriages. Specifically, Congress was spurred to action by a 1993 decision by the Hawaii Supreme Court, which suggested that same-sex couples might be entitled to marry. Baehr v. Lewin 852 P.2d 44 (Haw. 1993). The House Judiciary Committee's Report on DOMA ("House Report") discussed Baehr at length, describing it as a "legal assault . . . against traditional heterosexual marriage." H.R. Rep. No. 104-664, at 3 (1996). The Report noted that, if homosexuals were permitted to marry, "that development could have profound practical implications for federal law," including making homosexual couples "eligible for a whole range of federal rights and benefits." Id. at 10. A federal definition of marriage was seen as necessary because, the Committee reasoned, never before had the words "marriage" (which, at the time, appeared in 800 sections of federal statutes and regulations) or "spouse" (appearing more than 3,100 times) meant anything other than a union between a man and a woman—an implicit assumption upon which Congress had relied in enacting

these statutes and regulations. Id. at 10.

In addition to this notion of "mak[ing] explicit what has always been implicit," id. at 10, the House Report justified DOMA as advancing government interests in: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance;[1] and (4) preserving scarce government resources." Id. at 12.

B. The Parties

In 1963, Plaintiff in this action, Edie Windsor, met her late-spouse, Thea Spyer, in New York City. Shortly thereafter, Windsor and Spyer entered into a committed relationship and lived together in New York. In 1993, Windsor and Spyer registered as domestic partners in New York City, as soon as that option became available. In 2007, as Spyer's health began to deteriorate due to her multiple sclerosis and heart condition, Windsor and Spyer decided to get married in another jurisdiction that permitted gays and lesbians to marry. They were married in Canada that year.

Spyer died in February 2009. According to her last will and testament, Spyer's estate passed for Windsor's benefit. Because of the operation of DOMA, Windsor did not qualify for the unlimited marital deduction, 26 U.S.C. § 2056(a), and was required to pay $363,053 in federal estate tax on Spyer's estate, which Windsor paid in her capacity as executor of the estate.

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[1] This interest was not addressed to section 3, therefore the Court does not consider it. See Massachusetts v. U.S. Dep't of Health & Human Servs., et al., Nos. 10-2207 & 10-2214, slip op. at 25 (1st Cir. May 31, 2012).

On November 9, 2010, Windsor commenced this suit, seeking a refund of the federal estate tax levied on Spyer's estate and a declaration that section 3 of DOMA violates the Equal Protection Clause of the Fifth Amendment.

In February 2011, Attorney General Holder announced that the Department of Justice would no longer defend DOMA's constitutionality because the Attorney General and the President believed that a heightened standard of scrutiny should apply to classifications based on sexual orientation, and that section 3 is unconstitutional under that standard. Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep., at 5 (Feb. 23, 2011). Given the Executive Branch's decision not to enforce DOMA, the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") moved to intervene to defend the constitutionality of the statute. BLAG's motion was granted on June 2, 2011.

On June 24, 2011, Windsor moved for summary judgment, arguing that DOMA is subject to strict constitutional scrutiny because homosexuals are a suspect class. She contends that DOMA fails under that standard of constitutional review because the government cannot establish that DOMA is narrowly tailored to serve a compelling or legitimate government interest. In the alternative, she argues that DOMA has no rational basis.

On August 1, 2011, BLAG moved to dismiss Plaintiff's complaint. It argues that the weight of the precedent compels the Court to review DOMA only for a rational basis and, under that standard, there are ample reasons that justify the legislation. Because the motion to dismiss turns on the same legal question as the motion for summary judgment, the Court will address the two motions simultaneously.

II. DISCUSSION

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Bessemer Trust Co., N.A. v. Branin, 618 F.3d 76, 86 (2d Cir. 2010) (quoting Fed. R. Civ. P. 56(c)). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995).

To survive a motion to dismiss pursuant to Rule 12(b)(6), "the operative standard requires the plaintiff [to] provide the grounds upon which [her] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008) (citation and internal quotation marks omitted). That is, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

B. Windsor's Standing to Pursue this Suit

As a threshold matter, the Court addresses whether Windsor has standing to pursue this action. "[T]he irreducible constitutional minimum of standing contains three elements. 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.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations

and internal quotation marks omitted). Second, the plaintiff must present a "causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." Id. (internal quotation marks and alterations omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. at 561.

There is no question that Windsor meets the first and third requirements. BLAG seeks to undermine the second factor by arguing that Windsor has not proved that her marriage was recognized under New York law in 2009, the relevant tax year. In support of this argument, it points to a 2006 case where the New York Court of Appeals held 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).

While the Court acknowledges the Court of Appeals' decision in Hernandez, in light of subsequent state executive action and case law, the Court ultimately finds BLAG's argument unpersuasive. In 2009, all three statewide elected executive officials—the Governor, the Attorney General, and the Comptroller—had endorsed the recognition of Windsor's marriage. See Godfrey v. Spano, 13 N.Y.3d 358, 368 n.3 (N.Y. 2009) (describing 2004 informal opinion letters of the Attorney General and the State Comptroller which respectively concluded that "New York law presumptively requires that parties to such [same-sex] unions must be treated as spouses for purposes of New York law" and "[t]he Retirement System will recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, under the

principle of comity") ; Dickerson v. Thompson, 73 A.D.3d 52, 54-55 (N.Y. App. Div. 2010) (citing a 2008 directive by the Governor to recognize same-sex marriages from other jurisdictions).

In addition, every New York State appellate court to have addressed the issue in the years following Hernandez has upheld the recognition of same-sex marriages from other jurisdictions. See In re Estate of Ranftle, 917 N.Y.S.2d 195 (N.Y. App. Div. 2011) (holding that a Canadian same-sex marriage is valid in New York); Lewis v. N.Y. State Dep't of Civil Serv., 60 A.D.3d 216 (N.Y. App. Div. 2009), aff'd on other grounds sub nom. Godfrey, 13 N.Y.3d 358 (affirming the lower court's holding that New York's marriage recognition rule requires the recognition of out-of-state same-sex marriages); Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (holding that plaintiff's same-sex Canadian marriage is entitled to recognition in New York).

Finally, although the Court of Appeals has yet to readdress the question of same-sex marriage recognition directly, its 2009 opinion in Godfrey v. Spano said nothing to cast doubt on the uniform lower-court authority recognizing the validity of same-sex marriages. 13 N.Y.3d at 377.

For all of these reasons, since the State, through its executive agencies and appellate courts, uniformly recognized Windsor's same-sex marriage in the year that she paid the federal estate taxes, the Court finds that she has standing.

C. The Effect of Baker v. Nelson

The Court next considers BLAG's argument that the Supreme Court's holding in Baker v. Nelson, 409 U.S. 810 (1972), requires it to dismiss Windsor's case. There, the Supreme Court summarily affirmed a challenge to a

Minnesota state law that denied a marriage license to a same-sex couple. The plaintiffs challenged the law in state court on equal protection grounds, arguing that "the right to marry without regard to the sex of the parties is a fundamental right," and that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). The Supreme Court dismissed the challenge for "want of a substantial federal question." Baker, 409 U.S. 810. BLAG now argues that Baker is dispositive of the issue before this Court and, as binding precedent, compels the Court to find that "defining marriage as between one man and one woman comports with equal protection." (BLAG Mot. to Dismiss at 12.)

Summary judgments from the Supreme Court are binding on the lower courts only with regard to the precise legal questions and facts presented in the jurisdictional statement. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979). The case before the Court does not present the same issue as that presented in Baker. DOMA defines marriage for federal purposes, with the effect of allocating federal rights and benefits. It does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses), as did the Minnesota statute in Baker. Indeed, BLAG agrees that DOMA does not preclude or inhibit same-sex marriage and Windsor does not argue that DOMA affects the fundamental right to marry.

Accordingly, after comparing the issues in Baker and those in the instant case, the Court does not believe that Baker "necessarily decided" the question of whether DOMA violates the Fifth Amendment's Equal Protection Clause. Accord, e.g., Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 872-73 (C.D. Cal. 2005), aff'd in part, rev'd in part on other grounds, 447 F.3d 673 (2006) (declining

to find that Baker controlled in an equal protection challenge to DOMA); see also In re Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004) (same). The Court will not rest its decision on such a "slender reed" of support. Morse v. Republican Party of Va., 517 U.S. 186, 203 n.21 (1996).

Having decided that Baker does not require a decision in BLAG's favor as a matter of law, the Court turns to the parties' equal protection arguments.

D. Equal Protection

Equal protection requires the government to treat all similarly situated persons alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). It prohibits the government from drawing "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." Lehr v. Robertson, 463 U.S. 248, 265 (1983).

Of course, not all legislative classifications violate equal protection. See Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). The "promise [of] equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). With that reality in view, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, 473 U.S. at 440. That general rule, embodied in the "rational basis" test, applies in the mine-run of cases involving "commercial, tax and like regulation." Massachusetts v. U.S. Dep't of Health & Human Servs., et al., Nos. 10-2207 & 10-2214, slip op. at 13 (1st Cir. May 31, 2012).

Rational basis review is the "paradigm of judicial restraint." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993). The burden of proving a statute unconstitutional falls on the party attacking the legislation. Heller v. Doe, 509 U.S. 312, 321 (1993); Baker v. Carr, 369 U.S. 186, 266 (1962) (Stewart, J., concurring). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). Accordingly, courts must accept as constitutional those legislative classifications that bear a rational relationship to a legitimate government interest.

Courts review with greater scrutiny classifications that disadvantage a suspect class or impinge upon the exercise of a fundamental right. Plyler v. Doe, 457 U.S. 202, 216-17 (1982). Pursuant to a court's "strict scrutiny," a classification violates equal protection unless it is "precisely tailored to serve a compelling governmental interest." Id. at 217; see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Classifications that disadvantage a quasi-suspect class are also subject to a heightened standard of constitutional review. Courts review those classifications with an intermediate level of scrutiny. Under "heightened" or "intermediate scrutiny," the classification must be "substantially related to a legitimate state interest" to survive constitutional attack. Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

There are few classifications that trigger strict or heightened scrutiny. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (illegitimacy subject to intermediate scrutiny); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender subject to intermediate scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race subject to strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin subject

to strict scrutiny). "And because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." Thomasson v. Perry, 80 F.3d 915, 928 (1996) (quoting City of Cleburne, 473 U.S. at 441); see also Lyng v. Castillo, 477 U.S. 635, 638 (1986) (declining to extend strict scrutiny to "[c]lose relatives"); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (declining to extend strict scrutiny to the elderly).

Windsor now argues that DOMA should be subject to strict (or at least intermediate) scrutiny because homosexuals as a class present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class's ability to perform in or contribute to society.

In making this claim, Windsor asks the Court to distinguish the precedent in eleven Courts of Appeals that have applied the rational basis test to legislation that classifies on the basis of sexual orientation. See Massachusetts v. HHS, Nos. 10-2207 & 10-2214; Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004); Equality Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); Thomasson, 80 F.3d 915; Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodard v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984). She invites

this Court to decide, as a matter of first impression in the Second Circuit, whether homosexuals are a suspect class.

Though there is no case law in the Second Circuit binding the Court to the rational basis standard in this context, the Court is not without guidance on the matter. For one, as the Supreme Court has observed, "courts have been very reluctant, as they should be in our federal system," to create new suspect classes. City of Cleburne, 473 U.S. at 442. Moreover, the Supreme Court "conspicuously" has not designated homosexuals as a suspect class, even though it has had the opportunity to do so. See Massachusetts v. HHS, Nos. 10-2207 & 10-2214, slip op. at 15 (noting that "[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in Romer"). Against this backdrop, this district court is not inclined to do so now. In any event, because the Court believes that the constitutional question presented here may be disposed of under a rational basis review, it need not decide today whether homosexuals are a suspect class.

The Court will, however, elaborate on an aspect of the equal protection case law that it believes affects the nature of the rational basis analysis required here. The Supreme Court's equal protection decisions have increasingly distinguished between "[l]aws such as economic or tax legislation that are scrutinized under rational basis review[, which] normally pass constitutional muster," and "law[s that] exhibit[] . . . a desire to harm a politically unpopular group," which receive "a more searching form of rational basis review . . . under the Equal Protection Clause . . . ." Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring); see Romer, 517 U.S. 620; City of Cleburne, 473 U.S. 432; U.S. Dep't of Agric. v.

Moreno, 413 U.S. 528 (1973). It is difficult to ignore this pattern, which suggests that the rational basis analysis can vary by context.

At least one Court of Appeals has considered this pattern as well. As the First Circuit explains, "Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications." See Massachusetts v. HHS, Nos. 10-2207 & 10-2214, slip op. at 15. And, "in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity." Id.

Regardless whether a more "searching" form of rational basis scrutiny is required where a classification burdens homosexuals as a class and the states' prerogatives are concerned, at a minimum, this Court must "insist on knowing the relation between the classification adopted and the object to be attained." Romer, 517 U.S. at 632. "The search for the link between classification and objective gives substance to the [equal protection analysis]." Id. Additionally, as has always been required under the rational basis test, irrespective of the context, the Court must consider whether the government's asserted interests are legitimate. Pursuant to these established principles, and mindful of the Supreme Court's jurisprudential cues, the Court finds that DOMA's section 3 does not pass constitutional muster.[2]

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[2] Any additional discussion of heightened or intermediate scrutiny would be "wholly superfluous to the decision" and contrary to settled principles of constitutional avoidance. City of Cleburne, 473 U.S. at 456 (Marshall, J., concurring in part, dissenting in part);

E. Congress's Justifications

Contemporaneous with its enactment, Congress justified DOMA as: defending and nurturing the traditional institution of marriage; promoting heterosexuality; encouraging responsible procreation and childrearing; preserving scarce government resources; and defending traditional notions of morality. In its motion to dismiss and memorandum in opposition to summary judgment, BLAG advances some, but not all of these interests as rational bases for DOMA. It additionally asserts that Congress passed DOMA in the interests of caution, maintaining consistency in citizens' eligibility for federal benefits, promoting a social understanding that marriage is related to childrearing, and providing children with two parents of the opposite sex. The Court considers all of these interests to determine whether Windsor has "negative[d] every conceivable basis which might support [the statute]." Heller, 509 U.S. at 320-21 (citation and internal quotation marks omitted).

1. Caution and The Traditional Institution of Marriage

BLAG submits that "caution" was a rational basis for DOMA insofar as Congress wanted time to consider whether it should embrace (some of) the states' "novel redefinition" of marriage. As BLAG describes it, caution justified DOMA because altering the social concept of marriage would undermine Congress's goal of nurturing

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Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); see also Miss. Univ. for Women, 458 U.S. at 724 n.9 (declining to address strict scrutiny when heightened scrutiny was sufficient to invalidate the challenged action); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 618 (1985) (declining to reach heightened scrutiny in reviewing classifications that failed the rational basis test).

the foundational institution of marriage. (BLAG Mot. to Dismiss at 29-31.) By that account, Congress's putative interest in "caution" seems, in substance, no different than an interest in nurturing the traditional institution of marriage. See H.R. Rep. No. 104-664, at 12. The Court therefore considers both of these interests together.

With respect to traditional marriage, BLAG argues that Congress believed DOMA would promote it by "maintain[ing] the definition of marriage that was universally accepted in American law." (BLAG Mot. to Dismiss at 28). That interest may be legitimate.[3] However, it is unclear how DOMA advances it.

DOMA does not affect the state laws that govern marriage. (BLAG Mot. to Dismiss at 20 (noting that DOMA does not "directly and substantially interfere with the ability of same-sex couples to marry").) Precisely because the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, "preserve" the institution of marriage as one

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[3] While tradition as an end in itself may not be a legitimate state interest in this case, see Heller, 509 U.S. at 326 (noting that the "[a]ncient lineage" of a tradition does not necessarily make its preservation a legitimate government goal), the Court acknowledges that an interest in maintaining the traditional institution of marriage, when coupled with other legitimate interests, could be a sound reason for a legislative classification, see Lawrence, 539 U.S. at 585 (O'Connor, J., concurring) (stating that "preserving the traditional institution of marriage" would be a legitimate state interest in an equal protection analysis). To the extent Congress had an interest in defending traditional notions of morality in furtherance of an interest in traditional marriage, H.R. Rep. No. 104-664, at 16, the Court agrees that "[p]reserving th[e] institution [of traditional marriage] is not the same as mere moral disapproval of an excluded group, and that is singularly so in this case given the range of bipartisan support for [DOMA]." Massachusetts v. HHS, Nos. 10-2207 & 10-2214, slip op. at 29, 30 (citation and internal quotation marks omitted).

between a man and a woman. The statute creates a federal definition of marriage. But that definition does not give content to the fundamental right to marry—and it is the substance of that right, not its facial definition, that actually shapes the institution of marriage. Cf. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (noting that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law, [which] is especially true where a statute deals with a familial relationship [because] there is no federal law of domestic relations").

To the extent Congress had any other independent interest in approaching same-sex marriage with caution, for much the same reason, DOMA does not further it. A number of states now permit same-sex marriages. DOMA did not compel those states to "wait[] for evidence spanning a longer term before engaging in . . . a major redefinition of a foundational social institution." (BLAG Mot. to Dismiss at 29.) Thus, whatever the "social consequences" of this legal development ultimately may be, DOMA has not, and cannot, forestall them.[4]

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[4] Congress also expressed "a corresponding interest in promoting heterosexuality" as "closely related to the interest in protecting traditional marriage." H.R. Rep. No. 104-664, at 15 n.53. BLAG does not contend that this is a rational basis for DOMA's classification; nonetheless, the Court briefly considers it, as a "conceivable" basis that "might" support it. Heller, 509 U.S. at 320.

A permissible classification must at least "find some footing in the realities of the subject addressed by the legislation." Id. at 321. Here, such footing is lacking. DOMA affects only those individuals who are already married. The Court finds it implausible that section 3 does anything to persuade those married persons (who are homosexuals) to abandon their current marriages in favor of

2. Childrearing and Procreation

Promoting the ideal family structure for raising children is another reason Congress might have enacted DOMA. Again, the Court does not disagree that promoting family values and responsible parenting are legitimate governmental goals. The Court cannot, however, discern a logical relationship between DOMA and those goals.

BLAG argues that Congress enacted DOMA to avoid a social perception that marriage is not linked to childrearing. In furtherance of that interest, it argues, Congress might have passed DOMA to deter heterosexual couples from having children out of wedlock, or to incentivize couples who are pregnant to get married. (BLAG Mot. to Dismiss at 36.) BLAG also claims that Congress had an interest in promoting the optimal social (family) structure for raising children—that is, households with one mother and one father. (BLAG Mot. to Dismiss at 38.) These concerns appear related to Congress's contemporaneously stated interest in "responsible procreation." H.R. Rep. No. 104-664, at 12-13.

These are interests in the choices that heterosexual couples make: whether to get married, and whether and when to have children. Yet DOMA has no direct impact on heterosexual couples at all; therefore, its ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married, is remote, at best. It does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people

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heterosexual relationships. Thus, the stated goal of promoting heterosexuality is so attenuated from DOMA's classification that it "render[s] the distinction arbitrary or irrational." City of Cleburne, 473 U.S. at 446.

(opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation. See In re Levenson, 587 F.3d 925, 934 (9th Cir. 2009).

Conceivably, Congress could have been interested more generally in maintaining the societal perception that a primary purpose of marriage is procreation. However, even formulated as such, the Court cannot see a link between DOMA and childrearing. DOMA does not determine who may adopt and raise children. Nor could it, as these matters of family structure and relations "belong[] to the laws of the States and not to the laws of the United States." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004).

At most, then, DOMA has an indirect effect on popular perceptions of what a family "is" and should be, and no effect at all on the types of family structures in which children in this country are raised. And so, although this Court must "accept a legislature's generalizations even when there is an imperfect fit between means and ends," Heller, 509 U.S. at 320, here, Congress's goal is "so far removed" from the classification, it is impossible to credit its justification. Romer, 517 U.S. at 635; see Lewis v. Thompson, 252 F.3d 567, 584 n.27 (2d Cir. 2001) (noting that the justification for the law cannot rely on factual assumptions that are beyond the "limits of 'rational speculation'" (quoting Heller, 509 U.S. at 320)).

3. Consistency and Uniformity of Federal Benefits

Additionally, BLAG explains that Congress was motivated to define marriage at the federal level to ensure that federal benefits are distributed consistently. In other words, Congress might have enacted DOMA to avoid a scenario in which "people in different States . . . have different eligibility to receive Federal benefits," depending

on the state's marriage laws. (BLAG Mot. to Dismiss at 34 (quoting 142 Cong. Rec. S10121 (daily ed. Sept. 10, 1996) (statement of Sen. Ashcroft)).)

Here, the Court does discern a link between the means and the end. It is problematic, though, that the means used in this instance intrude upon the states' business of regulating domestic relations. That incursion skirts important principles of federalism and therefore cannot be legitimate, in this Court's view.

In the first instance, it bears mention that this notion of "consistency," as BLAG presents it, is misleading. Historically the states—not the federal government—have defined "marriage." Cf. United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (noting that the states have enjoyed the latitude to "experiment[] and exercis[e] their own judgment in an area to which [they] lay claim by right of history and expertise"). For that reason, before DOMA, any uniformity at the federal level with respect to citizens' eligibility for marital benefits was merely a byproduct of the states' shared definition of marriage. The federal government neither sponsored nor promoted that uniformity. See In re Levenson, 587 F.3d at 933 (noting that the relevant status quo prior to DOMA was the federal government's recognition of any marriage declared valid according to state law); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 393 (D. Mass. 2010) (same).

Yet even if Congress had developed a newfound interest in promoting or maintaining consistency in the marital benefits that the federal government provides, DOMA is not a legitimate method for doing so. To accomplish that consistency, DOMA operates to reexamine the states' decisions concerning same-sex marriage. It sanctions some of those decisions and rejects others. But such a sweeping federal review in

this arena does not square with our federalist system of government, which places matters at the "core" of the domestic relations law exclusively within the province of the states. See Ankenbrandt v. Richards, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring); Sosna v. Iowa, 419 U.S. 393, 404 (1975) ; see also Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 249-50 (D. Mass. 2010) (discussing the history of marital status determinations as an attribute of state sovereignty).

The states may choose, through their legislative or constitutional processes, to preserve traditional marriage or to redefine it. See Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (noting that thirty states have passed constitutional amendments banning same-sex marriage). But generally speaking, barring a state's inability to assume its role in regulating domestic relations, the federal government has not attempted to manage those processes and affairs. See id. at 1000 n.l0 (observing that, historically, the federal government has only legislated in this area where there has been a failure or absence of state government). BLAG has conceded this historical fact. See Transcript of Oral Argument at 10:15-20, 18:2-5, Golinski, 824 F. Supp. 2d 968 (No.10-257) (conceding that BLAG's "research hasn't shown that there are historical examples which [sic] Congress has legislated on behalf of the federal government in the area of domestic relations"). This is the "virtue of federalism." Massachusetts v. HHS, Nos. 10-2207 & 10-2214, slip op. at 30.

4. Conserving the Public Fisc

Lastly, Congress also justified DOMA as a means of conserving government resources. (BLAG Mot. to Dismiss at 32.) An interest in conserving the public fisc alone, however, "can hardly justify the classification used in allocating those resources." Plyler, 457 U.S. at

227. After all, excluding any "arbitrarily chosen group of individuals from a government program" conserves government resources. Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011). With no other rational basis to support it, Congress's interest in economy does not suffice. Accord, e.g., Dragovich v. U.S. Dep't of the Treasury, No. C 10-01564, slip op. at 26 (N.D. Cal. May 24, 2012); Golinski, 824 F. Supp. 2d at 994-95.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED and Defendant-Intervenor's motion to dismiss is DENIED. The Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff. Plaintiff is awarded judgment in the amount of $353,053.00, plus interest and costs allowed by law. Each party shall bear their own costs and fees.

This case is CLOSED. The clerk of the court is directed to terminate the motions at docket numbers 28, 49, and 52.

SO ORDERED:

/s/ Barbara S. Jones

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 6, 2012

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10 CIVIL 8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA,
DEFENDANT

Filed: June 6, 2012

JUDGMENT

Plaintiff having moved for summary judgment; Defendant-Intervenor having moved to dismiss, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court, on June 6, 2012, having rendered its Order granting Plaintiff's motion for summary judgment, denying Defendant-Intervenor's motion to dismiss, declaring that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff, awarding Plaintiff judgment in the amount of $363,053.00, plus interest and costs allowed by law with each party to bear their own costs and fees, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated June 6, 2012, Plaintiff's motion for summary judgment is granted and Defendant-Intervenor's motion to dismiss is

denied; the Court declares that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, is unconstitutional as applied to Plaintiff; Plaintiff is awarded judgment in the amount of $363,053.00, plus interest and costs allowed by law; each party shall bear their own costs and fees; accordingly, the case is closed.

Dated: New York, New York
June 7, 2012

/s/ **RUBY J. KRAJICK**
Clerk of Court

BY: **[UNINTELLIGIBLE]**
Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 10-CV-8435 (BSJ)(JCF)

EDITH SCHLAIN WINDSOR, in her capacity as executor of the estate of THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: June 8, 2012

NOTICE OF APPEAL OF INTERVENOR-DEFENDANT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

Intervenor-Defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") hereby appeals to the U.S. Court of Appeals for the Second Circuit the District Court's Order (June 6, 2012) (ECF No. 93), and Judgment (June 7, 2012) (ECF No. 94), both insofar as they grant plaintiff's [. . .] Motion for Summary Judgment (June 24, 2011) (ECF No. 28) and deny the [House]'s Motion to Dismiss (Aug. 1, 2011) (ECF No. 52). Copies of the Order and Judgment are attached as Exhibits A and B, respectively.

The statutory basis for this appeal is 28 U.S.C. § 1291. The House is exempt from the filing fee requirement for this appeal. See 28 U.S.C. § 1913; Judicial Conference of

the United States, Court of Appeals Miscellaneous Fee Schedule, *available at*

http://www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx.

Respectfully submitted,

/s/ Paul D. Clement

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Counsel for Intervenor-Defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives[2]

[1] Kerry W. Kircher, as the ECF filer of this document, attests that concurrence in the filing of the document has been obtained from signatory Paul D. Clement.

[2] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, is currently 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 Democratic Whip decline to support the filing of this Notice of Appeal.

OF COUNSEL:

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June 8, 2012

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10-CV-8435 (BSJ)(JCF) ECF CASE

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA,
DEFENDANT

Filed: June 14, 2012

NOTICE OF APPEAL

TO THE CLERK OF THIS COURT AND ALL PARTIES OF RECORD:

NOTICE IS HEREBY GIVEN that Defendant the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment dated June 7, 2012 [ECF No. 94] and the underlying Order dated June 6, 2012 [ECF No. 93].

Dated this 14th day of June, 2012.

Dated: June 14, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ *Jean Lin*

JEAN LIN (NY Bar No. 4074530)
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Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 10-CV-8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, in her capacity as executor of the estate of THEA CLARA SPYER, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: February 25, 2011

NOTICE TO THE COURT BY DEFENDANT UNITED STATES OF AMERICA

Defendant United States of America, by its undersigned counsel, hereby notifies the Court and the parties that the Department of Justice will cease defending the constitutionality of Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, for the reasons explained in the attached letter to the Court from Tony West, Assistant Attorney General for the Civil Division, dated February 24, 2011. The reasons cited in Assistant Attorney General West's letter are further explained in the letter from the Attorney General to The Honorable John A. Boehner, Speaker of the House, dated February 23, 2011, which is attached thereto. The Attorney General has informed Members of Congress of this decision pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii), so that Members who wish to defend Section 3 may pursue that option.

Dated: February 25, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/ *Jean Lin*

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[Filed Feb. 24, 2011, S.D.N.Y. No. 10-8435(BSJ)(JCF)]

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

February 24, 2011

VIA ECF

Honorable Barbara S. Jones
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *Windsor v. United States*, Civil Action No. 10-843 5 (BSJ)(JCF)

Dear Judge Jones:

The above-referenced action involves the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. The President and Attorney General have recently made a determination regarding the constitutionality of Section 3. Pursuant to the attached letter, the Attorney General and President have concluded: that heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation; that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department will cease its defense of Section 3 in such cases.

Further, as the Attorney General explained in the attached letter, we hereby "notify the courts of our

interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." In addition, we "will remain parties to the case and continue to represent the interests of the United States throughout the litigation."

Respectfully submitted,

Tony West

Assistant Attorney General

[Filed Feb. 24, 2011, S.D.N.Y. No. 10-8435(BSJ)(JCF)]

Office of the Attorney General

Washington, D.C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the

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[1] DOMA Section 3 states; "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No.1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual

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[2] *See, e.g.*, *Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123,145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L, No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

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the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See*, *e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more

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[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

recent social science understandings,[5] And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an

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[5] *See, e.g.*, *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v, Virginia*, 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear" are not permissible

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[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people… feel ought to be illegitimate" and "put[s] a stamp of approval… on a union that many people… think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at

bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be

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31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief… that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business… pronouncing that 'animosity' toward homosexuality is evil").

faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized

under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.

Attorney General

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10 Civ. 8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA,
DEFENDANT

Filed: August 1, 2011

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES' AMENDED RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to the Court's order of July 28, 2011, in this case, and to Rules 26 and 36 of the Federal Rules of Civil Procedure, Interventor-Defendant The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("Defendant") makes the following supplemental response to Plaintiff's First Requests for Admission.

Request for Admission 1. Admit that if, at the time of her, death, Thea Spyer had been married to a man instead of a woman, who was a U.S. citizen and who survived Thea Spyer's death, her estate would have qualified for the estate tax marital deduction, 26 U.S.C. § 2056(a), and would not have been liable for any federal estate tax.

Response: Defendant admits that Plaintiff has submitted documents that, if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death.

/s/ H. Christopher Bartolomucci
Paul D. Clement

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The Bipartisan Legal Advisory
Group of the U.S. House of
Representative

Dated: August 1, 2011

Appendix G

1. U.S. Const., Amend. V provides, in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 1 U.S.C. 7 provides:

Definition of "marriage" and " spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

3. 28 U.S.C. 2056(a) provides:

Allowance of marital deduction – For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

4. N.Y. Tax Law § 952 (a) provides:

A tax is hereby imposed on the transfer of the New York estate by every deceased individual who at his or her death was a resident of New York state. The tax imposed by this subsection shall be an amount equal to the maximum amount allowable against the federal estate Tax as a credit for state death taxes under section two thousand eleven of the internal revenue code.

5. N.Y. Tax Law § 961 (a) provides:

(a) General.–A final federal determination as to

(1) the inclusion in the federal gross estate of any item of property or interest in property,

(2) the allowance of any item claimed as a deduction from the federal gross estate, or

(3) the value or amount of any such item, shall also determine the same issue for purposes of the tax under this article unless such final federal determination is shown by a preponderance of the evidence to be erroneous.