No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EDITH SCHLAIN WINDSOR

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Section 3 of the Defense of Marriage Act (DOMA) defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. 7. It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." *Ibid.* The question presented is:

Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

PARTIES TO THE PROCEEDING

Petitioner, who was a defendant in the district court and is an appellant in the court of appeals, is the United States of America.

Respondent, who was plaintiff in the district court and is an appellee in the court of appeals, is Edith Schlain Windsor.

The Bipartisan Legal Advisory Group of the United States House of Representatives intervened to present arguments in defense of the constitutionality of Section 3 of DOMA.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-22a) is reported at 833 F. Supp. 2d 394.

JURISDICTION

The judgment of the district court was entered on June 6, 2012. Notices of appeal were filed on June 8, 2012, and June 14, 2012 (App., *infra*, 25a-26a, 27a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App., *infra*, 30a.

STATEMENT

1. a. Congress enacted the Defense of Marriage Act (DOMA or Act) in 1996. Pub. L. No. 104-199, 110 Stat. 2419. DOMA contains two principal provisions. The first, Section 2 of the Act, provides that no State is required to give effect to any public act, record, or judicial proceeding of another State that treats a relationship between two persons of the same sex as a marriage under its laws. DOMA § 2, 110 Stat. 2419 (28 U.S.C. 1738C).

The second provision, Section 3, which is at issue in this case, defines "marriage" and "spouse" for all purposes under federal law to exclude marriages between persons of the same sex, including marriages recognized under state law. Section 3 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, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3, 110 Stat. 2419 (1 U.S.C. 7).

b. Congress enacted DOMA in response to the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (1993), which held that the denial of marriage

licenses to same-sex couples was presumptively invalid under the Hawaii Constitution. H.R. Rep. No. 664, 104th Cong., 2d Sess. 2 (1996) (*1996 House Report*). Although Hawaii ultimately did not permit same-sex marriage, other States later recognized such marriages under their respective laws. See *Massachusetts* v. *United States Dep't of Health & Human Servs.*, 682 F.3d 1, 6 nn.1 & 2 (1st Cir. 2012), petitions for cert. pending, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012).

Although Section 3 of DOMA does not purport to invalidate same-sex marriages in those States that permit them, it excludes such marriages from recognition for purposes of more than 1000 federal statutes and programs whose administration turns in part on individuals' marital status. See U.S. Gen. Accounting Office, Report No. GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004), http://www.gao.gov/assets/100/92441.pdf (GAO Report) (identifying 1138 federal laws that are contingent on marital status or in which marital status is a factor). Section 3 of DOMA thus denies to legally married same-sex couples many substantial benefits otherwise available to legally married opposite-sex couples under federal employment, immigration, public health and welfare, tax, and other laws. See *id.* at 16-18.

2. In 2007, plaintiff married Thea Spyer, her same-sex partner of more than 40 years, in Canada. The couple resided in New York. When Spyer died in 2009, she left her estate for plaintiff's benefit. App., *infra*, 3a; Am. Compl. ¶¶ 10, 11.

In her capacity as executor of Spyer's estate, plaintiff paid approximately $363,000 in federal estate taxes. She thereafter filed a refund claim under 26 U.S.C. 2056(a), which provides that property that passes from

a decedent to a surviving spouse may generally pass free of federal estate taxes. The Internal Revenue Service (IRS) denied the refund claim on the ground that plaintiff is not a "spouse" within the meaning of DOMA Section 3 and thus not a "surviving spouse" within the meaning of Section 2056(a). App., *infra*, 3a-4a; Am. Compl. ¶¶ 72-78.

Plaintiff filed this suit challenging the constitutionality of DOMA Section 3 in the United States District Court for the Southern District of New York. She contended that, by treating married same-sex couples in New York differently from opposite-sex couples, Section 3, as applied by the IRS, violates the equal protection component of the Fifth Amendment. She sought declaratory and injunctive relief, as well as recovery of the $363,053 in federal estate taxes paid by Spyer's estate. App., *infra*, 4a; Am. Compl. ¶¶ 82-85.

3. After plaintiff filed her complaint, the Attorney General sent a notification to Congress under 28 U.S.C. 530D that he and the President had determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under state law. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, House of Representatives (Feb. 23, 2011) (Attorney General Letter).[1] The letter explained that, while the Department of Justice had previously defended Section 3 if binding precedent in the circuit required application of rational basis review to classifications based on sexual orientation, the President and the Department of Justice had conducted a new examination of the issue after two lawsuits (this one and

[1] 1:10-cv-08435 Docket entry No. 10 (S.D.N.Y. Feb. 25, 2011). Text also available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

Pedersen v. *Office of Personnel Management*, petition for cert. before judgment pending, No. 12-231 (filed Aug. 21, 2012)) had been filed in a circuit that had yet to address the appropriate standard of review. Attorney General Letter 1-2. The Attorney General explained that, after examining factors this Court has identified as relevant to the applicable level of scrutiny, including the history of discrimination against gay and lesbian individuals and the relevance of sexual orientation to legitimate policy objectives, he and the President had concluded that Section 3 warrants application of heightened scrutiny rather than rational basis review. *Id.* at 2-4. The Attorney General further explained that both he and the President had concluded that Section 3 fails that standard of review and is therefore unconstitutional. *Id.* at 4-5.

The Attorney General's letter reported that, notwithstanding this determination, the President had "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 faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Attorney General Letter 5. The Attorney General explained that "[t]his 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." *Ibid.* In the interim, the Attorney General instructed the Department's lawyers to cease defense of Section 3. *Id.* at 5-6. Finally, the Attorney General noted that the Department's lawyers would take appropriate steps to "provid[e] Congress a full and fair opportunity to partici-

pate" in litigation concerning the constitutionality of Section 3. *Id.* at 6.

Following the Attorney General's announcement, respondent Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG), a five-member bipartisan leadership group, moved to intervene to present arguments in defense of the constitutionality of Section 3.[2] The district court granted the motion. 6/2/11 Mem. & Order 1; see App., *infra*, 4a.

Both BLAG and the government moved to dismiss plaintiff's challenge to the constitutionality of Section 3. While BLAG presented arguments in support of Section 3's constitutionality, the government explained that it was filing a motion to dismiss plaintiff's constitutional claim solely for purposes of ensuring that the court had Article III jurisdiction to enter judgment for or against the federal officials tasked with enforcing Section 3. The government's brief on the merits set forth its view that heightened scrutiny applies to Section 3 of DOMA and that, under that standard of review, Section 3 violates the equal protection guarantee of the Fifth Amendment. Gov't Resp. to Pl. Mot. for Summ. J. and Intervenor's Mot. to Dismiss 4-27 (Aug. 19, 2011).

4. The district court denied the motions to dismiss and granted summary judgment in favor of plaintiff, concluding that Section 3 of DOMA violates the equal protection guarantee of the Fifth Amendment. App., *infra*, 1a-22a.

As a preliminary matter, the district court rejected BLAG's argument that plaintiff lacks Article III standing because she had failed to prove that New York rec-

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[2] Two of the group's five members declined to support intervention. BLAG Mot. to Intervene 1 n.1 (Apr. 18, 2011).

ognized her marriage in 2009, the relevant tax year, and thus had failed to establish that her injuries were traceable to Section 3 of DOMA. App., *infra*, 6a-8a. The court acknowledged the New York Court of Appeals' decision in *Hernandez* v. *Robles*, 855 N.E.2d 1, 6 (2006), which held that New York statutory law "clearly limit-[ing] marriage to opposite-sex couples" was not invalid under the New York Constitution. See App., *infra*, 6a.[3] The district court noted, however, that all three statewide elected officials and every state court to address the issue had concluded that principles of comity require recognition of same-sex marriages performed in other jurisdictions. *Id.* at 6a-7a.

The district court also rejected BLAG's threshold argument that plaintiff's equal protection challenge is foreclosed by this Court's summary dismissal of the appeal in *Baker* v. *Nelson*, 409 U.S. 810 (1972), which sought review of the Minnesota Supreme Court's decision upholding the constitutionality of a state statute interpreted to limit marriage to persons of the opposite sex, see *Baker* v. *Nelson*, 191 N.W.2d 185, 185-187 (1971). The district court explained that Section 3, unlike the statute at issue in *Baker*, "does not preclude or otherwise inhibit a state from authorizing same-sex marriage (or issuing marriage licenses)," but instead "defines marriage for federal purposes, with the effect of allocating federal rights and benefits." App., *infra*, 9a. The court concluded that *Baker* therefore did not "'necessarily decide[]' the question of whether DOMA vio-

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[3] In 2011, New York passed legislation permitting individuals of the same sex to marry in the State. Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (A.8354) (McKinney) (N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2012)).

lates the Fifth Amendment's Equal Protection Clause." *Ibid.*

The district court assumed without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review. App., *infra*, 13a. The court also expressed the view that the nature of such review "can vary by context": while "[l]aws such as economic or tax legislation that are scrutinized under rational basis review" will "normally pass constitutional muster," laws that "exhibit[] . . . a desire to harm a politically unpopular group" receive "a more searching form of rational basis review." *Ibid.* (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 579-580 (2003) (O'Connor, J., concurring)).

Without deciding whether "a more 'searching' form of rational basis scrutiny is required," the district court held that Section 3 is invalid under rational basis review. App., *infra*, 14a.[4] The court concluded that neither the legislative purposes articulated in support of Section 3 at the time of its enactment (see *1996 House Report* 12) nor additional interests offered by BLAG bear a rational relationship to a legitimate governmental objective. App., *infra,* 15a-22a.

The district court first determined that Section 3 does not advance a federal governmental interest in "maintain[ing] the definition of marriage that was uni-

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[4] In its response to plaintiff's certiorari petition in this case, BLAG contends that "the district court adopted a novel standard of constitutional review involving 'intensified scrutiny,' a level of scrutiny between ordinary rational-basis and intermediate scrutiny." BLAG No. 12-63 Br. in Opp. 8-9. That is incorrect. As noted above, the district court held Section 3 invalid under rational-basis review "*[r]egardless* whether a more 'searching' form of rational basis scrutiny is required." App., *infra*, 14a (emphasis added).

versally accepted in American law," App., *infra*, 16a (brackets in original; citation omitted), whether provisionally or otherwise, because it "does not affect the state laws that govern marriage," *ibid.* Nor could the court "discern a logical relationship" between Section 3 and a governmental interest in "[p]romoting the ideal family structure for raising children," *id.* at 18a, since Section 3 has "no effect at all on the types of family structures in which children in this country are raised," *id.* at 19a.

The district court also rejected BLAG's argument that Congress might have enacted Section 3 "to ensure that federal benefits are distributed consistently," without regard to differences between state marriage laws. App., *infra*, 19a-20a. The court reasoned that, although Section 3 is "link[ed]" to that goal, "the means used in this instance intrude upon the states' business of regulating domestic relations" and "therefore cannot be legitimate." *Id.* at 20a.

Finally, the district court concluded that the government's interest in "conserving government resources" alone is insufficient to "'justify the classification used in allocating those resources.'" App., *infra*, 21a-22a (quoting *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982)).

5. Both BLAG and the government filed timely notices of appeal to the United States Court of Appeals for the Second Circuit. App., *infra*, 25a-26a (government notice of appeal); *id.* at 27a-29a (BLAG notice of appeal). The court of appeals has jurisdiction pursuant to 28 U.S.C. 1291. The appeals were docketed as Nos. 12-2335 and 12-2435 and remain pending before that court. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Eugene Gressman et al., *Supreme Court Practice* § 2.4, at 83-84 (9th ed. 2007).

6. Plaintiff filed a petition for a writ of certiorari before judgment in this case on July 16, 2012 (No. 12-63), and the government and BLAG filed responses to that petition on August 31, 2012.

REASONS FOR GRANTING THE PETITION

The question of whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection as applied to same-sex couples legally married under state law is presented in the government's petition for a writ of certiorari in *United States Department of Health & Human Services* v. *Massachusetts*, No. 12-15 (filed July 3, 2012),[5] and in the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). For the reasons explained in those pending petitions, that question warrants this Court's review now.

The Court should hold this petition pending its consideration and disposition of the petitions in *Massachusetts* and *Golinski*. Should the Court grant review in either of those cases, it need not grant review in this case. If the Court concludes that neither *Massachusetts* nor *Golinski* provides an appropriate vehicle for resolving the question presented, it should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court also concludes that *Pedersen* is not an appropriate vehicle, it should grant this petition to ensure a timely and definitive ruling on Section 3's constitutionality.

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[5] Two other petitions for a writ of certiorari have been filed in the *Massachusetts* case, one by BLAG (No. 12-13) and a conditional cross-petition by the Commonwealth of Massachusetts (No. 12-97).

As noted above, the plaintiff in this case has also filed a petition for a writ of certiorari before judgment on Section 3's constitutionality (No. 12-63, filed July 16, 2012), and the plaintiffs in *Pedersen* v. *Office of Personnel Management*, No. 12-231 (filed Aug. 21, 2012), have done so as well. As explained in the government's response to plaintiff's petition in this case (at 15-19), however, her petition raises two threshold questions potentially posing obstacles to this Court's review: (1) whether plaintiff, who obtained a district court judgment and decision entirely in her favor, has appellate standing to seek certiorari before judgment, and (2) whether New York law recognized her Canadian marriage at the time of Thea Spyer's death. As further explained in that response (at 19-20), the government, which plainly is a proper party to invoke this Court's jurisdiction to review the district court's judgment in this case, has filed this petition (as well as one in *Pedersen*) to obviate the Court's need to resolve the first issue if it is inclined to grant review in this case or in *Pedersen*.[6]

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[6] BLAG contends that plaintiff in this case potentially lacks appellate standing by referring to its argument that the government lacks standing to seek this Court's review of the First Circuit's judgment in *Massachusetts*. See BLAG No. 12-63 Br. in Opp. 12 ("What is more, as explained more fully in the House's opposition in No. 12-15, it is not clear that [plaintiff Windsor], who prevailed in the district court, even has appellate standing to petition."). But one critical fact materially distinguishes the government from plaintiff in this case (and from the plaintiffs in the other DOMA cases): the district court's judgment was entered *against* the government, such that the government is *not* a "prevailing party" in the relevant sense. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028-2029 (2011). As the Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), makes clear, "[w]hen an agency of the United States is a party to a case in which the Act of Congress it administers

The second potential obstacle in this case is not present in *Massachusetts*, *Golinski*, or *Pedersen*. As the government noted in its response to plaintiff's petition (at 16), "BLAG has identified no reason to believe that the State's highest court would reach a conclusion different from the uniform decisions of its intermediate appellate courts" recognizing foreign same-sex marriages. And as the government further noted (*ibid.*), the Court may conclude that the issue in fact goes to the merits of plaintiff's tax-refund claim rather than to her standing. BLAG itself appears to acknowledge that possibility. See BLAG No. 12-63 Br. in Opp. 19 n.9 (suggesting that validity of plaintiff's foreign marriage is a vehicle problem "whether or not it is critical to [her] standing"). But the Court would at least have to address whether the foreign-marriage issue implicates plaintiff's standing before reaching the merits of Section 3's constitutionality. For that reason, and because the district court in *Pedersen* (unlike the district court in this case) examined the applicability of heightened scrutiny (see *Pedersen* Pet. App. 27a-75a), *Pedersen* would be preferable to this case as a vehicle for resolving the constitutionality of Section 3 in the event the Court does not grant review in *Massachusetts* or *Golinski*.

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is held unconstitutional," it may seek this Court's review of that decision, even though "the Executive may agree with the holding that the statute in question is unconstitutional." *Id.* at 930-931. Although BLAG points out in its response to the government's petition in *Massachusetts* that Section 3 (unlike the statute at issue in *Chadha*) is not administered by a single agency, that is a distinction without a difference. Indeed, BLAG makes no effort to explain why that distinction could matter. See BLAG No. 12-15 Br. in Opp. 18-19.

CONCLUSION

This petition for a writ of certiorari before judgment should be held pending the Court's consideration and disposition of the petitions in *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13 (filed June 29, 2012), 12-15 (filed July 3, 2012), and 12-97 (filed July 20, 2012), and *Office of Personnel Management* v. *Golinski*, No. 12-16 (filed July 3, 2012). If the Court determines that neither *Massachusetts* nor *Golinski* provides an appropriate opportunity to decide the question presented, the Court should grant the government's petition for a writ of certiorari before judgment in *Office of Personnel Management* v. *Pedersen* (filed concurrently with this petition). If the Court determines that *Pedersen* is not an appropriate vehicle, the Court should grant this petition.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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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 Speyer 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

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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).

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.

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 prece-

dent 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. Igbal*, 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 be-

fore 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.*, 476 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); *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).

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 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 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

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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).

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 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.

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 (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.10 (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
FOR THE SOUTHERN DISTRICT OF NEW YORK

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10 **CIVIL** 8435 (BSJ)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 7, 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 Plaintiffs 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 grant-

ed 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

RUBY J. KRAJICK
Clerk of Court

BY: /s/ ILLEGIBLE
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

EDITH SCHLAIN WINDSOR, ET AL., 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 D

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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[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

OF COUNSEL:

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June 8, 2012

Democratic Whip decline to support the filing of this Notice of Appeal.

APPENDIX E

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.