No. 12-307

In the Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

EDITH S. WINDSOR, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP, ADDRESSING THE MERITS, AND SUPPORTING REVERSAL

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300
apicarello@usccb.org
Counsel for *Amicus Curiae*

Counsel of Record

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INTEREST OF *AMICUS*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States.[1] The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

We submit this brief on the merits in support of the Bipartisan Legal Advisory Group, and urge this Court to reverse the judgment of the Court of Appeals below and to uphold the Defense of Marriage Act.

SUMMARY OF ARGUMENT

Legislation challenged on equal protection grounds is subject to rational basis review as long as it does not infringe upon a fundamental right or involve a suspect or quasi-suspect classification. The

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

Defense of Marriage Act ("DOMA") does not infringe upon a fundamental right, and involves neither a suspect nor quasi-suspect classification. It is therefore subject to rational basis review.

There is no fundamental right to marry a person of the same sex. Such a claim must be rejected because it does not satisfy the test to which this Court adheres in determining whether an asserted right is fundamental. Specifically, civil recognition of same-sex relationships is not deeply rooted in the Nation's history and tradition—quite the opposite is true. Nor can the treatment of such relationships as marriages be said to be implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Windsor's claim also cannot fairly be characterized as part of a generalized "right to marry." This Court's decisions describing marriage as a fundamental right plainly contemplate the union of one man and one woman. In addition, a generalized claim of a right to marry in this case does not satisfy the requirement, articulated in *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997), of a "careful" or particularized description of the asserted interest.

This case involves no suspect or quasi-suspect classification. This Court has accorded heightened scrutiny to only a small and discrete set of classifications, to which persons in same-sex relationships bear no relation and whose qualifying characteristics they do not share. None of the suspect or quasi-suspect classifications is defined by conduct; Windsor's involvement in a past homosexual relationship, by contrast, is the product of her own voluntary choice. Likewise, she is not a member of a

politically powerless group needing protection against majoritarian impulses. To the contrary, the last two decades have witnessed far-reaching changes in how the law treats persons in same-sex relationships, changes that belie any claim of political powerlessness.

Application of heightened scrutiny in this case would not only have a distorting effect on this Court's equal protection jurisprudence as a whole, but would undermine the defense of state laws that define marriage as the union of one man and one woman, or that otherwise involve a classification based on "sexual orientation." Such a ruling would compromise the ability of states to accommodate religious and moral objections to homosexual conduct on the part of employers and individuals. In the end, a decision applying heightened scrutiny would seriously impede democratic solutions to questions about the legal treatment of persons in same-sex relationships.

ARGUMENT

I. The Defense of Marriage Act Is Subject to Rational Basis Review.[2]

"Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927))). This Court has therefore applied rational basis review to laws unless they infringe a fundamental right or employ a suspect classification. *See Heller* v. *Doe*, 509 U.S. 312, 320 (1993).

Although this Court has never squarely addressed whether a classification based on "sexual orientation" is suspect or trenches on a fundamental right, the Court has nonetheless used the rational basis test when reviewing laws that classify on that basis. *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003); *Romer* v. *Evans*, 517 U.S. 620, 631-32 (1996).

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[2] We agree with the dissent in the Court of Appeals below that invalidation of DOMA is precluded by *Baker* v. *Nelson*, 409 U.S. 810 (1972). *See Windsor* v. *United States*, 699 F.3d 169, 192-95 (2d Cir. 2012) (Straub, J., dissenting). Briefly, if states do not run afoul of the Equal Protection Clause when they define marriage as the union of one man and one woman, as *Baker* holds, then neither does the federal government run afoul of equal protection guarantees when it so defines marriage for purposes of federal programs. Rejection of *Baker* would also upset the reliance interests of an overwhelming majority of states that, subsequent to *Baker*, have defined marriage as the union of one man and one woman. *See* note 5, *infra*, and accompanying text.

The lower courts have addressed the question directly, and every federal court of appeals to do so—with only two exceptions, including in the present case[3]—has concluded that rational basis is the appropriate standard for reviewing such laws. *Perry* v. *Brown*, 671 F.3d 1052, 1082, 1086-90 (9th Cir. 2012); *id.* at 1100-01 (Smith, J., concurring in part and dissenting in part); *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Witt* v. *Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005); *Peterson* v. *Bodlovich*, No. 99-3150, 2000 WL 702126, at *2 (7th Cir. May 26, 2000); *Thomasson* v. *Perry*, 80 F.3d 915, 927-928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996); *Steffan* v. *Perry*, 41 F.3d 677, 684-685 (D.C. Cir. 1994); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

Consistent with this case law, and as a number of courts have held, DOMA too is subject to rational

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[3] The Second Circuit applied intermediate scrutiny to strike down DOMA. *Windsor* v. *United States*, 699 F.3d at 176, 185. Months earlier, the First Circuit had applied "intensified scrutiny"—a level of review more rigorous than rational basis review but less rigorous than intermediate scrutiny—to strike down DOMA. *Commonwealth of Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012); *but see Cook* v. *Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (applying rational basis review to the military's "don't ask, don't tell" policy), *cert. denied sub nom.*, *Pietrangelo* v. *Gates*, 129 S. Ct. 2763 (2009).

basis review. *Smelt* v. *County of Orange*, 374 F.Supp.2d 861, 879 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Wilson* v. *Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *Hunt* v. *Ake*, No. 8:04-cv-01852-JSM-TBM (M.D. Fla. Jan. 20, 2005); *In re Kandu*, 315 B.R. 123, 144 (Bankr. W.D. Wash. 2004); *Lui* v. *Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011); *Torres-Barragan* v. *Holder*, No. 2:09-cv-08564 (C.D. Cal. Apr. 30, 2010). An analysis of the relevant factors reveals that this conclusion is sound.

A. There Is No Fundamental Right to Marry a Person of the Same Sex.[4]

A claimed right is fundamental for constitutional purposes only if two conditions are met: the asserted right is (a) "deeply rooted in this Nation's history and tradition" and (b) "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist" if it were sacrificed. *Glucksberg*, 521 U.S. at 720-21. The law's historic treatment of marriage as the union of one man and one woman belies any conclusion that there is a fundamental right to marry a person of the same sex. *Jackson* v. *Abercrombie*, No. 11-00734 ACK-KSC, slip op. at 63-66, 2012 WL 3255201 at *23-26 (D. Haw. Aug. 8, 2012); *Hernandez* v. *Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *In re Kandu*,

[4] The argument that the present claim is foreclosed by *Baker*, *see* note 2, *supra*, is particularly strong with respect to any claim that there is a "fundamental right" to marry a person of the same sex. *See Commonwealth of Massachusetts*, 682 F.3d at 8 (finding that *Baker* precludes any arguments that "rest on a constitutional right to same-sex marriage"), quoted in *Windsor*, 699 F.3d at 178 n.1.

315 B.R. at 140; *Standhardt* v. *Superior Court*, 77 P.3d 451, 460 & n.14 (Ariz. App. 2003), and cases cited therein; *Baker* v. *Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). Far from it, the legal definition of marriage as the union of one man and one woman has been the ubiquitous norm in Western cultures for millennia. Questions about that definition in relation to persons in same-sex relationships began to emerge in this country only in the last two decades, beginning with *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993). Faced with those emerging questions, and to uphold the definition of marriage as the union of one man and one woman, 37 states, the vast majority by state constitutional amendment, explicitly *reaffirmed* the legal definition of marriage as the union of one man and one woman.[5] These

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[5] From 1998 on, thirty States adopted such amendments. ALA. CONST. amend. 774(b); ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, ¶ I(a); IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35(A); OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29(1); VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13. Another state, Hawaii, adopted a constitutional amendment in 1998 giving the legislature "the power to reserve marriage to opposite-sex couples." HAW. CONST. art I, § 23. Between 1996 and 2004, Hawaii and six States having no state constitutional amendment on the precise question adopted statutes, currently in effect, defining marriage as the union of one man and one woman. DEL. CODE ANN. tit. 13, § 101(a) (2011); HAW. REV.

developments were foreshadowed by DOMA, which was passed in 1996 by overwhelming bipartisan majorities of Congress and was signed into law by President Clinton.[6] Today, only a minority of states and the District of Columbia have redefined marriage to include two persons of the same sex.[7]

Nor can a right to marry a person of the same sex be shoehorned into a generalized "right to marry." *Jackson*, *supra*, slip op. at 59-63, 2012 WL 3255201 at *23-25, and cases cited therein. For well over a century, this Court has held that marriage is a fundamental right, but those decisions, which expressly reference the link between marriage and procreation, make clear that by "marriage," the Court

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STAT. § 572-1 (2012); 750 ILL. COMP. STAT. 5/212(a)(5) (2011); IND. CODE § 31-11-1-1 (2012); MINN. STAT. § 517.03 (2012); 23 PA. CONS. STAT. § 1704 (2011); W. VA. CODE §§ 48-2-104(c), 48-2-603 (2012).

[6] The vote in the House was 342-67 in favor, and in the Senate 85-14 in favor. 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate).

[7] Between 2003 and 2009, judicial decisions in three States (Massachusetts, Connecticut, and Iowa) redefined marriage to include same-sex couples. *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). From 2009 to 2012, in the absence of a judicial decision, six States (Maryland, Maine, New Hampshire, New York, Washington State, and Vermont) and the District of Columbia redefined marriage by legislation or ballot initiative. D.C. CODE §46-401 (2010); ME. REV. STAT. ANN. tit. 19-A, § 650-A (approved by voters Nov. 2012); MD. CODE ANN., FAM. LAW, § 2-201 (approved by voters Nov. 2012); N.H. REV. STAT, ANN. § 457:1-a (2010); N.Y. DOM. REL. LAW § 10-a (McKinney 2012); VT. STAT. ANN. tit. 15, § 8 (2009); WASH. REV. CODE § 26.04.010 (approved by voters Nov. 2012).

means the union of one man and one woman. *Zablocki* v. *Redhail*, 434 U.S. 374, 383 (1978) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (same); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (marriage is "fundamental to the very existence and survival of the race"); *Maynard* v. *Hill*, 125 U.S. 190, 211 (1888) (marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress"); *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885) (referring to marriage as "the union for life of one man and one woman"). This Court has been careful to distinguish the claim of a right to marry a person of the same sex, which it has never recognized, from others which it has. *Lawrence*, 539 U.S. at 578 (stating that the case under review, involving a ban on homosexual sodomy, "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *id.* at 585 (O'Connor, J., concurring in the judgment) ("reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group").[8]

[8] *Lawrence* did not decide that homosexual *conduct* is a fundamental right, let alone that government must formally recognize homosexual relationships by equating them with marriage. *Lawrence*, 539 U.S. at 578 (holding that Texas sodomy law "furthers no legitimate state interest"); *id.* at 586 (Scalia, J., dissenting) ("nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right'"). *See Lofton*, 358 F.3d at 815-17 (rejecting a claimed "fundamental right to private sexual intimacy" and concluding that "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"), quoted with

Furthermore, the claimed right to marry a person of the same sex as an aspect of a more generalized "right to marry" does not satisfy the requirement for a "careful description" of the asserted right required under *Glucksberg*, 521 U.S. at 721. In *Glucksberg*, proponents of a right to physician-assisted suicide strained to recast it as a right to determine "the time and manner of one's death," "to die," to "choose how to die," to "control … one's final days," and "to choose a humane, dignified death." *Id.* at 724. This Court rejected all of these rhetorical sleights of hand, insisting instead on a "careful description" of the right at issue. *Id.* at 721. For similar reasons, Windsor cannot plausibly recast her claim as a "right to marry."[9]

B. As Defined by Courts to Date, "Sexual Orientation" Is Not a Classification That Should Trigger Heightened Scrutiny.

This Court has relied upon four criteria to identify the very limited set of classifications that qualify for heightened scrutiny as suspect or quasi-suspect: members of the class have (a) "no ability to attract

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approval in *Seegmiller* v. *LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008).

[9] *Loving* v. *Virginia*, 388 U.S. 1 (1967), is distinguishable because it did not involve an attempt to *redefine* marriage as the union of one man and one woman. Instead, it removed a statutory *bar* to such unions, a bar that was rooted in now-discredited and gravely unjust notions of white supremacy. *Id.* at 7-8; *see Jackson*, slip op. at 65-66, 2012 WL 3255201 at *25 (rejecting the *Loving* analogy); *Conaway* v. *Deane*, 932 A.2d 571, 601-02, 619-20 (Md. 2007) (same); *Lewis* v. *Harris*, 908 A.2d 196, 210 (N.J. 2006) (same).

the attention of the lawmakers," (b) a history of unequal treatment, and (c) an obvious, immutable or distinguishing trait (d) bearing no relation to their ability to perform or contribute to society. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441, 445 (1985); *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); *San Antonio Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality).

Applying these criteria, this Court has recognized principally three classifications (race, alienage, and national origin) as suspect, and two (sex and illegitimacy) as quasi-suspect for purposes of triggering, respectively, strict or intermediate scrutiny. *Loving*, 388 U.S. at 11 (race); *Graham* v. *Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944) (national origin); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-24 (1982) (sex); *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy). An overarching feature of all five of these established protected classes is that they involve a trait attributable from conception or birth. For several reasons, sexual orientation does not rank as a suspect or quasi-suspect class.

1. In contrast to the classes for which this Court has applied heightened scrutiny,[10] what lower courts have understood to be a homosexual "orientation" is not a *trait* attributable from conception or birth. Rather, particularly as framed by Respondents here,

[10] *Frontiero*, 411 U.S. at 686 (noting that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth").

it involves a species of *conduct*.[11] *See High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."); *Woodward*, 871 F.2d at 1076 ("Homosexuality … differs fundamentally from those [traits] defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."). Indeed, with this distinction in mind, this Court has recognized that a finding of a suspect or quasi-suspect class for equal protection purposes is simply inappropriate when the distinguishing characteristic is a product of "voluntary action." *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982).

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[11] Many courts, including this Court recently in *dicta*, have used the legal terms "homosexuality" and "sexual orientation" in a manner that includes conduct. *See, e.g., Christian Legal Soc'y* v. *Martinez,* 139 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."). The parties in this case do the same. We note, however, that these same terms do not necessarily bear the same meaning in the Catholic moral tradition, where the distinction between status or inclination and conduct is critical. *See, e.g.,* Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-discrimination of Homosexual Persons*, No. 12 (July 22, 1992); *see also* Brief *Amicus Curiae* of USCCB in *Christian Legal Society* v. *Martinez,* No. 08-1371, at 8-11 (Feb. 4, 2010). For purposes of this brief, we use these two terms exclusively as they are currently understood and applied in the law, not as they might be understood within Catholic teaching.

Disregarding the "voluntary action" limit on "distinguishing traits" would yield absurd results, as it would threaten to expand dramatically the range of legislative categories triggering heightened scrutiny. In particular, any "voluntary action" that is now or has ever been illegal would readily satisfy the factor of having suffered government disfavor or a history of discrimination based on the distinguishing trait. Where the conduct is still illegal, those with the trait could just as readily claim political powerlessness or the inability to attract the attention of lawmakers. Finally, if the current or former illegality of the "voluntary action" can be discounted as reflecting mere disapproval or discrimination, then it is a small step (if any) to conclude that the "voluntary action" bears no relation to the ability to perform or contribute to society.

The example of polygamists—a class that is defined in part by conduct—illustrates the point. One can substitute "polygamists" for "homosexuals" as that term is used in the *Windsor* opinion and arrive at the same conclusion for the former as the Second Circuit did with respect to the latter. *Windsor* v. *United States*, 699 F.3d 169, 181-82 (2d Cir. 2012) ("In this case, all four factors justify heightened scrutiny: A) [polygamists] as a group have historically endured persecution and discrimination; B) [polygamy] has no relation to aptitude or ability to contribute to society; C) [polygamists] are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter [polygamous relationships]; and D) the class remains a politically weakened minority."). Our point, of course, is not that the two are morally equivalent, but simply that the Second Circuit's logic

leads to absurd results, and that the absurdity originates with the decision to ignore this Court's "voluntary action" limitation on "distinguishing traits" that may trigger heightened scrutiny.

2. The claim that homosexual persons today have "no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S., at 445, is frivolous. Indeed, courts rejected claims of political powerlessness on the part of homosexual persons *almost twenty-five years ago*. *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) ("In these times homosexuals are proving that they are not without growing political power. It cannot be said 'they have no ability to attract the attention of the lawmakers.'"), *cert. denied*, 494 U.S. 1004 (1990); *High Tech Gays*, 895 F.2d at 574 ("homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by … [anti-discrimination] legislation."). Since then, the movement to change the law in a manner favorable to people who have and want to act on homosexual inclinations has gained enormous ground.

As one federal district judge recently observed:

> Today, unlike in 1990, the public media are flooded with editorial, commercial, and artistic messages urging the acceptance of homosexuals…. Homosexuals serve openly in federal and state political offices. The President of the United States has announced his personal acceptance of the concept of same-sex marriage, and the announcement was widely applauded in the national media. Not only has the President expressed his moral

> support, he has directed the Attorney General not to defend against legal challenges to the Defense of Marriage Act…. It is exceedingly rare that a president refuses in his official capacity to defend a democratically enacted federal law in court based upon his personal political disagreements. That the homosexual-rights lobby has achieved this indicates that the group has great political power.

Sevcik v. *Sandoval*, No. 2:12-cv-00578-RCJ-PAL, slip op. at 19, 2012 WL 5989662 at *11 (D. Nev. Nov. 26, 2012).[12] Indeed, just weeks before this decision was handed down, three states by voter referendum recognized same-sex unions as marriage. *See* n.7, *supra*.

3. The distinction that DOMA makes between unions of one man and one woman and other interpersonal relationships is unmistakably "relevant to interests the State has the authority to implement." *City of Cleburne,* 473 U.S. at 441. As set forth in our *amicus* brief (pp. 4-19) in *Hollingsworth* v. *Perry*, No. 12-144, such a classification, when it appears in *state* legislation, is reasonably related to important government interests, such as the recognition of the unique value

[12] Closely related to a claim of political powerlessness and with the same animating goal of protecting minorities from majoritarian impulses, a claim of "past discrimination" also weighs less in Windsor's favor given the dramatic changes in the social and legal landscape. *Sevcik*, slip op. at 18, 2012 WL 5989662 at *11 ("without a showing of continuing discrimination or lingering effects of past discrimination, the first factor [*i.e.*, historical discrimination] does not tend to support an argument that the group need be protected from majoritarian processes").

to society of procreation, and the unique value to children of being raised by a mother and father together. The classification specially affirms these unique contributions to society, which only opposite-sex couples may make. Likewise, when the *federal* government—for purposes of *federal* programs and *federal* entitlements—defines marriage to mean the union of one man and one woman, that characteristic is just as reasonably related to the aims of those programs and entitlements.

A decision by the federal government to support and encourage marriage, understood as the union of one man and one woman, through the provision of federal benefits to married couples or surviving spouses does not translate into a constitutional duty to provide the same benefits to persons who are not or were not married and who therefore are not similarly situated. *Plyler*, 457 U.S., at 216 ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same"), quoting *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). That Windsor did not marry, as the federal government defines that term, is surely "relevant" to its decision not to provide her with a benefit it has reserved to married couples.

Finally, for all of the reasons above that DOMA is not subject to "intermediate" or "strict" scrutiny, DOMA is also not subject to "intensified" scrutiny under the alternative theory offered by the First Circuit. *Commonwealth of Massachusetts*, 682 F.3d at 10. In its equal protection cases, this Court has only applied one of three levels of judicial review: rational basis review, intermediate scrutiny, or strict scrutiny. There is no authority for a fourth level of

review. Moreover, the three Supreme Court cases that the First Circuit cited in favor of "intensified" scrutiny involved rational basis review.[13] It is also unclear what criteria should trigger "intensified" scrutiny or how it would differ from other, established levels of review. For that reason, adoption of "intensified" scrutiny would leave the law in a state of uncertainty and confusion. And perhaps most importantly, the endorsement of a fourth level of review—something more than rational basis but less than heightened scrutiny—would open the door for lower courts to substitute their own policy judgments for those of legislatures on a range of hot-button social issues. Respectfully, that is not the role of the Judiciary.

In sum, for reasons we have discussed, application of either heightened or "intensified" scrutiny to legislative classifications that, like DOMA, touch upon neither a fundamental right nor a suspect or quasi-suspect class would seriously distort this Court's equal protection jurisprudence. Under rational basis review, DOMA should be upheld. All

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[13] *Romer*, 517 U.S. at 631-32 (applying "conventional [rational basis] inquiry" to conclude that Colorado's Amendment 2 violated the Equal Protection Clause); *City of Cleburne*, 473 U.S. at 450 (applying rational basis review to strike down a zoning ordinance that "appear[ed] … to rest on an irrational prejudice against the mentally retarded"); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533, 538 (1973) (applying "traditional equal protection analysis" to conclude that a classification that rendered households of unrelated individuals ineligible for food stamps was "wholly without any rational basis"). *See Jackson*, slip op. at 83-84, 2012 WL 3255201 at *32 (concluding that *Romer*, *City of Cleburne*, and *Moreno* "do not support a new level of 'intensified scrutiny'").

the legitimate reasons for which the government encourages and supports marriage as the union of one man and one woman, set forth in our *amicus* brief (pp. 4-19) in *Hollingsworth* v. *Perry*, No. 12-144, apply to DOMA as well. In addition, the federal government has a legitimate (indeed, a very strong) interest in the uniform administration of its own programs. *See* Bipartisan Legal Advisory Group's Brief on the Merits, at 33-37. That interest is served by a uniform definition of marriage for purposes of eligibility for federal marital benefits and exemptions like the ones at issue in this case. In the administration of federal programs, the federal government is not constitutionally bound by, and should not be held hostage to, redefinitions of marriage that are adopted in some states.[14]

[14] Though rational basis review is the correct standard to apply, DOMA would also survive heightened or "intensified" scrutiny. Endorsing and encouraging the procreation and upbringing of children in households headed by their mother and father are interests of a compelling nature. As we have noted with respect to Proposition 8, no institution other than marriage joins a man and a woman together in a permanent and exclusive way and unites them to any children born of their union. No other institution ensures that children will have at least the opportunity to be raised by both a mother and father. Laws that encourage and promote the union of one man and one woman in marriage are an important remedy for the many problems surrounding the present-day decline of the family. For all of these reasons, it would be a serious misreading of the Constitution, and a grave injustice, to strike down DOMA.

II. Application of Stricter-Than-Rational Scrutiny to Classifications Based on Sexual Orientation Would Have Adverse Consequences in Other Areas of Law.

As we have argued, DOMA satisfies the rational basis test and, indeed, would survive even more rigorous scrutiny. Nevertheless, a decision by this Court to apply any scrutiny stricter than rational to classifications based on sexual orientation, as even the First Circuit recognized, "would have far-reaching implications…." *Commonwealth of Massachusetts*, 682 F.3d at 9.[15]

Three implications are especially noteworthy.

First, elevation of sexual orientation to a quasi-suspect class would immerse federal courts into a quagmire of family law issues reserved to the states, issues for which the Judicial Branch is not institutionally suited.[16]

Second, application of heightened scrutiny would hinder the ability of legislatures to create accommodations for those with religious or moral objections to homosexual conduct.[17] To take one

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[15] With due respect to the First Circuit, the same could be said of the "intensified" scrutiny that that court applied to DOMA.

[16] This is not an argument against DOMA, of course, because DOMA defines marriage for purposes of *federal* programs only, which is plainly within the *federal* government's power.

[17] The burdens on religious liberty that would arise from invalidation of Proposition 8, as discussed in our *amicus* brief (pp. 21-24) in *Hollingsworth* v. *Perry*, No. 12-144, would arise here as well were the Court to invalidate DOMA.

example, through its domestic partnership law the State of Nevada extends many of the rights and benefits of marriage, but not the name "marriage," to persons in same-sex relationships. But "[t]here is at least one notable exception…." *Sevcik*, *supra*, slip op. at 8, 2012 WL 5989662 at *5. The statute does "not require a public or private employer in [Nevada] to provide health care benefits to or for the domestic partner of an officer or employee…." *Id.*, citing Nev. Rev. Stat. § 122A.210(1) (2011). This protects the religious liberty of those employers with a religious objection to providing such coverage. If, however, classifications based on "sexual orientation" trigger some form of heightened scrutiny, then reasonable legislative accommodations of this sort, in Nevada and everywhere else in the Nation, will be suspect. The ability of legislatures to relieve burdens on religious liberty, in turn, will be severely impeded. And, in the end, federal courts will be called upon time and again to address conflicts between this newly-suspect classification and the more well-established rights of religious liberty, conscience, speech, and association.

Third, if this Court were to conclude that the Constitution requires a redefinition of marriage to include persons in same-sex relationships—a requirement that we believe cannot reasonably be inferred from the Constitution—it is unclear where the logical stopping point would be. This Court will ultimately be asked why other interpersonal relationships are not entitled to similar inclusion, and why other "barriers" to marriage (such as those posed by youth, kinship, or multiplicity of parties) should not also have to be struck down as inconsistent with this redefinition.

All of these considerations counsel judicial restraint.

CONCLUSION

For the foregoing reasons, DOMA should be upheld and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
UNITED STATES CONFERENCE
OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300
apicarello@usccb.org

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