No. 12-307

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, et al.,

Respondents.

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

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD; THE ROMANIAN-AMERICAN EVANGELICAL ALLIANCE OF NORTH AMERICA; AND TRUTH IN ACTION MINISTRIES IN SUPPORT OF BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS

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QUESTION PRESENTED

This brief addresses the following question presented:

Does Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violate the equal protection component of the Due Process Clause of the Fifth Amendment?

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INTEREST OF *AMICI CURIAE*

The voices of tens of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge to support the proposition that the traditional, opposite-sex definition of marriage in the civil law is not only constitutional but essential to the welfare of families, children, and society. Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution. We seek to be heard in the democratic and judicial forums where the fate of that foundational institution will be decided. This brief is submitted out of a shared conviction that the Fifth Amendment does not prohibit Congress from exercising its core lawmaking power to preserve the traditional definition of marriage for purposes of federal law.[1]

SUMMARY OF ARGUMENT

This brief addresses whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (2012)

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Letters from the United States and the Bipartisan Legal Advisory Group consenting to the filing of this brief are on file with the Clerk. Written consent by Respondent Edith Windsor has been submitted with this brief.

("DOMA"),[2] violates the equal protection component of the Due Process Clause of the Fifth Amendment. We argue that it does not.

Rational basis, not heightened scrutiny, should govern this case. Fairly considered, what is at issue in DOMA is not discrimination against a discrete and insular minority needing extraordinary judicial protection from majoritarian forces, but rather a profound cultural debate over the nature and meaning of marriage.

Marriage can be conceived in very different ways. The age-old, traditional understanding conceives of marriage as a union between a man and a woman that is inherently oriented toward procreation and childrearing and in which society has a profound stake. A more recent conception views marriage as primarily a vehicle for affirming and supporting intimate adult relationship choices, a vision that is not inherently oriented toward uniting the sexes for the bearing and rearing of children. Both visions are held honestly and sincerely by well-informed, rational people of good will.

Which vision should prevail in the federal government and in the various States is a matter of spirited and legitimate debate among scholars, lawyers, judges, legislators, and of course the People. We

[2] Unless otherwise specified, all references herein to "DOMA" refer to Section 3 of the Defense of Marriage Act."

and other religious communions are a necessary part of that democratic discussion. Faith communities are essential pieces of the social fabric that sustains our Nation's marriage culture. Our faith traditions define, explain, and nourish the institution of marriage and the couples and families whose lives in turn depend on and are defined by it. And our long experience in these matters gives us unique perspectives that are as worthy of consideration in this debate as any others. We have just as much right as anyone else to have our views considered by democratic decision makers.

But that cannot properly occur if the great marriage debate is removed from our democratic institutions and decided by the judiciary under a heightened standard of review. While we certainly believe empirical evidence and sound science support our position, fundamental social questions such as the nature of marriage cannot be decided on technical grounds. They are matters of the People's values, morals, judgments, and culture – of their "history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

This is yet another reason, beyond the many provided in the brief of the Bipartisan Legal Advisory Group ("BLAG"), why rational basis is the right standard for evaluating the conflicting visions and moral claims inherent in challenges to the millennia-old definition of marriage. Only that deferential standard affords the democratic process its proper respect and place. Only that deferential standard

allows all voices in this historic debate to be fairly heard.

ARGUMENT

I. Rational-Basis Review Is the Proper Standard for Evaluating Legislation, Like DOMA, That Implicates Fundamental Questions of Social Values and Policy.

Section 3 of DOMA declares that for the limited purpose of construing federal law "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." 1 U.S.C. § 7. Respondents[3] challenged these commonplace and time-tested definitions as a violation of the Fifth Amendment's implicit guarantee of equal protection, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), alleging that limiting the term "marriage" to opposite-sex couples denies same-sex couples the equal protection of the laws. The Second Circuit agreed, holding that "Section 3 of DOMA violates equal protection and is therefore unconstitutional." *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

[3] The unconventional alignment of parties in this case makes it necessary to clarify that the word "petitioner" refers to the Bipartisan Legal Advisory Group of the United States House of Representatives and that the word "respondents" refers to the United States and Ms. Windsor.

The decision below stands on a rickety foundation. Conceding important interests on both sides of the marriage issue, the panel majority "decline[d] to join issue with the dissent" on whether "Section 3 of DOMA may withstand rational basis review" and instead concluded that Section 3 must satisfy "heightened scrutiny," *id.* at 181, because "homosexuals compose a class that is subject to heightened scrutiny," *id.* at 185. Thus, the court created the first new protected class in 35 years. *See* Kenji Yoshino, *The New Equal Protection*, 122 Harv. L. Rev. 747, 748 (2011) (noting that "the last classification accorded heightened scrutiny by [this] Court was that based on nonmarital parentage in 1977" and that since then, "[a]t least with respect to federal equal protection jurisprudence, this canon has closed.") (footnotes omitted). At the circuit court level, this holding runs headlong into a phalanx of contrary decisions. Until the decision below, *every* federal court of appeals to address the question had concluded that sexual orientation classifications were subject only to rational-basis review.[4]

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[4] *Compare Windsor*, 699 F.3d at 185 ("homosexuals compose a class that is subject to heightened scrutiny") *with Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012) (applying rational basis); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (same); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (same); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing

(Continued on following page)

BLAG's opening brief provides an array of convincing reasons why heightened scrutiny is plainly improper in this case. Several additional points bolster that conclusion.

1. First, this Court's heightened-scrutiny jurisprudence teaches that there is a strong presumption against new suspect classes, for courts should be "very reluctant . . . to closely scrutinize legislative choices." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985). Reserving heightened scrutiny for the adjudication of fundamental rights and already-recognized suspect classes affirms that our democratic "constitution . . . is made for people of fundamentally differing views," *Lochner v. New York*, 198 U.S. 45, 75-76 (1906) (Holmes, J., dissenting). Most often, therefore, "the appropriate method of reaching such instances [of discrimination] is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation." *City of Cleburne*, 473 U.S. at 446. Our Constitution presumes, rather, that unjust discrimination will be remedied through the ordinary democratic process. *See Vance v. Bradley*, 440 U.S. 93, 97 (1979). This Court's 35-year history of refusing to recognize new suspect classes confirms the necessity of a very cautious approach in this

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decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits) (same).

sensitive area. The court below erred in failing to exercise such caution.

2. That mistake led to a second, more profound error: the failure to adequately account for the role of rational-basis review in preserving the primacy of the democratic process in cases turning on fundamental issues of public policy, culture, and morality. This is a preeminent example of such a case. Rational-basis review is essential here because respondents' challenge to DOMA implicates a far-reaching debate over conflicting conceptions of marriage – our most fundamental social institution – about which reasonable people can and do disagree.

Technically, Section 3 of DOMA is unremarkable. It is merely a rule of interpretation adopted by Congress prescribing the meaning it intends to attach whenever the words "marriage" and "spouse" appear in its own statutes and in rules and regulations promulgated by federal agencies. It does not regulate marriage itself or disturb state definitions of marriage. On the contrary, a key purpose of DOMA – both Section 2 and its other provisions – is to ensure that States remain free to set their own marriage policies while also ensuring that no State may unilaterally define marriage for a sister State or for the federal government. Each jurisdiction can define marriage within its own sphere. *See, e.g.*, H.R. Rep. No. 104-664, at 6-10 (1996) ("House Report"). And the definitions DOMA prescribes would have been deemed obvious a mere 20 years ago. Moreover, in setting definitions intended to control the interpretation of

federal law *en masse*, DOMA resembles the definitions of the Dictionary Act, *see* 1 U.S.C. § 1 (2012), that the Court has followed carefully to ensure adherence to congressional intent. *See, e.g.*, *Rowland v. California Men's Colony*, 506 U.S. 194, 199-201 (1993) (determining whether "person" includes associations).

But DOMA has become a major flashpoint in a monumental cultural conflict between rival conceptions of marriage. The traditional, opposite-sex conception arises from a particular vision of family and ordered liberty. It is a social institution deeply rooted in this Nation's history, culture, laws, and diverse religions that gives distinctive recognition and legal protection to male-female couples and their children. It uniquely unites a man and a woman in a legally protected bond that sustains "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Sex between men and women presents both a social problem and an opportunity, in that "'an orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth.'" *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. Ct. App. 2005) (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (citations omitted)). Traditional marriage provides that mechanism. Long experience, including our own over many decades, has taught that children thrive best when cared for at home by their biological parents, *see*

Standhardt v. Super. Ct., 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (accepting as reasonable that "the children born from such [opposite-sex married] relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children"), and that "children benefit from the presence of both a father and mother in the home." *See Lofton*, 358 F.3d at 819. Traditional marriage is therefore the knot tying together a man, a woman, and their children in an institution the law uniquely supports and protects. *See also* Edward Westermarck, *The History of Human Marriage* 22 (1891) ("Marriage and family are thus intimately connected with each other: it is for the benefit of the young that male and female continue to live together.").

Thus, while acknowledging the wide variations in individual circumstances, traditional marriage supporters maintain that "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the [values] requisite for politically liberal citizenship." Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Leg. Studies 411, 414 (2012). In our best judgment, "'a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected

processes, would be chaotic'" and less civil for all Americans. *Morrison*, 821 N.E.2d at 25 (quoting *Goodridge*, 798 N.E.2d at 996 (Cordy, J., dissenting)). Accordingly, the welfare of adults and especially children "makes [traditional] marriage a public good that the state should recognize and support." Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* 3 (2012). This child-centered conception of marriage has deep roots in America's legal traditions and is fully recognized in international human rights law, which the American tradition has directly influenced. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 16(1) & (3) (1948) (declaring that "[m]en and women of full age . . . have the right to marry and found a family" and "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"); United Nations Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 28 I.L.M. 1456, 1460 ("as far as possible, [a child has the right] to know and be cared for by his or her parents"); *cf*. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."). It is eminently reasonable for defenders of traditional marriage to hold such views, and tens of millions of Americans do.

The competing vision of marriage in this debate is comparatively recent. It conceives of marriage primarily as a means of socially and legally affirming

intimate adult relationships. The Ninth Circuit in the Proposition 8 case summarized the notion: "'marriage' is the name that society gives to the relationship that matters most between two adults" and "signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships." *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012). This conception emphasizes that "[t]he basic rationale for marriage lies in its serving certain legitimate and important interests of married couples." *See* Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. Pol. Phil. 225, 225 (1999). Marriage, so understood, focuses on the spouses – two adults in an intimate relationship who seek the State's authorization of that official status and the approval that comes with it.

In contrast with the traditional conception, procreation and childrearing in this vision are not central to marriage's meaning. Indeed, in a radical break from all human history, gender itself is irrelevant. What matters most is public endorsement of the adults' chosen relationship, obtaining official status for that relationship, and the official approval that comes with such endorsement and status. Even if other means exist to provide benefits and rights to same-sex couples, withholding "marriage" harms same-sex couples, it is said, because of the loss of status and dignity. *See Perry*, 671 F.3d at 1063 (Proposition 8 "lessen[s] the status and human dignity of gays and lesbians in California").

These competing visions overlap in important respects but are nevertheless in deep tension. One is inherently intergenerational; the other, primarily interpersonal. One is inherently oriented toward children's and society's needs; the other, toward the desires of the couple. Which vision of marriage will ultimately prevail legally and culturally matters profoundly because the meaning of marriage shapes and guides behavior and determines the social goods marriage produces. Marriage conceived as a 10-year union with an option for additional 10-year periods, for example, would shape behavior differently than marriage conceived as a union for life. By the same token, the differences between the traditional, dual-gendered, child-centered understanding of marriage and the genderless, adult-centered conception are profound.

3. Whether the Nation retains the traditional definition of marriage or redefines marriage to include same-sex couples is a social issue with potentially wide-ranging consequences. By their nature, such policy questions cannot be definitively answered by science, professional opinion, or legal reasoning alone. Although we are certainly persuaded by scholarly opinion supporting traditional marriage, the truth is that social science scholars, for instance, disagree about the effects of gay parenting on children.[5] Whatever the ultimate conclusions may be,

[5] *Compare* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships?*, 41 Soc.

(Continued on following page)

"[n]othing in the Constitution requires [government] to accept as truth the most advanced and sophisticated [scientific] opinion." *Alberts v. California*, 354 U.S. 475, 501 (1957) (Harlan, J., concurring in result). Why? In part, because such opinions are inherently tentative, especially in the social sciences where conclusions are often laden with values-based assumptions and there is no values-neutral position from which to weigh and judge what is best. But also because in a democratic society the People govern – not philosophers, scientists, or academics.

Hence, whether the Nation should redefine marriage is principally about the People's values, morals, and policy judgments. Lawmakers are entitled, in making such judgments, to "act[ ] on various unprovable assumptions," including those that in "[t]he sum of [their] experience," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 63 (1973), lead them to conclude that traditional marriage and the family structure it supports deserve distinctive legal protection. "Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.* at 63.

Sci. Res. 752, 766 (2012), *and* Loren Marks, *Same-Sex Parenting and Children's Outcomes*, 41 Soc. Sci. Res. 735, 748 (2012), *with* Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98, 104 (2012).

Only rational-basis review has the flexibility to account for the fact that major social policy questions – and particularly how best to define marriage – are *always and inevitably* a matter of the People's values, moral sense, history, traditions, and practices. In equal protection jurisprudence, rational-basis review is the only standard that ensures the judicial deference and restraint necessary to allow the People's reasonable judgments to govern. In adopting heightened scrutiny, the court below failed to respect this important and necessary limitation on judicial incursions into the democratic process in core public-policy matters. We urge this Court to restore that important limitation.

4. A further reason not to adopt heightened scrutiny in the context of deciding the constitutionality of the traditional definition of marriage is that the Court itself has long endorsed the strong legislative preference for man-woman marriage as the foundation of our society, describing it as "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Murphy*, 114 U.S. at 44 (extolling "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony"). The Court's decisions describe traditional marriage as "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), and as "a relationship having its origins entirely apart from the

power of the State." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). The Court has stated that "[t]he institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983) (footnotes omitted). Decision after decision by this Court affirms "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (footnote omitted). This Court has recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (footnotes omitted).

By contrast, the genderless, adult-centered definition of marriage favored by respondents has never received this Court's endorsement. Decisions recognizing marriage as a fundamental right under the Fourteenth Amendment Due Process Clause were premised on relationships between men and women. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967) (describing the complainants as "Mildred Jeter, a Negro woman, and Richard Loving, a white man"); *Zablocki v. Redhail*, 434 U.S. 374, 379 (1978) ("[A]ppellee [Redhail] and the woman he desired to marry were

expecting a child in March 1975 and wished to be lawfully married before that time."); *Turner v. Safley*, 482 U.S. 78, 82 (1987) ("generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason" to permit the marriage of inmates affected by the challenged prison regulation). Subjecting the man-woman definition of marriage to heightened scrutiny would be a sharp break from this Court's frequent expressions of support for traditional marriage and the families that arise from them.

While no level of judicial scrutiny should require justification of laws by philosophers or experts, rational-basis review affords courts wide leeway to find rationality in the opinions of learned voices that the People could have relied on in establishing the man-woman definition of marriage. They are numerous and include leading thinkers, some who influenced the Founding generation, that long ago discerned the central significance of traditional marriage to society. Hume identified marriage as "the first and original principle of human society," grounded in "that natural appetite betwixt the sexes, which unites them together, and preserves their union, till a new tye [sic] take place in their concern for their common offspring." David Hume, *A Treatise of Human Nature* 486 (L.A. Selby-Bigge ed., 1975). Locke depicted marriage as a "*Conjugal Society* . . . which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children till they could shift for themselves. . . ." John Locke, *Two Treatises of Government* 322 (Peter

Laslett ed., 1988). *See also* Giambattista Vico, *The New Science* 7 (Thomas Goddard Bergin & Max Harold Fisch trans., 1948) (3d ed. 1744) (marriage is "the seed-plot of the family, as the family is the seed-plot of the commonwealth"). Nearer our own time, Justice Holmes discerned that marriage – "some form of permanent association between the sexes" – qualifies as one of the "necessary elements in any society that may spring from our own and that would seem to us to be civilized." Oliver Wendell Holmes, *Natural Law*, *in Collected Legal Papers* 312 (1920).

5. In sum, far from being subject to heightened scrutiny for trenching on a suspect classification, the venerable opposite-sex definition of marriage is entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted); *see also Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting) (charging the majority with neglecting its "obligation to interpret the law in a manner to validate it, not render it void"). Given that presumption, the Court should construe DOMA as a rational preference for the tried and familiar over the untried and novel. *See* Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167, 188 (1997) ("[T]here is nothing necessarily unenlightened about attempting to protect what has been of value in the past."). The common sense judgments of the People – deeply rooted in their history, traditions, morals, laws, practices, common experiences, and sense of identity – that mark traditional marriage for distinctive protection furnish a "reasonably conceivable

state of facts that could provide a rational basis" for distinguishing between opposite-sex and same-sex couples. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

The Equal Protection Clause requires no more. Congress's decision in DOMA to adopt the traditional definition of marriage as the rule of interpretation for federal law is, at a bare minimum, eminently debatable. It reflects a legitimate conflict that divides reasonable people of good will. From their kitchen tables to the halls of Congress, Americans are discussing, debating, compromising, and deciding how to address the needs and claims of same-sex couples; DOMA itself may be revised or repealed as part of that discussion, much as occurred recently with the military's "Don't Ask, Don't Tell" policy. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516. But as long as Congress's choice remains debatable, as it surely is here, the Court should be "very reluctant" to displace it by applying heightened scrutiny. *City of Cleburne*, 473 U.S. at 441. Rational basis scrutiny should apply.

It would be startling indeed for DOMA – a law enacted just a few years ago with the overwhelming support of Congress and the President – to falter under that "most relaxed and tolerant form of judicial scrutiny" for equal protection claims. *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). It appears that not since *Jimenez v. Weinberger*, 417 U.S. 628 (1974), has the Court invalidated an Act of Congress for failing rational basis, and nothing about DOMA makes it a

candidate to join that small and discredited catalog of laws.

II. Moral and Religious Views Voiced in Support of DOMA Do Not Detract From Its Validity.

Congress identified four "governmental interests" served by DOMA, among them was "defending traditional notions of morality" – a recognition that "[f]or many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities." House Report at 12, 15. Although some suggest otherwise, that expressed purpose of Congress is not constitutionally disqualifying in the least.

No principle of constitutional law prevents Congress from exercising its lawmaking power to protect a valued moral norm within its own sphere of authority. To the contrary, many congressional enactments reflect unmistakable moral and value choices. *See, e.g.*, 18 U.S.C. § 2252A (2012) (punishing involvement in child pornography); 42 U.S.C. § 7413(a) (2012) (explaining federal enforcement practices for the Clean Air Act). Certainly, it is axiomatic that no law is invalid when it "merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Sunday closing laws and abortion funding restrictions have been upheld on this principle, *see id.*; *Harris v.*

McRae, 448 U.S. 297, 319-20 (1980), and there is no reason why it does not sustain DOMA too.

More fundamentally, declaring DOMA void because it adheres to traditional moral and religious beliefs would fly in the face of this Court's teaching that the Constitution "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Board of Educ. of Westside Cnty. Schs. (Dist. 66) v. Mergens,* 496 U.S. 226, 248 (1990) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Religious Americans and their faith communities do not participate in the national debate over same-sex marriage out of official sufferance: "no less than members of any other group, [they] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel*, 435 U.S. at 641. Subjecting DOMA to unusual constitutional scrutiny because of its affiliation with traditional morality would raise First Amendment concerns.

Increased scrutiny could be regarded as a "religious gerrymander," indirectly "regulat[ing] . . . conduct [here, political participation] because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (Kennedy, J.) (citations omitted). By scrutinizing a law reflecting, in part, religious values more severely than others, courts would effectively target

such beliefs or religious support for unusual burdens or penalties.

Increased scrutiny could also result in the disenfranchisement, or at least vote dilution, of religious voters. Every American holds the "hard-won right to vote one's conscience without fear of retaliation," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995), behind which lies "perhaps the most fundamental individual liberty of our people – the right of each [person] to participate in the self-government of his society." *In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting). That taproot of American citizenship would be damaged if votes cast by the religious – or by their representatives when influenced by religious values – were evaluated more critically by courts than other votes. In such situations, invalidating votes *post hoc* poses no less a burden on the franchise than barriers at a polling station.

DOMA is entitled to be judged on its merits according to settled rules of law – not on a more demanding standard born of suspicion toward religion, religious believers, or their values.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

January 29, 2013

Respectfully submitted,

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