No. 0101-8

In the Supreme Court of the United States

BARRY MONTGOMERY,

Petitioner,

v.

MICHAEL B. MUKASEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

Competitor No. 50

Counsel for Respondents

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit correctly held that the definitions of "marriage" and "spouse" under the Defense of Marriage Act, 1 U.S.C. § 7, which exclude same-sex couples, did not violate the Equal Protection and Due Process Clauses of the Fifth Amendment to the Constitution.

II. Whether the Fourteenth Circuit correctly held that the second provision of the Defense of Marriage Act, 28 U.S.C. § 1738C, which allows one state to decline to give effect to a marriage license lawfully obtained in a sister state, did not violate the Full Faith and Credit Clause of the Constitution.

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JURISDICTION

This Court has jurisdiction to review this case under 28 U.S.C. § 1254 (2006), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ." This Court granted the petition for a writ of certiorari in *Montgomery v. Mukasey*, Docket No. 0101-08.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Article IV, section 1 of the United States Constitution provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

II. The Fifth Amendment of the United States Constitution states, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

III. The Defense of Marriage Act has two relevant provisions codified under the following sections of the U.S. Code:

1. 1 U.S.C. § 7 (2006) provides the definitions 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."

2. 28 U.S.C. § 1738C (2006) addresses "[c]ertain acts, records, and proceedings and the effect thereof."

> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other

State, territory, possession, or tribe, or a right or claim arising from such relationship."

IV. The Family and Medical Leave Act provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave . . . [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. § 2612C (2006).

V. 28 U.S.C. § 2403 (2006) addresses intervention by the government according to the Federal Rules of Procedure:

> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality"

STATEMENT OF THE CASE

In August 2005, Petitioner Barry Montgomery ("Petitioner") and Fred Hillhouse ("Hillhouse"), two homosexual men, obtained a marriage license in the state of Massachusetts. R. 3. The couple lived in South Boston until February 2006, when they moved to the State of Avalon. R. 3. Prior to moving, Hillhouse was diagnosed with a rare form of cancer. R. 3. The Petitioner and Hillhouse moved to Avalon because they wanted to live closer to Dr. Gina Kline, a physician at the University of Avalon Hospital who is known to treat that particular type of cancer. R. 3.

Intending to take up residence in Avalon, the Petitioner took a job with the Avalon Department of Motor Vehicles ("DMV"). R. 3. Within a year after moving to Avalon, Hillhouse's condition required continuing treatment by an oncologist, as well as supervision at home. R. 3. To care for Hillhouse, the Petitioner submitted a written request for a 10-week leave of absence from the DMV under the Family and Medical Leave Act ("FMLA"). R. 3. Avalon Commissioner of Benefits, Eric Dumas, ("Commissioner") denied the request on the grounds that 1) Hillhouse was not a "spouse" within the statutory language of the Defense of Marriage Act ("DOMA"), as applied to the FMLA; and 2) Avalon was not obligated under DOMA to recognize a same-sex marriage from another state. R. 3. The Commissioner told the Petitioner that "he could remain at work or be fired." R. 3. Consequently, when the Petitioner failed to show up for work, he lost his job. R. 3.

The Petitioner filed a lawsuit against the Commissioner in the United States District Court for the District of Avalon, seeking injunctive and declaratory relief. R. 6. He alleged that the Commissioner's grounds for denying the FMLA request not only violated the Due Process and Equal Protection guarantees of the Fifth Amendment, but also violated the Full Faith and

Credit Clause of the Constitution. R. 6. Pursuant to 28 U.S.C. § 2403, the United States intervened as a defendant on because the dispute involved a challenge to the "constitutionality of [an] Act of Congress." R. 6. The United States subsequently moved for summary judgment, contending that neither provision of DOMA violated the Constitution. R. 6. The District Court disagreed and denied the motion. R. 6.

The United States immediately filed an interlocutory appeal to the United States Court of Appeals for the Fourteenth Circuit. R. 4. Sitting en banc, the Fourteenth Circuit reversed the decision of the District Court. R. 5. First, finding that 1) same-sex marriage is not a fundamental right based on the "traditions and conscience of [] society," and 2) homosexuals do not constitute a suspect class, the Fourteenth Circuit concluded that DOMA "passes muster under several possible rational bases" and does not violate the Due Process or Equal Protection clauses of the Fifth Amendment. R. 6-8. Second, the Fourteenth Circuit cited this Court's exposition of Article IV's Effects Clause in *M'Elmoyle v. Cohen*, 38 U.S. 312 (1839), to limit the self-executing mandate of the Full Faith and Credit Clause. R. 8. Thus, the Fourteenth Circuit concluded that DOMA does not violate the Full Faith and Credit Clause of the Constitution. R. 8. It reversed the lower court's denial of summary judgment.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fourteenth Circuit correctly upheld the constitutional validity of the Defense of Marriage Act under a rational basis standard of review. While the right to marry has been established as a fundamental right, the right to marry someone of the same sex has never been afforded the same treatment. Unlike heterosexual marriage, same-sex marriage is not "deeply rooted" in the traditions of American history. Therefore, based on the Supreme Court's consideration of societal traditions, the right to same-sex marriage cannot be considered a fundamental right.

Similarly, homosexuals may not be considered a suspect or quasi-suspect class. As a group, homosexuals do not possess an immutable characteristic typically displayed by a discrete and insular minority. While gay, lesbian, and bisexual persons have faced a history of purposeful discrimination, they are not without access to the political process. Same-sex couples do, however, possess a unique disability that prevents them from contributing to society in the same way as heterosexual couples. Absent a fundamental interest or a suspect classification, DOMA does not warrant strict scrutiny but passes muster under rational basis scrutiny. DOMA advances four legitimate interests, including defending the tradition of heterosexual marriage, defending notions of morality, protecting state sovereignty, and preserving scarce resources.

The Fourteenth Circuit was also correct in finding that DOMA does not violate the Full Faith and Credit Clause of the Constitution. Under the Effects Clause of Article IV, Congress has discretionary legislative power to restrict the self-executing mandate of the Full Faith and Credit Clause. In the face of strong public policy to protect the historical self-governance of the states in defining the marriage relationship, DOMA is a proper exercise of Congress's legislative power under the Effects Clause.

ARGUMENT

It is well-established precedent, under both state and federal law, that the right to marry, in the most general sense, is a fundamental right protected under the substantive Due Process and Equal Protection guarantees of the Fifth and Fourteenth Amendments. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926–27 (1992). The right to marry, however, is not without limitations, as the courts have held as constitutional various statutes prohibiting certain unions. *See generally Reynolds v. United States*, 98 U.S. 145 (1878) (holding that government prohibition of polygamy was constitutional). The right to marry someone of the same sex, for example, has never been held to be a fundamental right in the history of American society. Subsequently, when Congress codified the tradition of heterosexual marriage in the Defense of Marriage Act, it also ensured that the sovereign states would retain their historical right to determine who could and could not marry. *See* Cort Walker, *The Defense of Marriage Act as an Efficacious Expression of Public Policy: Towards a Resolution of* Miller v. Jenkins *and the Emerging Conflict Between States over Same-Sex Parenting*, 20 REGENT U. L. REV. 363, 383 (2008) (noting that marriage laws implicate "core police functions" of the state government) (citations omitted).

I. RATIONAL BASIS SCRUTINY IS THE CORRECT STANDARD OF REVIEW BECAUSE SAME-SEX MARRIAGE IS NOT A FUNDAMENTAL RIGHT AND SEXUAL ORIENTATION IS NOT CONSIDERED A SUSPECT OR QUASI-SUSPECT CLASSIFICATION.

For challenges to legislative acts under substantive Due Process or Equal Protection, this Court applies a three-tiered standard of review to its analysis. Randall P. Ewing, Jr., *Same-Sex Marriage: A Threat to Tiered Equal Protection Doctrine?*, 82 ST. JOHN'S L. REV. 1409, 1412–13

(2008). Fundamental rights under Due Process and Equal Protection are essentially treated as the same. Equal Protection analysis further distinguishes among classifications. If the law either burdens a fundamental right or draws a distinction based on a suspect classification, this Court applies strict scrutiny, whereby the law or classification is presumed unconstitutional unless the government can show it is narrowly tailored to further a compelling government interest. *Id.* If the law neither burdens a fundamental right nor targets a suspect class, this Court only requires a rational relation to some legitimate end. *Id.* For quasi-suspect classifications under Equal Protection, this Court employs a heightened form of scrutiny, or intermediate scrutiny. *Id.*

A. The right to marry someone of the same sex is not a fundamental right subject to strict scrutiny under the Due Process Clause of the Fifth Amendment.

In the abstract, the right to marry is a fundament right long-held by this Court to be "one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . [and] fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Yet, this Court has indicated that the right to marry is not absolute. For example, polygamy has been outlawed in the United States since 1788. Samantha Slark, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 454 (2004). While the Court in *Loving* invalidated Virginia's anti-miscegenation statute, Justice Warren implied that given a "supportable basis," the Court may consider denying this "fundamental freedom." *Loving*, 388 U.S. at 12 ("To deny this fundamental freedom on so unsupportable a basis as the racial classifications . . . so directly subversive of the principle of equality at the heart of the Fourteenth Amendment[.]"). Furthermore, in *Zablocki v. Redhail*, this Court acknowledged that not all regulation touching upon the marriage relationship necessarily

implicated a fundamental right and triggered "the most exacting judicial scrutiny." 434 U.S. 374, 397 (1978).

1. The right to marry is a fundamental right subject to limitation according to traditions deeply rooted in American history.

In determining whether a fundamental right exists, this Court sets aside "personal and private notions" and looks to the "traditions and [collective] conscience of [the] people." *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). A right is considered fundamental if it is so "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). In *Glucksberg*, Chief Justice Rehnquist described a method of substantive due-process analysis with two primary components. One component is the observation that Due Process protection specifically applies to "those fundamental rights and liberties which are . . . 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720–21 (internal citations omitted). The second component is the requirement of a "careful description" of the asserted fundamental liberty interest. *Id.* This method of analysis, as stated in *Glucksberg*, provides the Court with "crucial guideposts" for "direct[ing] and restrain[ing]" the scope of the Due Process Clause. *Id.* at 721.

Precisely defined, the Petitioner's right at stake is the right to marry someone of the same sex, which is allegedly denied under DOMA. This Court has yet to address whether the right to marry someone of the same sex is a fundamental right. A number of other courts, including state courts of last resort, have answered this question in the negative – the right to same-sex marriage is not a fundamental right. *Conaway v. Deane*, 932 A.2d 571, 628 (Md. 2007) (noting that "virtually every court to have considered the issue has held that same-sex marriage is not

constitutionally protected as fundamental in either their state or the Nation as a whole."); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005) ("Although the Supreme Court has held that marriage is a fundamental right . . . no federal court has recognized that this right includes the right to marry a person of the same sex."); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (ruling that same-sex couples "do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.").

2. Same-sex marriage is not a fundamental right because it is not steeped in American tradition.

The Court of Appeals for the Fourteenth Circuit correctly stated that "[m]arriage in our society's deeply-rooted traditions has always been regarded as a union between a man and a woman, as well as an important institution in fostering procreation." R. 7. When the *Loving* Court stated that the marriage relationship was "fundamental to our very existence and survival," it stands to reason that this Court may have been referring to the procreative capability arising from marriage. *See Loving*, 388 U.S. at 12; *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). While this Court has long-recognized the tradition of heterosexual marriage in American society, it has yet to recognize a similar tradition in homosexual marriage. In fact, America has had more of a tradition condemning homosexual behavior than encouraging it. In *Lawrence v. Texas*, Justice Kennedy observed that while American laws directed criminalizing homosexual behavior appeared in the 1970's, general prohibitions against sodomy carried over from English common law. 539 U.S. 558, 568, 570 (2003). Furthermore, prior to *Lawrence*, this Court had not challenged the historical grounds analysis on which the Court based its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overturned in

Lawrence. Until *Lawrence*, states were permitted to enact legislation directed against homosexual conduct. Therefore, to conclude that the right to marry someone of the same sex is a fundament right "deeply rooted" in the traditions of American society would be inconsistent with society's historical view of homosexual behavior and morality.

Given the number of courts that have already determined that same-sex marriage is not a fundamental right, it is instructive to examine whether their methodologies are applicable in this case. In *Conaway v. Deane*, the Maryland Court of Appeals applied the same definition for "fundamental right" as this Court applied in *Griswold*. 932 A.2d at 617 (stating that in determining "whether an asserted liberty interest constitutes a fundamental right," the Court looks "to the traditions and [collective] conscience of our people.") (citing *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (quotations omitted)). *Conaway* involved a constitutional challenge to Maryland's marriage laws, which provided that "[o]nly a marriage between a man and a woman is valid in [the] State." MD. CODE ANN., FAM. LAW § 2-201 (West. 2009). Consistent with *Glucksberg*, the Court of Appeals defined the asserted liberty interest more precisely than the broadly-stated "right to marry a person of one's choosing." *Conaway*, 932 A.2d at 618–19 (choosing to frame the issue as "whether the right to choose same-sex marriage is fundamental").

The Maryland Court of Appeals noted that the interracial marriage right established by this Court in *Loving* implied the notion that marriage is a union between a man and a woman, drawing from decisions in other states' courts, as well as the Supreme Court's jurisprudence on the right to marry. *Id.* at 620–21 ("[v]irtually every Supreme Court case recognizing as fundamental the right to marry indicates as the basis for the conclusion the institution's inextricable link to procreation, which necessarily and biologically involves participation . . . by

a man and a woman."). Despite growing trends in the legal landscape that afford rights to gays, lesbians, and bisexual persons, the Court of Appeals stated that these trends, alone, do not require the State or the Court to recognize the asserted right as fundamental. *Id.* at 625. Rather, the Maryland Court found that even the precedent espoused in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence* "falls short of establishing as deeply rooted the concept of same-sex marriage." *Id.* In fact, the *Lawrence* Court stated clearly that its holding "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. Since the Maryland Court of Appeals' due process analysis mirrors the methodology used by this Court, if this Court applies the same analysis to the case at bar, it will reach the same conclusion – that the right to same-sex marriage is not "implicit in the concept of ordered liberty," nor is it "rooted in the history and tradition of our Nation." *Conway*, 932 A.2d at 616.

Finally, as the Court of Appeals for the Fourteenth Circuit accurately notes, "marriage between two people of the same sex has been recognized by only the slimmest minority of jurisdictions within this country." R. 7. As of November 2008, at least forty states have statutory or constitutional language defining marriage as between one man and one woman. Thirty states specifically define marriage in their constitutions. Only five states lack laws prohibiting same-sex marriage. At most, three out of the five states actually issue marriage licenses to same-sex couples. *See* National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm#DOMA (last visited February 2009); *see also* Ben Schuman, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2107–08 (2008) (noting that as of May

2008, forty-two states had laws prohibiting same-sex marriage; twenty-six of these states passed constitutional amendments prohibiting same-sex marriage).

The legislative actions taken in an overwhelming majority of the fifty states signal a socio-political snapshot of the climate in which single-sex marriage may be received. While this picture carries implications on the Full Faith and Credit discussion to follow, it is worth noting that this "slimmest minority of jurisdictions" clearly exemplifies the lack of a long-standing social tradition in same-sex marriage. Therefore, this Court should affirm the Court of Appeals' finding that DOMA, which comports with the majority of states' definition of "marriage" as between a man and a woman, does not violate the Due Process Clause of the Fifth Amendment.

3. DOMA's distinction under 1 U.S.C. § 7 burdens access to federal benefits, which is not a fundamental right.

The first section of DOMA applies the definition of "marriage" and "spouse" to "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States . . . ." 1 U.S.C. § 7 (2006). According to the Record, the Petitioner's request for leave under the FMLA was denied in part because the State of Avalon did not consider Hillhouse to be the Petitioner's "spouse," as defined under DOMA. In short, the Petitioner was denied a federal benefit. In his dissenting opinion, Judge Ramirez argued that DOMA "[denied] federal benefits based on marriage to same-sex married couples." R. 14. Contrary to Judge Ramirez's call for strict scrutiny, this Court has never held that the right to marry someone of the same sex is a fundamental right, as previously discussed; nor has the Court held that access to government benefits constitutes a fundamental right. *Plyler v. Doe*, 457, U.S. 202, 247 (1982) ("[W]e have held repeatedly that the importance of a governmental service does not elevate it to the status of a 'fundamental right' . . . ."). Furthermore, marriage is a state

function. If couples are denied an application for marriage, they are denied at the state level and not by the federal government. The federal government does not issue marriage licenses. In effect, DOMA draws distinctions with regard to access to federal benefits. It does not preclude a same-sex couple from obtaining a marriage license in Massachusetts or any other state that recognizes that type of civil union. For lack of a fundamental right for the purposes of Due Process under the Fifth Amendment, the Court of Appeals for the Fourteenth Circuit correctly applied and upheld the DOMA under rational basis review.

B. Homosexuals are not considered a suspect or quasi-suspect class for the purposes of the Equal Protection component of the Fifth Amendment.

Although the Fifth Amendment to the Constitution does not specifically mention equal protection, this Court has held that the scope of the equal protection argument extends to any government action or law that either "burdens a fundamental right" or "targets a suspect class." *See Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) (applying equal protection guarantees to the federal government through the Fifth Amendment). As previously discussed, the right to same-sex marriage has never been held to be a fundamental right by this Court. Therefore, it remains to be determined whether the DOMA specifically targets a "suspect class." Because the DOMA is gender-neutral on its face, the implied classification is one based on sexual orientation. *See Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999) ("Indeed, most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex."). This Court has yet to find that homosexuals constitute a suspect or quasi-suspect class. In the absence of a brightline formula for determining whether such a class may be recognized as suspect, courts follow the Supreme Court and turn to examine several indicia of suspect classifications. *Conaway*, 932 A.2d at 606. This Court

considers whether the disadvantaged group 1) constitutes a "discrete and insular minority" with readily-recognizable "immutable," or distinguishing characteristics; 2) has a history of being discriminated against such as to impede their access to the political process; and 3) is subjected to unique disabilities that affect their ability to perform or contribute to society. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); and *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

1. Court findings and scientific evidence do not support the assertion that homosexual behavior is an immutable characteristic.

This Court has not conclusively determined whether homosexuality is an immutable characteristic, though this Court includes this factor among the indicia of suspect classifications. *See Lyng*, 477 U.S. at 638 (1986) (noting that "suspect" or "quasi-suspect" classes exhibit "obvious, immutable, or distinguishing characteristics that define them as a discrete group"). Unlike race and gender, which are clearly immutable biological characteristics and genetically determined, homosexual behavior has not been determined to be biologically "fated." *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 62 (1996) ("Homosexuality has not been proven to be genetic in origin and includes a behavioral choice missing from the race and gender categories."). In fact, the scientific evidence to support homosexuality's immutability is, at best, inconclusive. *Id.* at 63 ("The nature versus nurture conflict in the search to understand the causes or origins of homosexuality is far from settled, but presently there is no undisputed or compelling scientific evidence that homosexuality is biologically fated."). Even the studies that are often cited to show a link between homosexuality and biology have been questioned for one "significant methodological problem" or another. *Id.*

Courts remain divided on the issue. Several courts have ruled that homosexuality is not an immutable characteristic. In *Woodward v. United States*, the United States Court of Appeals for the Federal Circuit, in reviewing the Navy's decision to release a gay officer from active duty, held that "homosexuality is primarily behavioral in nature." 871 F.2d 1068, 1076 (1989). Consequently, the Federal Circuit concluded that the homosexual officer was not a member of a suspect or quasi-suspect class for which heightened scrutiny was warranted. *Id.* Similarly, the Court of Appeals for the Ninth Circuit has also held that "[h]omosexuality is not an immutable characteristic[.]" *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (1990). Said the Court, "[Homosexuality] is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." *Id.* Other courts, however, have reached the opposite conclusion. *See Hernandez-Montiel v. Immigration & Naturalization Service*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("[s]exual orientation and sexual identity are immutable").

In the absence of a clear scientific consensus, this Court should not feel compelled or obligated to form an opinion on whether homosexuality is biologically determined. Because the question is not only controversial in nature, but also involves a technical question of biology, the participation of the scientific community is required. This Court would be justified in deferring to their expertise. In *Roe v. Wade*, the question of when life begins was not addressed by this Court. Said the Court, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. 113, 159 (1973). Similar to the question faced in *Roe*, the question of immutability continues to be researched.

2. Homosexual persons have access to the political process to seek redress and protection from discrimination.

There is no dispute that homosexuals face a history of discrimination. Homosexuals, as a group, have access to the political process. Several states have since adopted statutes that either recognize same-sex marriages or same-sex civil unions and domestic partnerships. Schuman, *supra*, at 2107 (noting that Vermont, Connecticut, New Hampshire, and New Jersey offer civil unions affording the same rights as heterosexual marriages, while Oregon offers equivalent domestic partnerships). Moreover, the Petitioner's marriage license from Massachusetts is an example of the result of the political process. Similarly, in a decree issued in May 2008, New York Governor David Paterson directed state agencies to recognize same-sex marriages licensed in other states or countries. *Id.* Accordingly, same-sex couples are able to receive benefits from 1,300 statutes and regulations in New York." *Id.* In *High Tech Gays*, the Court of Appeals for the Ninth Circuit commented that homosexual persons "are not without political power; they have the ability to and do attract the attention of the lawmakers." 895 F.2d at 574 (quotations omitted) (citations omitted). The fact that anti-discrimination legislation already exists evinces the group's ability to seek political redress.

This Court has ensured that homosexual persons would not be denied their political voice. In *Romer*, this Court considered the validity of an amendment to Colorado's constitution. Facially, Amendment 2 would have denied homosexuals protected class status or preferential treatment of any kind by prohibiting the state or local government of Colorado from taking any legislative, executive, or judicial action to persons of "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 624. The amendment would have also repealed all anti-discriminating statutes, regulations, ordinances, and policies already

in existence. *Id.* at 624. Under a rational basis test, this Court struck down Colorado's Amendment 2, finding it was so far removed from any legitimate justification for imposing the purported disadvantages on homosexuals. *Id.* at 635. Said Justice Kennedy, writing for the Court, "[I]n making a general announcement that gays and lesbians shall not have any particular protections from the law, [Amendment 2] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.*

3. Same-sex couples are subject to a unique disability that prevents them from contributing to society in the same way as heterosexual couples.

Under the third criterion of suspect classification analysis, this Court will consider whether same-sex couples are subjected to a unique disability that impairs their ability to contribute to society. In general, courts have recognized that the ability of an individual to participate and contribute to society is not dependent on whether that individual is hetero- or homosexual. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 435 (Conn. 2008) (noting that many courts have acknowledged the fact that sexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational capabilities") (citing *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (quoting 1985 Resolution of the American Psychological Association), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 508 U.S. 952 (1993)). A distinction should be drawn, however, between the unquestioned contributions of a single individual and a couple's contribution to society, which is wholly different in several aspects. With regard to marriage, the benefit to society comes from the pairing of two individuals. Therefore, the Court's subsequent analysis should focus on the contributory differences between heterosexual and same-sex couples.

One simple biological truth is self-evident – homosexual couples cannot, themselves, procreate and beget children. This truth is not synonymous with the ability to raise and rear a family; this Court need not address the latter point. The fruit of a heterosexual couple's union is children, even if by accident. While it is true that some heterosexual couples have no children, either by choice or otherwise, reproduction and the continued population of the species is a concrete benefit to society that most married heterosexual couples can provide. Same-sex couples simply cannot contribute in this way without external assistance, which implies involving additional lives outside of their own. In order to raise and rear children, a same-sex couple must either apply to adopt a child or pursue some surrogacy process. With adoption, there is no chance that hereditary information can pass from parent to child, which is, by definition, the basis of biological reproduction. Notably, the adopted child was still conceived by a man and a woman. With surrogacy or artificial insemination, at best, genetic information from one parent may be inherited, while the genetic information of a "stranger" will be introduced into the couple's family unit. Dependency on a surrogate or other method of external assistance potentially raises other issues that might significantly impact the rearing of that child.

At least one federal court has stated that two committed heterosexuals represent the optimal partnership for raising children. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006). The Court of Appeals for the Eighth Circuit noted that heterosexual marriage "encourages responsible procreation," which justifies "recognition and benefits on heterosexual couples, who can otherwise produce children by accident[.]" *Id.* The same cannot be said for same-sex couples.

C. DOMA's classification does not warrant heightened scrutiny because it does not represent bare animus toward homosexuals.

DOMA's restriction of the definitions of "marriage" and "spouse" to heterosexual couples is distinguishable from other laws whose distinctions between heterosexuality and homosexuality reflect a pure animus toward homosexuality which this Court has found constitutionally suspect. In *Loving*, the Supreme Court noted that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." 388 U.S. at 10. Because this Court has read an Equal Protection component into the Fifth Amendment through incorporation of the same guarantee originating in the Fourteenth Amendment, it stands to reason that the same prohibition against invidious racial discrimination applies to the federal government. There can be no question that DOMA, 1 U.S.C. § 7, rests upon the sole distinction drawn according to sexual orientation. The issue becomes whether this distinction constitutes an arbitrary and invidious discrimination.

The DOMA provision, on its face, does target homosexuals. It has an effect on and does burden the homosexual community, though that effect is not solely restricted to same-sex couples. This provision of DOMA would also apply to polygamy, incest and consanguinity. DOMA would exclude these groups from the same federal benefits and protections afforded to heterosexual married couples. Moreover, DOMA's classification is not arbitrary. As previously stated, marriage between one man and one woman is deeply rooted in the history of American society. Congress has a legitimate interest in defending the sacred institution of heterosexual marriage. As the Court of Appeals for the Eighth Circuit acknowledged, there is an express intent of traditional marriage laws "to encourage heterosexual couples to bear and raise children

in committed marriage relationships." *Bruning*, 455 F.3d at 868. For lack of arbitrary and invidious discrimination, heightened scrutiny is unnecessary.

II. DOMA PASSES MUSTER UNDER RATIONAL BASIS SCRUTINY BECAUSE THE ACT REASONABLY ADVANCES SEVERAL LEGITIMATE GOVERNMENTAL INTERESTS.

This Court has stated that if the Act of Congress fails to either burden a fundamental interest or target a suspect or quasi-suspect class, it will "uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; *see Heller v. Doe*, 509 U.S. 312, 319 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.") In *Heller*, this Court forwarded a presumption of constitutionality, stating that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." 509 U.S. at 321 (holding that Kentucky's statutory scheme for involuntary commitment of the mentally ill passed rational basis scrutiny and did not violate equal protection). Only when the statute "rests on grounds wholly irrelevant to the achievement of State's objective" does the statute actually fail rational-basis review. *Id.* at 324 (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978)).

In its Committee Report on the DOMA, the House Committee on the Judiciary listed four governmental interests advanced by the Act. These interests included 1) defending and nurturing the institution of traditional, heterosexual marriage; 2) defending traditional notions of morality; 3) protecting state sovereignty and democratic self-governance; and 4) preserving scarce government resources. Under rational basis review, or even a heightened rational review, this

Court can readily conclude that not only are these governmental interests legitimate, but also that DOMA is reasonably related, if not substantially related to advancing these interests.

A. DOMA advances an important governmental interest in preserving a long-standing tradition of heterosexual marriage in American society.

This Court has stated that the traditional idea of family is rooted the "union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Even in *Lawrence*, where this Court found a fundamental right of privacy in the homosexual behavior between consenting adults, Justice O'Connor, in a concurring opinion, indicated that "preserving the traditional institution of marriage" was as legitimate a state interest as national security. *Lawrence*, 539 U.S. at 585; *see Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (stating that the United States government has a "compelling interest in protecting [] the secrecy of information important to our national security"). Moreover, at least one legal scholar, a supporter of same-sex marriage, has conceded that "there are many reasons that governments have opposite-sex marriage, and courts will probably find at least some of them to be legitimate." Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 574 (2007).

The marriage relationship is not limited to being a private affair. In this regard, the issue of same-sex marriage differs from homosexual acts conducted in the privacy of one's bedroom, as addressed in *Lawrence*. There is a public component to marriage that invokes socio-political issues. As the House Committee on the Judiciary noted in House Report 664, "marriage is a

relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to the would-be parents that their long-term relationship is socially important." H.R. REP. NO. 104-664, at 14 (1996); *see also* Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 725 (2004) (stating the right to marry "involves many interests traditionally encompassed in the right to privacy [but] also has a public dimension which needs to be balanced against the private dimension"). Therefore, at minimum, the government has a legitimate, if not important, interest in preserving the tradition of heterosexual marriage. It is evident that DOMA is, in fact, narrowly tailored to this interest. But, this Court need not apply such a strict level review. Instead, this Court can easily find that the DOMA is reasonably related, if not substantially related to the interest of preserving the heterosexual marriage tradition.

B. DOMA advances the government's interest in defending traditional notions of morality.

> For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities . . . the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect.

H.R. REP. NO. 104-664, at 15. The marriage laws enacted by each State reflect its citizens' "collective moral judgment about human sexuality." *Id.* The fact that forty-one states have statutory definitions of marriage as between one man and one woman reveals both a "moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional morality." *Id.* at 16. Notably, in *Lawrence*, Justice O'Connor called into question the justification of the Texas statute targeting homosexual sodomy on grounds of moral disapproval of the conduct. Said O'Connor, "Moral disapproval of [homosexuals], like a bare desire to harm

the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Lawrence*, 539 U.S. at 582. Absent other asserted state interests, this Court has found moral disapproval, by itself, was an insufficient rationale to justify a law targeting certain groups under the Equal Protection Clause. *Id.* However, Justice O'Connor subsequently states that "other reasons exist [for the state] to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585. As there are four government interests advanced by DOMA, this Court will find there are several reasonable means that, if taken together, allow DOMA to pass muster under rational-basis analysis.

C. DOMA advances an important governmental interest in protecting state sovereignty, preserving their democratic control over the manner in which they define the marriage relationship.

This Court has long held that the institution of marriage is a state function. "[The state] has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878). State courts have also recognized their sovereign jurisdiction over marriage. "While we deem fundamental this latitudinously-stated right to marry, it is nevertheless a public institution that historically has been subject to the regulation and police powers of the State." *Conaway*, 932 A.2d at 622; *see Blake v. Sessions*, 220 P. 876, 879 (Okla. 1923) (stating that "the laws regulating marriages come clearly within the police power of the state, and, in the exercise of the state's sovereign right, it has the stole and only power within the state to regulate who shall, or who shall not, marry"). As a State matter, States set the terms that define the marriage relationship, including efforts to define who may marry. *See Zablocki*, 434 U.S. at 392 (Stewart, J., concurring) ("Surely, for example, a State may legitimately say that no

one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.").

In *Baehr v. Lewin*, three homosexual couples filed applications for marriage in Hawaii. When the State denied their applications because the marriage laws did not permit same-sex couples to marry, the plaintiffs filed suit. 852 P.2d 44, 48–49 (Haw. 1993). The Hawaiian Supreme Court held the denial constituted discrimination on the basis of sex, which it found to be a "suspect category" under the Hawaiian Constitution. *Id.* at 64–65. It ruled that the marriage statute could only be upheld if it passed strict scrutiny. *Id.* at 68. After the Hawaiian Supreme Court remanded the case to the lower court, the nation awaited the first state judicial decision permitting same-sex couples to marry. By way of the Full Faith and Credit Clause, the Hawaiian decision suddenly presented a threat to marriage laws in other states.

This Court touched on the potential confusion that may arise out of absolute enforcement of the Full Faith and Credit Clause. *See Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [state], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."). Indeed, the House Committee on the Judiciary remarked on the "evident disquiet in the various States created by the [*Baehr* decision]." The Committee commented on the sheer number of States acting on the "uncertain interstate implications of the Hawaii litigation" through attempts to "bolster their own public policy regarding traditional, heterosexual-only marriage laws." H.R. REP. NO. 104-664, at 9. With over forty states adopting statutory

protections of the institution of heterosexual marriage, including several constitutional amendments, the majoritarian public policy view opposing same-sex marriage is unmistakable.

To invalidate DOMA, particularly under the Full Faith and Credit Clause, would not only contravene the Legislators' intent to preserve State sovereignty on the issue of marriage, but also force many states to adopt a policy view of marriage that conflicts with their own. This Court simply cannot sanction such a result. The Supreme Court can, however, easily conclude that the states have a strong policy interest in protecting their sovereignty that outweighs the infringement on private right. Therefore, the Court should uphold the DOMA under a rational-basis review because the Act is reasonably advances the states' policy interests.

D. DOMA advances the government's economic interest in preserving scarce government resources.

According to House Report 664, over 800 sections of federal law contain the word "marriage," while "spouse" appears more than 3,100 times. H.R. REP. NO. 104-664, at 10. Based on the application of these terms, the federal benefits provided to married couples imposes "certain fiscal obligations on the federal government." *See id.* The government has a legitimate interest in conserving its limited resources by defining who may have access to those benefits. As the House Committee on the Judiciary noted, the government provides these benefits to married couples "in an effort to promote, protect, and prefer the institute of marriage." Expanding the definition of marriage to include same-sex couples would undermine the government's legitimate interest in both conservation of limited resources and protection of the institution of marriage. Additionally, such expansion would expose the government to costly and unnecessary litigation as those individuals who unsuccessfully seek benefits under the statute would likely file a lawsuit to obtain them.

III. DOMA IS A PROPER EXERCISE OF CONGRESS'S POWER UNDER THE EFFECTS CLAUSE OF ARTICLE IV TO LIMIT THE SELF-EXECUTING MANDATE OF THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

The Full Faith and Credit Clause under Article IV is comprised of a self-executing directive, which states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State;" and the "Effects Clause," which provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. From its literal meaning, the latter half of the Full Faith and Credit Clause clearly conveys discretionary authority to Congress to legislate under this provision. *See* Paige E. Chabora, *Congress' Power under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 621 (1997) (noting that the combination of the self-executing mandate under the Clause and the grant of discretionary authority "is not a mere accident of drafting"). The Petitioners dispute that extent to and manner with which Congress may exercise legislative discretion under the Effects Clause.

A. The Full Faith and Credit Clause gives power to Congress to determine what "effect" to give "any public act, record, or judicial proceeding of any other State."

Despite arguments to the contrary, the Fourteenth Circuit correctly held that the Effects Clause of Article IV "grants Congress full and general power to 'prescribe' the full-faith 'effect' of state acts and proceedings. R. 8. This Court has long perceived limits to the extension of full faith and credit. *M'Elmoyle v. Cohen*, 38 U.S. 312 (1839). In *M'Elmoyle*, the plaintiff had obtained judgment on a debt in a South Carolina state court, but sought to enforce the judgment

in Georgia. *Id.* at 312. By then, Georgia's statute of limitations to enforce the judgment had run. *Id.* Allowing the defendant in that case to raise a statute of limitations defense, this Court held that a judgment from one state "does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution." *Id.* at 325. The judgment must be made a judgment in the forum state in order to have force there. *Id.* The Fourteenth Circuit's position that "the natural meaning of the 'Effect' language is that Congress can prescribe that a particular class of acts will have no effect at all, or that effect of such acts will be confined to their state of origin[,]" comports with this Court's exposition in *M'Elmoyle*. R. 8. (noting that the Effects Clause "limits the self-executing mandate of the first sentence of the Full Faith and Credit Clause, subjecting both the manner and effect of full faith and credit to Congressional conditions."

While the Petitioners may urge the court to subscribe to existing theories that subject Congress's power under the Full Faith and Credit Clause to a one way ratchet – i.e., the Clause does not give Congress the power to decrease full faith and credit – this Court has never held the full faith and credit provision to be absolute. *See Yarborough v. Yarborough*, 290 U.S. 202, 214-15 (1933) (Stone, J., dissenting) ("As this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they have at home, and there are some, though valid in the state where rendered, to which the full faith and credit clause gives no force elsewhere."). In *Nevada v. Hall*, this Court recognized a public policy exception to the Full Faith and Credit Clause. 440 U.S. 410, 422 (1979) ("It has often been recognized by this Court hthat there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another State in contravention of its own statutes or policy." (quoting *Pacific Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493,

502-03 (1939))). The *Hall* Court stated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 424. As the Fourteenth Circuit reasoned, "[a]dopting the District Court's rigid interpretation of the Full Faith and Credit Clause would create a license for one state to create national policy." R. 8–9. In upholding the challenged DOMA provision, 28 U.S.C. § 1738C, this Court will remain consistent with its own jurisprudence regarding the Effects Clause.

B. DOMA is consistent with the Framer's intention behind the Article IV's Effects Clause in preserving a State's right to protect its public policy in the face of a conflict of laws.

As Justice Stone noted in *Yarborough*, Congress may expand or contract the Full Faith and Credit Clause in some degree "not yet fully defined" by the Court. *Yarborough*, at 215 n.2. As a matter of the 'effect' given in the interest of public policy, the DOMA is a proper limitation on the full faith and credit mandate. In his dissenting opinion, however, Judge Adams asserts that "the public policy exception to the Full Faith and Credit Clause fails to save DOMA" because the Act's language fails to include a public policy requirement. R. 13 ("DOMA . . . eliminates the requirement of a public policy, and instead authorizes states to reject, unilaterally and without any reason, sister states' same-sex marriages."). Judge Adams' conclusion fails to take into consideration DOMA's legislative history. In House Report 664, DOMA's drafters clearly state that the Defense of Marriage Act serves two primary purposes, one of which is "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." H.R. REP. NO. 104-664, at 2. A public policy interest is readily apparent in this stated purpose. Given

the controversial nature of the issue, it is far from insignificant that Congress enacted DOMA in the wake of the first decision by a state court to validate same-sex marriage. *See Baehr*, 852 P.2d at 68 (Haw. 1993) (holding that Hawaii's marriage laws denying marriage licenses to same-sex couples were presumed unconstitutional as violating the Equal Protection Clause of the Hawaiian Constitution unless the State can meet the strict scrutiny standard).

DOMA crtics are quick to raise the point that prior to DOMA, Congress had yet to decrease or withdraw full faith and credit. Chabora, *supra*, at 635. Even so, this fact alone cannot support an argument that the Framers intended for Congress to conform to a one-way ratchet theory of full faith and credit power, and the DOMA violates the proper exercise of that power. State and Congressional legislators were concerned about the implications of the *Baehr* decision on both federal law and the laws of other states, particularly in light of the Full Faith and Credit Clause. H.R. REP. NO. 104-664, at 6–7 (stating that Congress passed the DOMA "to clarify the extremely complicated situation that may result from one State's recognition of same-sex marriage"). Within the state of Hawaii, the *Baehr* decision encountered strong resistance by Hawaii's citizens. Shortly thereafter, the Hawaii Legislature voted overwhelmingly to reject the Hawaiian Supreme Court's interpretation of the state's Constitution, and to amend the marriage statutes to define legal marriage as between one man and one woman. *Id.* at 6; *see also* National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/programs/cyf/samesex.htm#DOMA (last visited February 2009). Congress passed the DOMA "to clarify the extremely complicated situation that may result from one State's recognition of same-sex marriage." H.R. REP. NO. 104-664, at 6. Therefore, it cannot be said that DOMA was enacted without strong public policy requirements in mind. This Court should affirm the Fourteenth Circuit's conclusion that DOMA did not violate the Full Faith and

Credit Clause because Congress properly exercised its discretionary legislative power under the Effects Clause of Article IV.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the Fourteenth Circuit, reversing the District Court's denial of summary judgment, and hold, as constitutional, the Defense of Marriage Act; namely, that the Act neither violates the Due Process and Equal Protection protections of the Fifth Amendment, nor violates the Full Faith and Credit Clause of the Constitution.

Respectfully Submitted,

Counsel for the Respondents

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