Nos. 12-15388 & 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

On Appeal from the United States District Court for the
Northern District of California

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE · CALIFORNIA COUNCIL OF CHURCHES · CALIFORNIA FAITH FOR EQUALITY · CENTRAL CONFERENCE OF AMERICAN RABBIS · GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST · HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA · HINDU AMERICAN FOUNDATION · INTERFAITH ALLIANCE FOUNDATION · JAPANESE AMERICAN CITIZENS LEAGUE· NATIONAL COUNCIL OF JEWISH WOMEN · PEOPLE FOR THE AMERICAN WAY FOUNDATION ON BEHALF OF THE AFRICAN AMERICAN MINISTERS LEADERSHIP COUNCIL · RECONSTRUCTIONIST RABBINICAL COLLEGE · THE RIGHT REVEREND MARC HANDLEY ANDRUS, THE RIGHT REVEREND BARRY L. BEISNER, AND THE RIGHT REVEREND MARY GRAY-REEVES · SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND· SOCIETY FOR HUMANISTIC JUDAISM · UNION FOR REFORM JUDAISM · UNITARIAN UNIVERSALIST ASSOCIATION · UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY CALIFORNIA · THE UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES · WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM · WOMEN OF REFORM JUDAISM
IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW
IN FAVOR OF PLAINTIFF-APPELLEE

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IDENTITY AND INTEREST OF *AMICI*

Amici curiae are a diverse group of religious and cultural organizations that advocate for religious freedom, tolerance, and equality. *See* Appendix filed herewith. They have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law.

* * *

All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici religious organizations support the district court's rulings invalidating Section 3 of the Defense of Marriage Act ("DOMA"). The district court's decision assures full access to civil marriage, while allowing religious groups the freedom to choose how to define marriage for themselves. Many religious traditions, including those represented by *amici*, value marriage as an important religious event. *See Turner* v. *Safley*, 482 U.S. 78, 96 (1987) (''[M]any religions recognize marriage as having spiritual significance . . . .''). But religious understandings of marriage differ and must, pursuant to the First Amendment of the United States Constitution, remain separate from civil law in order to guard religious liberty for all.

In the past, Congress and the federal courts have recognized the importance of this distinction by deferring to state-based civil schemes for marriage that are separate from religious marriage. DOMA, however, departs from this longstanding separation between religious and civil definitions of marriage by incorporating, for the first time, a single religious definition into federal law — a definition inconsistent with the decision of many religious groups, including many of the undersigned *amici*, to embrace an inclusive view of marriage — with no legitimate secular purpose. The inescapable reality that DOMA institutionalizes a certain religious viewpoint is made clear by its legislative history, which is replete

with statements by Congress explicitly tying the statute's definition of marriage to a particular strand of religious tradition.

DOMA's failure to further any legitimate government interest also dooms it to fail under an equal protection analysis. The district court's ruling recognizes that, under *Lawrence* v. *Texas*, 539 U.S. 558 (2003), moral condemnation of a group alone is an inadequate rational basis for a law. While *amici* recognize the role that religious and moral beliefs have in shaping the public policy views of citizens and legislators, those beliefs, standing alone and directed toward the disparagement of a single identifiable group, cannot survive even the lowest level of constitutional review. This principle, articulated by *Lawrence*, has implications for cases brought under both the Equal Protection and Due Process Clauses. DOMA was passed out of a bare desire to harm gay men and lesbians[1] and lacks any rational basis.[2] It thus violates the Equal Protection Clause.

[1] As discussed further *infra*, however, the court does not ultimately need to make a finding of animus in order to hold the statute unconstitutional.

[2] For reasons articulated in Plaintiff-Appellee's brief, the district court correctly determined that heightened scrutiny applies to DOMA. *See* Brief of Plaintiff-Appellee at 14-28. But DOMA fails even the less exacting rational basis standard.

ARGUMENT

I. The District Court's Decision Implicitly Maintains the Important Distinction Between Religious and Civil Marriage and Ensures that Federal Law Does Not Favor a Particular Religious Understanding of Marriage.

Religious groups have always varied as to which marriages they choose to solemnize. Pursuant to the First Amendment, religious groups have the right to define marriage as they wish. However, the Establishment Clause precludes the government from incorporating a religious definition of marriage into civil law. Under the enactment of DOMA, the federal government had maintained this important distinction between religious practices and civil laws regarding marriage. In stark contrast, members of Congress openly advocated for adoption of their religious understanding of marriage into federal law, resulting in DOMA – a law that favors one religious viewpoint above all others with no valid secular purpose. *Infra*, Part I.B.2.

A. Civil and Religious Marriage Are Distinct, as the Constitution Requires.

Different religious groups have different views on marriage. Indeed, some religious groups, including many of the undersigned *amici*, welcome religious marriage between same-sex couples, while others oppose it.[3] In most religious

[3] The fact that some religious groups welcome marriage between same-sex couples does not demonstrate that gay and lesbian individuals have "political power" as that term is used in the context of heightened scrutiny. *See Kerrigan* v. *Comm'r of*

communities, there is disagreement among individual congregations, and, within congregations, disagreement among individual parishioners about how to approach marriage. This diversity of approaches is not new. Even within unified religious groups, restrictions on religious marriage have changed over time. Under our constitutional scheme, these groups have a fundamental right to adopt and modify the requirements for marriage within their own individual religious communities. But they do not have the right to demand that civil law reflect their particular religious view, particularly where, as in the context of marriage, many religions (including many of the undersigned *amici*) welcome marriage of same-sex couples.

Many religious groups have at times recognized the benefit inherent in ensuring that their own rules on marriage are distinct from those embodied in civil law, because it provides them with autonomy to determine which marriages to solemnize and under what circumstances.[4] *Cf. McCollum* v. *Bd. of Educ.*, 333 U.S.

Pub. Health, 289 Conn. 135, 187-214, 957A.2d 407, 439-54 (2008). In any case, many religious groups historically have been — and apparently continue to be — strong opponents of equal marriage rights for same-sex couples.

[4] *See, e.g.*, Southern Baptist Convention, *Position Statement on the Separation of Church and State*, http://www.sbc.net/aboutus/pschurch.asp (last visited July 9, 2012) ("We stand for a free church in a free state. Neither one should control the affairs of the other."); Joseph F. Smith et al., *Presentation of the First Presidency to the April 1896 Conference of the Church of Jesus Christ of Latter Day Saints, reprinted in* U.S. Congress, *Testimony of Important Witnesses as Given in the Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protest Against the Right of Hon. Reed Smoot, A Senator from the State of Utah, to Hold His Seat*, at 106 (1905) ("[T]here has not

203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). A review of practices surrounding interfaith, interracial, and post-divorce remarriage demonstrates this important distinction.

Interfaith Marriage: Some churches historically have prohibited (and some continue to prohibit) interfaith marriage, while others accept it. For example, the Roman Catholic Church's *Code of Canon Law* proscribed interfaith marriage for most of the twentieth century. Michael G. Lawler, *Marriage and the Catholic Church: Disputed Questions* 118-19 (2002) ("The church everywhere most severely prohibits the marriage between two baptized persons, one of whom is Catholic, and the other of whom belongs to a heretical or schismatic sect." (quoting 1917 CODE C.1060)). Although this restriction was relaxed in 1983, modern Catholic doctrine still requires the Church's "express permission" to marry a Christian who is not Catholic and the Church's "express dispensation" for a Catholic to marry a non-Christian. 1983 CODE C.1086, 1124; *Catechism of the Catholic Church* 1635. Similarly, Orthodox and Conservative Jewish traditions both tend to proscribe interfaith marriage, *see* David S. Ariel, *What Do Jews Believe?: The Spiritual Foundations of Judaism* 129 (1996), as do many

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been, nor is there, the remotest desire on our part, or on the part of our coreligionists, to do anything looking to a union of church and state.").

interpretations of Islamic law, *see, e.g.*, *Bandari* v. *INS*, 227 F.3d 1160, 1163-64 (9th Cir. 2000) (Iran's official interpretation of Islamic law forbids interfaith marriage and dating).

Despite these religious traditions prohibiting or limiting interfaith marriage, American civil law has not prohibited or limited marriage to couples of the same faith, or any faith at all, and doing so would be patently unconstitutional. *See Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *cf. Bandari*, 227 F.3d at 1168 ("[P]ersecution aimed at stamping out an interfaith marriage is without question persecution on account of religion." (citation and internal quotation marks omitted)).

Interracial Marriage: As with interfaith marriage, religious institutions in the past have differed markedly in their treatment of interracial relationships. For example, some fundamentalist churches previously condemned interracial marriage. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 580-81 (1983) (fundamentalist Christian university believed that "the Bible forbids interracial dating and marriage").

In the past, the Church of Jesus Christ of Latter-day Saints ("LDS Church") discouraged interracial marriage.[5] Additionally, in the context of its policy on excluding African-Americans from the priesthood, the LDS Church expressly recognized that its position on treatment of African-Americans was "wholly within the category of religion," applying only to those who joined the church, with "no bearing upon matters of civil rights." The First Presidency, *Statement on the Status of Blacks*, Dec. 15, 1969, *Neither White Nor Black: Mormon Scholars Confront the Race Issue in a Universal Church* (Lester E. Bush, Jr. & Armand L. Mauss eds., 1984). But such views regarding interracial marriage may not dictate the terms of civil marriage.[6]

Marriage Following Divorce: Finally, the Catholic Church does not recognize marriages of those who have divorced and remarried, viewing those marriages as "objectively contraven[ing] God's law." *Catechism of the Catholic Church* 1650, 2384. However, civil law has not reflected this position, and doing so would interfere with the fundamental right to marry. *See Boddie* v. *Connecticut*,

[5] *See Interracial Marriage Discouraged*, Church News, June 17, 1978, at 2 ("Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying." (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)).

[6] Notwithstanding the fact that certain religions continued to support anti-miscegenation laws at the time *Loving* v. *Virginia*, 388 U.S. 1 (1967), was decided, the Supreme Court held that such restrictions on *civil* marriage were unconstitutional under the Fourteenth Amendment.

401 U.S. 371, 376 (1971) (connecting the right of access to court to obtain a divorce with the fundamental right to remarry).

* * *

In all three instances discussed above, individual religious groups have adopted particular rules relating to marriage, yet those rules have not been allowed to dictate the confines of civil marriage law. Similarly, while some religious institutions may have a history of upholding "traditional" marriage, that tradition is separate from, and cannot be allowed to dictate, civil law. The legal definition of civil marriage is not tied to particular religious traditions, but instead reflects changes in contemporary understandings of marriage. *See Amicus* Br. of Historians at 27 ("Over centuries of our nation's history, state legislatures and courts have continuously reviewed and refined marriage criteria, in order to keep marriage a vital institution aligned with changing standards."). A religious group cannot be forced to open its doors or its sacraments to nonbelievers, but neither can the government restrict access to civil marriage to align with any particular religious beliefs. Such interference should not and cannot be permitted, particularly when it undermines the decision by other religious groups, including many of the undersigned *amici*, to recognize religious marriage for same-sex couples.

B. DOMA Favors One Form of Religious Marriage over Another Without a Secular Purpose.

Religious belief can play an important role in the formation of some individuals' public policy preferences. But that role must be tempered by principles of religious liberty, as "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 796 (1973) (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 622 (1971)). DOMA runs afoul of these longstanding Establishment Clause principles because its purpose was to write one particular religious understanding of marriage, an understanding directly at odds with the position taken by other religious traditions, into federal law without a legitimate secular rationale.

1. *The Establishment Clause Prohibits Laws that Endorse or Favor a Particular Religious Viewpoint.*

Since this country's founding, the concept of religious liberty has, at a minimum, included the equal treatment of all faiths without discrimination or preference. *See Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). As the Supreme Court explained in *Larson*:

> Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs.

> But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Id. at 245; *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1636 (1989) ("The . . . proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state.").

Applying these principles, the Supreme Court has consistently invalidated laws that have the purpose or primary effect of advancing certain religious denominations over others. *See Edwards* v. *Aguillard*, 482 U.S. 578 (1987) (holding that law requiring teaching of creationism was unconstitutional because it lacked a secular purpose); *Larson*, 456 U.S. at 244. In *Lemon*, the Court laid out an Establishment Clause test that remains instructive: a law must have a secular purpose; its primary effect cannot be to advance or inhibit religion; and it must not result in excessive government entanglement in religion. 403 U.S. at 612-13.

2. *DOMA Has No Secular Purpose, Has the Primary Effect of Advancing One Religious Viewpoint, and Limits Access to Civil Marriage Based on Particular Religious Beliefs.*

The Supreme Court has discussed at length the requirement that a statute have a secular purpose, noting that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cnty.* v.

ACLU of Ky., 545 U.S. 844, 864 (2005). Furthermore, under the Establishment Clause, the relevant question is whether Congress *at the time legislation was passed* was acting with a proper purpose. *See Edwards*, 482 U.S. at 594-95. The *McCreary* Court emphasized that this test has "bite," such that legislation will not survive scrutiny under the Establishment Clause simply because "some secular purpose" is constructed after the fact. 545 U.S. at 865 & n.13. In examining congressional purpose, courts look to a variety of sources, including legislative history, statements on the record, and testimony given by supporters. *Edwards*, 482 U.S. at 587, 591-92.

Certain opposition *amici* contend that "judicial scrutiny of legislative motives is fraught with peril." *Amicus* Br. of U.S. Senators Orrin G. Hatch et al. at 12. But as the Supreme Court explained in *McCreary*, examination of the purpose of a statute "is a staple of statutory interpretation that makes up the daily fare of every appellate court in this country." 545 U.S. at 861. The Court further explained that employing traditional tools of statutory interpretation such as legislative history allows a court to determine legislative purpose without resort to any "judicial psychoanalysis of a drafter's heart of hearts." *Id*. at 862.

Here, Congress made no secret of its intentions: DOMA's legislative history is replete with religious sentiments. The House Judiciary Committee Report on DOMA underscores the statute's religious underpinnings. The Report stated that

"[c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." Defense of Marriage Act, H.R. Rep. 104-664, at 15-16 (1996) (footnote omitted).

In addition, numerous members of Congress noted that an express purpose of DOMA was to incorporate their interpretation of Judeo-Christian religious beliefs about marriage into civil law. *See* 142 Cong. Rec. S10,109 (daily ed. Sept. 10, 1996) ("One only has to turn to the Old Testament and read the word of God to understand how eternal is the true definition of marriage.") (statement of Sen. Byrd); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 33 (1996) (hereinafter "*House Hearing*") ("Traditional heterosexual marriage . . . has been the preferred alternative by every religious tradition in recorded history.") (statement of Rep. Sensenbrenner); 142 Cong. Rec. H7442 (daily ed. July 11, 1996) ("[M]arriage is a covenant established by God.") (statement of Rep. Hutchinson); *id.* at H7446 (daily ed. July 11, 1996) ("[T]he institution of marriage is not a creation of the State. . . . [Rather] [i]t has been sanctified by all the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture.") (statement of Rep. Talent); 142 Cong. Rec.

H10113 (daily ed. Sept. 10, 1996) ("The definition of marriage is not created by politicians and judges . . . It is rooted in our history, in our laws and our deepest moral and religious convictions, and in our nature as human beings.") (statement of Sen. Coats).

As one example, a DOMA sponsor admitted that DOMA was enacted based on "God's principles," stating that:

> We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. It is under attack. There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want, as long as it feels good and does not hurt others.
>
> When one State wants to move towards the recognition of same-sex marriages, it is wrong. . . . We as a Federal Government have a responsibility to act, and we will act.

142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer). Religious witnesses also testified before Congress on both sides of the debate. *House Hearing*, *supra*, at 211 (testimony of Rabbi Saperstein); *id.* at 216-17 (testimony of Jay Alan Sekulow); *see also Edwards*, 482 U.S. at 591-92 (use of religious experts in support of legislation indicated that purpose was religious). Indeed, the comments of members of Congress reflect the very sort of "political

division along religious lines [that] was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622.

Moreover, as the district court held, there is no rational basis that would justify the federal government's wholesale disregard of same-sex marriages, which makes the religious commentary surrounding DOMA's enactment all the more constitutionally suspect. *Golinski v. United States Office of Personnel Management*, 824 F.Supp.2d 968, 1002 (N.D. Cal. 2012) ("The Court finds that neither Congress' claimed legislative justifications nor any of the proposed reasons proffered by BLAG constitute bases rationally related to any of the alleged governmental interests.").

While it dealt with the similar but distinct issue of the constitutionality of a state constitutional amendment limiting marriage to one man and one woman, the Northern District of California's decision in *Perry* v. *Schwarzenegger* deconstructs many of the rationales often set forth for state-level prohibitions on marriage between same-sex couples. *See Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 997-1004 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).[7]

[7] The *Perry* court examined six purported rationales for California's ban on marriage of same-sex couples: "(1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest." 704 F. Supp. 2d at

Many of those same rationales are offered in support of DOMA. *Amici* note that those rationales are even more illogical with respect to DOMA, because they are being applied to couples who are already married. They fail for the reasons discussed by the court in *Perry*, by the district court in its decision below, and by the Appellees and other *amici* supporting affirmance of the district court's decision in this case. *Amici* will not rehash each purported rationale here, but note that the absence of legitimate, secular rationales offered in support of DOMA, coupled with the religious sentiments expressed by legislators, renders DOMA constitutionally suspect under the Establishment Clause.

If measured at the time of enactment, DOMA also had no effect except to express the religious preference of the members of Congress who proffered these religious justifications for the law. Indeed, at the time of enactment, no state permitted marriages between same-sex couples. Even if measured after states began to recognize marriage equality, however, DOMA's effect was to put the entire weight of the federal government behind a particular religious understanding of marriage. DOMA should thus be viewed with suspicion.

Some opposition *amici*, in an attempt to argue that gay men and lesbians have "meaningful political power" for purposes of determining the appropriate

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998. It found that these "purported state interests fit so poorly with [the ban] that they are irrational…" *Id*. at 1002. Ultimately, the court held that the "evidence shows conclusively that [the ban] enacts, without reason, a private moral view that same-sex couples are inferior to opposite sex couples." *Id*. at 1003.

level of judicial scrutiny, contend that gay men and lesbians are "not without support" from certain religious groups. *See Amicus* Br. of Concerned Women for America at 25. These *amici* proceed to provide a statistical tally of religious constituencies arrayed for and against same-sex marriage. *Id.* at 25-27. But this exercise only further illustrates why DOMA violates the Establishment Clause. Through DOMA, the federal government has endorsed an official definition of marriage based on one particular side of the religious divide on this issue.

II. Moral Disapproval Alone Is Not an Adequate Rational Basis for DOMA.

Religion plays an important role in the lives of many Americans. Thus, many lawmakers unquestionably have personal religious and moral beliefs that guide their legislative decisions.[8] But under a long line of cases culminating in the Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), a law must have a purpose beyond the desire to disadvantage a group on the basis of moral or religious conviction. DOMA lacks such other purpose. The law is therefore unconstitutional.[9]

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[8] Separate from the constitutional and public policy issues involved, it should be noted that *amici* generally do not believe that homosexuality or marriage between same-sex couples is immoral. *See, e.g.*, Rev. Dr. C. Welton Gaddy, President, Interfaith Alliance, *Same-Gender Marriage & Religious Freedom: A Call to Quiet Conversations and Public Debates* (Aug. 2009), http://www.interfaithalliance.org/equality/read.

[9] *Amici* support the Department of Justice's conclusion, with which the Plaintiff-Appellee agrees, that DOMA should be scrutinized under a heightened level of

A. Moral Disapproval Without More Is Not a Valid Rational Basis Under the Equal Protection Clause.

The Supreme Court has held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice." *Lawrence*, 539 U.S. at 577 (2003) (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). As Justice O'Connor observed in her concurrence, "[m]oral disapproval of [a particular group], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582. Justice O'Connor further observed that the Court had "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

Lawrence is consistent with a series of cases in which the Supreme Court invalidated laws that reflect a "bare . . . desire to harm a politically unpopular group." *E.g.*, *Romer* v. *Evans*, 517 U.S. 620, 634-35 (1996) (alteration in original) (citation omitted); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973); *see also Perry v. Brown*, 671 F.3d at 1094 ("Enacting a rule into law based solely on the disapproval of a group, however, 'is a classification of persons undertaken for

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review. Pl.-Appellee's Br. 14. However, this brief analyzes the issue under rational basis review to show that DOMA cannot withstand even the lowest level of constitutional review, much less heightened scrutiny.

its own sake, something the Equal Protection Clause does not permit'" (quoting *Romer*, 517 U.S. at 635)). In these cases, the Court has properly stripped away the rationales proffered in support of such laws to uncover the fact that "animus," "negative attitudes," "unease," "fear," "bias," or "unpopular[ity]" actually motivated the legislative action at issue. *E.g.*, *Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that "irrational prejudice" against mentally disabled is not a legitimate interest); *Moreno*, 413 U.S. at 534 (invalidating restriction on households receiving food stamps based on unpopularity of "hippies"); *Romer*, 517 U.S. at 634 (finding that law targeting gay men and lesbians "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").[10]

In *Moreno*, for example, the Court struck down a federal law excluding from the food stamp program "any household containing an individual who is unrelated to any other member of the household." *Moreno*, 413 U.S. at 529. The Court first determined that the stated purpose of the law — "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households," *id.* at 533 (citation omitted) — was not furthered by the challenged provision. Looking for other possible rationales, the Court found, based primarily

[10] Contrary to the arguments made by BLAG and some opposition *amici*, the court need not find animus to find DOMA unconstitutional. *See* Pl.-Appellee's Br. 50-51.

on statements in the congressional record suggesting that the law was animated by dislike of "hippies" and "hippy communes," that the law's true purpose was to harm these groups. *Id.* at 534. The Court then found the law unconstitutional, holding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* (citation omitted).

Underlying this line of cases is an awareness that allowing condemnation of a politically unpopular group to satisfy the rational basis test would effectively eviscerate the Equal Protection Clause:

> [T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

R.R. Express Agency, Inc. v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). This risk is hardly theoretical: Some of the most notable violations of equal protection were justified by moral condemnation, from interracial marriage prohibitions, *Loving*, 388 U.S. at 3 (trial judge justified 25-year sentence by invoking God's separation of the races), to gender discrimination, *Bradwell* v.

Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J. concurring) (upholding state law prohibition on practice of law by women because it was consistent with "the law of the Creator" and "the general constitution of things").

B. *Lawrence* Has Equal Protection Implications.

While *Lawrence* was decided on due process grounds, *id*. at 578, the liberty interest that *Lawrence* protected is fundamental to the identity of gay men and lesbians, an insular and often stigmatized minority. *See e.g.*, *Perry v. Brown*, 671 F.3d at 1093 ("Indeed, because laws affecting gays and lesbians' rights often regulate individual conduct — what sexual activity people may undertake in the privacy of their own homes, or who is permitted to marry whom — as much as they regulate status, the Supreme Court has 'declined to distinguish between status and conduct in [the] context' of sexual orientation.'" (quoting *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010)). The *Lawrence* Court spoke not only of a protected liberty interest in the conduct prohibited by the Texas law — sodomy — but also of its opposition to laws that "demean[]" gay people and "stigma[tize]" a group that deserves "respect." *Id*. at 571-75; *see also* Nan D. Hunter, *Living with Lawrence*, 88 Minn. L. Rev. 1103, 1124 (2004). *Lawrence*

must be read to apply not only to due process cases, but also to equal protection cases involving laws that disadvantage gay men and lesbians as a class.[11]

The majority opinion in *Lawrence* noted that the decision's implications touch not only on due process, but also on equal protection, stating that the Equal Protection Clause theory "is a tenable argument," but that it did not go far enough. *Lawrence*, 539 U.S. at 574-75 ("[T]he instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). The Court then declared that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. The Court thus made it clear that the principles it was espousing pertain to any laws that treat gay men and lesbians as an unequal class, not just those challenged under the Due Process Clause.

The Court's recent decision in *Christian Legal Society* further buttresses this point by noting that, in the context of sexual orientation, conduct is closely tied to

[11] Heightened scrutiny applies to such an equal protection violation because DOMA impermissibly burdens the liberty interest of same-sex spouses' to build a family life together. *See* Pl.-Appellee's Br. 27-28.

status itself. 130 S. Ct. at 2990 ("Our decisions have declined to distinguish between status and conduct in this context."). Thus, any law targeting conduct that is closely linked with sexual orientation will have both a due process and an equal protection component. *Id.* Of particular import, the Court in *Christian Legal Society* cited *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring), for the proposition that "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."

These cases, taken together, reflect a clear intent by the Supreme Court that the due process and equal protection inquiries are interconnected when laws single out conduct closely aligned with status, particularly conduct associated with gay men and lesbians. *Lawrence* cannot be read as limited to the due process context. It has implications for equal protection as well.

C. DOMA Was Motivated by Moral Disapproval and Is Therefore Unconstitutional.

As noted in a recent letter to Congress expressing the Executive Branch's belief that DOMA is unconstitutional, "[t]he [Congressional Record underlying DOMA] contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships — precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to

guard against." Letter from Eric Holder, Attorney General, to John Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011). The Record shows that DOMA was motivated by moral disapproval of gay men and lesbians. H.R. Rep. No. 104-664, at 15-16; 142 Cong. Rec. H7444 (daily ed. July 11, 1996) ("[N]o society . . . has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.") (statement of Rep. Coburn); *id.* at H7482 (daily ed. July 12, 1996) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society . . . .") (statement of Rep. Barr); *id.* at S10068 (daily ed. Sept. 9, 1996) ("[DOMA] will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.") (statement of Sen. Helms); *id.* at H7444 (daily ed. July 11, 1996) ("The real debate is about homosexuality and whether or not we sanction homosexuality in this country. . . . What [constituents] believe … is that homosexuality is immoral, that it is based on perversion, that it is based on lust.") (statement of Rep. Coburn).

Tellingly, in 59 pages of briefing, Defendant-Intervenor Bipartisan Legal Advisory Group ("BLAG") never once mentions moral disapproval, which was an expressly stated congressional purpose of DOMA. Yet, as the Congressional

Record statements make clear, the purported rationales for DOMA only mask the true congressional purpose of morally condemning gay men and lesbians. In fact, DOMA's enactment had no effect *except* to express religious and moral disapproval, as at the time of its passage, no state licensed marriages between same-sex couples, a fact that BLAG would prefer to forget. Such a purpose is unconstitutional.

CONCLUSION

For the reasons stated herein, *amici* respectfully submit that the district court's decision should be upheld.

Respectfully submitted,

This 10th day of July 2012

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2012.

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