No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
EDITH SCHLAIN WINDSOR AND BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

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

Amicus Curiae Brief of Gay & Lesbian Advocates & Defenders and Lambda Legal Defense & Education Fund, Inc. in Support of Edith Windsor and the United States Addressing the Merits and Supporting Affirmance

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INTEREST OF AMICI[1]

Amici are among the nation's leading organizations committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work.

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. That litigation has included challenges to Section 3 of the federal Defense of Marriage Act ("DOMA"). *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. June 29, 2012) (No. 12-13), 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), 81 U.S.L.W. 3065 (U.S. July 20, 2012) (No. 12-97); and *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012), *petition for cert. before judgment filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231), 81 U.S.L.W.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

3115 (U.S. Sept. 11, 2012) (No. 12-302). In this Court, GLAD's work has included: *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Miller-Jenkins v. Miller-Jenkins*, 550 U.S. 918 (2007) (counsel for respondent on cert petition), *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (same), as well as being a participant on numerous amicus briefs.

Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal"), founded in 1973, is the nation's oldest and largest national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and policy work. Lambda Legal has appeared in this Court in numerous cases as counsel to parties and *amici*, including as counsel to the successful challengers of the anti-gay state initiative in *Romer v. Evans*, 517 U.S. 620 (1996), and of Texas's sodomy law in *Lawrence v. Texas*, 539 U.S. 558 (2003), two landmark sexual orientation cases decided by this Court. Lambda Legal is also counsel to the plaintiff in *Golinski v. United States Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal docketed*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012), *petition for cert. before judgment filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12-16), which held that DOMA violates the equal protection guarantee under both heightened scrutiny and rational basis review.

SUMMARY OF ARGUMENT

Amici support fully the position of the United States and of Edith Schlain Windsor that heightened scrutiny applies to classifications disadvantaging gay people, and that DOMA cannot survive application of that standard. *Amici* further believe that the Court should resolve this case on the basis of such heightened review, as confusion in the lower courts about the applicable standard leaves gay men and lesbians vulnerable to impermissible discrimination.

The focus on heightened scrutiny in the parties' filings, however, should not leave the Court with the impression that heightened scrutiny would be *required* to find DOMA unconstitutional. To the contrary, this Court's equal protection jurisprudence requires the same result even absent heightened review.

Although rational basis review affords the government significantly wider leeway to legislate in ways that incidentally advantage or disadvantage particular groups in pursuit of some permissible governmental goal, it is far from toothless. While deferential to legislative judgments, it still requires that a classification rationally serve a legitimate objective. This two-part test—requiring both that a classification serve a "legitimate" purpose (the "legitimacy" element of the test) and a rational relationship between the classification and such purpose (the "fit" element of the test)—remains a meaningful check on the majority's use of law to bestow advantages on itself while excluding others.

Recognizing that laws disadvantaging unpopular groups can arise out of improper objectives, particularly where important personal interests are targeted, the Court has been cautious, even under rational basis review, about approving such measures. And where a legislature states openly an impermissible purpose, the Court has been especially vigilant in assessing the credibility of any other asserted justifications.

More frequently, improper attempts to use the law to exclude disfavored groups from rights and protections bestowed upon the majority are justified in benign-sounding ways. Such justifications may deliberately mask intentional discrimination, or just reflect the majority's misunderstanding of the disfavored group. Whether based on pretext or unreasoned stereotypical thinking, such justifications frequently share recurring, identifiable features. When a disadvantageous treatment harms the targeted group in ways going well beyond the claimed purpose of the law, the rationale will not suffice. Conversely, a benign-sounding justification for a law that would appear to require extension of disadvantageous treatment to a larger class, when advanced on behalf of a measure that instead targets only a smaller, disfavored group, likewise raises a strong inference that the actual purpose of a law differs from the stated one.

DOMA bears each of the various indicia the Court has considered when it has invalidated laws under rational basis review. DOMA both targets a group disliked at the time of its passage and impacts

important personal interests. It arose not out of the usual process of allocating federal rights and benefits but as a one-time departure from the traditional method of predicating eligibility for federal marriage-based protections on a couple's marital status under state law. It was accompanied by overt statements of the impermissible purpose to express disapproval of gay people—statements that undermine the credibility of other justifications now being put forward. Many of the rationales offered in DOMA's defense are not legitimate to begin with. And those permissible in theory would, if taken at face value, apply equally to many heterosexual couples DOMA leaves unaffected, and bear no logical nexus to the sheer number and variety of disadvantages DOMA imposes. These factors all demonstrate that DOMA is precisely the sort of law that should fail rational basis scrutiny. Indeed, a clearer example is hard to imagine.

ARGUMENT

I. RATIONAL BASIS REVIEW IS CONTEXT-DEPENDENT.

At its core, the Equal Protection Clause requires that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object or the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It serves as a check on arbitrary and invidious exercises of power by the government.

Thus, "even in the ordinary equal protection case," the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end," the Court "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

A decision to apply rational basis review does not guarantee a measure's constitutionality, and the examination of the government's purpose and its relationship to the classification is not uniformly deferential. Rather, this Court's cases recognize that the context in which classifications arise can inform whether particular governmental purposes are likely to be legitimate and to bear the requisite relationship to the classification.

This Court has recognized circumstances when particular attention is warranted under equal protection review, including when: (1) the group disadvantaged by a measure is traditionally disliked or misunderstood, (2) important personal or liberty interests are at stake, and (3) the disadvantageous classification arises not in the usual course of governing but as a one-time departure from past practice. Under these circumstances, the usual presumption of constitutionality—that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group—is weakened. Because DOMA raises

concerns under *all* these criteria, it presents the paradigmatic case for particularly demanding review under this Court's "conventional and venerable" rational basis test. *Romer*, 517 U.S. at 635. Indeed, that is why a string of recent lower court decisions, including the First Circuit's opinion in *Massachusetts v. United States Department of Health & Human Services* (Boudin, C.J.), *Pedersen v. Office of Personnel Management*, and *Golinski v. United States Office of Personnel Management* (each cited on pp. 1-2, *supra*), as well as *Dragovich v. United States Department of Treasury*, 872 F. Supp. 2d 944 (N.D. Cal. 2012), have each held DOMA unconstitutional even under rational basis review.

A. Rational Basis Review Takes Into Account Whether a Law Targets a Historically Disfavored Group.

With most classifications drawn in the regular course of ordinary legislation, there is no reason to believe that distinctions reflect impermissible purposes. "[A]bsent some reason to infer antipathy," the "Constitution presumes" the "democratic process" will correct "improvident decisions . . . and that judicial intervention is generally unwarranted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, BLAG's suggestion that judicial deference is therefore always at its "zenith" under rational basis review, BLAG Br. at 23, ignores that even absent application of heightened scrutiny, the normal presumption of constitutionality is less conclusive when a measure disfavors a historically disadvantaged or unpopular group. The targeting of

such groups raises questions about whether bare antipathy formed the basis for the legislation. *See Romer*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). In such cases, the Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment).

Romer, *Cleburne*, and *Moreno* all exemplify this principle. Each case reviewed a classification targeting a group to which the Court had not applied heightened scrutiny, but nonetheless was commonly held in disdain or misunderstood—gay people in *Romer*, those with mental disabilities in *Cleburne*, and those living in nontraditional households (or, as the legislative history characterized them, "hippie communes") in *Moreno*, 413 U.S. at 534. In applying rational basis review in each case, the Court did not ignore that the targeted group was widely disliked. The Court recognized instead the possibility that dislike of the groups might itself explain the measures in question, and responded by carefully assessing potential alternative explanations for each measure before reaching "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer,* 520 U.S. at 634; *see also Schweiker v. Wilson*, 450 U.S. 221, 231 (1981) (condoning more deferential review where classification at issue did *not* "isolate the mentally ill or subject them, as a discrete group, to special or subordinate treatment").

B. Rational Basis Review Takes Into Account Whether a Law Implicates Important Personal Interests, Even Indirectly.

This Court's rational basis cases also consider the nature of the interests affected by a classification. Even when fundamental rights, and thus "strict" scrutiny, are not implicated, the Court has exercised much greater caution in evaluating classifications that disadvantage important "personal relationships" and liberty interests. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (collecting cases).

The Court approaches measures burdening intimate and family relationships with particular care. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court invalidated a state law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to the latter, but not the former. Although some Justices viewed the case as resolvable on substantive due process grounds, the plurality decided it on the narrower basis that the law impermissibly discriminated against unmarried persons, a class not meriting heightened review. *Eisenstadt* closely examined how the law operated in practice, including whether the state's claimed interest in public health could justify the range of contraceptives covered as well as the preferential treatment of married couples under the statute. *Id.* at 447-53. Far from deferring to the state's policy claims, the plurality concluded that "despite the statute's superficial earmarks as a health measure, health, on the face of the statute,

may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations." *Id.* at 452. The opinion emphasized concern that the law infringed on personal relationships and "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453-54; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (citing *Eisenstadt*); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (same).

M.L.B. v. S.L.J., 519 U.S. 102 (1996), shows that this same principle also holds true when a measure's impact on important personal interests is only indirect. There, the Court reviewed, in a termination-of-parental-rights proceeding, a state requirement that civil appellants prepay certain costs before appeal. *Id.* at 108. The Court acknowledged that there is no fundamental right to appeal a civil ruling, but emphasized that its equal protection analysis must nonetheless be guided by "the character and intensity of the individual interest at stake." *Id.* at 120. The Court gave "close consideration" to the fee requirement because it implicated "[c]hoices about marriage, family life, and the upbringing of children . . . among associational rights this Court has ranked as of basic importance in our society." *Id.* at 116 (internal quotation marks omitted). Thus, even in the absence of a direct infringement on a fundamental right, the Court held that the state could not deny indigent parents the same access to appeal available to non-indigent parents.

Romer demonstrates that these concerns extend beyond intimacy and the severing of familial relationships. *Romer* was animated not only by the fact that the amendment at issue disfavored gay people, *see supra* Part I.A, but also the fact that it impacted their ability to participate in transactions and endeavors across the board—from housing, real estate sales, education, and employment to health and welfare services—burdens the Court reviewed with particular care. *See* 517 U.S. at 629. The Court's focus thus extended to protecting the broader panoply of "transactions and endeavors that constitute ordinary civic life," *id.* at 631; *see also Cleburne*, 473 U.S. at 443-44 (carefully analyzing under rational basis review zoning scheme affecting interest of mentally disabled persons in residing in particular community); *Moreno*, 413 U.S. at 534-38 (cautiously reviewing food stamp eligibility requirements affecting non-familial relationships); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (even though there is no "constitutional right to vote for electors for the President," Florida's method for counting ballots violated Equal Protection Clause because each voter must be treated with "equal dignity"); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (burden on individual's professional prospects formed basis for finding equal protection violation). Thus, the Court has a long history, in rational basis cases, of balancing the importance of the personal interests affected with the deference afforded the government.

C. Rational Basis Review Takes Into Account Whether a Law Is Historically Anomalous.

The Court's application of rational basis review also has reflected skepticism about unique and anomalous legislation imposing disadvantageous treatment. Because the regular business of governing routinely involves classifications that favor some groups and disfavor others, the mere drawing of such classifications does not normally raise an inference of improper purpose. Conversely, when the government goes out of its way to impose disadvantages on a group in an area where it has not traditionally drawn such classifications, the regular presumption—that some classification among persons is the inevitable business of governing—loses force. As the Court noted in a different context, "sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (internal quotation marks omitted) (alterations in the original).

Romer, again, is on point. There, the Court emphasized that the Colorado amendment, which prohibited local governments and state agencies from enacting antidiscrimination ordinances protecting gay people, but not other groups, was "unprecedented." *Romer*, 517 U.S. at 633. The lack of precedent for such selective elimination of local political control over municipal ordinances was significant because "'[d]iscriminations of an unusual character especially suggest careful consideration to

determine whether they are obnoxious to the constitutional provision.'" *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)) (brackets in original). As the Court in *Romer* noted, "[r]espect for th[e] principle [of equal protection] explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer*, 517 U.S. at 633.

D. DOMA Is the Paradigmatic Law Calling for Close Attention Under Rational Basis Review.

DOMA is a veritable perfect storm, meriting close review for every one of the reasons listed above. First, irrespective of whether classifications targeting gay people garner heightened scrutiny, it is obvious that the persons disadvantaged by DOMA have historically been mistreated and condemned. *See Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). For that reason alone, laws that selectively disadvantage gay men and lesbians, as DOMA does, merit closer attention. *See Romer*, 517 U.S. at 633.

Second, irrespective of whether the burdens imposed by DOMA on the marriages of same-sex couples are viewed as encroaching on fundamental rights to family relationships, the family and liberty interests at stake are certainly substantial. The burdens of having one's lawful marriage negated in the many important areas of life touched by the federal government (which range from treatment under the tax laws to legal protections in federal

court, private pension plans, rights under the Family Medical Leave Act, and federal benefits under numerous programs, among others) pervasively disadvantage those relationships and thereby implicate "[c]hoices about marriage, family life, and the upbringing of children." *M.L.B.*, 519 U.S. at 116. As *M.L.B.* recognized, even *indirect* burdens on such interests merit close attention. *See id.* at 116, 127-28. Moreover, DOMA's wholesale refusal to afford marriages of same-sex couples any legal recognition withdraws a panoply of protections of marriage that cumulatively "constitute ordinary civic life in a free society" taken for granted by other married couples. *Romer*, 517 U.S. at 631.

Finally, DOMA is precisely the sort of one-off, unprecedented government action that merits special attention. As explained more fully in the *amicus curiae* brief filed in this case by numerous historians and the American Historical Association, the traditional approach of the federal government has long been to use a couple's actual marital status under state law whenever the federal government chose to make a particular protection dependent upon marriage. Br. of *Amicus Curiae* Historians at Part III. Indeed, this longstanding federal deference to state law has constitutional dimensions given the states' traditional role as the sovereigns that issue marriage licenses, as well as make determinations of family status more generally. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("[T]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States." (quoting *In re Burrus*, 136 U.S.

586, 593-94 (1890))); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992); *id.* at 716 (Blackmun, J., concurring) ("declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity" lie at the "core" of domestic relations law reserved to states); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States"). DOMA's departure from this longstanding practice, cabined solely to same-sex couples, thus raises a potential inference that the effect of the law—disadvantaging same-sex couples—was also its purpose.

II. THE "LEGITIMACY" ELEMENT OF THE RATIONAL BASIS TEST IS A MEANINGFUL LIMITATION ON CLASS-BASED ENACTMENTS.

Even absent the considerations discussed in Part I *supra*, application of the Court's rational basis test, while more deferential than heightened forms of scrutiny, is far from "toothless." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). Among other things, the requirement that any governmental purpose served by a classification be "legitimate," *Romer*, 517 U.S. at 632, represents a real constraint on improper use of state power, which this Court has enforced to invalidate measures that classify persons for impermissible purposes.

A. Measures May Not Privilege Preferred Groups or Disadvantage Disfavored Groups for the Purpose of Favoritism or Animus Alone.

The legitimacy requirement, as an initial matter, ensures that a mere desire to bestow preferential treatment on a favored group, or disadvantages on a disfavored one, is an invalid reason for treating similarly situated persons differently. *Zobel v. Williams*, 457 U.S. 55 (1982), is instructive. There, the Court rejected under rational basis review a state dividend distribution plan giving preferential treatment to long-term residents, because such favoritism was not a legitimate purpose. *Id.* at 63-64. A string of similar cases illustrates that the mere desire to benefit a preferred group to the exclusion of others is an illegitimate basis for government action. *See, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618-22 (1985) (tax exemption to Vietnam veterans residing in New Mexico before certain date); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880-83 (1985) (tax policy favoring in-state corporations); *Williams v. Vermont*, 472 U.S. 14, 23 (1985) (tax exemption favoring those residing in state at time of car purchase).

The converse is equally true: disfavoring some groups might be the consequence of certain government policies, but it cannot itself be their object. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

Moreno, 413 U.S. at 534; *Cleburne*, 473 U.S. at 448. Indeed, as discussed in Part I.A *supra*, the impermissibility of such objectives is precisely why laws that single out disfavored groups for particular disadvantage, such as in *Moreno*, *Cleburne*, and *Romer*, trigger the need for greater caution in evaluating the laws' constitutionality.

This Court's decisions have sometimes used the term "animus" to describe this latter category of impermissible governmental objectives. Such "animus" toward gay people is not a legitimate basis for law. *Romer*, 517 U.S. at 632. This category of prohibited rationales extends well beyond overt animosity, bigotry, or hatred. Impermissible prejudice also includes a more subtle yet harmful "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). A belief that a particular group of persons is immoral is likewise impermissible; as Justice O'Connor noted in *Lawrence*, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause," *Lawrence*, 539 U.S. at 583, and thus a desire to express "dislike and disapproval against homosexuals" cannot form a valid basis for a classification. *Id.*; *see also Moreno*, 413 U.S. at 536 n.7 (citing favorably lower court's rejection, as raising "serious constitutional questions," of "morality" as basis for discriminating against

households of unrelated persons in federal program (quotation marks omitted)).

This Court's cases also extend the prohibition against class-based legislation under rational basis review beyond animus to instances where there is no outright dislike of the disfavored class or desire to afford preferential treatment to a preferred group at all, but instead arbitrary treatment caused by mere neglect or inertia. In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), for instance, the Court invalidated under rational basis review a property tax regime that essentially assessed value based on a property's most recent purchase price, thus causing over time the assessments to vary substantially as between recently purchased properties and those not recently purchased. *Id.* at 343-44. The Court's decision did not turn on any holding that the county tax commissioner had targeted recent purchasers out of animosity, but on a recognition that the tax scheme, while perhaps not intentionally discriminatory at the time of adoption, had become indefensibly arbitrary "over time," such that continuing the system in the face of those consequences amounted to "intentional" action by the relevant official. *Id.* at 346; *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam) ("irrational and wholly arbitrary" treatment by the government is sufficient to state an equal protection claim, even "apart from . . . subjective motivation" or "ill will" (internal quotation marks omitted)).

B. An Interest's "Legitimacy" Is Not Evaluated in the Abstract, but Rather Based on the Scope of Authority of the Entity Asserting It.

Because what constitutes a "legitimate" interest may depend on the scope of authority of the governmental entity asserting it, this Court's cases mandate a threshold inquiry into whether an interest advanced is within the purview of the particular government body drawing the classification. To be "legitimate," an interest must be not only a proper basis for government action in the abstract but also "properly cognizable" by the government body at issue, *Cleburne*, 473 U.S. at 448, and "relevant to interests" the classifying body "has the authority to implement." *Garrett*, 531 U.S. at 366 (quotation marks omitted).

For instance, in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court considered an equal protection and due process challenge to a Civil Service Commission rule that limited federal employment to citizens. The Court expressly assumed "that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized." *Id.* at 105. The Court refused to consider that and other immigration- or foreign-policy-related rationales as part of its inquiry, however, because they were "not matters which are properly the business of the Commission," and the rationality of the rule needed to be "justified by reasons which are properly the concern of that

agency." *Id.* at 115-16. Therefore, the only justification *Hampton* analyzed was whether "administrative desirability" supplied a "rational basis" for the rule, given that there were some "important and sensitive positions" for which citizenship was a genuine requirement—an administrative convenience rationale the Court then went on to reject. *Id.* at 115.[2]

Similarly, in *Plyler v. Doe,* 457 U.S. 202 (1982), the Court did *not* hold that it was illegitimate, in the abstract, to treat undocumented immigrants differently when it invalidated a law excluding their children from public education. Rather, it noted that a claim of need to treat undocumented persons differently had to be viewed with particular skepticism when asserted by a state, as opposed to the federal government. The Court explained that, while it is a "routine and normally legitimate part of the business of the *Federal Government* to classify based on the basis of alien status . . . only rarely are such matters relevant to *legislation by a State*." *Id.* at 225 (emphasis added) (internal quotation marks omitted).[3] Thus, to defend a discriminatory classification, it is not enough to articulate some

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[2] Although *Hampton* blended both equal protection and due process analyses, the opinion framed the relevant inquiry as whether a "rational basis" could be found for the Commission's rule. 426 U.S. at 115.

[3] Although the level of equal protection scrutiny ultimately applied by *Plyler* is arguable, its dismissal of the state's claimed interest was based on the respective powers of the state and federal governments, and not on the precise level of review. 457 U.S. at 225-26.

purpose that might be served by the classification. The purpose must also be an appropriate pursuit for the relevant government body.

C. The "Legitimacy" Element of the Rational Basis Test Sharply Limits the Justifications that Can Permissibly Be Asserted on Behalf of DOMA.

Leaving aside the other difficulties with the asserted rationales for DOMA, *see* Part III.E *infra*, the legitimacy element of the rational basis inquiry both undermines the contemporaneous justifications for enactment of the statute and excludes many of the rationales on which DOMA has been defended after the fact. Several of BLAG's claimed defenses of the law do not even survive this first element.

At the outset, because favoritism is not a legitimate governmental interest, DOMA cannot be justified as a measure to privilege heterosexual couples over same-sex couples—or, as BLAG puts it, to "retain" the privileged status of "traditional" marriage for heterosexuals on the theory that they had been the only ones to receive marital benefits in the past, and that previous Congresses had only wanted to confer marital benefits on heterosexuals. BLAG Br. 37, 43. Simply replicating and preserving special privileges for married heterosexual couples, not accessible to other married persons, smacks of precisely the sort of unreasoned favoritism for a preferred majority group that this Court's cases rule out as a legitimate justification. *See* Part II.A *supra*.

DOMA likewise cannot be sustained by the "morality" justifications invoked contemporaneously with its enactment. When it passed DOMA, Congress made crystal-clear that its purpose was to express moral disapproval of same-sex couples. *See, e.g.*, H.R. Rep. No. 104-664 at 15-16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919-20 (stating that goal of DOMA was to "reflect and honor a collective moral judgment about human sexuality" that "entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality" (footnote omitted)). Indeed, these were not stray statements from isolated legislators; they appear in the official Committee Report. But "moral disapproval" of gay people is not a legitimate government interest, and thus cannot suffice as a justification for DOMA's classification. *Lawrence*, 539 U.S. at 583; *see also Moreno*, 413 U.S. at 535 n.7.

Indeed, even to the extent that BLAG seeks to portray Congress's purposes for the law as having been sensible given the supposed unknowns at the time of enactment, *see* BLAG Br. at 39-41 (claiming unknown effects on the public fisc of marriages by same-sex couples); *id.* at 41-43 (claiming unknown effects on "society as a whole"), that is not enough. DOMA works a continuing violation of the rights of gay men and lesbians; what must be justified is not only the passage of the law in the first instance, but also its continued application. The "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by

showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *see also Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) ("A statute valid when enacted may become invalid by change in the conditions to which it is applied."). *Allegheny Pittsburgh Coal Co.* teaches that the Court must consider not only whether a governmental measure or practice made sense at the time of enactment, but also its continuing rationality, because continuing a practice that has become irrationally arbitrary "over time" itself becomes "intentional" arbitrary action. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 346. Thus, BLAG's claims that Congress could have been rationally responding to unknown or little-known facts about same-sex couples and their relationships in 1996, *see* BLAG Br. at 39, 42, neglects the obligation to evaluate the continuing effects of those decisions years later, as many same-sex couples have married.

The principle that "legitimate" interests must be evaluated based on the powers and authority of the particular enacting governmental body further restricts the permissible rationales upon which DOMA can be defended. Notably, because "[t]he whole subject of domestic relations . . . belongs to the laws of the States," *Elk Grove Unified School District*, 542 U.S. at 12, it cannot be, as BLAG contends, a defense of DOMA that Congress might have preferred a particular set of family law rules (in which same-sex couples cannot marry) to those actually in force in states that allow marriage by such couples. *See* BLAG Br. at 43-48 (arguing that

Congress could rationally exclude married same-sex couples from federal protections for same host of reasons some states decline to issue marriage licenses to same-sex couples); *see also id.* at 37-41 (arguing that past Congresses' understanding that only heterosexual couples could marry can justify DOMA's continued exclusion of same-sex couples once they married as well). To be sure, Congress is not required to use a state-law marital status in setting eligibility criteria for federal rights or benefits. It can set such criteria on other bases that advance its legitimate interests. But a Congressional desire to define who Congress thinks should or should not be married cannot itself be a legitimate reason for such differential treatment, as it is not within the "interests" the federal government has the "authority to implement." *Garrett*, 531 U.S. at 366 (quotation marks omitted); *see also Hampton*, 426 U.S. at 115.

Finally, Congress's admitted desire to use DOMA to express moral disapproval of gay people is important to this Court's analysis. The Court's cases in the rational basis context do not necessarily make legislators' subjective intent a dispositive criterion in evaluating whether the resulting legislation is constitutional. But neither do the cases require ignoring actual evidence of an improper legislative purpose in evaluating the credibility of *other* asserted justifications. In *Moreno*, for instance, the fact that the legislative history "indicate[d]" the measure was intended to target "hippie communes," 413 U.S. at 534, was specifically called out in the Court's analysis of whether the various other

interests asserted by the government made sense. *Id.* Here, the open congressional statements of hostility against gay people should cause particular skepticism about other after-the-fact explanations BLAG has attempted to generate.

III. THE "FIT" ELEMENT OF THE RATIONAL BASIS TEST IS ATTENTIVE TO PRETEXTUAL EXPLANATIONS FOR IMPERMISSIBLE DISCRIMINATION.

Rarely is legislation enacted to disadvantage an unpopular group accompanied by admissions of the law's true purpose. Indeed, the openness with which the Congress that enacted DOMA embraced "morality" as the justification for its disparate treatment represented an unusual degree of candor. *See* Part II.C *supra*.[4]

The more normal course is for a law that improperly disadvantages a disfavored group to be accompanied by some pretense that any harm to the group is merely the incidental byproduct of some other purpose. Rational basis review does not require the Court to take such fictions at face value. To the contrary, a "court applying rational-basis review under the Equal Protection Clause must

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[4] This candor is perhaps explained by Congress's explicit reliance on the now-overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), which the Committee cited for the proposition that it is a "rational purpose" to "express[] the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable." H.R. Rep. 104-664, at 31, *reprinted in* 1996 U.S.C.C.A.N. at 2937.

strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (citing *Cleburne,* 473 U.S. at 446-47, 450, and *Moreno*, 413 U.S. at 533-36).

Detection of such pretexts is a context-dependent inquiry that will inevitably vary with the nature of the interest asserted. However, this Court's cases invalidating measures under rational basis review have recognized certain categories of pretextual explanations that share recognizable features. First, where a measure imposes multiple and varied disadvantages on a class of persons, the disadvantages are more likely to reflect intentional harm rather than reasoned policymaking. Second, where the disadvantages imposed appear overbroad or disproportionate to the interest claimed, that again suggests that the claimed interest is pretextual. Third, where a claimed interest on its face would suggest that the majority group should also bear the same costs as the group disadvantaged, yet the costs are borne exclusively by the disfavored group, that too calls the explanation into serious question. And fourth, justifications that depend for their validity on unsupported, unfavorable factual assumptions about the disadvantaged group exceed the leeway afforded the governing branches in exercising legislative judgment. DOMA bears each and every one of these features.

A. Broad Legislation Imposing Multiple, Varied and Unrelated Disadvantages Raises an Inference that No Legitimate Policy Purpose Exists.

Particularly relevant here, *Romer* recognizes that where a law imposes a multitude of varied and seemingly unrelated disadvantages upon a disfavored group, it is likely to defy legitimate explanation. The measure in *Romer*, which repealed and prohibited further antidiscrimination ordinances protecting gay people addressing a wide variety of subjects, "identifie[d] persons by a single trait and then denied them protections across the board." *Romer*, 517 U.S. at 633. This deprivation of many different kinds of rights at the same time—addressing areas ranging from housing, real estate sales, education, and employment, to health and welfare services—caused the initiative to "def[y] . . . th[e] conventional inquiry" of rational basis review. *Id.* at 632.

The lesson from *Romer* is that as the disadvantages imposed by a classification multiply, they become much more difficult to explain as anything other than an intentional effort to burden the targeted group. To decide *Romer*, the Court did not need to determine, for instance, whether there might be some legitimate reason for Colorado to ensure uniformity in its discrimination laws pertaining to a particular area (such as employment) by preventing its localities from adopting a multitude of varying ordinances on the subject. That the initiative at issue in *Romer* also deprived gay people

of antidiscrimination protections in countless other areas demonstrated that no explanation other than a desire to disadvantage this group could exist for the initiative. *Id.* at 635.

B. Burdens on the Targeted Class Disproportionate or Excessive to the Claimed Interest Suggest Pretext.

Another sign of pretextual explanations for disadvantaging a group is that the burdens borne by the group are disproportionate to the interest claimed. For instance, in *Eisenstadt*, the Court dismissed as "dubious" the purported explanation that a prohibition on distribution of contraceptives to unmarried persons furthered the goal of deterring premarital sex. 405 U.S. at 448-49. Notably, the plurality did not deny that "pregnancy and the birth of an unwanted child" could in fact operate as such a deterrent. *Id.* at 448. To the contrary, it admitted that prohibiting the distribution of contraceptives to unmarried persons was "possibl[y]. . . effective" at furthering that goal. *Id.* at 449. Yet it also observed that the penalty for violating the prohibition on distributing contraceptives was substantial relative to the comparatively minor criminal offense of extramarital sex; it was "hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." *Id.* (quotation marks omitted). Thus, rational basis review considers not only whether there is a causal nexus between a claimed interest and a classification, but also whether the

burdens of the classification are proportionate to the interests purportedly advanced—and where substantial burdens address comparatively minor issues, the Court is rightly skeptical.

C. Declining to Extend to Majority or Preferred Groups the Same Burdens Borne by the Targeted Group Undercuts the Plausibility of Explanations for Disparate Treatment.

Another indicator that a benign-sounding justification for a measure masks impermissible discrimination is when the justification on its face would suggest the extension of unfavorable treatment to a wide class of persons, including members of the majority or favored groups, but the measure has instead been drafted to force a disliked group to bear its burdens exclusively. As this Court has recognized in another context, when a law's "pattern of exemptions parallels [a] pattern of narrow prohibitions," thus confining its burdens to a narrow group, it operates as a red flag that a law is likely an intentional effort to penalize or exclude the group in question. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

While such laws are "underinclusive," the defect goes beyond imprecise line-drawing, which can be inevitable in run-of-the-mill legislation and is not necessarily constitutionally problematic on its own. Rather, the Court has been particularly skeptical of those underinclusive measures where the majority has exempted itself from the very unfavorable

consequences claimed as necessary to the achievement of the government policy.

Cleburne and *Eisenstadt* are instructive. In *Cleburne*, the city cited a number of policies related to residential density to defend the zoning ordinance requiring a special use permit for the group home for people with mental disabilities. *Cleburne*, 473 U.S. at 449-50. Yet at the same time, the ordinance required no similar permit for other group living arrangements causing the same density issues, such as "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged," thus demonstrating that those claimed policy interests—although legitimate in the abstract—could not explain or justify the ordinance. *Id.* at 447.

Likewise, in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use." 405 U.S. at 449. Given those circumstances, the "deterrence of premarital sex [could not] reasonably be regarded" as the purpose of keeping contraceptives from unmarried persons because the law did not "deter married persons from engaging in illicit sexual relations" using contraceptives they could legally acquire under the same statute. *Id.*

To be sure, there are cases in which the government must inevitably extend favorable treatment to some and deny it to others, such as to

determine eligibility for particular governmental benefits that by necessity cannot be extended to everyone, or to define the class of entities subject to regulatory requirements that by necessity cannot apply to everyone. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (cable franchise exemptions); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (Social Security benefits); *Mathews v. Diaz*, 426 U.S. 67 (1976) (Medicare eligibility).[5] Because the exclusion of some classes of persons is inherent in the nature of this project, preferential treatment for some (and leeway to draw the resulting categories) does not necessarily raise an inference of improper purpose. But as *Moreno* demonstrates, that does not exempt from equal protection review instances where already-existing eligibility criteria are affirmatively altered for the purpose of excluding similarly situated persons from benefits to which they would otherwise qualify. And where a majority simply exempts itself entirely from the same burdens a policy would appear to require if taken at face

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[5] Although BLAG also cites *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), for the proposition that the government receives substantial deference in "determinations of who or what constitutes a family," BLAG Br. at 29, the case does not stand for that proposition. It simply upheld an exemption for related persons from a zoning ordinance prohibiting more than two persons from sharing a residence. Moreover, insofar as the justification proffered in *Belle Terre* was density-related, yet the challenged zoning ordinance conferred special privileges on related persons by exempting them from the ordinance's density limitation on dwellings occupied by unrelated persons, it is not at all clear that *Belle Terre* remains good law after *Cleburne*.

value, as in *Cleburne* and *Eisenstadt*, the Court has found special skepticism warranted.

D. Factual Justifications for Disparate Treatment Cannot Be Imaginary.

This Court's cases also recognize that justifications for impermissible laws can take the form of hypothesizing an alternate set of factual circumstances under which the law might advance some legitimate purpose. While the Court does not subject the lawmaking process to judicial standards of proof, and provides leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit "facts" simply to be invented, or declared by fiat, to justify a law that would otherwise appear impermissible. As the Court put it, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *accord Romer*, 517 U.S. at 632-33 (classification must be "grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it serve[s]").

Heller itself is an example. In affirming Kentucky's differential legal standards for involuntary commitment as between persons with mental retardation and persons with mental illness, the Court did not merely rely on the state's assertion, or guesswork, that the two groups bore real differences relevant to the classification. The Court did not simply allow Kentucky to speculate that

mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. Instead, it relied upon a long list of diagnostic manuals and journals to itself determine that Kentucky had legislated on the basis of reasonably conceivable facts and not stereotypes or misunderstandings. *See Heller*, 509 U.S. at 321-25.

Conversely, when unsupported and implausible factual assertions have been utilized in defense of discriminatory legislation, particularly where such assertions make unfavorable and unsupported judgments about the disadvantaged class, the Court has not been hesitant to disregard such assertions as false. Thus, in *Moreno*, the Court carefully scrutinized and rejected the government's claim that the law was justified because the targeted households of unrelated persons might be "relatively unstable," and also more likely to include individuals inclined to commit fraud. 413 U.S. at 534-35. Finding the government's explanations "wholly unsubstantiated," the Court held there was no rational basis for the status-based ban and struck it down. *Id.* at 535.[6] Thus, while not holding Congress

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[6] BLAG characterizes *Moreno* as rejecting an asserted interest in fraud prevention because the rules were susceptible to circumvention by persons determined to commit fraud. BLAG Br. 23 n.5. While this was among the Court's considerations, it was by no means the only one. It also observed that the Government was making "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households," and that there were independent statutory provisions designed to address fraud, which "casts considerable doubt upon the proposition that [the classification] could

to judicial standards of proof that persons in unrelated households were more likely to commit fraud or present instability that might undermine the purposes of the program, the Court did not treat unsupported, disparaging stereotypes of persons in such homes as sufficient to justify the discriminatory treatment.

Cleburne is likewise instructive. There, the Court dismissed any suggestion that the density-related concerns that supposedly justified the zoning scheme applied any differently to persons with mental disabilities than to other persons in similarly dense housing conditions. *Cleburne*, 473 U.S. at 449-50. Rather, it recognized that those concerns reflected no more than "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in a legislative determination, and refused to accept them. *Id.* at 448.

E. DOMA Bears All the Classic Indicia of Pretextual Discrimination.

DOMA triggers the very same constitutional concerns regarding the nexus between its stated rationales and actual operation that have caused this Court to strike down other measures under rational basis review. Indeed, to the extent any of BLAG's claimed rationales for DOMA survive the "legitimacy" element of the rational basis test, *see* Part II.C *supra*, they fail the "fit" element as discussed below.

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rationally have been intended to prevent those very same abuses." *Moreno*, 413 U.S. at 535, 536-37.

First, like the measure in *Romer*, DOMA imposes disadvantages on gay people that are so broad, and so varied, as to defy any credible connection to a legitimate purpose. DOMA amended well over a thousand federal laws and regulations dealing with such disparate subjects as tax policy, federal employee benefits, rights under private pension plans, protections under the Family Medical Leave act, rights to invoke spousal privilege in federal court, copyright law, bankruptcy proceedings, and conflict-of-interest rules.[7] It is impossible to see what any of these disparate laws and regulations have in common other than that Congress chose, in DOMA, to subject gay people to different treatment under each of them. The sheer number and variety of policies affected renders highly implausible any assertion that some real federal policy objective lay behind DOMA other than impermissibly to symbolize the federal government's condemnation of married same-sex couples.

Second, and relatedly, DOMA suffers from difficulties of proportionality and overbreadth relative to its stated rationales, similar to the measures at issue in cases such as *Eisenstadt* and *Romer*. It is unnecessary to consider whether a claimed interest in encouraging heterosexual child-rearing, for instance, might justify some differential

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[7] *See* U.S. Gen. Accounting Office, Office of Gen. Counsel, GAO/OCG-97-16, Defense of Marriage Act (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf; U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

treatment among same-sex and heterosexual couples. *See* BLAG Br. at 44-48. Nor is it necessary to decide whether some federal classification might be defended on the basis of an interest in creating "uniformity" so as to avoid the claimed administrative difficulty of determining eligibility for any particular federal program in the event a married same-sex couple relocates to another state. *See* BLAG Br. at 33-34. While *Amici* fully agree with Ms. Windsor that these purported rationales have no merit, *see* Windsor Merits Brief at Part II.B.2, *see also Hampton*, 426 U.S. at 115 (rejecting administrative convenience rationale for discrimination in federal employment context because Court could not "reasonably infer" that the administrative work avoided by the measure was "particularly onerous task"), it is unnecessary to answer either question because the disadvantages DOMA heaps upon married same-sex couples are vastly out of proportion to, and in many cases entirely unrelated to, those claimed objectives.

Third, like the measures at issue in *Cleburne* and *Eisenstadt*, many of the rationales asserted on behalf of DOMA would, if taken at face value, counsel equally in favor of extending the unfavorable treatment beyond the targeted group to members of the majority. For instance, rationales concerning a supposed federal policy to encourage unexpectedly expectant parents to marry, or a supposed federal policy to encourage child-rearing by heterosexual couples, logically apply only to a subset of those couples—unwed couples who become pregnant by accident. The extension of the full panoply of federal

marital rights and benefits to the much wider class of married heterosexual couples upon whom the states have conferred the right to marry undercuts the claimed nexus between that asserted policy objective and DOMA. The "purported justifications for the [statute] ma[k]e no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects," *Garrett*, 531 U.S. at 366 n.4 (citing *Cleburne*), and the law is "so riddled with exceptions that" the claimed purpose "cannot reasonably be regarded as its aim." *Eisenstadt*, 405 U.S. at 449.

In the same vein, a claimed policy interest in achieving "uniformity" in the treatment of all same-sex couples (whether married or not) to spare the federal government the supposed difficulties of discerning the marital status of couples whose marriages might be recognized in some jurisdictions but not others, *see* BLAG Br. at 33-37, loses force when comparably situated heterosexual couples (such as those in common-law marriages) are not asked to bear the same burden.[8] Likewise, a

[8] The legitimacy of this rationale is suspect as well. Colorado could have made the identical argument in *Romer*, and contended that it had an interest in ensuring that antidiscrimination laws remain "uniform" throughout the state such that landlords, employers, and operators of public accommodations not be subject to varying antidiscrimination standards from municipality to municipality (and such that gay people in some parts of Colorado not enjoy different legal protections than those in other parts of the state). *Romer* nowhere suggests that the initiative could rationally have been defended on this basis. In addition, given that the federal government does not treat all heterosexual couples the same

purported interest in sparing the public fisc the expense of federal marital benefits, *see* BLAG Br. at 37-41, cannot justify denying benefits only to the far smaller set of same-sex married couples while granting them to different-sex couples. The systematic misalignment between these claimed policies and the actual rule assigned by DOMA suggests that the exclusion of same-sex couples from federal marital rights and protections was the purpose, not the side effect, of the statute.

Finally, as with the federal statute at issue in *Moreno*, some purported defenses of DOMA rely on disparaging and unsupported factual assumptions that suggest an absence of reasoned contemplation or a deliberate ignorance about the group being targeted. Hypotheses that same-sex couples make poor parents whose marriages should be discouraged by penalizing them under federal law reflect disparaging and unsupported views about a disliked group that cannot pass for reasoned legislative judgment. This Court's jurisprudence does not allow such disparaging hypotheses simply to be invented, and then used as support for discriminatory measures that cannot stand without them.

(but in fact does the opposite, by affording rights and privileges to married couples not afforded to unmarried heterosexual couples), it is not at all clear why there should be a federal interest in treating all same-sex couples the same irrespective of whether they are married or unmarried.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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