No. ____

In The

Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

NANCY GILL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3 of the Defense of Marriage Act provides that for purposes of federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7.

The court of appeals held that Section 3 violates equal protection. It recognized that Section 3 is not subject to either "heightened" or "intermediate" scrutiny and that Section 3 passes "conventional" rational basis review. But it struck down Section 3 nonetheless based on a new form of review (which it viewed as outcome determinative) said to entail "intensified scrutiny," "closer than usual review," and "diminish[ed]" deference to Congress. The court based its new standard of review on a fusion of "equal protection and federalism concerns."

The questions presented are:

(1) Whether Section 3 of the Defense of Marriage Act violates the equal protection component of the Due Process Clause of the Fifth Amendment; and

(2) Whether the court below erred by inventing and applying to Section 3 of the Defense of Marriage Act a previously unknown standard of equal protection review.

PARTIES TO THE PROCEEDING

The Bipartisan Legal Advisory Group of the U.S. House of Representatives was the Intervenor-Appellant in the court below.

The U.S. Department of Health and Human Services, Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, the U.S. Department of Veterans Affairs, Eric K. Shinseki, in his official capacity as Secretary of the U.S. Department of Veterans Affairs, and the United States of America were Appellants in the court below.

The Office of Personnel Management, the U.S. Postal Service, Patrick R. Donahoe, in his official capacity as Postmaster General of the United States, Michael J. Astrue, in his official capacity as Commissioner of the Social Security Administration, Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and the United States of America were Appellants/Cross-Appellees in the court below.

Nancy Gill, Marcelle Letourneau, Martin Koski, James Fitzgerald, Mary Ritchie, Kathleen Bush, Melba Abreu, Beatrice Hernandez, Jo Ann Whitehead, Bette Jo Green, Randell Lewis-Kendell, Herbert Burtis, Marlin Nabors, Jonathan Knight, Dorene Bowe-Shulman, Mary Bowe-Shulman, and the Commonwealth of Massachusetts were Appellees in the court below.

Dean Hara was an Appellee/Cross-Appellant in the court below.

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PETITION FOR A WRIT OF CERTIORARI

The Bipartisan Legal Advisory Group of the United States House of Representatives ("the House") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.[1]

OPINIONS BELOW

The opinion of the First Circuit has not yet been published in the Federal Reporter, but is available at 2012 WL 1948017 and reproduced in the appendix hereto ("App.") at App. 1a. The opinions of the district court are reported at 699 F. Supp. 2d 374 and 698 F. Supp. 2d 234, and reproduced at App. 32a

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[1] The United States House of Representatives has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980's (although the formulation of the group's name has changed somewhat over time). Since 1993, the House rules have formally acknowledged and referred to the Bipartisan Legal Advisory Group, as such, in connection with its function of providing direction to the Office of the General Counsel. *See, e.g.*, Rule I.11, Rules of the House of Representatives, 103rd Cong. (1993); Rule II.8, Rules of the House of Representatives, 112th Cong. (2011). While the group seeks consensus whenever possible, it functions on a majoritarian basis, like the institution it represents, when consensus cannot be achieved. The Bipartisan Legal Advisory Group currently is comprised of the Honorable John A. Boehner, Speaker of the House, the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the position taken by the Group on the merits of DOMA Section 3's constitutionality in this and other cases.

and App. 78a.

JURISDICTION

The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

STATEMENT OF THE CASE

A. The Defense of Marriage Act

The Defense of Marriage Act of 1996 "was enacted with strong majorities in both Houses [of Congress] and signed into law by President Clinton." App. 3a. The House of Representatives voted 342-67 to enact DOMA, and the Senate voted 85-14 to do so. *See* 142 Cong. Rec. 17093-94 (1996) (House); *id.* at 22467 (Senate). In enacting DOMA, Congress acted to ensure that every sovereign—including each state

and the federal government—could make its own determination about same-sex marriage.

To that end, Section 2 of the Defense of Marriage Act, which plaintiffs do not challenge here, provides that no state is required to give effect to another state's recognition of same-sex marriages. *See* 28 U.S.C. § 1738C; App. 28a (addendum to opinion below).

Section 3 defines "marriage" as the legal union of one man and one woman and "spouse" as a person of the opposite sex who is a husband or wife. These definitions apply for purposes of federal law only.

DOMA does not bar or invalidate any marriages but leaves states free to decide whether they will recognize same-sex marriage. *See* App. 4a, 14a (DOMA does not "prevent same-sex marriages where permitted under state law"). Section 3 of DOMA simply asserts the federal government's right as a separate sovereign to provide its own definition which "governs only federal programs and funding." App. 17a.

Congress, of course, did not invent the meanings of "marriage" and "spouse" in 1996. Rather, DOMA merely reaffirmed and codified the traditional definition of marriage, *i.e.*, what Congress itself has always meant—and what courts and the executive branch have always understood it to mean—in using those words: a traditional male-female couple. *See*, *e.g.*, Revenue Act of 1921, § 223(b), 42 Stat. 227 (permitting "a husband and wife living together" to file a joint tax return; *cf.* 26 U.S.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes")); Veterans and Survivors Pension

Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(31), 89 Stat. 1013, *codified at* 38 U.S.C. § 101 ("For the purposes of this title—* * * (31) The term 'spouse' means a person of the opposite sex who is a wife or husband."); U.S. Dep't of Labor, Final Rule, *Family Medical Leave Act of 1993*, 60 Fed. Reg. 2180, 2190-91 (Jan. 6, 1995) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would have included "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting the District of Columbia's marriage statute of 1901, intended "that 'marriage' is limited to opposite-sex couples").

DOMA was enacted in response to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that the denial of marriage licenses to same-sex couples was subject to strict scrutiny under the state constitution. As the Hawaii courts "appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples," H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("House Rep."), Congress was concerned that this could interfere with the ability of other sovereigns—the other 49 states and the federal government—to define marriage in their own way. Section 2 of DOMA therefore employed Congress' power under the Full Faith and Credit Clause to clarify that

states need not recognize foreign same-sex marriages. And with Section 3, Congress reaffirmed that, no matter how any state might choose to redefine marriage under state law—whether through legislative change or judicial interpretation of state law—the federal definition of marriage need not follow suit. Instead, Congress provided for a uniform definition that would ensure that the definition for federal law purposes would remain what Congress had always intended: the lawful union of one man and one woman.

In DOMA's extensive legislative history,[2] Congress recognized that past Congresses uniformly used the words "marriage" and "spouse" to refer solely to opposite-sex couples. *See* House Rep. 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 30 ("Section 3 merely restates the current

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[2] The court below stated, incorrectly, that "only one day of hearings was held on DOMA." App. 19a. In fact, there were hearings in both Houses as well as extensive floor debates. A subcommittee of the House Committee on the Judiciary held a hearing on May 15, 1996. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1996) ("House Hrg."). It held a mark-up session on May 30. The full Committee held mark-up sessions on June 11 and June 12. The Committee issued its report, H.R. Rep. No. 104-664, on July 9. Floor debate on DOMA and its accompanying rule took place in the House on July 11 and 12. In the Senate, the Senate Judiciary Committee held a hearing on July 11. *See Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996) ("Senate Hrg."). Floor debate in the Senate occurred on September 10.

understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."); *id.* at 17072 (Rep. Sensenbrenner). DOMA thus was intended to ensure that the meaning of federal statutes already on the books, and the legislative judgments of earlier Congresses, would not be altered by changes in state law. *See* House Hrg. 32 (Rep. Sensenbrenner) ("When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages.").

Congress stressed that disagreements among the states regarding which couples can marry should not be permitted to create serious geographical disparities in the applicability of *federal* marital duties and benefits. As Senator Ashcroft stated, having a federal definition of marriage "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently * * * [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996). Federal benefits, he observed, "should be uniform for people no matter where they come from in this country. People in one State should not have a higher claim on Federal benefits than people in another State." *Id.*

Congress also enacted DOMA to conserve the public fisc. "Government currently provides an array of material and other benefits to married

couples," and those benefits "impose certain fiscal obligations on the federal government." House Rep. 18. Congress believed that DOMA would "preserve scarce government resources, surely a legitimate government purpose." *Id.*

Congress also repeatedly emphasized "'[t]he enormous importance of [traditional] marriage for civilized society.'" House Rep. 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from this Court's decision in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), in which the Court referred to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization." House Rep. 12. *See also* 142 Cong. Rec. 16970 (1996) (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id.* at 22442 (Sen. Gramm) ("There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society—it is the oldest institution that exists."); *id.* at 22454 (Sen. Burns) ("[M]arriage between one man and one woman is still the single most important social institution."). And Congress recognized that the institution of marriage has traditionally been defined in American law as the union of one man and one woman. *See* House Rep. 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); House Hrg. 1 (statement of Rep. Canady) ("[I]n the history of our country, marriage has never meant anything else."); 142 Cong. Rec. 16796 (1996) (Rep. McInnis) ("If we

look at any definition, whether it is Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as [a] union between a man and a woman * * * and this Congress should respect that."); *id.* at 22451 (Sen. Coats) (DOMA "merely restates the understanding of marriage shared by Americans, and by peoples and cultures all over the world"); *id.* at 22452 (Sen. Mikulski) (DOMA "is about reaffirming the basic American tenet of marriage").

Congress also explained that the reason "society recognizes the institution of marriage and grants married persons preferred legal status" is that it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. 12, 13. Congress recognized the basic biological fact that only a man and a woman can beget a child together without external assistance, and sought to encourage children to be raised by both their biological parents. *See* 142 Cong. Rec. 22446 (1996) (Sen. Byrd); *id.* at 22262 (Sen. Lieberman) ("I intend to support the Defense of Marriage Act because I think [it] affirms another basic American mainstream value, * * * marriage as an institution between a man and a woman, the best institution to raise children in our society."); House Hrg. 1 (Rep. Canady) ("[Marriage] is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children."); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) ("[M]arriage of a man and woman is the foundation of the family.

The marriage relationship provides children with the best environment in which to grow and learn.").

Before enacting DOMA, Congress received and considered advice on its constitutionality and determined that DOMA is constitutional. *See*, *e.g.*, House Rep. 33 (DOMA "plainly constitutional"); House Hrg. 87-117 (testimony of Professor Hadley Arkes); Senate Hrg. 1, 2 (Sen. Hatch) (DOMA "is a constitutional piece of legislation" and "a legitimate exercise of Congress' power"); *id.* at 23-41 (testimony of Professor Lynn D. Wardle); *id.* at 56-59 (letter from Professor Michael W. McConnell). Congress specifically sought constitutional advice from the executive branch, and the Justice Department under the Clinton Administration advised Congress three times that DOMA was constitutional. *See* Letters from Andrew Fois, Asst. Att'y Gen., to Rep. Canady (May 29, 1996), *reprinted in* House Rep. 34; to Rep. Hyde (May 14, 1996), *reprinted in* House Rep. 33-34; and to Sen. Hatch (July 9, 1996), *reprinted in* Senate Hrg. 2.[3]

Discharging the Executive's constitutional duty to "take care that the Laws be faithfully executed," U.S. Const., art. II, § 3, the Justice Department during the Bush Administration successfully defended

[3] This Court "does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). "The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).

DOMA against several constitutional challenges, prevailing in every case to reach final judgment. *See Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 447 F.3d 673 (9th Cir. 2006); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005); *Sullivan v. Bush*, No. 04-21118 (S.D. Fla. Mar. 16, 2005) (granting voluntary dismissal after the Department moved to dismiss); *In re Kandu,* 315 B.R. 123 (Bankr. W.D. Wash. 2004).

The Department of Justice continued to defend DOMA during the first two years of the current Administration. In February 2011, however, the Attorney General abruptly notified Congress that the Department had decided "to forgo the defense" of DOMA. Letter from Att'y Gen. Eric H. Holder, Jr., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011) (App 128a). Attorney General Holder stated that he and President Obama were of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3." App. 129a.

The Attorney General acknowledged that, in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense." App. 127a-128a. He did not, however, apply that standard to DOMA. On the contrary, he conceded that every circuit to consider the issue (*i.e.*, eleven circuits) had held that sexual orientation classifications are subject only to rational

basis review, and he acknowledged that "a reasonable argument for Section 3's constitutionality may be proffered under [the rational basis] standard." App. 123a-125a, 129a.

B. The District Court's Decisions in *Gill* and *Massachusetts*

Gill v. Office of Personnel Management was filed in March 2009 in the District of Massachusetts by six same-sex couples married in Massachusetts and three surviving spouses of such marriages. The *Gill* plaintiffs sought to enjoin the executive-branch defendants from enforcing DOMA and to force the executive-branch defendants to extend to the *Gill* plaintiffs federal benefits available to opposite-sex married couples. In July 2009, Massachusetts filed a companion case styled *Massachusetts v. U.S. Department of Health and Human Services* asserting that DOMA also violated the Tenth Amendment and the Spending Clause. App. 4a-5a.

The Justice Department defended DOMA in the district court in the *Gill* and *Massachusetts* cases, App. 5a, although it declined to defend many of Congress' stated justifications for the statute. *See* App. 57a-58a ("[T]he government has disavowed Congress's stated justifications for the statute and, therefore, they are addressed below only briefly.").

In *Gill*, the district court held that Section 3 of DOMA violates the equal protection component of the Fifth Amendment's Due Process Clause. App. 33a. In *Massachusetts*, the district court held that Section 3 violates the Tenth Amendment and the Spending Clause "by intruding on areas of exclusive state authority" and by "forcing" the Commonwealth

to "discriminat[e] against its own citizens in order to receive and retain federal funds" for Medicaid and for veterans' cemeteries. App. 79a.

The executive-branch defendants appealed the district court's rulings in *Gill* and *Massachusetts*. The district court stayed its judgments pending appeal. C.A. App. 676, 1425.

C. The Justice Department's About-Face

On appeal, the Justice Department "filed a brief in [the First Circuit] defending DOMA against all constitutional claims." App. 6a. That brief argued that "DOMA is subject to rational basis review under the equal protection component of the Due Process Clause. Under such review the statute is fully supported by several interrelated rational bases." Corrected Br. for U.S. Dep't of HHS, *et al.* 25, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Jan. 20, 2011).

Only a few weeks later, in February 2011, the Department performed its "about face" on DOMA, App. 6a, and informed the First Circuit that it would "cease its defense" in the *Gill* and *Massachusetts* appeals. Letter from Tony West, Asst. Att'y Gen., to Margaret Carter, Clerk of Court (Feb. 24, 2011) (App. 130a). The House then moved to intervene on appeal, and the Department moved to withdraw its opening brief. App. 6a. The First Circuit granted the House's motion to intervene, but denied the Department's motion to withdraw its opening brief, while permitting the Department to file a superseding brief. *See* Order (June 16, 2011). In its new brief, the Department not only failed to defend the constitutionality of an Act of Congress but

affirmatively attacked it, arguing that "the equal protection claim should be assessed under a 'heightened scrutiny' standard and that DOMA failed that standard." App. 6a. Indeed, the brief affirmatively assailed DOMA's constitutionality and went so far as to attack the motives of individual legislators and charge them with animus.[4]

D. The First Circuit's Decision

Affirming the district court, the First Circuit held that Section 3 of DOMA violates equal protection.

Although the *Gill* plaintiffs, the Department of Justice, and Massachusetts all urged the court below to recognize sexual orientation as a suspect or quasi-suspect classification and to apply heightened scrutiny to DOMA, the First Circuit declined to do so. It explained that creating "a new suspect classification for same-sex relationships would have far-reaching implications—in particular by implying an overruling of *Baker* [*v. Nelson*, 409 U.S. 810 (1972)], which we are neither empowered to do nor willing to predict." App. 11a. The court below also said that it would not declare such classifications suspect because doing so "could overturn marriage laws in a huge majority of individual states." App. 11a.

The First Circuit also rejected the Justice Department's request for the application of "the so-called intermediate scrutiny test," stating that "extending intermediate scrutiny to sexual

[4] After the Justice Department switched sides in this case, the *Gill* plaintiffs, supported by the Department, petitioned the First Circuit for initial en banc hearing. The court denied the petition. *See* Order (Aug. 23, 2011).

preference classifications is not a step open to us." App. 10a. The court noted that in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009), the First Circuit had "declined to create a major new category of 'suspect classification' for statutes distinguishing based on sexual preference," and that *Cook* "binds the panel." App. 10a.

Significantly, the First Circuit recognized expressly that DOMA passes the rational basis test, stating that, "[u]nder such a rational basis standard, the *Gill* plaintiffs cannot prevail." App. 10a. The court also noted that the Justice Department conceded this point. *See* App. 10a ("The federal defendants conceded that rational basis review leaves DOMA intact"); App. 9a ("The federal defendants said that DOMA would survive such rational basis scrutiny").

But the First Circuit did not apply what it called "classic" or "conventional" rational basis review. App. 11a, 14a. Instead, it invented a new standard of equal protection review that it described as involving "intensified scrutiny" and "closer than usual review." App. 11a, 7a. *See also* App. 15a ("closer than usual scrutiny"). The court said that, under this newly minted form of judicial review, the "deference ordinarily accorded" to an Act of Congress is "diminish[ed]." App. 15a.

The First Circuit purported to draw support for its new standard of review from three of this Court's cases, *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). Contrary to the First Circuit's

claim, however, those cases did not involve a departure from "classic rational basis review." App. 12a. *See infra* pp. 29-31.

Although it squarely rejected Massachusetts' Tenth Amendment and Spending Clause challenges to DOMA, App. 15a-17a, the First Circuit nonetheless invoked "federalism concerns" in support of its new standard of equal protection review. Indeed, it presented its new standard of review as a fusion of federalism and equal protection concerns. *See* App. 7a ("equal protection and federalism concerns * * * combine * * * to require a closer than usual review"); App. 15a ("Supreme Court precedent relating to federalism-based challenges to federal laws reinforce[s] the need for closer than usual scrutiny of DOMA's justifications and diminish[es] somewhat the deference ordinarily accorded"); App. 19a ("closer examination" of whether DOMA violates equal protection "is uniquely reinforced by federalism concerns"); App. 23a-24a, 25a.

Applying its new form of review, the First Circuit concluded that Section 3 of DOMA "has not been adequately supported by any permissible federal interest." App. 25a. *See also* App. 23a ("[T]he rationales offered do not provide adequate support for section 3 of DOMA."). The First Circuit's new standard of review was outcome determinative in this case, since the court acknowledged that DOMA satisfies rational basis review. App. 10a.

Although it erred in striking down Section 3 of DOMA, the First Circuit correctly rejected "the charge that DOMA's hidden but dominant purpose was hostility to homosexuality." App. 24a. The

court explained that "[t]he opponents of section 3 point to selected comments from a few individual legislators; but the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." App. 24a. *See id*. ("[T]he elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect.").

The First Circuit *sua sponte* stayed its mandate on the view that "Supreme Court review of DOMA is highly likely." App. 27a. *See also* App. 30a-31a (Judgment) (staying mandate); App. 7a ("only the Supreme Court can finally decide" this case).

REASONS FOR GRANTING THE WRIT

As the First Circuit recognized, this case calls out for this Court's review. The court of appeals has invalidated a duly-enacted Act of Congress and done so even though it acknowledged *both* that DOMA satisfies ordinary rational basis review and does not implicate heightened scrutiny. In the established world of equal protection law that result should have been impossible. Under this Court's cases, a law with a rational basis that does not implicate a suspect class or heightened scrutiny is constitutional. The court of appeals reached this counterintuitive result by applying an entirely novel form of scrutiny that cannot be reconciled with the approach of this Court and that of ten other circuits. Thus, the decision below invalidates an Act of Congress, conflicts with the decisions of this Court and numerous other courts of appeals, and embraces an entirely novel approach to constitutional equal protection analysis. It is hard to imagine a stronger candidate for this Court's review.

Yet there is one more compelling reason for granting this petition. Separation of powers considerations strongly counsel in favor of this Court's review. The executive branch has not only abdicated its traditional role of defending the constitutionality of duly-enacted statutes, but has simultaneously announced that it will continue to enforce DOMA. App. 127a. As a result, the House has been forced into the position of defending numerous lawsuits challenging DOMA across the Nation. That is a role for which the Justice Department—not the House—is institutionally designed. Only this Court can settle this matter definitively. Unless and until this Court decides the question, the executive branch will continue to attack DOMA in the courts, while continuing to enforce it, thus creating more potential litigation for the House to defend. This Court and this Court alone has the power to settle this question and redirect controversy over this important national question to the democratic process.

I. The Constitutionality of Section 3 of DOMA Is an Issue of Great National Importance and Separation-of-Powers Considerations Strongly Counsel in Favor of Prompt Review.

The First Circuit struck down Section 3 of DOMA employing novel reasoning to conclude that it violates equal protection. That holding clearly warrants this Court's review. Even in the absence of a circuit split, this Court has indicated that a circuit court decision invalidating an Act of Congress on constitutional grounds is a sufficient basis for this Court's plenary review. *See, e.g., Gonzales v. Raich*,

545 U.S. 1, 9 (2005) (certiorari granted because of the "obvious importance of the case"); *United States v. Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari."); *Reno v. Condon*, 528 U.S. 141, 147-148 (2000); *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding * * * invalidated a portion of an Act of Congress, we granted certiorari."); *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("Because the Court of Appeals held an Act of Congress unconstitutional, we granted certiorari."). In this case, the First Circuit declared unconstitutional a high-profile and important federal statute passed by Congress with overwhelming bipartisan support. The fact that it needed to deviate from settled law of this Court and other circuits and invent an entirely novel form of equal protection review to do so, *see infra* pp. 28-34, only strengthens the case for review.

Review of the First Circuit's decision is warranted because "[j]udging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is called on to perform. The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-205 (2009) (quotation marks and citations omitted). Furthermore, "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

Because the terms "marriage" and "spouse" are used in numerous federal statutes, including those conferring federal benefits, the First Circuit's decision will have a sweeping impact. By one account, as of 2004, 1,138 provisions in the United States Code made marital status "a factor in determining or receiving benefits, rights, and privileges." U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act* 1 (2004). *See also* App. 4a ("DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws.").

The issue of DOMA's constitutionality is important not only because of the unprecedented number of statutes affected, but also because litigation over DOMA's constitutionality is proliferating. While the First Circuit was the first circuit court to rule on DOMA's constitutionality, three pending DOMA cases are on appeal in two other circuits. *See Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 12-15388 & 12-15409 (9th Cir.) (oral argument scheduled for week of September 10, 2012); *Windsor v. United States*, Nos. 12-2335 & 12-2435 (2d Cir.) (oral argument scheduled for week of September 24, 2012); *Dragovich v. U.S. Dep't of Treasury*, No. 12-16461 (9th Cir.) (opening brief on appeal due October 4, 2012). A DOMA appeal is also pending in the U.S. Court of Appeals for Veterans Claims. *See Cardona v. Shinseki*, No. 11-3083 (Vet. App.).

District courts have rendered conflicting decisions on DOMA's constitutionality. Four district courts have held that Section 3 of DOMA is constitutional. *See Lui v. Holder*, No. 2:11-cv-01267 (C.D. Cal. Sept. 28, 2011); *Torres-Barragan v. Holder*, No. 2:09-cv-08564 (C.D. Cal. Apr. 30, 2010); *Wilson v. Ake*, 354

F. Supp. 2d 1298 (M.D. Fla. 2005); *Hunt v. Ake*, No. 04-1852 (M.D. Fla. Jan. 20, 2005).[5]

Three district courts (and the district court in this case) have held that DOMA is unconstitutional, based on widely divergent rationales. The court in *Windsor v. United States,* 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012), followed the First Circuit's approach in this case and applied "intensified scrutiny." In *Dragovich v. U.S. Department of the Treasury*, No. 10-1564, 2012 WL 1909603, at *10, *14 (N.D. Cal. May 24, 2012), the court applied rational-basis scrutiny but concluded, contrary to the panel below, that DOMA is invalid because it was motivated by "animus." The court in *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 989-90 (N.D. Cal. 2012), took yet another approach and held that heightened scrutiny should apply to sexual orientation classifications and that DOMA is invalid under that standard. All three of those decisions are now on appeal. Additionally, the district court in this case held that DOMA violates the Tenth Amendment and the Spending Clause. *See supra* pp. 11-12. [6]

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[5] A fifth district court also upheld DOMA's constitutionality, but that portion of its judgment was vacated on appeal on the ground that the unmarried plaintiffs challenging DOMA in that case lacked standing. *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 477 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006).

[6] Two bankruptcy courts within the Ninth Circuit have reached opposite conclusions on DOMA's constitutionality. *Compare In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (DOMA constitutional) *with In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (DOMA unconstitutional). The *Balas* opinion added to

There are currently seven other DOMA cases pending in district courts around the country in six different circuits. *See Bishop v. United States*, No. 04-848 (N.D. Okla.); *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750 (D. Conn.); *Revelis v. Napolitano*, No. 11-1991 (N.D. Ill.); *Cozen O'Connor, P.C. v. Tobits*, No. 11-45 (E.D. Pa.); *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.); *Cooper-Harris v. United States*, No. 12-887 (C.D. Cal.); *Blesch v. Holder*, No. 12-1578 (E.D.N.Y.).

This proliferation of cases is a product of the Department's incoherent decision to implement-but-not-defend DOMA. That awkward posture not only forces executive branch officials to take actions that executive branch lawyers will not defend, but also forces the House into a litigation role for which it is not institutionally staffed or designed. Because the Justice Department has abdicated its responsibility to defend DOMA, an Act of Congress, the House has had to intervene in all of the pending cases to defend Congress' handiwork and do the Department's job for it. And to be clear: the Justice Department not only has ceased to defend DOMA but is affirmatively attacking the statute and the motives of the

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the confusion in the lower courts by additionally concluding that DOMA is unconstitutional sex discrimination. *Id.* at 577. It should be noted that the DOMA issue in *Balas* was generated by the Department's incoherent position that it will enforce but not defend DOMA. The Department's own U.S. Trustee affirmatively created the constitutional issue by moving to dismiss, on the basis of DOMA, a joint bankruptcy petition filed by a same-sex couple; the U.S. Trustee, having created the issue, then refused to defend the statute on the basis of the Attorney General's direction not to defend the statute; and no other party defended DOMA in that case.

legislators who enacted it, many of whom still serve. The lower court litigation thus inverts the normal order and pits the political branches against each other. Only this Court has the capacity to settle this matter. Unless and until this Court settles the constitutional matter, the executive will continue to enforce the statute while attacking it in court. Only this Court has the potential to redirect the fractious debate to the democratic process where issues like this are best resolved.

II. The Decision Below Conflicts With This Court's Decision in *Baker v. Nelson* and With the Decisions of Other Courts of Appeals.

The decision below not only invalidates an Act of Congress on constitutional grounds, but it does so in a way that conflicts with binding precedent of this Court—*Baker v. Nelson*, 409 U.S. 810 (1972)—and other circuits. In *Baker*, the State of "Minnesota had, like DOMA, defined marriage as a union of persons of the opposite sex, and the state supreme court had upheld the statute." App. 8a. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

The plaintiffs in *Baker*, a same-sex couple, were denied a marriage license "on the sole ground that [they] were of the same sex." *Id.* at 185. They brought an equal protection challenge to Minnesota's statute, arguing that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Id.* at 186. The Minnesota Supreme Court rejected their challenge, holding that equal protection "is not offended by the state's classification of persons authorized to marry.

There is no irrational or invidious discrimination." *Id*. at 187.

The plaintiffs appealed to this Court under former 28 U.S.C. § 1257(2). Their Jurisdictional Statement presented the question "[w]hether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights [to] equal protection." Jurisdictional Statement 3, *Baker v. Nelson*, No. 71-1027 (S.Ct. Feb. 10, 1972). The plaintiffs argued to this Court that Minnesota law unconstitutionally discriminated based on both sex and sexual orientation. On the latter point, they argued that "there is no justification in law for the discrimination against homosexuals," and that they were "similarly circumstanced to childless heterosexual couples" and therefore entitled to the same "benefits awarded by law." *Id*. at 10, 17 (quotation marks omitted). They argued that the Minnesota marriage statute failed both heightened scrutiny and rational basis review. *See id*. at 15 (arguing that the state's proscription of "single sex marriage" did not "describe a legitimate government interest which is so compelling that no less restrictive means can be found" and in the alternative that "Minnesota's proscription simply has not been shown to be rationally related to any governmental interest").

This Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810. Such dismissals are, of course, decisions on the merits, and lower courts are "not free to disregard" them. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the

specific challenges presented in the statement of jurisdiction * * *." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

Here, the First Circuit recognized that *Baker* "is binding precedent." App. 8a. It also recognized that, unless and until this Court says otherwise, *Baker* forecloses any arguments that "presume or rest on a constitutional right to same-sex marriage." App. 8a. Having recognized those things, the First Circuit should have recognized that *Baker* controls this case. As the First Circuit acknowledged, *Baker* stands for the proposition that a state may use the traditional definition of marriage without violating equal protection. It necessarily follows that Congress may use the same traditional definition of marriage for federal purposes without violating equal protection.[7]

The First Circuit was able to evade the clear implications of *Baker* for this case only by creating an entirely novel form of equal protection review that deviates from this Court's precedents and the law in virtually every other circuit. Those further conflicts only underscore the need for this Court's review. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals.").

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[7] "[T]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (quotation marks omitted). Thus, the fact that *Baker* involved the Fourteenth Amendment, while this case involves the Fifth Amendment, is of no moment.

In *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982), the Ninth Circuit held that it was constitutional for Congress to limit a spousal immigration preference to opposite-sex spouses. The case involved a same-sex couple who "were 'married' by a minister" and "obtained a marriage license from the county clerk in Boulder, Colorado." 673 F.2d at 1038. The Ninth Circuit assumed *arguendo* that the marriage was valid under state law, *see id.* at 1039, but found that "Congress intended that only partners in heterosexual marriages be considered spouses under section 201(b)" of the Immigration and Nationality Act. *Id*. at 1041.

The Ninth Circuit then rejected the couple's claim that "the law violates the equal protection clause because it discriminates against them on the bases of sex and homosexuality." *Id*. (footnote omitted). Applying the rational basis test, the Ninth Circuit held "that Congress's decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." *Id*. at 1042.

Finding it unnecessary to enumerate all of the rational bases Congress possibly could have had, the Ninth Circuit said that Congress rationally could have "determined that preferential status is not warranted" for same-sex marriages because such "marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores." *Id*. at 1042, 1043. Finally, although *Adams* arose in the immigration context, the Ninth

Circuit applied ordinary rational basis review, stating that "[t]here is no occasion to consider in this case whether some lesser standard of review should apply." *Id.* at 1042.

The decision below also conflicts with *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (per curiam). That case involved the same two men who filed suit in *Baker v. Nelson*. Unlike the *Baker* case, in which the men were seeking to be married, in *McConnell* the men already had "obtained a marriage license from the Blue Earth County Court Clerk" and "were 'married' by a minister." *Id.* at 55. Baker, a veteran, then petitioned for increased veteran's education benefits "on grounds that McConnell was his dependent spouse." *Id.* The Veterans Administration denied the request "on grounds that McConnell was not the spouse of the veteran Baker." *Id.* The district court dismissed the suit "on the basis that *Baker v. Nelson*, *supra*, was dispositive of the issues." *Id.* The Eighth Circuit agreed and affirmed. *Id.*[8]

Additionally, the First Circuit's decision conflicts with the holdings of ten other circuits that sexual orientation is not a suspect classification and hence ordinary rational basis review applies to such classifications. *See, e.g.*, *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) ("Because this court has not recognized sexual orientation as a suspect classification, Davis's claim is governed by

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[8] *See also McConnell v. United States*, 188 F. App'x 540, 541 (8th Cir. 2006) (per curiam) (affirming the dismissal of McConnell's "complaint seeking a federal tax refund arising from his marital status and seeking a declaration that his 1971 Minnesota same-sex marriage is lawful").

rational basis review."); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 n.9 (10th Cir. 2008) ("[T]his court, like many others, has previously rejected the notion that homosexuality is a suspect classification.") (citing cases from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-867 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) ("[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.") (citing cases), *cert. denied*, 543 U.S. 1081 (2005); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 927-928 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996); *Steffan v. Perry*, 41 F.3d 677, 684-85 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.3d 97, 101-104 (D.C. Cir. 1987); *see also Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (applying ordinary rational basis review to, and upholding, the military's "don't ask, don't tell" policy), *cert. denied sub nom. Pietrangelo v. Gates*, 129 S. Ct. 2763 (2009). Every circuit that has ruled on the issue—*i.e.*, every circuit except the Second and Third Circuits—has held that sexual orientation classifications are not suspect and thus are reviewed under the rational basis test.

For example, *Citizens for Equal Protection v. Bruning*, *supra*, involved an equal protection challenge to Article I, § 29 of the Nebraska Constitution, which provides that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska." Neb. Const. art. I, § 29. The Eighth Circuit held that "§ 29 should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny." *Citizens for Equal Protection*, 455 F.3d at 866.

Similarly, as discussed above, the Ninth Circuit in *Adams v. Howerton* applied the rational basis test in reviewing a Fifth Amendment equal protection challenge to Congress' decision to limit an immigration preference for spouses to opposite-sex spouses. *See Adams*, 673 F.2d at 1042.

As explained next, the First Circuit's effort to evade this wall of precedent, and its own circuit law, by invoking an entirely novel form of equal protection review only underscores the need for plenary review.

III. The Court of Appeals Invented a New Standard of Equal Protection Review.

The First Circuit correctly recognized that it would be error to apply either strict or intermediate scrutiny to Section 3 of DOMA and that the statute passes rational basis scrutiny. But instead of drawing the only conclusion permitted by well-established law—that a law not subject to strict or intermediate scrutiny and supported by a rational basis is constitutional—the First Circuit found another way to invalidate DOMA, by inventing a

previously unknown standard of equal protection review.[9]

This Court's cases recognize three, and only three, levels of equal protection review, and the Court has not expressed any enthusiasm for complicating matters further.

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

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[9] Although the First Circuit denied that it was applying any form of heightened scrutiny, it described Section 3 of DOMA as drawing a distinction "against a historically disadvantaged group * * * less able to protect itself through the political process." App. 21a. But the notion that the same-sex marriage movement lacks political power simply blinks reality. Not only is the executive branch attacking DOMA in this and other cases, but same-sex marriage is supported by President Obama, Vice President Biden (who voted for DOMA as a Senator in 1996), the Senate majority leader, and the House minority leader. Nearly one-third of the Members of the House filed an *amici* brief in the court below attacking both the wisdom and constitutionality of DOMA. The political process stands ready to address this matter with ample political support for both sides of the debate.

Clark v. Jeter, 486 U.S. 456, 461 (1988) (citations omitted).

In defense of its decision to eschew "classic rational basis review" in favor of "intensified scrutiny," App. 11a, the First Circuit heavily relied upon three of this Court's cases: *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). *See* App. 12a-15a. But none of those cases supports a deviation from the well-established three tiers of equal protection review, let alone justifies the First Circuit's novel federalism-based standard.

In *Romer*, this Court went out of its way to make clear that it was applying the "conventional" rational basis test to Colorado's Amendment 2. This Court said that

> if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312 (1993). Amendment 2 fails, indeed defies, even *this conventional inquiry*.

Romer, 517 U.S. at 631-632 (emphasis added). Thus, contrary to the First Circuit's assertion (and the complaints of the *Romer* dissent, *see id.* at 651 (Scalia, J., dissenting)), the *Romer* Court did indeed apply "conventional rational basis review." App. 14a. *See also Romer*, 517 U.S. at 635 ("[A] law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.") (citation omitted).

Nor does *Cleburne* support what the First Circuit did here. In that case, the Fifth Circuit "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." 473 U.S. at 442. Here, the First Circuit committed a similar, but even more glaring, error in refusing to apply conventional rational basis review to DOMA while expressly acknowledging that it would survive conventional scrutiny. *See* App. 10a ("Under [the conventional] rational basis standard, the *Gill* plaintiffs cannot prevail."). In *Cleburne*, this Court applied "[t]he general rule" that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," and found the ordinance lacking under that standard. 473 U.S. at 440. The First Circuit's approach thus draws no support from *Cleburne*.

Finally, in *Moreno*, the only one of the three cases to involve a federal statute, this Court applied "traditional equal protection analysis." 413 U.S. at 533. *Accord id.* at 538 ("[t]raditional equal protection analysis"). Reciting the traditional test, this Court stated that "a legislative classification must be sustained, if the classification itself is rationally related to a legitimate government interest." *Id.* at 533. Here, the First Circuit recognized that Section 3 of DOMA passes traditional equal protection analysis, but it struck down DOMA nonetheless. Nothing in this Court's cases supports that counterintuitive result.

As further justification for its new form of equal protection review, the First Circuit relied upon purported "federalism concerns." *See supra* p. 15. The court's invocation of federalism concerns is doubly surprising. First, this Court has gone to great lengths to underscore that there is only one constitutional standard of equal protection, and it applies equally to federal and state actions. *See supra* n.7. Second, and even more fundamentally, the Constitution's equal protection guarantees exist to constrain government action, not to protect the states. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Adarand*, 515 U.S. at 227 (emphases in original). A federalism overlay to equal protection is fundamentally misplaced.

Moreover, the court of appeals specifically rejected the argument that Section 3 of DOMA violates the Tenth Amendment or the Spending Clause. As to the Tenth Amendment, the court found that DOMA "governs only federal programs and funding" and "does not commandeer state governments or otherwise directly dictate the *internal operations* of state government." App. 16a-17a (emphasis in original) (citing *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)). And as to the Spending Clause, the court concluded that DOMA does not "run afoul of the 'germaneness' requirement that conditions on federal funds must be related to federal purposes." App. 17a (citing *South Dakota v. Dole*, 483 U.S. 203, 208 (1987)). "This requirement is not implicated," the First Circuit explained, "where, as here, Congress merely defines the terms of the federal

benefit." App. 17a. But for the same basic reason—that Section 3 only implicates the definition of marriage for federal law purposes—a federalism-based intensified scrutiny would be inapplicable to DOMA even if it existed, which it does not.

The First Circuit cited (App. 17a) *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), but those are Commerce Clause cases. They provide no support for the First Circuit's invention of an "intensified scrutiny" standard of equal protection review under the Due Process Clause of the Fifth Amendment. The First Circuit's citation (App. 18a) to *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), is similarly off base. That opinion discussed the Voting Rights Act's intrusion on state sovereignty. It did not call for "closer than usual" review of equal protection claims in any context.

The First Circuit's application of a new form of equal protection review is dubious for a final reason. The court stated that its new standard of review was based not on any existing precedent of this Court, but on a prediction of what this Court would do were DOMA before it. *See* App. 15a (predicting that the "deference accorded to ordinary economic legislation * * * would not be extended to DOMA by the Supreme Court"). But the proper role of a court of appeals is to apply this Court's cases, not to forecast doctrinal developments that this Court might (or might not) make someday in the future. *See Tenet v. Doe*, 544 U.S. 1, 10-11 (2005); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court has never recognized a standard of equal protection review hovering between the rational basis test and intermediate scrutiny, and no precedent of this Court supports the application of anything other than ordinary rational basis review to DOMA. Indeed, this Court's decision in *Baker v. Nelson* holds that a classification based on the traditional definition of marriage does *not* violate equal protection. The First Circuit erred, and did so egregiously, by striking DOMA down on the basis of a prediction that this Court would apply a previously unknown standard of "intensified scrutiny" to DOMA.

Although the First Circuit erred in inventing a new form of equal protection review, it was certainly correct about one point: "only the Supreme Court can finally decide" this case. App. 7a. Further litigation in the lower courts promises only further conflict between the political branches before courts that cannot definitively decide the issue. Only this Court has the power to settle this issue and return the debate to the democratic process where it belongs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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