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Brief of Amici Curiae Professors Nan D. Hunter, et al., Addressing the Merits in Support of Respondents

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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

BRIEF OF *AMICI CURIAE* PROFESSORS NAN D. HUNTER, SUZANNE B. GOLDBERG, KATHRYN ABRAMS, KATHERINE M. FRANKE, BURT NEUBORNE, AND ANGELA P. HARRIS ADDRESSING THE MERITS IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are legal scholars with expertise in equal protection jurisprudence. Although *amici* support heightened scrutiny for sexual orientation-based classifications under the extant, tiered framework, they believe that the framework proposed here will enhance the clarity and accuracy of equal protection review, given the ever-increasing demographic and social complexity of the United States in the twenty-first century.

SUMMARY OF ARGUMENT

This Court is at a crossroads in its equal protection jurisprudence. The problem lies not in what the Court has done in analyzing legislative classifications of groups of persons, but in the murkiness that has surrounded the articulation of which analytical principles apply when invidious classifications are not traditionally suspect. As our Nation becomes ever

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[1] All parties have consented to the filing of all *amicus curiae* briefs by letters filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amici curiae*, or their counsel made a monetary contribution to the preparation or submission of the brief.

Names of individual *amici* appear in the Appendix to this brief.

more diverse, the confusion for lower courts and the political branches generated by this lack of clarity will only worsen.

Building on precedents dating back to *Carolene Products* Footnote 4,[2] there is a clear path forward for situations in which courts must examine group-based classifications that correlate with social stigma. Like Footnote 4, the analysis must be grounded in the particular facts surrounding a classification, recognizing that context often determines meaning. And by examining a classification in context, the review can be flexible enough to accommodate increasing social pluralism in American life as it evolves in ways that we cannot foresee.

Amici agree that deferential equal protection review is often appropriate because classification is intrinsic to governance, and most distinctions made in the context of economic and social policy merit judicial restraint. As is evident from precedent, however, the decisive factor for determining the stringency of review is not whether a policy is "economic or social" but whether the classification itself is tainted with prejudice or is patently arbitrary. When social prejudice *is* present, Footnote 4 and its progeny necessitate an appropriately searching judicial inquiry into whether the burdens imposed on a politically vulnerable minority are discontinuous with, and

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[2] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

disproportional to, the neutral public goals, if any, that are asserted as the purposes of the legislation.

In many respects, Justices Stevens and Marshall were surely correct that there is only one Equal Protection Clause, under which judicial review inevitably operates along a spectrum.[3] But a sliding scale, without more, does not provide a workable method for adjudication. The Court has the opportunity now to make explicit what has become muddied: that all classifications with the indicia of invidiousness trigger a more searching inquiry than the standard of "deference" would imply. Traits that have already been marked for either strict or heightened scrutiny easily fit within this broader principle; indeed, the very design of the upper tiers aims to capture those classifications most likely to be invidious.

The sharp "all or nothing" dichotomy between classifications that are always or never suspicious no longer works in contemporary America as social dynamics and demographics have become increasingly complex. In response, *amici* propose a unifying,

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[3] *See*, *e.g.*, *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) ("[This Court] has applied a spectrum of standards . . . [that] clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis . . . [of] the particular classification.").

coherent two-part equal protection test, which distinguishes between classifications that have the indicia of invidiousness and those that do not. The proposed test asks:

> Is the classification based on a trait that is associated with a broad or historical pattern of social prejudice, animus, or stereotyping or a trait that, as evidenced by the surrounding political context, is associated with acute political or social vulnerability?; and
>
> If yes, does the classification impose a burden that is discontinuous with, or disproportionate to, its purported neutral justification?

Per Footnote 4, more searching review follows for classifications that are likely to be invidious, while more deferential review applies to the rest.

The Defense of Marriage Act (DOMA) fails equal protection review under both the current and proposed tests. But because the more contextual approach presented here will be more capable of application to new situations, while also enhancing transparency and judicial accountability, *amici* urge its consideration in this case.

ARGUMENT

I. Multiple Forms of Invidious Classifications, Including Those Not Traditionally Deemed Suspect, Such as Those Based on Sexual Orientation, Necessitate a More Transparent Statement of the Court's Existing Equal Protection Jurisprudence.

The lower federal courts and the parties to this case disagree on many points, but none is so central as the identification of which standard of review should apply to classifications based on sexual orientation.[4] The choice between deferential rational basis review, with its presumption that the statute at issue is constitutional, and heightened scrutiny, with its

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[4] Since this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 583-85 (2003) (O'Connor, J., concurring) (plurality opinion), which found laws criminalizing sexual conduct between same-sex partners unconstitutional, federal courts have struggled with identifying the correct standard for sexual orientation classifications. Some have applied heightened scrutiny, *see*, *e.g.*, *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012), or stated they believe it applies, *see*, *e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012). Many have utilized a more searching rational basis standard under which DOMA and other laws have been found unconstitutional, *see*, *e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (2012). Finally, other federal courts have used a rational basis standard under which sexual orientation classifications have been upheld. *See*, *e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006) (referring to equal protection standard for sexual orientation classifications as "murky").

presumption that the challenged form of discrimination is illegitimate, has not only become a doctrinal sorting mechanism but is also often seen as a proxy for moral judgment. Especially in cases, such as this one, that involve highly contentious social issues that tend to intensify public perceptions about what is at stake, it is important that the analytic process be forthright, with a framework that provides objective referents for assessing classifications.

The Court has long recognized that the rich diversity of the American population necessitates an equal protection standard that can accommodate forms of discrimination that were not specifically envisaged by the Reconstruction Framers. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court articulated enduring principles for when the judiciary analyzes

> whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon* . . .: *Nixon v. Condon* . . .: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.

Id. at 153 n.4. These situations, the Court wrote, "may call for a correspondingly more searching judicial

inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited." *Id.*

While Footnote 4 is most often invoked for its concern with "discrete and insular minorities," a close reading reinforces that its reach is far broader. *Id.* Examining Footnote 4's text, in its context, establishes that today's Court, in our context, must apply "a correspondingly more searching judicial inquiry" whenever invidious classifications target a trait reflecting either historical or acute contemporary stigma for burdens that are discontinuous with, and disproportional to, the neutral public goals, if any, that are asserted as the purposes of the legislation. *Id.*

A. Footnote 4's Scalable Framework Reflects the Court's Understanding, Reinforced by Experience, that Invidious Classifications Can Arise in a Wide Range of Contexts.

Footnote 4 establishes a scalable framework for analyzing invidious classifications that recent history has only made more necessary and that this Court has embraced, both explicitly for classifications now recognized as suspect and implicitly for more complex forms of discrimination.

In its first modern explication of the standards for judicial scrutiny of legislative classifications, this Court highlighted examples involving discrimination

based on characteristics that were disfavored in their particular time and place, in addition to characteristics, such as race,[5] that have been the enduring subjects of disfavor and were later labeled as suspect or quasi-suspect.[6] These other examples included persons who were geographic outsiders in a particular state even though not members of an otherwise stigmatized group,[7] Americans of German descent in the wake of World War I,[8] and Asian-Americans in the Hawaiian Islands.[9] In each instance, the need for close judicial attention arose from a context in which unpopular minorities were saddled with disproportionate burdens.

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[5] Two of the cited cases involved African-Americans whose voting rights were blocked in Texas Democratic Party primary elections. *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

[6] *Carolene Prods.*, 304 U.S. at 152 n.4.

[7] *S.C. State Highway*, 303 U.S. 177. In *Barnwell*, the Court wrote:

> State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted.

Id. at 184-85 n.2.

[8] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

[9] *Farrington v. Tokushige*, 273 U.S. 284 (1927).

The cases cited in Footnote 4 regarding ethnic minorities grew out of a campaign against those groups that occurred in the United States between the world wars, a tool of which was to "bring foreign language schools under a strict governmental control." *Farrington*, 273 U.S. at 298. In *Meyer*, the Court struck down a 1919 Nebraska statute forbidding the teaching of German to students before the eighth grade, overriding "[t]he desire of the Legislature to foster a homogeneous people," 262 U.S. at 402, but the state then enacted a near-identical statute in 1921. In *Bartels*, the Court ruled that the newer Nebraska law, in addition to similar laws from Ohio and Iowa, was unconstitutional. 262 U.S. at 409-11. When a 1922 Oregon statute prohibiting all private schools was challenged, state officials declined to defend it. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533 (1925). In the last case in the series, the Court in *Farrington* invalidated a law that would have prohibited significant instruction in Asian languages, primarily Japanese. 273 U.S. at 297-99.

By contrast, *Barnwell*, 303 U.S. 177 (1938), addressed the issue of legislative action imposing a burden on interstate commerce. The Court clarified that even in an ordinary commercial regulation, an invidious distinction disadvantaging geographic and political outsiders could be invalid. As the Court explained, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally

exerted on legislation where it affects adversely some interests within the state." *Id.* at 185 n.2. In *Barnwell*, the Court also cited numerous other cases that similarly underscored the need for courts to be attentive when reviewing legislative burdens that "fall[ ] principally" upon a group that, for whatever reasons, is relatively vulnerable in the political process. *Id.*[10]

These and other Footnote 4 citations illustrate the 1938 Court's understanding that oppressive laws could vary in their specific manifestations of invidiousness. For some, such as the cases addressing restrictions on foreign language education, their placement in Footnote 4 foreshadows the more stringent scrutiny applied when invidiousness and an important interest co-exist. Indeed, *Meyer* and *Pierce* are now understood primarily as liberty, rather than equality,

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[10] The portion of Footnote 4 that cited *Barnwell* articulated the political process concern of the Court's Dormant Commerce Clause jurisprudence:

> The Commerce Clause of Article I, Section 8 provides simply that Congress shall have the power to regulate commerce among the states. But early on the Supreme Court gave this provision a self-operating dimension as well, one growing out of the same need to protect the politically powerless . . . . By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provided political insurance that the taxes imposed on the former would not rise to a prohibitive or even an unreasonable level.

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 83-84 (1980).

decisions establishing the rights of parents to control the education of their children, even though the context of their citation in Footnote 4 reveals that the Court invoked them to illustrate the need to curb discriminatory laws.[11] For others, such as *Barnwell*, their inclusion in Footnote 4 reinforces the Court's recognition that invidious prejudice can exist independently of demographic minorities.[12]

B. The Social Complexity of Today's America Illustrates the Enduring Wisdom of Footnote 4's Open-Ended Approach.

The importance of heeding the wisdom of Footnote 4's approach has become more, not less, urgent with time. The United States in 1938 had a far less diverse population than it has today, as is evident even from the data regarding only the most prominent demographic groups, which shows exponential shifts in the

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[11] The text of Footnote 4 identifies the law at issue in *Pierce* as an example of discrimination against religious minorities, although the language of the opinion does not make explicit that aspect of the case.

[12] *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965, 1005 (1997) ("In a long list of later cases [after *Carolene Products*], the Court continued to consider the impact of 'interest group participation' in assessing legislation under the dormant Commerce Clause."); *see also* Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 251-52 (1995) ("The political process leading to the enactment of laws that discriminate against outside commerce is an important theme of the Court's decisions . . . .").

breadth of racial and religious identifications of Americans.[13] Nor is the trend toward a multicultural nation, with an accompanying wide range of interests and identities, likely to diminish.[14]

This growth in demographic diversity at a time when social movements have been similarly expansive has generated a wider range of cross-cutting identities and interests than ever before. Indeed, antidiscrimination laws provide evidence of some of these shifts, with new laws enacted in recent decades to respond to discrimination based on numerous aspects of identity not traditionally designated as suspect. At the federal level, for example, laws now prohibit employment discrimination based on age, disability, and information about genetic predispositions.[15] Some state legislatures have taken even broader note of

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[13] *Compare*, *e.g.*, U.S. Census Bureau, *Statistical Abstract of the United States: 1948*, at 19 (69th ed. 1948) with Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, U.S. Census Bureau, *Overview of Race and Hispanic Origin: 2010*, at 7 tbl.3 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf; *see also* Pew Forum on Religion & Pub. Life, *U.S. Religious Landscape Survey* 5 (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

[14] *See* Laura B. Shrestha & Elayne J. Heisler, Cong. Research Serv., RL 32701, *The Changing Demographic Profile of the United States* 12 tbl.2 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL32701.pdf.

[15] *See*, *e.g.*, Genetic Information Nondiscrimination Act of 2008, 42 U.S.C.A. §§ 2000ff to 2000ff-11 (2011); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12300 (2006); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006).

types of discrimination not envisioned in 1938. In Edith Windsor's home state of New York, for example, the human rights law also covers "sexual orientation, military status, . . . marital status, [and] domestic violence victim status."[16]

Yet while many governments have expanded the bases for statutory protection as just described, laws such as these cannot keep pace with the exponential increase in diversity, the dynamics of contemporary social formation, and, as a result of these changes, the burgeoning array of equal protection claims that come before the federal courts.[17] *Cf. United States v. Richardson*, 418 U.S. 166, 179 (1974) ("As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the

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[16] N.Y. Exec. Law § 296 (McKinney 2010).

[17] Other Western democracies are experiencing the same kinds of change, and they, too, face challenges in revising antidiscrimination law to continue to fulfill its purposes. The European Convention on Human Rights, for example, denominates more categories for protection against discrimination than have been designated for strict or heightened scrutiny under the Constitution, but courts nonetheless continue to employ reasoning by analogy in order to retain the relevance of the antidiscrimination principle. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221 (prohibiting discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"), interpreted in *Salgueiro da Silva Mouta v. Portugal*, IX Eur. Ct. H.R. 309 (1999), to also include sexual orientation.

courts on a greater variety of issues than at any period of our national development.").

C. Principles of Transparency and Judicial Accountability Also Support the Wisdom of Revisiting and Simplifying the Standard of Equal Protection Review.

Clarifying the framework that underlies equal protection review will enhance, not undermine, the jurisprudence of restraint. A test like the one proposed here, which makes explicit the inquiries that are implicit in the Court's cases, will streamline equal protection review in a way that is more responsive than the existing tiered framework to the surrounding environment of classifications. Lower courts particularly will benefit as they face an increasing stream of classifications that are not traditionally suspect but may warrant more searching review consistent with the longstanding commitments articulated in Footnote 4.

Clearer guidance will also reinforce the importance of judicial restraint. The great fear associated with equal protection review is that courts will arbitrarily impose normative and policy preferences, rather than evaluate classifications based on principled consideration of objective referents. The process of articulating reasons why a classification may or may not be invidious in a particular factual context that is attentive to both stigma and burden, as required by the framework proposed by *amici* here,

will itself help screen out problematic rationalizations.

Justice Stevens' forceful statement in *Cleburne* of the logic behind approaching equal protection review as a spectrum is consistent with, but less precise than, the approach presented here. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). *Amici* suggest framing the inquiries in a way that will implement the normative aspirations of the Equal Protection Clause, while also providing administrative workability.

II. Invidious Classifications Should and Do Trigger a More Contextual Inquiry than the Sharply Dichotomous Tiered Framework Can Provide.

No obligation of the sovereign is more fundamental than the duty to govern impartially, relying on legitimate and neutral criteria, *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring), and to eschew assignment of burdens and benefits based on status – based on "who someone is." Our "Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Therefore, regardless of the standard applied or the designated tier of review, this Court has repeatedly found that the markings of invidious discrimination must trigger meaningful examination. Indeed, invidious line drawing is the *exception* to the

principle of deference to legislative bodies in all equal protection review. *Compare Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (sustaining a law on legislative deference grounds), *with U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (refusing to defer to the legislature where an illegitimate interest underlay the classification at issue). And the jurisprudence makes clear that legislatures cross that threshold when they differentiate among constituents "for the purpose of disadvantaging the group burdened by the law," *Romer*, 517 U.S. at 633.

Over time, this Court has catalogued the clearest and most odious kinds of prejudicial classifications into the tiered approach to equal protection analysis. Race, for example, "is the paradigm" of "classifications [that] in themselves supply a reason to infer antipathy," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), hence its designation as suspect. The uppermost tiers express our Nation's evolved sense of repugnance at the use of particular characteristics, such as race, to differentiate among Americans. They also implement that sense of repugnance with heightened scrutiny, which streamlines review of challenges to disparate treatment based on those antipathy-laden classifications. This more rigorous form of review promotes administrative workability by creating the presumption that distinctions based on suspect and quasi-suspect characteristics reflect stereotypes about or hostility toward the burdened class. *United States v. Virginia*, 518 U.S. 515, 549-51 (1996). As the Court has explained regarding racial classifications,

for example, they "are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220 (1995) (citation and internal quotation marks omitted).

The characteristics such as race and sex that are recognized as self-evidently suspicious do not exhaust the potential instances of invidious legislation, however.[18] As noted almost sixty years ago, although "differences in race and color" have historically served as markers of discrimination, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *cf. Oyler v. Boles*, 368 U.S. 448, 456 (1962) (selective enforcement violates the Constitution if "the selection was deliberately based upon an unjustifiable standard such as race, religion, *or other arbitrary classification*" (emphasis added)).

While this shifting social reality has precluded the formulation of one talismanic formula for equal protection review, the Court has maintained a focus on discerning and barring invidiousness in classifications. In interpreting 42 U.S.C. § 1985(3)'s prohibition against intentional deprivations of equal

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[18] *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 512-13, 528-31 (2004) (reviewing cases invalidated on invidiousness grounds and highlighting the Court's longstanding concern with invidious class legislation).

protection of the laws, for example, the Court found that the statute's intent requirement "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the [defendant's] action[s]." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Court then elaborated the meaning of "invidious" in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993), citing with approval the dictionary definition as "[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." *Id.* (alteration in original) (internal quotation marks omitted) (citing *Webster's Second International Dictionary* 1306 (1954)).[19] The corollary term with which "invidious" is paired in *Griffin* – "animus" – may in addition reflect the insensitivity that arises from stereotyping or from the "simple want of careful, rational reflection." *Bd. of Trs. of the Univ. of Ala. v.*

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[19] This Court and lower courts also have linked invidiousness to an array of terms connoting unfair discrimination. *See Cleburne*, 473 U.S. at 440 (noting that the presumption of validity "gives way" when statute classifications "reflect "prejudice and antipathy"); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 609 (1979) (White, J., dissenting) (noting that, if irrational, a classification "must fall"); *Califano v. Goldfarb*, 430 U.S. 199, 218 (1977) (Stevens, J., concurring) (noting the implications of inferiority when a classification "add[s] to the burdens of an already disadvantaged discrete minority"); *Welch v. Henry*, 305 U.S. 134, 144 (1938) (noting that hostility toward a group may be impermissible). Because proof of invidiousness is an element of a plaintiff's case in claims brought under § 1985(3), lower courts are accustomed to the term. *See*, *e.g.*, *Farber v. City of Paterson*, 440 F.3d 131, 135-43 (3d Cir. 2006).

Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

The first inquiry in the framework proposed here emerges directly in response to the Court's concern with invidiousness. It asks: *Is the classification based on a trait that is associated with a broad or historical pattern of social prejudice, animus or stereotyping or a trait that, as evidenced by the surrounding political context, is associated with acute political or social vulnerability?*

This inquiry, with its aim to discern the potential for invidiousness, does not require the Court to jettison its existing structure of categories of heightened scrutiny. Those categories exist because they reliably reflect manifestations of invidiousness that, over long periods of time, we have come to recognize as unacceptable in our constitutional democracy. Invoking an anti-invidiousness principle, rather than a list of specific characteristics, however, would provide a better explanation of the need for meaningful review when indicia that have traditionally been deemed suspect are not present. Justice O'Connor reinforced this point: "When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review . . . ." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

Invidious classifications will often be marked by some of the same indicia currently associated with heightened or strict scrutiny, such as being based on

a trait that has been subjected to "a 'history of purposeful unequal treatment'" or having the effect of imposing disadvantages based on "stereotyped characteristics not truly indicative of [group members'] abilities," *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). But greater flexibility will allow for more principled adjudication – based on what the Court has already done in many cases – of situations in which classifications may be justifiable in one context but not in another. People with developmental disabilities, for example, may elicit contradictory legislative responses of "irrational prejudice"[20] or solicitude,[21] depending on the situation. Residency requirements, likewise, may establish legitimate eligibility criteria[22] or may reflect "discriminat[ion] against out-of-state commerce or new residents." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (characterizing *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); and *Zobel v. Williams*, 457

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[20] *Cleburne*, 473 U.S. at 450.

[21] *Washington v. Glucksberg*, 521 U.S. 702, 730-32 (1997).

[22] *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (upholding bona fide residency requirements for free primary and secondary schooling); *McCarthy v. Phila. Civil Serv. Comm'n*, 424 U.S. 645, 647 (1976) (per curiam) (upholding continuing residency requirements for municipal employment against equal protection challenge).

U.S. 55 (1982)).[23] With a growing number of social minorities, whose memberships increasingly overlap, this flexibility is essential.

There are other, rare instances when a classification may be so arbitrary as to raise concerns about a possible equal protection violation even though it is not related to a socially stigmatized characteristic or a characteristic that is otherwise disadvantaged in the political process.[24] The flexibility of the proposed framework can also accommodate these outliers. But the situation that has produced the greatest constitutional uncertainty has been where courts are asked to evaluate classifications based on characteristics, such as sexual orientation, that have not formally been designated as suspicious but which are known to be frequently linked to stigma.[25] *See supra* note 2. As the

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[23] The form of invidiousness in these cases may be described as "protectionism – a desire to protect in-staters at the expense of out-of-staters." Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 14, 59 (1996).

[24] *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam) ("[The] complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners."); *see also id.* at 566 (Breyer, J., concurring) (revealing that the factual context included allegations of " 'vindictive action,' 'illegitimate animus,' and 'ill will' " (citation omitted)).

[25] Alternatively, *amici* agree with a more narrow argument that sexual orientation classifications should be subjected to heightened scrutiny. *Windsor*, 699 F.3d at 185 (finding quasi-suspect class criteria satisfied "based on the weight of the

(Continued on following page)

Court of Appeals in the instant case noted with some understatement, "it is safe to say that there is some doctrinal instability in this area." *Windsor*, 699 F.3d at 181.

Petitioner Bipartisan Legal Advisory Group (Petitioner or BLAG) would disable this Court from acknowledging the social realities behind varying forms of class-based legislation by seeking an unthinking and unvarying application of the most deferential equal protection standard. Citing cases in which either no indicia of invidiousness were present in the context at issue[26] or in which a trait-based classification was in fact struck down as violative of the Equal Protection Clause,[27] BLAG strings together a series of quotes to argue that, absent strict scrutiny, "'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process,'"[28] "'judicial intervention is generally unwarranted no matter how unwisely we may think a

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factors and on analogy to the classifications recognized as suspect and quasi-suspect").

[26] Brief in Opposition at 4, *Windsor v. United States*, No. 12-307 (U.S. cert. granted Dec. 7, 2012) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979)).

[27] *Cleburne*, 473 U.S. at 450.

[28] Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28, *Windsor v. United States*, No. 12-307 (U.S. cert. granted Dec. 7, 2012) (quoting *Cleburne*, 473 U.S. at 440).

political branch has acted'"[29] and "Congress' decision where to draw the line is 'virtually unreviewable.'"[30] If these decontextualized platitudes were true, this Court's decisions in *Moreno*, *Cleburne*, and *Romer* would not – could not – exist.

To properly interpret the Equal Protection Clause, the Court should continue its refusal to engage in such willful blindness. Contrary to the arguments of BLAG and its supporting *amici*, it need not fear that taking account of the stigmatization and stereotyping associated with a trait that is subjected to legislative disadvantage will jeopardize the capacity of government to function in the future, as it has not in the past. Markers of invidiousness rarely occur in the mine run of legislation involving "ordinary commercial transactions." *Carolene Prods.*, 304 U.S. at 152.

The reformulated equal protection standard proposed here will not produce routine second-guessing of legislative authority to regulate a wide variety of economic and social matters. But the jurisprudential guideline favoring restraint does not bar the Court from taking a closer look when the classification itself reveals that a disfavored, often small, group has been scapegoated as the cause of broader social anxieties, or used as fodder for the creation of a wedge issue. Simply put, no floodgates for challenges to legislative line-drawing between landlords and tenants,

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[29] *Id.* (quoting *Vance*, 440 U.S. at 97).

[30] *Id.* at 30 (quoting *Beach*, 508 U.S. at 316).

mortgagors and mortgagees, or cable facilities that serve units under common or separate ownership will swing open if this Court engages in a meaningful inquiry into the constitutionality of the invidious exclusion created by DOMA.

Instead, where groups are politically unpopular, either nationally or locally – as gay people were when Congress passed DOMA and when voters approved Amendment 2 in Colorado; as people with developmental disabilities were when a small town in Texas imposed uniquely burdensome zoning rules on them; and as hippies were when the Department of Agriculture adopted its restrictive food stamp rule – the risk of invidious classification masked by benign-sounding rationales runs high and the most deferential forms of review are no longer appropriate. *See*, *e.g.*, *Romer*, 517 U.S. 620; *Moreno*, 413 U.S. 528; *Cleburne*, 473 U.S. 432.

There are times, as here, when the most salient concern is that legislative processes may not have operated impartially. In such situations, courts must serve their essential function in our constitutional democracy as the sole branch of national government that is unelected. "[W]hen the fervor of political passions moves the Executive and the Legislative branches to act in ways inimical to basic constitutional principles, it is the duty of the judiciary to intervene." *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1276 (11th Cir. 2005) (Birch, C.J., concurring). That same duty attaches here, where Congress has excluded one subset of married couples from the

federal scheme of marriage recognition and regulation based on a trait that has long been subjected to social and political disfavor.

III. When a Classification Exhibits the Indicia of Invidiousness, Courts Examine Whether It Is Discontinuous with, or Creates a Burden that Is Disproportionate to, Its Purported Neutral Justification.

Examination of the legislative purpose and the nexus between that purpose and the classification, as well as the relationship between the purpose and the burden imposed by the classification, will often reveal whether the government's reliance on a socially disfavored trait must be invalidated.[31] A justification that may be legitimate in the abstract, but does not

[31] In a handful of cases, the Court has found that the total absence of a legitimate purpose or a radical disconnect between ends and means can render a law unconstitutional because a classification is patently arbitrary, even without the indicia of invidiousness. *See, e.g.*, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345 (1989) (noting "intentional systematic undervaluation by state officials" led to gross disparity in property tax rates (citation and internal quotation marks omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (finding that a law requiring only those indigent persons whose appeals were unsuccessful to repay court costs failed to meet the standard that there must be "some rationality in the nature of the class singled out"). Such cases are analogous to those in which the invidiousness of a particular trait is so clear from the face of a statute and so unrelated to ability or merit that consideration of its relationship to the particular legislative goal is unnecessary.

explain why the trait in question had been singled out for legislative burden in the particular context at issue, will not suffice. To pass muster under the Equal Protection Clause, a "classificatory scheme must 'rationally advanc[e] a reasonable and *identifiable* governmental objective.'" *Nordlinger v. Hahn*, 505 U.S. 1, 1516 (1992) (alterations in original) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981)).

Thus the second inquiry in the framework proposed here asks: *Does the classification impose a burden that is discontinuous with, or disproportionate to, its purported neutral justification?*

A. Meaningful Review of a Classification with the Indicia of Prejudice or Stereotypes Requires Inquiry into the Law's Purpose and the Relationship Between Legislative Goals and the Basis for the Classification under Challenge.

This Court has required that classifications reflect genuinely "legitimate public concerns," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000), rather than antipathy toward a minority. When the signs of prejudice or stereotyping are present, as they are in the case at bar, the Court has been especially vigilant in examining the proffered rationales for the classification. *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (regarding the need to "strike down a government classification that is clearly intended to injure a particular class of private

parties, with only incidental or pretextual public justifications").

In *Romer*, 517 U.S. at 635, for example, the Court found that a ban on antidiscrimination protections for gay people could not be justified by benign-sounding references to cost-saving and protecting associational rights when its actual purpose was far more likely to have been instantiation of an inferior status. Similarly, in *Cleburne*, 473 U.S. at 447-50, the Court found that concerns about a flood plain could not explain why homes for people with mental retardation were restricted while other group homes were not. And in *Moreno*, 413 U.S. at 537-38, the Court rejected superficially neutral rationales for refusing food stamps to people living with unrelated others – a purported government interest in stimulating agriculture and minimizing fraud – finding that they masked an underlying and impermissible hostility toward hippies.

Conversely, a direct relationship between a legislative goal and the classification will bolster the constitutionality of a law. In *Dandridge v. Williams*, 397 U.S. 471, 473-75 (1970), for example, the Court reviewed a Maryland statute that classified based on family size in setting the amount of welfare payments by capping the amount due any one family rather than by calculating the amount on a per-child basis. The Court found that the classification by family size was "free from invidious discrimination," *id*. at 487, and legitimately grounded in the state's interest in encouraging employment and avoiding an end result

that would discriminate against "families of the working poor." *Id*. at 486.

B. Laws That Impose a Burden out of Proportion to the Legislative Goal, Based on Classifications with the Markings of Invidiousness, Also Violate the Equal Protection Clause.

Even where a proper fit exists between legislative ends and means, a gross disparity between the burden created by the classification and the public benefit that is the ostensible legislative purpose may nonetheless doom the law. The Court has noted this link between a disproportionate burden on a group of people and the risk that invidious discrimination has occurred: "If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

The disproportionality principle explains cases that otherwise appear difficult to catalog because they involve non-suspect classifications that can be, depending on the context, invidious, and where a burden is imposed on a liberty interest that is important but not fundamental. In *Plyler v. Doe*, 457 U.S. 202, 202, 223 (1982), for example, the Court noted that the immigration status of undocumented resident children was a legitimate basis for classification, yet their exclusion from public schools would

produce "a lifetime [of] hardship" with the "stigma of illiteracy [that] will mark them for the rest of their lives," and struck down a law barring this group of children from schools.

The Court has similarly found equal protection violations when laws have imposed a disproportionate burden on low-income persons, although poverty itself is not a suspect classification. *Rodriguez*, 411 U.S. at 25. Four years after *Carolene Products*, the Court struck down a statute that allowed sterilization of habitual larcenists, but not habitual embezzlers, stressing both the heavy burden on the right to bear children and the invidiousness of a classification so linked to economic class. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment," the Court wrote. *Id*. When participation in government was at stake, the Court struck another wealth-linked classification: "[I]t is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government." *Quinn v. Millsap*, 491 U.S. 95, 107 (1989); *see also Bullock v. Carter*, 405 U.S. 134, 149 (1972) (striking down requirement of a filing fee for candidates in local primary elections).

In several other cases, a classification that allocated burdens in a way that further disadvantaged

low-income persons was invalidated in light of its impact on the criminal or civil justice system. As the Court has explained, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956); *accord Douglas v. California*, 372 U.S. 353, 355, 357-58 (1963). Although there is no absolute constitutional right to appeal, for example, the Court struck down economic barriers to pursuing an appeal in both criminal and civil cases that involved important liberty interests. In *Griffin*, the Court required states to furnish indigent criminal defendants with free trial transcripts on appeal. The same obligation was imposed for indigent appellants in parental termination cases. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996); *cf. Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (finding it unconstitutional for a state not to permit waiver of filing fees for indigent persons in divorce cases).

The underlying principle that greater burdens require more persuasive justifications provides one of the anchors of constitutional jurisprudence, and is found across multiple doctrines. In the realm of equal protection, for example, the Court has developed a concept of "proportionality and congruence between the means adopted and the legitimate end to be achieved" in assessing whether Congress has exceeded its authority in enacting remedial legislation. *Boerne*, 521 U.S. at 533. The limitation on Congress' power to enforce the Equal Protection Clause must surely be at least matched by a comparable boundary

to mark when Congress has violated the same provision. Similarly, under the Due Process Clause, states have flexibility in permitting the use of punitive damages to penalize and deter tortious conduct, but a punitive damages award may run afoul of basic fairness concerns if it can "fairly be categorized as 'grossly excessive' in relation" to those goals. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The guideposts that lower courts use to determine whether an award is grossly excessive include the reprehensibility of the defendant's conduct and the proportionality between the award and the harm suffered by plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

In sum, the Court has brought to bear a more searching inquiry into the logic and appropriateness of how a legislature uses its power to classify groups of people when there are indicia of invidiousness, including a missing nexus between the ends and means of a law or the imposition of a burden that is disproportionate to the benefit that the law is likely to convey. In doing so, the Court has recognized the importance of calibrating the degree of stringency in its review to importance of the constitutional values at issue.

IV. DOMA Fails Any Level of Equal Protection Review.

DOMA mandates the singling out of a subclass of lawfully married persons for disqualification as

married for purposes of any federal law. It is grounded in the invidious targeting of a socially stigmatized minority. And the burden it imposes by depriving married same-sex couples and their children of all federal recognition is both discontinuous with and disproportionate to any legitimate, neutral public purpose. DOMA thus fails any level of equal protection review, including under the standard proposed here.

There can be no serious question about the degree of stigma historically associated with homosexuality. *See Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) ("Condemnation of [homosexual] practices is firmly rooted in Judeao-Christian moral and ethical standards."); *cf. Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). As in *Romer*, where the Court found that the primary purpose of the law was discrimination per se, in this case, one way to reveal the invidiousness at work is to ask whether DOMA's exclusion would have been enacted if *any* group of married heterosexual couples were subject to it: for example, couples beyond child-bearing age or in which one or both partners had been sterilized. This inquiry does not probe whether the law could be more perfectly attuned to the stated purpose, but rather *whether the law would have ever been enacted at all without its invidious distinction.* "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir. of*

Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). The extreme *un*likelihood that such a law regulating recognition of marriages would affect anyone except same-sex couples demonstrates the extreme *like*lihood that the primary purpose behind this exclusion was simply to exclude this particular group.

Nor can BLAG identify genuinely neutral purposes served by DOMA's exclusion of this one group of couples. Rather, DOMA's effect is to impose harsh and unnecessary burdens that are not justified by a legitimate purpose but instead simply deny these persons access to the federal programs that track the obligations of interdependency to which they are already being held under state law.

BLAG's primary assertion appears to be that the federal government can limit its recognition of existing marriage to relationships most associated with procreative capacity – even if only hypothetically. Yet DOMA's broad scope sweeps across hundreds of statutes (and perhaps thousands of regulations) that shape a wide range of substantive policy areas. Consequently, there is striking discontinuity between DOMA's breadth and its purported interests, whether in procreation and parenting, uniformity, or any of BLAG's other implausibly hypothesized purposes. Its enormous impact also highlights how out of proportion its burden is to any likely public benefit.

For example, the desire to police the definition of marriage because of its association with procreation

bears little relationship to the many social welfare laws affected by DOMA. There is simply no link between child-raising and many of the federal programs that DOMA forecloses, such as immigration categories, surviving spouse benefits, and health insurance and pension benefits for the spouses of federal employees, as well as countless collateral programs unrelated to procreation in which DOMA itself is generating new instances of gratuitous discrimination.[32]

In general, the structure of benefits programs is not a proper venue for federal resolution of a competition among states over differing definitions of marriage or beliefs as to socially acceptable family structures for childrearing. "'[T]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with [the purposes of the Food Stamp Act,] their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements." *Moreno*, 413 U.S. at 534 (quoting *U.S. Dep't of Agric. v. Moreno*, 345 F. Supp. 310, 313 (D.D.C. 1972)).

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[32] For example, a military wives group at Fort Bragg, North Carolina, was told that it could not admit the wife of a lesbian officer because DOMA forbids recognition of same-sex marriages by any federal government entity. The Associated Press, *Wife of Female Army Officer Can Join Spouses Club*, USA Today (Jan. 26, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/01/26/army-military-bragg-gay/1866019/.

Moreover, the animating impulse behind DOMA, even when families with children are at issue, is not consonant with the purposes and functions of many of the federal programs that it affects. For example, DOMA distorts the Social Security survivor benefits program, "the primary purpose [of which] is to pay benefits in accordance with the probable needs of the beneficiaries," based on the "years worked and amount earned by a covered employee." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644, 647 (1975); *see also Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169 (1972) ("[T]he fact of a child's birth out of wedlock bore no reasonable relation to the purpose of wrongful-death statutes which compensate children for the death of a mother.").

Petitioner's attempt to reframe the motivation behind DOMA into a neutral one designed to incentivize heterosexual couples to marry, rather than to demean married same-sex couples, smacks of rationalizing an attempt "to mandate [Congress'] own moral code." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992). The exclusion of same-sex couples from recognition as married will not affect whatever incentives may succeed in influencing the behavior of heterosexual couples.[33] As this Court

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[33] *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs* 1999 (2) SA 1 (CC) para. 56 (S. Afr.) (finding "there is no rational connection between the exclusion of same-sex life partners from the benefits under [South African law] and the government interest sought to be achieved thereby, namely the

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noted in response to a similarly illogical argument: "Nor can it be thought . . . that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." *Weber*, 406 U.S. at 173.

DOMA's impact on children is even more discontinuous with BLAG's asserted aims, as its only effect is to harm the children of married same-sex couples by denying them the benefits to which they would otherwise be entitled. Of lesbian, gay, bisexual, and transgender (LGBT) persons, 49% of women and 19% of men are raising a child.[34] Same-sex couples with children are nearly twice as likely as non-LGBT persons with children to report household incomes near the poverty threshold of $24,000 per year.[35] Some portion of these children are rendered ineligible by DOMA for benefits that they would otherwise receive, because their parents' marriage is not recognized under federal law.

BLAG's claim that DOMA is justified by an interest in federal uniformity regarding marriage recognition also suffers from discontinuity with DOMA's actual effects. That is, the purported interest in uniformity fails equal protection's baseline requirement

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protection of families and the family life of heterosexual spouses").

[34] Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

[35] *Id.*

that a legitimate explanation exists for burdening some people but not others. Notably, the invocation of a benign-sounding concern for uniformity in an attempt to justify restricting the rights of lesbians and gay men is not new. In *Romer*, the defenders of Colorado's ban on civil rights laws for gay people similarly argued that they were merely trying to achieve a uniform approach to sexual orientation laws in the state. *See Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586, at *3 (Colo. Dist. Ct. Dec. 14, 1993). But, just as "uniformity" could not adequately explain why Colorado restricted only gay rights measures, so too it cannot explain why the federal government accepts the variability and dis-uniformity among state marriage laws except vis-à-vis same-sex couples. *Cf. Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing marriage as "a virtually exclusive province of the States").

The same is true for cost-savings. While the government no doubt has a legitimate interest in saving money, the question for equal protection purposes is whether that interest can explain the refusal to recognize same-sex couples' marriages or whether that goal is too discontinuous with the burden DOMA imposes. Cost-savings could arguably justify any government action, but, as with uniformity, there is no nexus between this rationale and the trait targeted by DOMA. Without that linkage, the designation of same-sex couples to serve the government's fiscal interest lacks any neutral justification. Saving money "'cannot justify an otherwise invidious classification,'"

this Court has explained. *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). Nor can it transform a sweeping federal ban on recognition of same-sex couples' marriages, replete with numerous laws that have no relation to federal spending, into a measure tailored to prevent the extension of certain financial benefits for married couples who had not previously enjoyed them. *Cf. Romer*, 517 U.S. at 635 ("find[ing] it impossible to credit" the state's "interest in conserving resources" as an explanation for why it had banned legal protection only for gay people); *Plyler*, 457 U.S. at 227 (similarly rejecting cost-savings argument).

Tradition, too, lacks the explanatory power required by equal protection. If tradition for its own sake could justify the government's burdening of particular classes, particularly when there is a history of governmental discrimination against the group that is now recognized as improper, virtually all historically-rooted classifications could be sustained. For this reason, the Court has repeatedly rejected the tradition rationale. *Cf. Heller v. Doe*, 509 U.S. 312, 327 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ." (alterations in original) (citation and internal quotation marks omitted)).

In the end, DOMA "classifies [lawfully married] homosexuals not to further a proper legislative end but to make them unequal to everyone else. This [Congress] cannot do." *Romer*, 517 U.S. at 635.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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