Case Nos. 10-2204, 10-2207 and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, REPRESENTATIVE LAMAR SMITH IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

When a federal law is challenged, no one has a greater interest in the defense of that law than Congress, the representatives of the American people. Ordinarily, Congress relies on the Department of Justice ("DOJ") to provide a robust defense of federal laws. In the past two years, however, DOJ has openly acknowledged a new-found reluctance to present a vigorous defense of the Defense of Marriage Act ("DOMA"). As Assistant Attorney General Tony West recently explained, DOJ has "presented the court through [its] briefs with information which seemed to undermine some of the previous rationales that have been used [in] defense of that statute." Ryan J. Reilly, *DOJ Official: Defending DADT, DOMA "Difficult" for Administration*, Talking Points Memo, Nov. 22, 2010.[1] In fact, DOJ "has worked with the Civil Rights Division's liaison to the gay, lesbian, bisexual and transgender community" to ensure it does not "advance arguments that they would find offensive." *Id.*

Indeed, DOJ has chosen not to present the Court with the arguments embraced by the Supreme Court and every other state and federal appellate court to consider challenges to the traditional opposite-sex definition of marriage under the federal constitution. Rather, it has adopted an approach that even political

[1] *available at* http://tpmmuckraker.talkingpointsmemo.com/2010/11/doj_official_defending_dadt_doma_difficult_for_administration.php.

supporters of same-sex marriage describe as "faint-hearted advocacy" of a duly enacted federal statute.[2] The anemic defense provided by DOJ does not begin to adequately inform this Court of the binding precedent and clear rational basis supporting the federal definition of marriage. In order to fully inform this Court, Representative Lamar Smith, Chairman of the House Committee on the Judiciary, respectfully submits this brief.

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

SUMMARY OF ARGUMENT

This Brief presents critical arguments supporting DOMA that are conspicuously absent from DOJ's current defense of the law. In prior challenges to DOMA—in which the law has been consistently upheld—DOJ argued successfully that the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), is "binding and dispositive" of DOMA's constitutionality. *E.g.*, Defs.' Br. Mot. Dismiss at 5, 6, *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (No.

[2] "[*Gill v. United States*] looks almost like collusive litigation …. As a supporter of gay marriage, I still think that the DOJ's faint-hearted advocacy is no way to run a legal system." Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, Forbes.com, July 12, 2010, http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

8:04-cv-01680) (ECF No. 39). This brief provides the Court with that missing argument.

In addition, in each of its past successful cases, DOJ forcefully argued that the traditional opposite-sex definition of marriage codified by DOMA furthers the important interests identified by Congress—including, most notably, society's "deep and abiding interest in encouraging responsible procreation and child rearing," Comm. on the Judiciary, Report on DOMA, H.R. Rep. No. 104-664 at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917. *See, e.g.*, Br. Appellee United States at 33, 37, *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (No. 05-56040) (arguing that DOMA furthers these "manifestly legitimate" interests).[3] Although under the current Administration, DOJ has suddenly disavowed these interests, whether DOMA furthers "manifestly legitimate" interests does not turn on Executive-branch policy shifts. The interests invoked by Congress have not changed. And many courts—including every federal or state appellate court to consider the issue under the Federal Constitution, and the majority of state appellate courts to do so under their own constitutions—have found the same interests identified by Congress more than sufficient to sustain the traditional opposite-sex definition of marriage. This brief provides the Court with a defense

[3] The DOJ's brief in *Smelt* is included in full in the Addendum.

of the principal rationale articulated by Congress in enacting DOMA and repeatedly embraced by appellate courts across the Nation.

ARGUMENT

I. THE DISTRICT COURT'S RULINGS CONTRADICT BINDING PRECEDENT FROM THE SUPREME COURT AND THE UNIFORM JUDGMENT OF STATE AND FEDERAL APPELLATE COURTS ACROSS THE NATION.

To read the district court's opinions, one might think that the validity of the traditional opposite-sex definition of marriage under the Federal Constitution was an issue of first impression. Nothing could be further from the truth. Indeed, the district court's holding that the United States Constitution requires the federal government to recognize same-sex relationships as marriages contravenes binding precedent from the Supreme Court. It is also contrary to the consistent decisions of every state and federal appellate court to address the validity of the traditional definition of marriage under the Federal Constitution.

A. THE SUPREME COURT'S DECISION IN BAKER V. NELSON MANDATES REVERSAL OF THE DISTRICT COURT'S RULINGS.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court unanimously dismissed, "for want of substantial federal question," an appeal from the Minnesota Supreme Court presenting the same questions at issue here: whether the government's refusal to recognize same-sex relationships as marriages violates due process and equal protection. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v.*

Nelson, 409 U.S. 810 (1972) (No. 71-1027); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). Although *Baker* was not cited by the district court, Plaintiffs, or even DOJ, the Supreme Court's dismissal of the appeal in that case was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *accord Auburn Police Union v. Carpenter*, 8 F.3d 886, 894 (1st Cir. 1993). It thus constitutes "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976). And because Plaintiffs' claims are the same as those rejected in *Baker*, they are foreclosed by that decision.

B. THE DISTRICT COURT'S RULING IS CONTRARY TO THE UNANIMOUS CONCLUSION OF APPELLATE COURTS ACROSS THE COUNTRY.

The district court's decision conflicts not only with *Baker*, but also with the decisions of *every* other state or federal appellate court to address the validity of the traditional opposite-sex definition of marriage under the Federal Constitution, including the United States Courts of Appeals for the Eighth and Ninth Circuits, three state courts of final resort, and four intermediate state courts. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 675-77 (Tex.

Ct. App. Dec. 8, 2010); *Standhardt v. Superior Court of Ariz.*, 206 Ariz. 276, 278, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Singer v. Hara*, 11 Wash. App. 247, 262-64, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 291 Minn. at 313-15, 191 N.W.2d at 187. The district court's decisions thus stand in stark conflict with the considered, uniform judgment of this Nation's appellate courts.

II. DOMA EASILY SATISFIES RATIONAL BASIS SCRUTINY.

When it codified the traditional opposite-sex definition of marriage for purposes of federal law, Congress clearly articulated the overriding societal interest it sought to advance: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children." H.R. Rep. No. 104-664 at 13, 1996 U.S.C.C.A.N. at 2917. In identifying this interest, Congress stood on firm, well-trodden ground: as eminent authorities throughout the ages have uniformly recognized, it is precisely because marriage serves this vital, universal interest that it has existed in virtually every society throughout history. And, as demonstrated below, Congress's decision to provide

federal recognition and benefits to committed opposite-sex relationships plainly furthers the vital interests that marriage has always served.[4]

A. RESPONSIBLE PROCREATION AND CHILDREARING HAVE ALWAYS BEEN AN ANIMATING PURPOSE OF MARRIAGE IN VIRTUALLY EVERY SOCIETY.

The federal definition of marriage as "a legal union between one man and one woman as husband and wife," 1 U.S.C. § 7 (2010), is neither surprising nor invidious. To the contrary, with only a handful of very recent exceptions, marriage is, and always has been, limited to opposite-sex unions in virtually every society. Indeed, until recently "it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 7 N.Y.3d 338, 361, 855 N.E.2d 1, 8 (N.Y. 2006). In the words of highly respected anthropologist Claude Levi-Strauss, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially

[4] DOMA is also rationally related to Congress's legitimate interests in administrative efficiency and morality. *See* H.R. Rep. No. 104-664 at 15-16, 18; Br. Professor Robert P. George et al., Amici Curiae Supporting Appellants.

recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.").

Nor is this traditional limitation in any way arbitrary or irrational. Rather, it reflects the undeniable biological reality that opposite-sex unions—and only such unions—can produce children. Marriage, thus, is "a social institution with a biological foundation." Claude Levi-Strauss, *Introduction* to 1 A History of the Family: Distant Worlds, Ancient Worlds 1, 5 (Andre Burguiere, et al. eds., Belknap Press of Harvard Univ. Press 1996) (1996). Indeed, an overriding purpose of marriage in virtually every society is, and has always been, to regulate sexual relationships between men and women so that the unique procreative capacity of such relationships benefits rather than harms society. In particular, through the institution of marriage, societies seek to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.

This central—indeed animating—purpose of marriage was well explained by William Blackstone, who, speaking of the "great relations in private life," describes the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." William Blackstone, 1 Commentaries *422. Blackstone

then immediately turns to the relationship of "parent and child," which he describes as "consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*; *see also id.* *435 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown"). John Locke likewise writes that marriage "is made by a voluntary compact between man and woman," Second Treatise of Civil Government § 78 (1690), and then provides essentially the same explanation of its purposes:

> For the end of conjunction between male and female, being not barely procreation, but the continuation of the species; this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.

Second Treatise of Civil Government § 79 (1690).

Throughout history, other leading linguists, lawyers, and social scientists have likewise consistently recognized the essential connection between marriage and responsible procreation and childrearing. *See, e.g.*, Noah Webster, 2 An American Dictionary of the English Language (1st ed. 1828) (defining marriage as the "act of uniting a man and woman for life" and explaining that marriage "was instituted … for the purpose of preventing the promiscuous intercourse of the

sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); Joel Prentiss Bishop, Commentaries on the Law of Marriage & Divorce § 225-26 (1st ed. 1852) ("It has always . . . been deemed requisite to the entire validity of marriage . . .that the parties should be of different sex…[T]he first cause and reason of matrimony . . . ought to be the design of having an offspring . . . the law recognizes [this] as the principle end[] of matrimony"); Bronislaw Malinowski, *Sex, Culture, and Myth* 11 (1962) ("the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents"); Quale, *supra*, at 2 ("Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); James Q. Wilson, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."); W. Bradford Wilcox, et al., eds., Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences 15 (2d ed. 2005) ("As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society."). In the words of the sociologist Kingsley Davis:

> The family is the part of the institutional system through which the creation, nurture, and socialization of the next generation is mainly accomplished. … The genius of the family system is that, through it, the society normally holds the biological parents responsible for each

> other and for their offspring. By identifying children with their parents … the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

The Meaning & Significance of Marriage in Contemporary Society 7-8, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution (Kingsley Davis, ed. 1985).

As these and many similar authorities illustrate, the understanding of marriage as a union of man and woman, uniquely involving the rearing of children born of their union, is age-old, universal, and enduring. Indeed, prior to the recent movement to redefine marriage to include same-sex relationships, it was commonly understood, without a hint of controversy, that the institution of marriage owed its very existence to society's vital interest in responsible procreation and childrearing. That is why, no doubt, the Supreme Court has repeatedly recognized marriage as "fundamental to our very existence and survival." *E.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967). And certainly no other purpose can plausibly explain the ubiquity of the institution. As Bertrand Russell put it, "it is through children alone that sexual relations become of importance to society." Bertrand Russell, *Marriage & Morals* 96 (Routledge Classics, 2009). Thus, "[b]ut for children, there would be no need of any institution concerned with sex." *Id*. at 48. Indeed, if "human beings reproduced asexually and … human offspring were self-sufficient[,] … would *any* culture have developed an institution

anything like what we know as marriage? It seems clear that the answer is no." Robert P. George, *et al.*, *What is Marriage?* 34 Harv. J. L. & Pub. Pol'y 245, 286-87 (Winter 2010).

In short, as Congress aptly explained:

> Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

H.R. Rep. No. 104-664 at 14, *reprinted in* 1996 U.S.C.C.A.N. at 2918.

B. DOMA Plainly Furthers Society's Vital Interest in Responsible Procreation and Childrearing.

The traditional opposite-sex definition of marriage codified by DOMA plainly bears at least a rational relationship to society's interest in increasing the likelihood that children will be born to and raised by the couples who brought them into the world in stable and enduring family units. Because only sexual relationships between men and women can produce children, such relationships have the potential to further—or harm—this interest in a way, and to an extent, that other types of relationships do not. By retaining the traditional definition of marriage as a matter of federal law, Congress preserves an abiding link between that institution and this traditional purpose, a purpose that still serves vital interests that are uniquely implicated by male-female relationships. And by providing

federal recognition and benefits to committed opposite-sex relationships, DOMA provides an incentive for individuals to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, society's interest in responsible procreation and childrearing.

1. "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised." *Adams*, 486 F. Supp. at 1124. Indeed, "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). The Supreme Court has confirmed this vital societal interest, holding repeatedly that marriage is "fundamental to our very existence and survival." *E.g.*, *Loving*, 388 U.S. at 12.

Underscoring society's interest in marriage is the undisputed truth that when procreation and childrearing take place outside stable family units, children suffer. As a leading survey of social science research explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. … There is thus value for children in promoting strong, stable marriages between biological parents.

Kristen Anderson Moore, et al., *Marriage from a Child's Perspective*, Child Trends Research Brief at 6 (June 2002).

In addition, when parents, and particularly fathers, do not take responsibility for their children, society is forced to step in to assist, through social welfare programs and by other means. Indeed, according to a Brookings Institute study, $229 billion in welfare expenditures between 1970 and 1996 can be attributed to the breakdown of the marriage culture. Isabel V. Sawhill, *Families at Risk*, *in* Setting National Priorities: the 2000 Election and Beyond 108 (Henry J. Aaron & Robert Danton Reischauer eds., 1999).

More than simply draining public resources, the adverse outcomes for children so often associated with single parenthood and father absence, in particular, harm society in other ways, as well. As President Obama has emphasized:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

President Obama, Statement at the Apostolic Church of God (June 15, 2008).[5]

[5] available at http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

Conversely, children benefit when they are raised by the couple who brought them into this world in a stable family unit. "[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore et al., *supra,* at 6. These benefits appear to flow in substantial part from the biological connection shared by a child with both mother and father. *See*, *e.g.*, *id.* at 1-2 ("[I]t is not simply the presence of two parents, … but the presence of *two biological parents* that seems to support children's development."); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.").

In addition, there is little doubt that children benefit from having a parent of each gender. As Professor Norval Glenn explains, "there are strong theoretical reasons for believing that both fathers and mothers are important, and the huge amount of evidence of relatively poor average outcomes among fatherless children makes it seem unlikely that these outcomes are solely the result of the correlates of fatherlessness and not of fatherlessness itself." Norval D. Glenn, *The Struggle for Same-Sex Marriage*, 41 Soc'y 27 (2004). Many others agree. *See, e.g.*, David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood &*

Marriage are Indispensable for the Good of Children & Society 146 (1996) ("The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."); James Q. Wilson, *supra*, at 169 ("The weight of scientific evidence seems clearly to support the view that fathers matter."); David Blankenhorn, *Fatherless America* 25 (HarperPerennial 1996) ("In virtually all human societies, children's well-being depends decisively upon a relatively high level of paternal investment.").

2. As a simple and undeniable matter of biological fact, same-sex relationships, which cannot naturally produce offspring, do not implicate society's interest in responsible procreation in the same way that opposite-sex relationships do. *See Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it."). And given this biological reality, as well as marriage's central concern with responsible procreation and childrearing, the "commonsense distinction," *Heller v. Doe*, 509 U.S. 312, 326 (1993), that our law has traditionally drawn between same-sex couples, which are categorically incapable of natural procreation, and opposite-sex couples, which are in general capable of procreation, "is neither surprising nor troublesome from a constitutional perspective." *Nguyen*, 533 U.S. at 63. For as the Supreme Court has made clear,

"where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) (internal quotation marks and citations omitted); *accord City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985). Simply put, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks and citations omitted).

Even though some same-sex couples do raise children, they cannot create them in the same way opposite-sex couples do—as the often unintended result of even casual sexual behavior. As a result, same-sex relationships simply do not pose the same risk of irresponsible procreation that opposite-sex relationships do. And as courts have repeatedly explained, it is the unique procreative capacity of heterosexual relationships—and the very real threat it can pose to the interests of society and to the welfare of children conceived unintentionally—that the institution of marriage has always sought to address. *See, e.g.*, *Bruning*, 455 F.3d at 867; *Hernandez*, 855 N.E.2d at 7; *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005).

3. Because sexual relationships between individuals of the same sex neither advance nor threaten society's interest in responsible procreation in the same

manner, or to the same degree, that sexual relationships between men and women do, the line drawn by DOMA between opposite-sex couples and other types of relationships, including same-sex couples, cannot be said to "rest[] on grounds wholly irrelevant to the achievement of the [government's] objective." *Heller*, 509 U.S. at 324 (citation omitted). Accordingly, it readily satisfies rational-basis scrutiny. *See id.* Indeed, it is well settled both that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson v. Robison*, 415 U.S. 361, 383 (1974), and, conversely, that the government may make special provision for a group if its activities "threaten legitimate interests … in a way that other [group's activities] would not," *Cleburne*, 473 U.S. at 448; *see generally Vance v. Bradley*, 440 U.S. 93, 109 (1979) (law may "dr[aw] a line around those groups ... thought most generally pertinent to its objective").

Not surprisingly, then, "a host of judicial decisions" have relied on the unique procreative capacity of opposite-sex relationships in concluding that "the many laws defining marriage as the union of one man and one woman … are rationally related to the government interest in 'steering procreation into marriage.' " *Bruning*, 455 F.3d at 867-68; *see also Wilson*, 354 F. Supp. 2d at 1308-09; *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams*, 486 F. Supp. at 1124-25; *Baker*, 191 N.W.2d at 186-87; *In re Marriage of J.B.*,

326 S.W.3d 654, 680; *Standhardt* , 77 P.3d at 461-64 (Ariz. Ct. App. 2003); *Singer*, 522 P.2d at 1197. This is true not only of *every* appellate court to consider this issue under the Federal Constitution, but the majority of state courts interpreting their own constitutions as well. *See Conaway v. Deane*, 401 Md. 219, 317-23, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez*, 855 N.E.2d at 7-8; *Andersen v. King County*, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64.[6] Without even citing any of these decisions, the district court summarily dismisses the proposition that procreation and childrearing bear any rational relationship to the traditional opposite-sex definition of marriage and thus effectively condemns as *irrational* scores of federal and state court judges who have disagreed.

C. THE DISTRICT COURT'S CONTRARY ARGUMENTS LACK MERIT.

In rejecting any rational relationship between the traditional opposite-sex definition of marriage embraced by DOMA and society's interest in responsible

[6] A number of foreign nations have reached the same conclusion. *See* French National Assembly, *Report Submitted on Behalf of the Mission of Inquiry on the Family and Rights of Children*, No. 2832 at 77 (English translation at http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf, original at http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf) ("Above all else then, it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage."); Australian Senate Legal and Constitutional Affairs Legislation Committee, *Marriage Equality Amendment Bill 2009*, at 37, http://www.aph.gov.au/senate/committee/legcon_ctte/marriage_equality/report/report.pdf .

procreation, the district court failed meaningfully to engage the arguments embraced by so many other courts. Instead, it offered only a cursory and superficial analysis that is readily rebutted.

1. The district court first claimed that "[s]ince the enactment of DOMA, a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." *Gill v.Office of Personnel Management,* 699 F. Supp. 2d 374, 388 (D. Mass 2010). Not only does this claim rest on a hotly disputed premise, it is also simply beside the point. Indeed, it fails even to come to grips with the critical fact underlying society's interest in responsible procreation—the unique potential for relationships between men and women to produce children inevitably. *E.g., Bruning*, 455 F.3d at 867.

"Despite legal contraception, numerous studies have shown that unintended pregnancy is the common, not rare, consequence of sexual relationships between men and women." Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. St. Thomas L.J. 33, 47 (2004). And the question in nearly every case of unintended pregnancy is *not* whether the child will be raised by two opposite-sex parents or by two same-sex parents, but rather whether it will be raised, on the one hand, by both its mother and father, or, on the other hand, by its mother alone, often with public assistance. *See, e.g.*, William J. Doherty et al.,

Responsible Fathering, 60 J. Marriage & Fam. 277, 280 (1998) ("In nearly all cases, children born outside of marriage reside with their mothers."). And there simply can be no dispute that children raised in the former circumstances do better, on average, than children raised in the latter, or that society has a direct and compelling interest in avoiding the financial burdens and social costs too often associated with single parenthood. *See, e.g.*, Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries."). Thus, even if the district court were right that it matters not whether a child is raised by the child's own parents or by any two males or any two females, it would still be perfectly rational for society to make special provision through the institution of marriage for the unique procreative risks posed by sexual relationships between men and women.

At any rate, the district court's startling suggestion that children receive no special benefit, whatsoever, from being raised by their own mothers and fathers—

and indeed that it is *irrational* to believe otherwise[7]—simply cannot be squared with a wealth of contrary scholarship and empirical studies, as discussed above, nor with the most basic instincts embedded in the DNA of the human species. The law "historically … has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also*, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child."); *cf.* Convention on the Rights of the Child, G.A. Res. 44/25, Art. 7, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) ("as far as possible, [a child has the right] to know and be cared for by his or her parents"). And "[a]lthough social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton*, 358 F.3d at 820. Courts have thus repeatedly upheld as rational the "commonsense" notion that "children will do best with a mother and father in the home." *Hernandez*, 855 N.E.2d at 7-8; *see also*, *e.g.*, *Bruning*, 455 F.3d at 867-68; *Lofton*, 358 F.3d at 825-

[7] "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111. Accordingly, so long as the "assumptions underlying [a law's] rationales" are at least "arguable," that is "sufficient, on rational basis review, to immunize the [legislative] choice from constitutional challenge." *Heller*, 509 U.S. at 333 (internal quotation marks and citation omitted).

26; *cf. Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) ("the optimal situation for the child is to have both an involved mother and an involved father") (internal quotation marks and citation omitted).

Furthermore, the position statements cited by the district court and the studies on which they rely do not come close to establishing that the widely shared, deeply instinctive belief that children do best when raised by both their biological mother and their biological father is *irrational*. To the contrary, there are "significant flaws in the[se] studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." *Lofton*, 358 F.3d at 825; *see also id*. (noting "the absence of longitudinal studies following child subjects into adulthood").[8]

In light of the limitations of these studies, it is not surprising that a diverse group of 70 prominent scholars from all relevant academic fields recently concluded:

> [N]o one can definitively say at this point how children are affected by being reared by same-sex couples. The current research on children reared by them is inconclusive and underdeveloped—we do not yet have any large, long-term, longitudinal studies that can tell us much about how children are affected by being raised in a same-sex

[8] *See generally* Br. Amicus Curiae American College of Pediatricians (collecting scholarly critiques of same-sex parenting studies).

> household. Yet the larger empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents.

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008).

The district court's confident assertions to the contrary notwithstanding, Congress, in the words of the Eleventh Circuit,

> could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Lofton, 358 F.3d at 825 n.26 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 999-1000 (Mass. 2003) (Cordy, J., dissenting)).

2. The district court also claimed that "an interest in encouraging responsible procreation plainly cannot provide a rational basis" for DOMA because "the ability to procreate is not now, nor has it ever been, a precondition to marriage." 699 F. Supp. 2d at 389. But the district court did not even acknowledge the many cases squarely and repeatedly rejecting precisely this argument. *See, e.g., Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187; *Adams*, 486 F. Supp. at 1124-25; *In re Kandu*, 315 B.R. at 146-47; *Conaway*, 932 A.2d at 633 (applying state constitution); *Hernandez*, 855 N.E.2d at 11-12 (same);

Andersen, 138 P.3d at 983 (same); *Morrison*, 821 N.E.2d at 27 (same).

As these cases have repeatedly recognized, it is well settled that rational-basis review allows the government to draw bright lines, "rough accommodations," *Heller*, 509 U.S. at 321, and "commonsense distinction[s]," *id*. at 326, based on "generalization[s]," *id*., presumptions, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315 (1976), and "common-sense proposition[s]," *Vance*, 440 U.S. at 112. "[C]ourts are compelled under rational-basis review to accept [such] generalizations," *Heller*, 509 U.S. at 321, presumptions, and propositions, moreover, unless they hold true in "so few" circumstances "as to render [a line based upon them] wholly unrelated to the objective" of the law drawing that line, *Murgia*, 427 U.S. at 315-16; *see also Williamson v. Lee Optical*,348 U.S. 483, 487 (1955) (upholding categorical rule that was based on an assumption that the legislature "might have concluded" was "often enough" true). And the presumption that sexual relationships between men and women can result in pregnancy and childbirth holds true for the vast majority of couples and is plainly sufficient to render rational, at least, the "commonsense distinction" the law has traditionally drawn between opposite-sex couples, and same-sex couples, which are categorically incapable of natural procreation.

Furthermore, any policy conditioning marriage on procreation would presumably require enforcement measures—from premarital fertility testing to

eventual annulment of childless marriages—that would surely violate constitutionally protected privacy rights. *See, e.g., Standhardt*, 77 P.3d at 462-63; *Adams*, 486 F. Supp. at 1124-25. And such Orwellian measures would, in any event, be unreliable. *See, e.g.*, Monte Neil Stewart, *Marriage Facts*, 31 Harv. J. L. & Pub. Pol'y 313, 345 (2008) (noting the "scientific (i.e., medical) difficulty or impossibility of securing evidence of [procreative] capacities"). Even where infertility is clear, moreover, usually only one spouse is infertile. In such cases marriage still furthers society's interest in responsible procreation by decreasing the likelihood that the fertile spouse will engage in sexual activity with a third party, for that interest is served not only by *increasing* the likelihood that procreation occurs *within* stable family units, but also by *decreasing* the likelihood that it occurs *outside* of such units.[9]

For all of these reasons, it is neither surprising nor significant that societies throughout history have chosen to forego an Orwellian and ultimately futile attempt to police fertility and have relied instead on the common-sense presumption that sexual relationships between men and women are, in general, capable of procreation. *See, e.g.*, *Nguyen*, 533 U.S. at 69 (2001) (Congress could properly enact "an easily administered scheme" to avoid "the subjectivity,

[9] Infertile opposite-sex marriages also advance the institution's central procreative purposes by reinforcing social norms that heterosexual intercourse—which in general, though not every case, can produce offspring—should take place only within marriage. *See, e.g.*, *id.* at 344-45.

intrusiveness, and difficulties of proof" of "an inquiry into any particular bond or tie."); *Murgia*, 427 U.S. at 315-16 (government may rely on reasonable but imperfect irrebuttable presumption rather than conduct individualized testing). By so doing, societies further their vital interests in responsible procreation and childrearing by seeking to channel the presumptive procreative *potential* of opposite-sex relationships into enduring marital unions so that *if* any offspring are produced, they will be more likely to be raised in stable family units by the mothers and fathers who brought them into the world.[10]

3. The district court's remaining arguments warrant little response. Because, under rational-basis review, DOMA "must be upheld … if there is any reasonably conceivable state of facts that could provide a rational basis" for it, and Plaintiffs thus bear "the burden … to negative every conceivable basis which might support it," *Heller,* 509 U.S. at 320, the fact that DOJ "disavowed Congress's

[10] Even where heightened scrutiny applies, courts have not "required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Indeed, applying heightened scrutiny in a closely analogous context, the Supreme Court rejected as "ludicrous" an argument that a law criminalizing statutory rape for the purpose of preventing teenage pregnancies was "impermissibly overbroad because it makes unlawful sexual intercourse with prepubescent females, who are, by definition, incapable of becoming pregnant." *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 475 (1981) (plurality); *see also id.* at 480 n.10 (Stewart, J., concurring) (rejecting argument that the statute was "overinclusive because it does not allow a defense that contraceptives were used, or that procreation was for some other reason impossible," because, *inter alia*, "a statute recognizing [such defenses] would encounter difficult if not impossible problems of proof").

stated justifications for the statute," 699 F. Supp. 2d at 388, is of little moment. Simply put, this Court's review of DOMA's rationality is not limited to "explanations … that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988).

Further, the district court's assertions that "denying federal recognition to same-sex marriages … does nothing to promote stability in heterosexual parenting," and that "denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages mores secure," 699 F. Supp. 2d at 389, reflect a fundamental misunderstanding of settled principles of rational-basis review. There can be little doubt that *providing* federal recognition and benefits to committed opposite-sex couples makes *those potentially procreative relationships* more stable, and by doing so promotes society's interest in responsible procreation and childrearing. *See, e.g.*, Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Res. & Pol'y Rev. 135, 136 (2004) ("A well-known difference between cohabitation and marriage is that cohabiting unions are generally quite short-lived.").[11] And under *Johnson* and other controlling Supreme Court authorities, the relevant inquiry is not, as the

[11] Contrary to the district court's assertion, providing recognition and benefits to opposite-sex couples furthers this vital societal interest directly, not "by punishing same-sex couples who exercise their rights under state law." 699 F. Supp. 2d at 389.

district court would apparently have it, whether denying federal recognition and benefits to include same-sex couples is *necessary* to promote society's interest in responsible procreation and childrearing, but rather is whether providing such recognition and benefits to committed opposite-sex relationships furthers interests that would not be furthered, or would not be furthered to the same degree, by recognizing same-sex relationships as marriages. *See, e.g., Andersen*, 138 P.3d at 984; *Morrison*, 821 N.E.2d at 23. And as demonstrated above, the answer to this inquiry is clear.

The district court's failure to "discern a means by which the federal government's denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex," 699 F. Supp. 2d at 389, is even further afield. Marriage has always been uniquely concerned with steering potentially procreative sexual conduct into stable marital relationships. Its rationality in no way depends on its also steering those not inclined to engage in such conduct into such relationships.

4. In short, the district court's superficial analysis does not begin to undermine the rational relationship between the traditional definition of marriage codified by DOMA and society's vital interest in responsible procreation and childrearing.

CONCLUSION

For the forgoing reasons, Amici respectfully request that this Court reverse the district court's judgments.

Respectfully submitted,
this 27th day of January 2011

s/ David Austin R. Nimocks
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

s/ David Austin R. Nimocks
David Austin R. Nimocks

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of Representative Smith in the consolidated cases of *Commonwealth of Massachusetts v. United States Department of Health and Human Services* and *Hara, Gill, et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207, and 10-2214,, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ David Austin R. Nimocks
David Austin R. Nimocks

Addendum

No. 05-56040

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR BRUNO SMELT, et al.

Plaintiffs-Appellants,

v.

COUNTY OF ORANGE, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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No. 05-56040

IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE UNITED STATES

STATEMENT OF JURISDICTION

Plaintiffs in this case contend, among other things, that Sections 2 and 3 of the Defense of Marriage Act ("DOMA") violate the federal constitution. The district court had statutory jurisdiction under 28 U.S.C. § 1331 but, as explained below, plaintiffs lack standing to challenge Section 2 of DOMA.

On June 16, 2005, the district court abstained from deciding plaintiffs' constitutional challenges to various provisions of state law, held that plaintiffs lack standing to challenge Section 2 of DOMA, and upheld the constitutionality of Section 3 of DOMA. E.R. 16. On July 7, 2005, plaintiffs filed a timely notice of appeal. See E.R. 14 (docket number 129). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Section 2 of DOMA provides that no state shall be required to give effect to a same-sex marriage recognized in any other state. Plaintiffs are a same-sex couple who allege a desire to marry in California, but who allege no present or future connection with any other state. The first question presented is whether the district court correctly held that plaintiffs lack standing to challenge Section 2.

2. Section 3 of DOMA codifies, for purposes of federal law, the traditional definition of marriage as the union of one man and one woman. The second question presented is whether the district court correctly held that Section 3 is consistent with the Fifth Amendment.

The United States takes no position on whether the district court properly abstained from deciding plaintiffs' challenges to various provisions of California law.

STATEMENT OF THE CASE

Plaintiffs, two males, wish to marry each other in California and to obtain the benefits afforded to married couples under California and federal law. In this action, plaintiffs raise constitutional challenges to DOMA and to various provisions of California law defining marriage as the union of one man and one woman. The district court abstained from deciding plaintiffs' challenges to California law, held that plaintiffs

lack standing to challenge Section 2 of DOMA, and upheld the constitutionality of Section 3 of DOMA.

A. Statutory and Enactment Background

1. In 1996, Congress enacted the Defense of Marriage Act ("DOMA") by overwhelming majorities in both Houses, and President Clinton signed it into law. Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 2 of DOMA addresses whether one state must give effect to same-sex marriages recognized by another state. Specifically, it provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other State * * * respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." 28 U.S.C. § 1738C. Section 3 of DOMA defines the terms "marriage" and "spouse" for purposes of federal law. Specifically, it 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.

1 U.S.C. § 7.

2. The House Judiciary Committee issued a report explaining the background and purposes of DOMA. As the Committee explained, DOMA was a direct response to Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), in which a plurality of the Hawaii Supreme Court concluded that the definition of marriage under Hawaii law, as the union of

one man and one woman, might warrant heightened scrutiny under the state constitution. H.R. Rep. No. 104-664, at 2, reprinted in 1996 U.S.C.C.A.N. 2905, 2906. In response, Congress sought both to "preserve[] each State's ability to decide" what should constitute a marriage under its own laws and to "lay[] down clear rules" regarding what constitutes a marriage for purposes of federal law. Id. Congress thus enacted Section 2 of DOMA pursuant to its "express grant of authority," under the Full Faith and Credit Clause, "to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States." Id. at 25, reprinted in 1996 U.S.C.C.A.N. at 2930. In Section 3 of DOMA, Congress codified, for purposes of federal law, the definition of marriage in "the standard law dictionary." Id. at 31, reprinted in 1996 U.S.C.C.A.N. at 2935 (citing Black's Law Dictionary 972 (6th ed. 1990)).

In explaining why Congress chose to limit federal marital benefits to opposite-sex couples, the House Judiciary Committee stressed the link between traditional opposite-sex marriage and procreation. According to the Committee, society "recognizes the institution of marriage" in order to encourage "responsible procreation and child-rearing." Id. at 12-13, reprinted in 1996 U.S.C.C.A.N. at 2916-17. Congress thus agreed with the Supreme Court that "'no legislation can be supposed more wholesome and necessary * * * than that which seeks to establish [government] on the basis of the idea of the family, as consisting in and

springing from the union for life of one man and one woman.'" Id. at 12, reprinted in 1996 U.S.C.C.A.N. at 2916 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)). The Committee elaborated: "Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity." Id. at 13-14, reprinted in 1996 U.S.C.C.A.N. at 2917-18. In discussing DOMA, President Clinton similarly reasoned that "marriage is an institution between a man and a woman, that among other things, is used to bring children into the world." 32 Weekly Comp. Pres. Doc. 933 (May 23, 1996).

B. Facts and Proceedings

1. Plaintiffs, Arthur Bruno Smelt and Christopher David Hammer, have stipulated that each "is an adult male desiring and intending to enter into a civil marriage with each other and in the State of California." E.R. 51. In February and March 2004, plaintiffs "applied for a marriage license from the County Clerk, Orange County, California," but the Clerk on both occasions "refused to issue a marriage license because Plaintiffs are of the same gender." E.R. 51-52. Plaintiffs "received a Declaration of Domestic Partnership from the State of California dated January 10, 2000." E.R. 52.

2. Plaintiffs filed this lawsuit against several California and Orange County agencies and officals. Plaintiffs raised

various state and federal constitutional challenges to Sections 300, 301, and 308.5 of the California Family Code, which define marriage as exclusively a relationship between one man and one woman. E.R. 17.[1] Plaintiffs also raised federal constitutional challenges to Sections 2 and 3 of DOMA, and the United States intervened to defend those provisions. E.R. 17-18. The parties filed cross-motions for summary judgment, and the California defendants alternatively sought abstention under Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), and its progeny.

3. On June 16, 2005, the district court issued the order under review in this appeal. The court made three distinct legal rulings.

First, the district court abstained from addressing the plaintiffs' state and federal constitutional challenges to Sections 300, 301, and 308.5 of the California Marriage Code. The court reasoned that Pullman abstention was appropriate because the treatment of same-sex couples under state law is a "sensitive area of social policy"; because the invalidation of Sections 300, 301, and 308.5 under the state constitution would obviate any need to determine whether those provisions are

[1] Section 300 provides in pertinent part that marriage "is a personal relation arising out of a civil contract between a man and a woman." Section 301 provides that "[a]n unmarried male of the age of 18 years or older, and not otherwise disqualified, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage." Section 308.5 provides that "[o]nly marriage between a man and a woman is valid or recognized in California."

consistent with the federal Constitution; and because the proper resolution of the state constitutional challenges to Sections 300, 301, and 308.5 remains uncertain. E.R. 21-28.[2]

Second, the district court held that plaintiffs lack Article III standing to challenge Section 2 of DOMA. The court reasoned that plaintiffs "have not shown what 'injury in fact' they have suffered as a result" of Section 2." E.R. 29. As the court explained, although plaintiffs allege a desire to marry each other in California, they allege neither a desire "to get married * * * elsewhere and attempt to have the marriage recognized in California" nor a desire "to seek recognition of their eventual California marriage in another state." E.R. 30.

Third, the court held that Section 3 of DOMA is consistent with due process and equal protection principles embodied in the Fifth Amendment. The district court declined to give binding effect to the Supreme Court's dismissal for want of a substantial federal question in Baker v. Nelson, 409 U.S. 810 (1972), which rejected due process and equal protection challenges to Minnesota statutes prohibiting same-sex marriage. E.R. 31-35. Nonetheless, the court held that heightened equal protection scrutiny would be inappropriate because classifications based on homosexuality are neither suspect nor quasi-suspect for equal

[2] As the district court explained, a state trial court judge has held that these provisions of state law violate the state constitution. See Marriage Cases, No. 4635, 2005 WL 583129 (Cal. Superior March 14, 2005). That decision remains pending on appeal in the state courts.

protection purposes (E.R. 36-38) and because DOMA makes no classification based on sex (E.R. 38-41). The court further held that heightened due process scrutiny would be inappropriate because there is no fundamental right to same-sex marriage. E.R. 41-45. As the court explained, until 2003, "marriage in the United States uniformly had been an union of two people of the opposite sex," and a different definition "only recognized in Massachusetts and for less than two years cannot be said to be 'deeply rooted in this Nation's history and tradition.'" E.R. 44 (citations omitted). Finally, applying rational-basis review, the district court upheld Section 3 as rationally related to the legitimate government interest in encouraging "the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents." E.R. 46.[3]

[3] The district court certified its rulings with respect to DOMA as a final judgment under Fed. R. Civ. P. 54(b). E.R. 47-48 & n.25. We do not believe that this certification was necessary to create appellate jurisdiction under 28 U.S.C. § 1291. The district court definitively rejected plaintiffs' constitutional challenges to Section 2 of DOMA on standing grounds, and it definitively rejected plaintiffs' constitutional challenges to Section 3 of DOMA on the merits. Moreover, the district court's decision to apply Pullman abstention to the constitutional challenges to the California Family Code was itself a final resolution of those claims for purposes of appellate jurisdiction. See, e.g., Porter v. Jones, 318 F.3d 483, 489 (9th Cir. 2003) (decision to abstain under Pullman is "final" under § 1291 and collateral order doctrine); Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994) (same). Because the district court's June 16 decision thus finally resolved all claims against all defendants, this appeal does not present any of the questions of appellate jurisdiction that can arise when a district court enters a "final judgment as to * * * fewer than all of the claims or parties" (Fed. R. Civ. P. 54(b)).

SUMMARY OF ARGUMENT

I. The district court correctly held that plaintiffs lack standing to challenge Section 2 of DOMA. That provision addresses the extent to which one state must give effect to same-sex marriages recognized in another state. It has no impact whatsoever on plaintiffs, who allege only the desire to marry each other in California.

II. The district court correctly held that Section 3 of DOMA does not violate the Fifth Amendment. Section 3 merely codifies, for purposes of federal law, the longstanding, traditional, and nearly universal definition of marriage as the union of one man and one woman.

Plaintiffs' due process and equal protection challenges to Section 3 are foreclosed by binding Supreme Court precedent. In a dismissal for want of a substantial federal question, which operates as a judgment on the merits, the Supreme Court has rejected Fourteenth Amendment due process and equal protection challenges to state statutes prohibiting same-sex marriage. Moreover, this Court has held that decision to be binding in a case addressing Fifth Amendment due process and equal protection challenges to a federal-law definition of marriage as limited to unions of one man and one woman. Those precedents alone should be dispositive.

In any event, the district court correctly upheld Section 3 under rational-basis review. Because DOMA neither impinges on

any fundamental right nor makes any suspect classification, it is properly subject only to rational-basis review. Under that highly deferential standard, Section 3 is constitutional because it furthers the plainly legitimate end of encouraging what Congress could reasonably view as the optimal human relationships for procreation and child rearing.

III. If it reaches the merits of plaintiffs' challenge to Section 2 of DOMA, the Court should uphold that provision as a valid exercise of Congress's power, under the Full Faith and Credit Clause, to prescribe the effect of one state's acts in the other states. In recognizing the power of the states to apply their own marriage laws in the face of another state's opposing position, Congress was merely confirming longstanding conflict of-law principles in the valid exercise of its express power to prescribe the effect of one state's laws in another state.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. See United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc., 366 F.3d 767, 770 (9th Cir. 2004).

ARGUMENT

I. Plaintiffs Lack Standing To Challenge Section 2 Of DOMA

The power of federal courts extends only to "Cases" and "Controversies." See U.S. Const. Art. III, § 2. To establish a case or controversy under Article III, a plaintiff must establish the "irreducible constitutional minimum of standing": first, that the plaintiff has suffered an "injury in fact"; second, that the injury is "fairly traceable" to the challenged statute or conduct; and third, that the injury would be "redressable" by decision for the plaintiff. See, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The injury in fact must be "concrete" as opposed to "abstract," and must also be "actual" or "imminent" as opposed to "conjectural" or "hypothetical." See, e.g., Lujan, 504 U.S. at 560; Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). It is the "plaintiff's burden to establish standing," Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180 (2000), and each of its elements must be "supported in the same way as any other matter on which the plaintiff bears the burden of proof." Lujan, 504 U.S. at 560.

The district court correctly held that plaintiffs lack standing to challenge Section 2 of DOMA. That provision confirms that one state need not recognize same-sex marriages that another state may choose to recognize. See 28 U.S.C. § 1738C.

Plaintiffs have neither alleged nor introduced any summary-judgment evidence that this provision causes them any actual or imminent injury. To the contrary, plaintiffs allege only that they desire and intend "to enter into a civil marriage with each other in the State of California." E.R. 51. As the district court explained, plaintiffs "do not claim to have plans or a desire to get married in [another state] * * * and attempt to have the marriage recognized in California," and also "do not claim to have plans to seek recognition of their California marriage in another state." E.R. 30. Absent any desire to obtain a same-sex marriage in one state and to compel its recognition in another, plaintiffs cannot show that Section 2 impacts them in any way. The district court thus correctly concluded that plaintiffs "have not shown what 'injury in fact' they have suffered as a result" of Section 2. E.R. 29.[4]

II. Section 3 of DOMA Does Not Violate The Fifth Amendment

Section 3 merely codifies, for purposes of federal law, the longstanding, traditional, and nearly universal definition of marriage as the union of one man and one woman. See 1 U.S.C. § 7. As far as we know, every court to address the question —

[4] We do not dispute plaintiffs' standing to challenge the constitutionality of Section 3 of DOMA. Plaintiffs have alleged a present desire and intention to marry each other in California. E.R. 51. If plaintiffs were to succeed on their challenges to the California Family Code and to Section 3, they then could marry each other and obtain the benefits afforded to married couples under state and federal law respectively. Accordingly, plaintiffs have alleged concrete injuries fairly traceable to the California Family Code and to Section 3, which would be redressed by a decision in their favor.

Addendum 5

including the Supreme Court and this Court – has rejected federal constitutional challenges to that traditional definition of marriage. See, e.g., Baker v. Nelson, 409 U.S. 810 (1971); Lofton v. Secretary of Dep't of Children & Family Servs., 358 F.3d 804, 811-27 (11th Cir. 2004); Adams v. Howerton, 673 F.2d 1036, 1041-43 (9th Cir. 1982); McConnell v. Nooner, 547 F.2d 54, 55-56 (8th Cir. 1976) (per curiam); Wilson v. Ake, 354 F. Supp. 2d 1298, 1304-09 (M.D. Fla. 2005); In re Kandu, 315 B.R. 123, 138-48 (Bankr. W. D. Wash. 2004); Lewis v. Harris, 875 A.2d 259 (N.J. Super. A.D. 2005); Standhardt v. Superior Court, 77 P.3d 451, 455-60, 464-65 (Ariz. Ct. App. 2003); Dean v. District of Columbia, 653 A.2d 307, 331-33, 362-64 (D.C. 1995); Baehr v. Lewin, 852 P.2d 44, 55-57 (Haw. 1993); Singer v. Hara, 522 P.2d 1187, 1195-97 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). This Court should do the same.

A. Plaintiffs' Claims Are Foreclosed By Binding Precedent

To resolve plaintiffs' due process and equal protection challenges to section 3 of DOMA, this Court need look no farther than the binding Supreme Court precedent in Baker v. Nelson. Although the district court correctly rejected plaintiffs' due process and equal protection challenges, it gave no sound reason for treating Baker as less than dispositive on those points.

1. In Baker, the Minnesota Supreme Court rejected the contention that a state statute limiting marriage to one man and one woman violated federal due process or equal protection principles. The court specifically held that there is no "fundamental right" to same-sex marriage, that the traditional definition of marriage effects no "invidious discrimination," and that the definition easily survives rational-basis review. 191 N.W.2d at 186-87. Invoking the United States Supreme Court's then-mandatory appellate jurisdiction, see 28 U.S.C. § 1257(2) (repealed 1988), a same-sex couple sought review of that decision and specifically raised the question whether denial of same-sex marriage "deprives appellants of their liberty to marry * * * without due process of law under the Fourteenth Amendment" or "violates their rights under the equal protection clause of the Fourteenth Amendment." See Jurisdictional Statement, Baker v. Nelson, No. 71-1027, at 3 (attached as Appendix). The Supreme Court dismissed that appeal "for want of a substantial federal question." 409 U.S. 810.

The Supreme Court's disposition of Baker established a binding precedent. In Hicks v. Miranda, 422 U.S. 332 (1975), the Supreme Court specifically held that dismissals "for want of a substantial federal question" bind the lower courts. As the Court explained, such dismissals constitute a "merits" judgment, and "'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view

that * * * the Court has branded a question as unsubstantial.'" Id. at 344-45 (citation omitted); see also id. at 345 ("the lower courts are bound by summary decisions by this Court 'until such time as the Court informs them that they are not'" (citations omitted)). Moreover, "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). Applying those principles, this Court, in rejecting due process and equal protection challenges to the traditional definition of marriage applicable to federal immigration statutes, specifically noted that Baker "'operates as a decision on the merits.'" Adams, 673 F.2d at 1039 n.2 (citation omitted); see McConnell, 547 F.2d at 56 (Baker is "binding on the lower federal courts"); Ake, 354 F. Supp. 2d at 1304 (Baker is "binding on lower federal courts" and precludes due process and equal protection challenges to Section 3 of DOMA); Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. App. 2005) ("There is binding United States Supreme Court precedent indicating that state bans on same-sex marriage do not violate the United States Constitution." (citing Baker)).

2. Baker has not been overruled or undermined by intervening precedent. In particular, it is fully consistent with both Lawrence v. Texas, 539 U.S. 558 (2003), and Romer v. Evans, 517 U.S. 620 (1996).

In Lawrence, the Supreme Court held that the government cannot criminalize private, consensual, adult homosexual sodomy. In doing so, however, the Court expressly declined to address the question "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. As the Eleventh Circuit has explained, in holding that a state may constitutionally prohibit homosexuals from adopting children, Lawrence simply does not address "the affirmative right to receive official and public recognition" for a personal relationship. Lofton, 358 F.3d at 817. An Arizona intermediate appellate court, in upholding a traditional definition of marriage against due process and equal protection challenges, has likewise concluded that Lawrence "did not * * * address same-sex marriages." See Standhardt, 77 P.3d at 456-57. And a federal district court, in upholding Section 3 of DOMA against due process and equal protection challenges, has concluded, for the same reason, that "Lawrence does not alter the dispositive effect of Baker." See Ake, 354 F. Supp. 2d at 1305. Because Baker specifically resolved due process and equal protection challenges to the traditional definition of marriage, and because Lawrence expressly declined to address any question regarding marriage, Baker remains the governing precedent with respect to marriage.

Romer is similarly unhelpful to plaintiffs. In Romer, the Supreme Court applied rational-basis review to invalidate an

"unprecedented" state constitutional amendment that barred homosexuals from seeking any protection under any state or local anti-discrimination statute or ordinance. See 517 U.S. at 633. Because Romer involved no substantive due process question at all, it plainly does not undermine the due process holding of Baker. Because Romer applied rational-basis review, it plainly does not support the application of heightened equal protection scrutiny. And because Romer did not involve a statute specifically related to marriage, the Supreme Court had no occasion to consider, and did not consider, whether a traditional definition of marriage is rationally related to the legitimate government interest in encouraging responsible "procreation and rearing of children" (Baker, 191 N.W.2d at 186). For all of these reasons, Romer has no significant bearing on the questions resolved in Baker and directly presented here. See, e.g., Kandu, 315 B.R. at 147-48 ("DOMA is not so exceptional and unduly broad as to render * * * its enactment 'inexplicable by anything but animus' towards same-sex couples" (quoting and distinguishing Romer, 517 U.S. at 632)); Standhardt, 77 P.3d at 464-65 (similar).

3. The district court recognized that the only possible distinctions between this case and Baker are small ones. As the court itself explained, the "difference between DOMA and the state statutes in Baker is relatively minor"; the plaintiffs here "challenge DOMA under the same constitutional principles

presented in Baker"; and the "governmental interests" asserted in support of the traditional definition of marriage contained in the Minnesota marriage statutes and in DOMA "may be similar." E.R. 32-33. The district court asserted that it must "reac[h] the merits" to the extent of determining "whether these differences have constitutional significance." E.R. 33. We agree with that proposition. However, examining the possible distinctions between this case and Baker is a far cry from deciding this case as if Baker were not itself a binding precedent. For the reasons set forth above, the district court erred to the extent that it undertook to do the latter.

The asserted distinctions between this case and Baker are all constitutionally immaterial. First, Baker was decided under the Fourteenth Amendment (which applies to the states), whereas this case is governed by the Fifth Amendment (which applies to the federal government). However, there is no textual or structural difference between the due process clauses in each amendment, which obviously must be construed in pari materia. And although the Fifth Amendment by its terms contains no equal protection clause, the Supreme Court has long held that identical equal protection principles constrain state and federal action respectively. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217-18 (1995); Bolling v. Sharpe, 347 U.S. 497 (1954). Second, as the district court noted, the question of "allocating benefits" is arguably different from the question of "sanctifying

a relationship" (E.R. 33). However, the state licensing statute upheld in Baker, in defining marriage for state-law purposes as the union of one man and one woman, both declined to recognize same-sex marriage and declined to extend to same-sex couples any of the benefits afforded to married couples under state law. If that is constitutional, as the Supreme Court held in Baker, then it is a fortiori constitutional for the federal government, which does not provide marriage licenses at all, but which does provide married couples with certain benefits, to adopt the identical definition of marriage for federal-law purposes. Third, the district court noted that DOMA "is a relatively new law reflecting new interests and its own legislative history." E.R. 33. None of those observations undercuts DOMA: the age of a law has no relevance to its validity; the interests asserted in support of DOMA are identical to those held constitutionally sufficient in Baker, compare H.R. Rep. No. 104-664 at 13, reprinted in 1996 U.S.C.C.A.N. at 13 (DOMA definition of marriage seeks to encourage responsible "procreation and child-rearing") with Baker, 191 N.W.2d at 186 (Minnesota definition of marriage rationally related to legitimate government interest in "procreation and rearing of children"); and, in any event, legislative history and actual motivation are of no moment in conducting rational-basis review, as that level of scrutiny "never require[s] a legislature to articulate its reasons for enacting a statute," making it "entirely irrelevant for

constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Communications, 508 U.S. 307, 315 (1993).

For all of these reasons, the merits ruling by the Supreme Court in Baker v. Nelson forecloses the due process and equal protection claims asserted here by plaintiffs.

B. DOMA Is Constitutional In Any Event

DOMA is clearly constitutional even apart from the binding precedential effect of Baker. Under settled principles, most due process and equal protection claims are subject to rational-basis review, under which a challenged statute will be upheld "as long as it bears a rational relation to a legitimate state interest." Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (equal protection); see Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997) (due process). Only if a statute implicates a "fundamental right" or makes a "suspect classification" is more heightened scrutiny appropriate. See, e.g., National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000). As the district court correctly concluded, DOMA does not impinge upon any fundamental right, makes no suspect classification, and easily satisfies rational-basis scrutiny.

1. **DOMA Does Not Impinge Upon Any Fundamental Right**

The Due Process Clause affords substantive protection only to those "fundamental" rights that are, "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted); see Christy v. Hodel, 857 F.2d 1324, 1330 (9th Cir. 1988). The right to marry qualifies as "fundamental" under these standards. Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978). That right does not, however, encompass the right to marry someone of the same sex. As the district court explained, while it "is undisputed there is a fundamental right to marry," the "history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex." E.R. 41, 44.

The Supreme Court has mandated extreme caution in elevating liberty interests to the status of fundamental constitutional rights. As the Court explained in Glucksberg, in holding that there is no fundamental right to physician-assisted suicide:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

521 U.S. at 720 (citations omitted); see Christy, 857 F.2d at 1330 (noting "Supreme Court's admonition that we exercise restraint" in creating fundamental rights).

As part of this "restraint," Glucksberg requires a "careful description" of the alleged right, in specific as opposed to general terms, before determining whether it is fundamental. See 521 U.S. at 721. For example, in Glucksberg itself, the asserted right was not properly characterized generally as a "right to die," but rather as a "right to commit suicide which itself includes a right to assistance in doing so." See id. at 722-23. Similarly, in Reno v. Flores, 507 U.S. 292 (1993), the Supreme Court rejected an invitation to characterize the asserted right as "freedom from physical restraint," and instead characterized it as "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." See id. at 302. See also Doe v. City of Lafayette, Ind., 377 F.3d 757, 769 (7th Cir. 2004) (a 'careful description' of the asserted right must be one that is specific and concrete, one that avoids sweeping abstractions and generalities"). Once this specific, "careful description" is reached, the court can proceed to determine whether the asserted right is fundamental. See Glucksberg, 521 U.S. at 720-21.

Carefully described, the right at issue here is not merely the right to marry, but an asserted right to marry someone of the same sex. As the district court correctly concluded (E.R. 45), that asserted right is far from "fundamental," as there is no widespread or longstanding history or tradition of same-sex marriage, in this country or elsewhere. See, e.g., Ake, 354 F. Supp. 2d at 1306 ("no federal court has recognized that this right [to marry] includes the right to marry a person of the same sex"); Kandu, 315 B.R. at 140 ("there is no basis for this Court to unilaterally determine at this time that there is a fundamental right to marry someone of the same sex"); Standhardt, 77 P.3d at 455-60 (no fundamental right to same-sex marriage).

The traditional understanding of marriage as the union of one man and one woman is deeply rooted in Western history. As this Court explained in Adams, in holding (pre-DOMA) that federal immigration statutes implicitly incorporated the traditional definition of marriage, "[t]he term 'marriage' ordinarily contemplates a relationship between a man and a woman." 673 F.2d at 1040; see Baker, 191 N.W.2d at 185-86; Black's Law Dictionary 762 (2d ed. 1910) (defining marriage as "the civil status of one man and one woman united in law for life"). As the district court explained, even if one looks only to the "history and tradition of the last fifty years," there is no support for the notion that "marriage * * * include[s] a union of two people regardless of their sex." E.R. 44.

Until recently, moreover, no state or foreign country had ever permitted same-sex marriages. See H.R. Rep. No. 104-664, at 3, reprinted in 1996 U.S.C.C.A.N. at 2907. To the contrary, every state but Massachusetts understands "marriage" in accordance with the historical practice, and courts repeatedly have upheld prohibitions against same sex marriage against due process attacks, both before and after the enactment of DOMA. See, e.g., Ake, 354 F. Supp. 2d at 1305-06; Kandu, 315 B.R. at 138-41; Standhardt, 77 P.3d at 455-60; Lewis, 875 A.2d at 268-71; Dean, 653 A.2d at 331-33; Baker, 191 N.W.2d at 186-87. Occasional contrary decisions such as Baehr, resting exclusively on state constitutional law, have been promptly overruled by constitutional amendment. See Haw. Const. Art. 1, § 23 (ratified Nov. 3, 1998) ("The legislature shall have the power to reserve marriage to opposite-sex couples."); Alaska Const. Art. 1, § 25 (effective Jan. 3, 1999) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). Numerous other states, concerned about even the possibility of aberrational decisions such as Baehr, have enshrined the traditional definition of marriage within their state constitutions.[5]

[5] See, e.g., Ark. Const. Amend. 83, § 1 (adopted 2004); Ga. Const. Art. 1, § 4, ¶ I (ratified 2004); Ky. Const. § 233A (ratified 2004); La. Const. Art. XII, § 15 (approved 2004); Mich. Const. Art. 1, § 25 (adopted 2004); Miss. Const. Art. 14, § 263A (approved 2004); Mo. Const. Art. 1, § 33 (adopted 2004); Mont. Const. Art. XIII, Sec. 7 (approved 2004); Nev. Const. Art. 1, § 21 (ratified 2002); North Dak. Const. Art. XI (approved 2004); Ohio Const. Art. XV, § 11 (effective 2004); Okla. Const. Art. 2,

Currently, same-sex marriage is permitted only in Massachusetts, as a result of a judicial decision resting entirely on state constitutional provisions with no exact analog in the federal Constitution. See Goodridge v. Department of Pub. Health, 798 N.E.2d 941, 948-49 (Mass. 2003) (stressing that Massachusetts constitution is "more protective of individual liberty and equality than the Federal Constitution"); see also Andersen v. King County, No. 04-2-04964, 2004 WL 1738447, *12 (Wash. Super. Ct. Aug. 4, 2004) (holding that prohibition against same-sex marriage violates Washington constitution, but declining to enter "specific remedy" and staying any remedial order pending appellate review), appeal pending, No. 75934-1 (Wash.). The district court was therefore correct in concluding that "[a] definition of marriage only recognized in Massachusetts and for less than two years cannot be said to be 'deeply rooted in this Nation's history and tradition' of the last half century." E.R. 44 (quoting Glucksberg, 521 U.S. at 721).

Moreover, the Supreme Court has defined the right to marry consistent with traditional understandings. Thus, the Court has

§ 35 (enacted 2004); Oregon Const. Art. XV, § 5a (ratified 2004); Utah Const. Art. 1, § 29 (adopted 2004). Litigation regarding some of these amendments is pending in state courts. A federal court has held invalid a Nebraska constitutional amendment, Neb. Const. Art. I, § 29, that the court viewed as much broader than a state's definition of marriage as being between a man and a woman. See Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980, 995 n. 11 (D. Neb. 2005) ("the court need not decide whether and to what extent Nebraska can define or limit the state's statutory definition of marriage"). An appeal of that decision is pending.

repeatedly linked marriage to related rights of procreation. See, e.g., Zablocki, 434 U.S. at 386 (fundamental right to "marry and raise the child in a traditional family setting"); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is "fundamental to our very existence and survival"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). The Supreme Court has also repeatedly enforced traditional restrictions on marriage, such as age limitations and prohibitions against polygamy. See, e.g., Maynard v. Hill, 125 U.S. 190, 205 (1888); Reynolds v. United States, 98 U.S. 145, 166-67 (1878); Gaines v. Relf, 53 U.S. (12 How.) 472, 504 (1851). As Justice Powell explained, state regulation has permissibly "included bans on * * * homosexuality, as well as various preconditions to marriage." Zablocki, 434 U.S. at 399 (concurring opinion); see Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 711 (6th Cir. 2001) ("marriage as it was recognized by the common law is constitutionally protected, but this protection has not been extended to forms of marriage outside the common-law tradition") (emphasis added).

Given this widespread tradition against same-sex marriage, there is no basis for courts to enshrine that arrangement in the federal Constitution. As the Supreme Court explained in Glucksberg, substantive due process does not authorize the courts to "reverse centuries of legal doctrine and practice, and strike

down the considered policy choice of almost every State." 521 U.S. at 723.[6]

In any event, unlike the state marriage statutes discussed above, DOMA does not directly or substantially interfere with the ability of anyone to marry the individual of his or her choice. Instead, it simply indicates how couples who have already married under the law of a state will be treated for purposes of federal law. The Supreme Court has made clear that regulations which "do not significantly interfere with decisions to enter into the marital relationship" may be upheld without heightened scrutiny. Zablocki, 434 U.S. at 386. Accordingly, statutes like DOMA, which merely allocate benefits and burdens based on marital status, are routinely subjected only to rational-basis review — and upheld under that standard. See, e.g., Califano v. Jobst, 434 U.S. 47, 54 (1977) (loss of federal social security benefits upon marriage does not "interfere with the individual's freedom to make a decision as important as marriage"); Parks v. City of Warner Robins, Ga., 43 F.3d 609, 614 (11th Cir. 1995) (city's

[6] Lawrence is not to the contrary. That case did not create any new fundamental rights at all, as two courts of appeals already have held. See Muth v. Frank, 412 U.S. 809, 817-18 (7th Cir. 2005) (Lawrence "did not apply the specific method [the Court] had previously created for determining whether a substantive due process claim implicated a fundamental right"); Lofton, 358 F.3d at 815 ("it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right"). A fortiori, Lawrence - which expressly refused to consider "whether the government must give formal recognition" to same-sex relationships (539 U.S. at 578) - did not create a fundamental right to same-sex marriage. See, e.g., Ake, 354 F. Supp. 2d at 1306-07; Kandu, 315 B.R. at 139-40; Standhardt, 77 P.3d at 456-57.

anti nepotism policy for supervisory employees does not "create a direct legal obstacle that would prevent absolutely a class of people from marrying," and thus does not "directly and substantially interfere with the right to marry"); P.O.P.S. v. Gardner, 998 F.2d 764, 768 (9th Cir. 1993) (same for child-support obligations that imposed distinct "financial pressures" on married individuals); Druker v. Commissioner, 697 F.2d 46, 50 (2d Cir. 1982) (same for "marriage penalty" in federal tax code). Similarly, DOMA does not address the question whether the plaintiffs in this case may marry under the law of California or of any other state.

2. DOMA Does Not Make Any Suspect Classification

As the district court correctly concluded, DOMA cannot be subjected to heightened scrutiny on the theory that it draws any suspect classification.

This Court squarely has held that homosexuality is not a suspect classification. See High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (rejecting challenge to policy of conducting expanded investigations of homosexual applicants for security clearances). More recently, the Eleventh Circuit observed that all of the circuits which "have considered the question have declined to treat homosexuals as a suspect class." Lofton, 358 F.3d at 818 (citing cases from the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal Circuits). Thus, even

assuming that statutes with a "disproportionate effect on homosexual individuals" (E.R. 37) necessarily discriminate against homosexuals, but cf. Washington v. Davis, 426 U.S. 229 (1976), DOMA cannot be subjected to heightened scrutiny on that basis.

DOMA also does not discriminate on the basis of sex. To begin with, DOMA on its face makes no "detrimental * * * classification[]" that disadvantages either men or women. Michael M. v. Superior Court, 450 U.S. 464, 478 (1981) (plurality). It cannot be "traced to a * * * purpose" to discriminate against either men or women. Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979). It imposes no disparate impact on men or women as a class. And it does not reflect either the "baggage of sexual stereotypes," Orr v. Orr, 440 U.S. 268, 283 (1979), or "stigmatization of women," Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982). Accordingly, there is no basis for concluding that DOMA discriminates on the basis of sex. See, e.g., Ake, 354 F. Supp. 2d at 1307 ("DOMA does not discriminate on the basis of sex because it treats women and men equally."); Kandu, 315 B.R. at 143 ("Women, as members of one class, are not being treated differently from men, as members of a different class.").

Loving v. Virginia, 388 U.S. 1 (1967), is not to the contrary. There the Supreme Court rejected a contention that the assertedly "equal application" of a statute prohibiting

interracial marriage immunized the statute from strict scrutiny. See id. at 8. The Court had little difficulty concluding that the statute, which applied only to "interracial marriages involving white persons," was "designed to maintain White Supremacy" and therefore unconstitutional. Id. at 11. No comparable purpose is present here, for DOMA does not seek in any way to advance the "supremacy" of men over women, or of women over men. Thus, in rejecting equal protection challenges to the traditional definition of marriage, numerous courts have held that Loving has no bearing on the question presented. See, e.g., Baker v. State, 744 A.2d at 880 n.13 (rejecting claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex"); Singer, 522 P.2d at 1191-92; Baker v. Nelson, 191 N.W.2d at 187; see also Dean, 653 A.2d at 362-63 & n.2 (Steadman, A.J., concurring) ("It seems to me to stretch the concept of gender discrimination to assert that it applies to treatment of same-sex couples differently from opposite-sex couples."). The district court was therefore correct to reject "[p]laintiffs' Loving analogy." E.R. 40.

3. DOMA Easily Satisfies Rational-Basis Review

Because DOMA neither burdens fundamental rights nor makes any suspect classification, it is subject only to rational-basis review. See, e.g., Glucksberg, 521 U.S. at 728. A classification satisfies that review if "there is a rational relationship between the [challenged government action] and some

legitimate governmental purpose." Heller v. Doe, 509 U.S. 312 (1993).

The Supreme Court described rational-basis review exhaustively in Heller. Such review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Id. at 319. Legislative classifications are "accorded a strong presumption of validity." Id. The legislature "need not actually articulate at any time the purpose or rationale supporting its classification." Id. at 320; see Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1999) ("[i]t is * * * irrelevant for constitutional purposes whether, at the time the legislature acted, it articulated the 'conceivable basis' for the legislation"). Instead, the "classification must be upheld * * * if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller, 509 U.S. at 320.

Moreover, in conducting rational-basis review, a "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id. The person challenging the classification bears the "burden * * * to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." Id. at 320-21. "Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means

and ends." Id. at 321. Thus, a "classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Id.

As this Court has held, a court applying rational-basis review "may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack." Shaw v. State of Or. Pub. Employees' Ret. Bd., 887 F.2d 947, 948-49 (9th Cir. 1989) (internal quotation marks omitted). Rational-basis analysis is, in short, "a paradigm of judicial restraint." FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993); see Kahawaiolaa v. Norton, 386 F.3d 1271, 1279 (9th Cir. 2004) (rational-basis standard is "highly deferential"), cert. denied, 125 S. Ct. 2902 (2005). Thus, a plaintiff seeking to invalidate a statute under the rational-basis test faces a "heavy burden." Dittman, 191 F.3d at 1031.

Section 3 of DOMA is rationally related to at least two legitimate government interests. First, it is rationally related to the legitimate government interest in encouraging the development of relationships that are optimal for procreation. As the House Judiciary Committee explained, the benefits and obligations of marriage are rooted in "the inescapable fact that only two people, not three, only a man and a woman, can beget a child." H.R. Rep. No. 104-664, at 13, reprinted in 1996

U.S.C.C.A.N. at 2917. Congress could properly seek to encourage the creation of stable relationships in which people can securely procreate.

To this end, marriage historically has provided an important legal and normative link between procreation and family responsibilities. See 1 William Blackstone, Commentaries on the Laws of England 443 (Univ. of Chicago Press 1979) ("The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong * * *."). Congress's interest in encouraging responsible procreation is manifestly legitimate. As the district court reasoned, "it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents." E.R. 46.

In Adams, this Court upheld under rational-basis review the traditional definition of marriage as incorporated into federal immigration statutes. This Court reasoned that the use of the traditional definition is rational "because homosexual 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." 673 F.2d at 1043 (emphasis added). Accordingly, this Court concluded that "Congress's decision to confer spouse status * * * only upon the parties to

heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements." See id. at 1042. Of course, this panel is bound by those determinations.

Other courts have applied the same reasoning to uphold DOMA. In Ake, the district court concluded that DOMA is rationally related to the legitimate government interest in encouraging "the development of relationships that are optimal for procreation." See 354 F. Supp. 2d at 1308. The Kandu court likewise concluded that DOMA is rationally related to the same interest. See 315 B.R. at 145 ("a heterosexual union is the only one that can naturally produce a child"); see also Standhardt, 77 P.3d at 462 (upholding traditional definition of marriage under rational-basis review, given "reasonable[] * * * link between opposite-sex marriage, procreation, and child-rearing"). In short, Congress has an interest in promoting heterosexual marriage because it has an interest in the stable generational continuity of the United States. See Kandu, 315 B.R. at 145-46 ("Marriage and procreation are fundamental to the very existence and survival of the race.") (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). The district court was therefore correct in reasoning:

> Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government.

E.R. 31. DOMA furthers this interest by adopting the traditional definition of marriage for purposes of federal statutes.

Second, Congress may permissibly decide to encourage the creation of stable relationships that facilitate not only the birth, but also the rearing, of children by both of their biological parents. The Kandu court also relied on this rationale in upholding DOMA:

> Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern. * * * It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end.

315 B.R. at 146; see also Ake, 354 F. Supp. 2d at 1308 (DOMA rationally related to legitimate government interest in encouraging relationships that "facilitate the rearing of children by both their biological parents"). The Eleventh Circuit has concurred, in upholding Florida's prohibition against adoption by a practicing homosexual. See Lofton, 358 F.3d at 818-19 ("Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children. * * * [T]he state has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and father.").

By incorporating the traditional definition of marriage into federal statutes, DOMA encourages the creation of stable families in which children can be nurtured by both of their biological parents. Congress could legitimately seek to strengthen that relationship so as to "unite men and women * * * through the prolonged period of dependency of a human child" – and thus facilitate what Congress reasonably understood to be the "most durable and effective means of meeting children's needs over time." See H.R. Rep. No. 104-664, at 14 n.50 (citations omitted), reprinted in 1996 U.S.C.C.A.N. at 2918.

Under rational-basis review, it is no valid objection to contend that some opposite-sex couples will not procreate (which makes DOMA arguably overinclusive in its allocation of federal marital benefits), or that many individuals besides biological parents can raise children quite effectively (which makes DOMA arguably underinclusive). See, e.g., Standhardt, 77 P.3d at 462-63 (rejecting both contentions in upholding state statute limiting marriage to opposite-sex couples); Kandu, 315 B.R. at 147 ("that same-sex couples also raise children does not negate the reasonableness of the link between opposite-sex marriage and child-rearing"). As explained above, rational classifications cannot be struck down merely because they are to some degree over- or under-inclusive. See, e.g., Vance v. Bradley, 440 U.S. 93, 108 (1979). To the contrary, in framing any legislation, Congress "must necessarily engage in a process of line-drawing,"

which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (citation omitted); see Taylor v. Rancho Santa Barbara, 206 F.3d 932, 936 (9th Cir. 2000) ("[E]ven though the [legislature's line] might be over and underinclusive on the margin, legislatures are given leeway under rational-basis review to engage in such line drawing.").

In sum, it is beyond dispute that procreation requires one man and one woman; Congress reasonably concluded that children ideally should be raised by both of their biological parents; and DOMA is rationally related to Congress's plainly legitimate interests in encouraging the optimal social arrangements for procreation and childrearing. Under settled principles of rational-basis review, nothing more is required. See, e.g., Heller, 509 U.S. at 319-20; Beach Communications, Inc., 508 U.S. at 314-15.[7]

[7] Section 2 of DOMA survives rational-basis review for all of the same reasons that Section 3 does. Moreover, Section 2 also rationally furthers the legitimate governmental interest of protecting the interests of each state in determining and implementing its own policy on same-sex marriage.

III. Section 2 of DOMA Is A Valid Exercise of Congress's Power Under the Full Faith and Credit Clause

If it reaches the merits on this point, the Court should conclude that Section 2 of DOMA is a valid exercise of Congress's power under the Full Faith and Credit Clause.

A. Section 2 Confirms Settled Conflicts Principles

The Full Faith and Credit Clause has never been construed to require the states literally to give effect, in all circumstances, to the statutes or judgments of other states. Such a "rigid" enforcement of the Clause, "without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935). Accordingly, the Clause must be "interpreted against the background of principles developed in international conflicts law," Sun Oil Co. v. Wortman, 486 U.S. 717, 723 & n.1 (1988), which do "not require a State to apply another State's law in violation of its own legitimate public policy," Nevada v. Hall, 440 U.S. 410, 422 (1979). Accord Williams v. North Carolina, 317 U.S. 287, 296 (1942) ("Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.").

For these reasons, the Full Faith and Credit Clause does not require states, within their respective borders, to give effect to out-of-state laws that violate the forum state's own laws or public policy. See, e.g., Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939) (California courts need not apply Massachusetts law of workers compensation to Massachusetts employee of Massachusetts employer, where that law was contrary to California's "policy to provide compensation for employees injured in their employment within the state"); see also Hilton v. Guyot, 159 U.S. 113, 167 (1895) ("A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law."); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) (noting the longstanding conflicts principle that the laws of one country "will, by the comity of nations, be recognised and executed in another * * * provided that law was not repugnant to the laws or policy of their own country").

The courts have followed this principle, moreover, in relation to the validity of marriages performed in other states. Both the First and Second Restatements of Conflict of Laws recognize that a state may refuse to give effect to a marriage, or to certain incidents of a marriage, that are "sufficiently offensive" to the forum state's law or public policy. See Restatement (First) of Conflict of Laws § 134; Restatement

(Second) of Conflict of Laws § 284. The courts have widely held that certain marriages performed elsewhere need not be given effect, because they violate the law or public policy of the forum. See, e.g., Catalano v. Catalano, 170 A.2d 726, 728-29 (Conn. 1961) (marriage of uncle to niece, "though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of th[at] state"); Wilkins v. Zelichowski, 140 A.2d 65, 67-68 (N.J. 1957) (marriage of 16-year-old female held invalid in New Jersey, regardless of validity in Indiana where performed, in light of New Jersey statute permitting adult female to secure annulment of her underage marriage); In re Mortenson's Estate, 316 P.2d 1106 (Ariz. 1957) (marriage of first cousins held invalid in Arizona, though lawfully performed in New Mexico, given Arizona policy reflected in statute declaring such marriages "prohibited and void").

Section 2 of DOMA thus follows settled conflicts principles as applied to the specific question of recognition of foreign marriages. Even absent congressional action, the Full Faith and Credit Clause would not preclude a state from declining to give effect, within its own borders, to marriages performed in other states that violate the state's own laws or public policy. A fortiori, the Clause does not preclude the Congress from confirming that traditional state power. See Sun Oil Co, 486 U.S. at 728-29 (Clause does not mandate interference with "long established and still subsisting choice-of-law practices").

B. Section 2 Permissibly Prescribes the "Effect" of One State's Acts in the Other States

The constitutionality of Section 2 of DOMA is further confirmed by the second sentence of the Full Faith and Credit Clause, which empowers Congress to prescribe "the Effect" to be accorded to the laws of a state by a sister state. See U.S. Const. Art. IV, § 1, cl. 2. Whatever the precise contours of this provision, it plainly encompasses the power to enact Section 2 of DOMA.

First, there is ample support in both history and case law for according plenary power to Congress under the effects provision. The Full Faith and Credit Clause was designed to make up for the inadequacies of a predecessor provision in the Articles of Confederation, which recognized no legislative power to prescribe the "effect" of such laws. In the Framers' view, that provision was "deficien[t]" because it did not "declare what was to be the effect of a judgment obtained in one state in another state." McElmoyle ex rel. Bailey v. Cohen, 38 U.S. (13 Pet.) 312, 325-26 (1839) (emphasis added). In the absence of any provision as to such "effect," the Framers viewed the meaning of "full faith and credit" as "extremely indeterminate," and "of little importance."[8]

[8] See The Federalist No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) ("The meaning of the [Full Faith and Credit Clause in the Articles] is extremely indeterminate, and can be of little importance under any interpretation which it will bear.").

As the Supreme Court explained in McElmoyle, this historical record accords limited significance to the first sentence of the Full Faith and Credit Clause, and plenary power to Congress to prescribe the substantive effects of one state's laws in other states. Specifically, the first sentence merely provides that the judgments of one state "are only evidence in a sister state that the subject matter of the suit has become a debt of record." McElmoyle, id. at 325 (emphasis added). It "does not declare what was to be the effect of a judgment obtained in one state in another state," id. (emphasis added) – an issue reserved by the second sentence to Congress.

This same construction was embraced in Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). At issue in Mills was the Full Faith and Credit statute of 1790, now codified in substantially similar terms at 28 U.S.C. § 1738, which provided that one state's judgment would have the same effect in other states as it would have in the rendering state. In rejecting a reading of the statute that would treat "judgments of the state Courts * * * [as] prima facie evidence only," the Court noted that "the constitution contemplated a power in congress to give a conclusive effect to such judgments." Id. at 485 (emphasis added). Like McElmoyle, Mills thus read the effects provision as conferring on Congress the broad power "to give a conclusive effect" to the laws of another state.

Under this view, Congress obviously acted within its plenary power in enacting Section 2 of DOMA. If the Constitution itself does not unalterably declare "the effect" of the law of "one state in another state," McElmoyle, 38 U.S. (13 Pet.) at 325, but instead leaves that "power in congress," Mills, 11 U.S. (7 Cranch) at 485, then Congress clearly had the authority in DOMA to declare that no state is "required to give effect" to the same-sex marriage laws of other states. 28 U.S.C. § 1738C.

In any event, whatever the breadth of Congress's power under the Full Faith and Credit Clause, it clearly encompasses the authority to confirm the applicability of one of the longstanding, generally applicable principles of conflicts law that formed the background of the Clause. See Sun Oil, 486 U.S. at 723 & n.1. As explained above, one such principle was that one state need not give effect, within its own borders, to the laws of a sister state that offend its own laws or public policy. Section 2 of DOMA merely confirms the applicability of that principle in the context of laws regarding same-sex marriage.

For all of these reasons, Section 2 of DOMA fits within any conceivable construction of the Full Faith and Credit Clause.[9]

[9] Plaintiffs' remaining arguments do not merit extended discussion. The federal definition of marriage in no way impacts plaintiffs' First Amendment right to associate. See Appellants' Br. at 32-33. The "right to travel" (Appellants' Br. at 45) concerns state decisions to treat new residents differently from existing residents of the state, but those concerns are not at all involved here. See Saenz v. Roe, 526 U.S. 489, 500 (1999) (the right to travel "protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor * * *, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State"). The Privileges and Immunities Clause (Br. at 45) is also not implicated by DOMA. Nevada v. Watkins, 914 F.2d 1545, 1555 (9th Cir. 1990) ("[T]he Privileges and Immunities Clause has been construed as a limitation on the powers of the States, not on the powers of the federal government.") (citations omitted).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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