**Nos. 12-15388, 12-15409**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**KAREN GOLINSKI,**

***Plaintiff-Appellee*,**
**v.**

**UNITED STATES OFFICE OF PERSONNEL MANAGEMENT et al.,**
***Defendants*,**

**and**

**BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,**

***Defendant-Intervenor-Appellant.***

**Appeal from United States District Court**
**for the Northern District of California**
**Civil Case No. 10-CV-00257 JSW (Honorable Jeffrey S. White)**

# BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, GEORGIA, IDAHO, KANSAS, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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## INTEREST OF THE *AMICI* STATES

The amici States file this amicus brief in support of reversal as a matter of right pursuant to Fed. R. App. P. 29(a). The overwhelming majority of States—forty-two in all—by either constitutional amendment or statute limit marriage to the union of one man and one woman, consistent with the historical definition of marriage. The amici states have an interest in protecting the ability of all states to preserve the traditional definition of marriage through the democratic process, and a decision invalidating the Defense of Marriage Act, 1 U.S.C. § 7, on equal protection grounds would likely imply the invalidity of these efforts.

## SUMMARY OF THE ARGUMENT

Invalidating the Defense of Marriage Act on constitutional grounds threatens not only the results of national democratic debate, but the diverse approaches to marriage policy existing among the States, ignoring both the virtues of federalism and the state interests in promoting traditional marriage.

Whereas only 20 years ago legal recognition of same-sex unions was unheard of, nowadays state marriage policy ranges from strictly

maintaining the traditional definition of marriage, to recognizing same-sex unions from other states (including for purposes of issuing divorce decrees), to sanctioning civil unions, to granting full marriage rights and recognition to same-sex couples. These policies are principally the result of ongoing political debate, sometimes in reaction to judicial interposition.

Indeed, flashpoints in the debate have centered on state judicial decisions prohibiting States from distinguishing between same-sex and opposite-sex couples. Decisions by the Supreme Courts of Hawaii in 1993 and Massachusetts in 2004 triggered a national political movement to solidify the traditional marriage laws in many States and more limited efforts to deconstruct such limits in others. And with public opinion on the subject ebbing and flowing in different regions, marriage policy remains in flux across the nation. Some States are legalizing same-sex marriage, while others pass state constitutional amendments upholding traditional marriage. Later this year, two States will hold referenda on whether to legalize same-sex marriage, while in another voters will consider a state constitutional amendment preserving traditional marriage.

Such political processes are the proper way to address differences over marriage policy. While citizens of different states reach different results using political channels, they almost uniformly reject judicial resolution. In Hawaii, voters amended the state constitution to overturn the first state supreme court decision in the country forcing recognition of same-sex marriage. In California, voters have voted through referenda to overturn judicial decisions invalidating laws against same-sex marriage. In Iowa, voters dismissed judges who invalidated traditional marriage laws.

The lesson is that where a divisive issue is undergoing continued and productive political debate, the judicial role, absent a clear constitutional directive to the contrary, should be to enable political resolutions rather than to stymie them. *Roe v. Wade* is a textbook example of how constitutionalizing policy differences on individual rights grounds only entrenches controversies and impedes citizens' acceptance of whatever resolution is imposed on them. If the Court here invalidates Congress's political resolution of the marriage question for federal program purposes, it will implicitly negate the political resolutions of States that choose to adhere to traditional marriage.

Fundamentally, the choices by Congress and forty-two States to distinguish between same-sex unions and traditional marriages are constitutionally legitimate. The traditional definition of marriage is deeply rooted in history and social experience, and Congress and the States may conclude that seismic changes in marriage policy could carry undesirable consequences, particularly where such change would utterly negate any apparent rationale for government recognition of marriage. The traditional definition of marriage furthers state interests in responsible procreation by encouraging biological parents to remain together, a rationale that cannot extend to same-sex couples. And while the principal advocates for same-sex marriage may be monogamous homosexual couples, there is no theory supporting government recognition of their relationships that would not also apply to other relationships, such as polyamorous or platonic relationships. It is legitimate for Congress and States to adhere to the traditional rationale for marriage—even if it might be marginally over-inclusive—precisely because no alternative theory for government recognition presents itself.

## ARGUMENT

### I. States Are Properly Addressing the Same-Sex Marriage Issue Through Ongoing Political Debate and Action

#### A. States have adopted different policies regarding civil recognition of same-sex relationships

States have addressed the same-sex marriage issue in a variety of ways, and the situation remains in flux as States continue to grapple with the issue. Citizens in a large majority of States have chosen to preserve the traditional definition of marriage. Thirty States have adopted constitutional amendments prohibiting the recognition of same-sex marriages: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.[1]

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[1] Ala. Const. art. I, § 36.03; Alaska Const. art. 1, § 25; Ariz. Const. art. 30, § 1; Ark. Const. amend. 83, § 1; Calif. Const. art. 1, § 7.5; Colo. Const. art. 2, § 31; Fla. Const. art. 1, § 27; Ga. Const. art. 1, § 4, ¶ I; Idaho Const. art. III, § 28; Kan. Const. art. 15, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss Const. art. 14, § 263A; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.C. Const. art. 14, § 6; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. 2, § 35; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, §

Another nine States have passed statutes explicitly limiting marriage to the union of a man and a woman: Delaware, Hawaii, Illinois, Indiana, Maine, Minnesota, Pennsylvania, West Virginia, and Wyoming.[2] Three additional States have marriage statutes predicated on a traditional definition of marriage: New Jersey, New Mexico, and Rhode Island.[3]

Six States and the District of Columbia currently authorize, either by judicial decree or legislative action, the solemnization of same-sex marriages: Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont.[4] Two more States that previously had statutory prohibitions against same-sex marriage, Maryland and Washington,

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18; Tex. Const. art. 1, § 32; Utah Const. art. 1, § 29; Va. Const. art. I, § 15-A; Wisc. Const. art. XIII, § 13. This Court, of course, has declared unconstitutional California's state constitutional amendment defining marriage as being between a man and a woman. *Perry v. Brown*, 671 F.3d 1052, 1078-79, 1086 (9th Cir. 2012).

[2] Del Code Ann. tit. 13, § 101(a) & (d); Haw. Rev. Stat. § 572-1; 750 Ill. Comp. Stat. 5/201, 212, 213.1; Ind. Code § 31-11-1-1; Me. Rev. Stat. Ann. tit. 19, §§ 650, 701; Minn. Stat. § 517.03; 23 Pa. Cons. Stat. Ann. § 1704; W. Va. Code § 48-2-603; Wyo. Stat. Ann. § 20-1-101.

[3] N.M. Stat. §§ 40-2-1 to 40-2-9; R.I. Gen. Laws §§ 15-1-1 to 15-1-5; *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

[4] Conn. Gen. Stat. § 1-1m; D.C. Code § 46-401; N.H. Rev. Stat. § 457:1-a; N.Y. Dom. Rel. Law § 10-a; Vt. Stat. Ann. tit. 15, § 8; *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

have recently enacted legislation authorizing such marriages, although those new laws have not yet gone into effect.[5] Maryland courts recognize same-sex marriages performed out of state for purposes of granting divorce decrees.[6] Additionally, elected executive branch officials in New Mexico and Rhode Island recognize same-sex marriages validly undertaken in other jurisdictions.[7]

Furthermore, several States that do not allow same-sex marriages have enacted other forms of legally-recognized domestic relationships, such as civil unions or domestic partnerships, for same-sex—and, sometimes, opposite-sex—couples (though not for larger groups): California, Delaware, Hawaii, Illinois, Maine, Nevada, New Jersey,

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[5] Md. Code Ann. Fam. Law § 2-201 (effective January 1, 2013); 2012 Wash. Leg. Serv. Ch. 3 (S.S.B. 6239) (effective June 7, 2012). Both enactments are subject to contingencies that would preclude them from taking effect on the tentative effective date.

[6] *See Port v. Cowan*, --- A.3d ---, 2012 WL 1758629 (Md. May 18, 2012).

[7] N.M. Stat. § 40-1-4; Opinion of the New Mexico Attorney General, 2011 WL 111243, No 11-01 (January 4, 2011); R.I. Exec. Order No. 12-02 (May 14, 2012), *available at* www.governor.ri.gov/documents/executiveorders/2012/Executive_Order_2012.02.pdf.

Oregon, Rhode Island, Washington, and Wisconsin.[8] In some States, this status provides nearly all of the legal rights and benefits of traditional marriage;[9] in others, only some.[10]

Which, if any, personal relationships between unrelated adults, other than traditional marriage, state law should recognize implicates fundamental questions of social, political, and cultural (including religious) values. State responses to political demands for recognition of same-sex marriage have not been uniform. Citizens continue the healthy democratic exercise of debating this matter and persuading one another with the strength of their arguments.

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[8] Cal. Fam. Code §§ 297-299.6; Del. Code Ann. tit. 13, §§ 201-217; Haw. Rev. Stat. §§ 572B-1 to 11; 750 Ill. Comp. Stat. 75/1-90; Me. Rev. Stat. Ann. tit. 22, § 2710; Nev. Rev. Stat. §§ 122A.010 – 510; N.J. Stat. Ann. §§ 26:8A-1 et seq.; 37:1-28 to 36; Or. Rev. Stat. §§ 106.300– 340; R.I. Gen. Laws §§ 15-3.1-1 to 1-11; Wash. Rev. Code §§ 26.60.010 – 901; Wis. Stat. Ann. §§ 770.001 – 770.018. Hawaii, Illinois, and Nevada open up such arrangements to opposite-sex couples, and California, New Jersey, and Washington also do so provided one or both partners is over the age of sixty-two.

[9] Cal. Fam. Code § 297.5(k)(1); Del. Code Ann. tit. 13, § 212; Haw. Rev. Stat. § 572B-9; 750 Ill. Comp. Stat. 75/20; N.J. Stat. Ann. § 37:1-29; Or. Rev. Stat. § 106.340; Wash. Rev. Code § 26.60.015.

[10] 2004 Me. Leg. Serv. Ch. 672 (H.P. 1152) (codified in scattered sections of Me. Rev. Stat. tit. 15, 18-A, 19-A, & 22); Nev. Rev. Stat. § 122A.200, 122A.210; N.J. Stat. Ann. § 26:8A-1; R.I. Gen. Laws §§ 15-3.1-5 to 1-6; Wis. Stat. Ann. § 770.001.

### B. Political battles over same-sex marriage illustrate the desirability of allowing this to remain a political issue

The current same-sex marriage debate goes back to 1993, when the Hawaii Supreme Court ruled that the state had to show a compelling state interest for limiting marriage to opposite-sex couples. *See Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). Observers across the nation became increasingly convinced that the courts would legalize same-sex marriage. David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. Times, Mar. 6, 1996, at 13, *available at* 1996 WLNR 4401892. Same-sex marriage advocates posited that other States would have to recognize those marriages under the Full Faith and Credit command, and defenders of traditional marriage worried that one state's judicial action could spread same-sex marriage to the entire Nation without any democratic debate. *Id.* The Hawaii Supreme Court ultimately invalidated the state's same-sex marriage ban, *see Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997), but voters overturned it with a 1998 constitutional amendment committing the power to define marriage exclusively to the legislature, *see* Haw. Const. art. I § 23.

The entire episode kick-started a fight in courts and state legislatures across the Nation. Congress rapidly approved the Defense of Marriage Act, signed by President Clinton on September 21, 1996, which not only defines marriage for purposes of federal law but also authorizes States not to recognize same-sex marriages from other states. And by 1998 nearly two-thirds of all States had passed their own legislation defining marriage as between one man and one woman and denying recognition of any same-sex marriages performed in other States or countries, a number that rose to forty by 2006. *State Laws Limiting Marriage to Opposite-Sex Couples*, National Conference of State Legislatures, http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx (last visited June 8, 2012).

Meanwhile, same-sex marriage advocates pursued litigation to win politically elusive recognition. The Vermont Supreme Court required the same *benefits* to same-sex couples as opposite-sex couples, though it did not require use of the term "marriage" for same-sex such couples. *See Baker v. State*, 744 A.2d 864 (Vt. 1999). The New York Times observed that the decision created "atypical rancor" across a polarized state and forced the legislature to debate legislation that few

actually wanted. Carey Goldberg, *In Vermont, Gay Couples Head for the Almost-Altar*, N.Y. Times, Jul. 2, 2000, at 110, *available at* 2000 WLNR 3259140. The Vermont legislature created "civil unions" to satisfy the judicial decree, but eight years later passed a law legalizing same-sex marriage over a gubernatorial veto. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. Times, Apr. 8, 2009, at A1, *available at* 2009 WLNR 6988923.

In 2003, the Supreme Judicial Court of Massachusetts held in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), that the State had to provide same-sex couples all of the benefits of marriage. The Massachusetts legislature initially tried to follow the Vermont civil-union idea, but the Court mandated *marriage*. *See* Pam Belluck, *Governor of Massachusetts Seeks to Delay Same-Sex Marriages*, N.Y. Times, Apr. 16, 2004, at A12, *available at* 2004 WLNR 5578536. Massachusetts experienced a bitter divide similar to that in Vermont.[11]

[11] Iowa has also experienced a sharp divide as a result of a judicial decision mandating same-sex marriage, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Attempts to amend Iowa's constitution have to date been unsuccessful, but the debate permeated the judicial retention process, led to the ouster of three judges voting with the *Varnum* majority, and provoked concerns for the health of the Iowa judicial system. *See Iowans Dismiss Three Justices*, Des Moines Register, Nov.

Governor Mitt Romney used all legal measures at his disposal to delay implementation and even tried to limit the decision's impact by prohibiting town clerks from issuing marriage licenses to out-of-state couples. *See id*. In following years, *Goodridge* opponents navigated the cumbersome constitutional referendum process by gathering over 100,000 signatures and sufficient votes at a special legislative convention, but fell short at a required second convention when nine legislators switched their votes. Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come: Vote Keeps Proposed Ban Off 2008 State Ballot*, Bos. Globe, Jun. 15, 2007, at 1A, *available at* 2007 WLNR 11225485.

*Goodridge* persuaded traditional marriage advocates across the country that statutes were not enough to ward off judicial imposition of same-sex marriage— constitutional amendments were necessary. In August 2004, Missouri voters passed a traditional-marriage amendment by a margin of 71% to 29%. Alan Cooperman, *Gay Marriage Ban in Mo. May Resonate Nationwide*, Wash. Post, Aug. 5, 2004, at A2, *available at*

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3, 2010, at A1, *available at* 2010 WLNR 21990809; *Proposed Constitutional Ban on Same-Sex Marriage Stalls Amid Signs of Support*, Des Moines Register, Feb. 2, 2011, at A1, *available at* 2011 WLNR 2083911.

2004 WLNR 23760209. In November of that year, voters in eleven other States, spurred by the *Goodridge* decision, passed similar amendments by large margins. *See* Scott Greenberger, *Gay-Marriage Ruling Pushed Voters Mobilized Bush, Left Kerry Wary*, Bos. Globe, Nov. 7, 2004, at B1, *available at* 2004 WLNR 6887819. In 2005, two more States followed suit, with another eight in 2006, three more in 2008, and North Carolina just a few weeks ago, bringing to 30 the number of States that have passed constitutional amendments precluding same-sex marriage. *See* Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. Times, May 9, 2012, at A15, *available at* 2012 WLNR 9730012.

California has presented its own unique drama. In 2000, California voters passed a statutory Proposition (Prop. 22) that defined marriage as a relationship between a man and a woman. *See* Jennifer Warren, *Campaign 2000: Proposition 22*, L.A. Times, Mar. 8, 2000, at 23, *available at* 2000 WLNR 8415650. In early 2004, the city of San Francisco started issuing marriage licenses in violation of the law. *See* Lee Romney, *State's High Court Voids S.F. Same-sex Marriages*, L.A. Times, Aug. 13, 2004, at 1 *available at* 2004 WLNR 19766463.

Although the California Supreme Court invalidated those licenses, in 2008 it declared Prop. 22's definition of marriage unconstitutional. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The California legislature had already voted to authorize same-sex domestic partnerships, but the California Supreme Court held that creating a term other than "marriage" to describe the union of same-sex couples impinged on a state constitutional right to marry. *Id.* at 435, 453.

In response, voters in 2008 passed Proposition 8, which constitutionalized the definition of marriage as an opposite-sex union, but which did not preclude recognition of same-sex civil unions. This Court, of course, has declared Proposition 8 invalid under the Equal Protection Clause on the theory that the State has no interest in restricting use of the nominal title "marriage," when it confers all the benefits of marriage on same-sex couples through civil unions. *Perry v. Brown*, 671 F.3d 1052, 1078-79, 1086 (9th Cir. 2012).

See-saw political battles over the issue are far from over. In Maine, the legislature passed a bill in 2009 that would have legalized same-sex marriage, but Maine's voters promptly rejected it in a referendum. Abby Goodnough, *Gay Rights Rebuke May Result in a*

*Change in Tactics*, N.Y. Times, Nov. 5, 2009, at A25, *available at* 2009 WLNR 22095273. This fall, however, the issue will be back on the ballot, in the form of a new referendum that, if passed, will legalize same-sex marriage. Jess Bidgood, *Maine: Gay-Rights Backers Say Petition Goal Is Met*, N.Y. Times, Jan. 27, 2012, at A18, *available at* 2012 WLNR 1851781.

Voters in Maryland and Washington, meanwhile, will vote on referenda that, if passed, will overturn legislation recognizing same-sex marriages. Alice Popovici, *Maryland Gay Marriage Foes Have Signatures for Referendum,* Reuters, May 29, 2012, *available at* http://www.reuters.com/article/2012/05/29/us-usa-maryland-gaymarriage-idUSBRE84S1HA20120529; Rachel La Corte, *Gay Marriage Opponents Closer to Qualifying R-74,* Seattle Times, May 30, 2012, *available at* http://seattletimes.nwsource.com/html/localnews/2018321092_apwagaymarriagereferendum1stldwritethru.html. And in Minnesota, voters will decide on a constitutional amendment barring same-sex marriage. Rochelle Olson, *Council Opposes Marriage Amendment*, Star Tribune, Jan. 26, 2012, at 4B, *available at* 2012 WLNR 1830273.

Public attitudes toward same-sex marriage have shifted. In 1996, when DOMA was signed into law, only 28% of Americans supported same-sex marriage according to a Gallup poll. Tony Mauro & Debbie Howlett, *Into the Courts, Away From Congress*, U.S.A. Today, Sep. 11, 1996, at 4A, *available at* 1996 WLNR 2813613. In 2000, that number stood at 34%. *Gay and Lesbian Rights*, Gallup, http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited June 8, 2012). In 2008, 40%. MJ Lee, *Gallup Poll: Same-Sex Relationships Moral*, Politico, May 14, 2012, *available at* http://www.politico.com/news/stories/0512/76264.html. That year, as part of his presidential campaign Candidate Obama declared that he did not favor bans on same-sex marriage but was not ready to fight for it. Patrick Healy, *Hopefuls Differ As They Reject Gay Marriage*, N.Y. Times, Nov. 1, 2008, at A1, *available at* 2008 WLNR 20871784. In February of 2012, the NBC/Wall Street Journal poll showed that 49% of Americans supported same-sex marriage. Tim Hanrahan, *WSJ/NBC/ Poll on Gay Marriage: 2012 vs. 2009 vs. 2004*, Washington Wire, May 7, 2012, *available at* http://blogs.wsj.com/washwire/2012/05/07/wsjnbc-poll-on-gay-marriage-2012-vs-2009-vs-2004/.

Last month, President Obama declared his unequivocal support for same-sex marriage. In the wake of that announcement, national support for same-sex marriage has been measured at 53%. David Crary, *Polls Show Growing Support for Gay Marriage Not Yet Reflected in Statewide Referendums*, Star Tribune, May 27, 2012, *availible at* http://www.startribune.com/politics/national/154677795.html.

## II. Constitutionalizing Same-Sex Marriage Would Poison the Political Well

Although this case targets only Congress's definition of marriage for purposes of federal law, invalidation of that definition on equal protection grounds would imply collateral invalidity of identical state definitions. Federal courts should not cut short the robust democratic debates occurring across the country by deeming same-sex marriage to be a matter of federal constitutional law. Keeping decisions about fundamental social issues within the ambit of state political processes helps inculcate democratic habits and values; the greater availability of political resolution encourages citizen participation, fosters political accountability, and enhances acceptance of the outcomes. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2, 7-8 (1988); *see also FERC v.*

*Mississippi*, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in part and dissenting in part).

The benefits of our federalist system resonate with especial clarity regarding the same-sex marriage debate—it is "[s]o well suited" to the issue "that it might almost have been set up to handle it." Jonathan Rauch, *A More Perfect Union*, The Atlantic, April 2004, *available at* www.theatlantic.com/magazine/archive/2004/04/a-more-perfect-union/2925. Some States have chosen to experiment with legal recognition of same-sex unions, while others have chosen to retain the centuries-old definition of marriage. The citizens of each State can observe the effects of the differing policies. They can attempt to persuade their fellow citizens as to the appropriate choice and vote for their desired policy and, if they are unhappy with the outcome of the democratic process, they retain the option of moving to a jurisdiction with laws more to their liking. "On certain social issues, such as abortion and homosexuality, people don't agree and probably never will—and the signal political advantage of the federalist system is that they don't have to. Individuals and groups who find the values or laws of one state obnoxious have the right to live somewhere else." *Id.*

Preemptively short-circuiting the democratic process by announcing only one permissible policy choice by *any* government under the Constitution destroys these benefits and should not occur unless the Constitution clearly mandates the legitimacy of only one outcome. The consequences of *Roe v. Wade,* 410 U.S. 113 (1973), shows the long-term divisive effects that occur otherwise.

Perhaps few lines of Supreme Court jurisprudence have been met with more incredulity than the *Casey* plurality's suggestion that in *Roe* the Court had "resolve[d]" the "intensely divisive" abortion issue and "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Planned Parenthood v. Casey*, 505 U.S. 833, 866-67 (1992) (plurality opinion). "Not only did *Roe* not . . . *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve." *Id.* at 995 (Scalia, J., concurring in part and dissenting in part); *see also* J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 293-95 (2009) (observing that *Roe* "shut down this process of legislative accommodation,

polarizing the debate and making future compromise more difficult," leading "[m]any scholars" to comment on the "*Roe* backlash" and the intense partisan divide that has resulted); Rauch, *supra* ("The nationalization of abortion policy [in *Roe*] created a textbook example of what can happen when this federalist principle is ignored.").

Writing during her time on the D.C. Circuit, Justice Ruth Bader Ginsburg remarked that *Roe* has "sparked public opposition and academic criticism, in part, . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375, 376 (1985). This outrage occurred despite increasing public support for abortion and a "marked trend in state legislatures 'toward liberalization of abortion statutes.'" Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U.L. Rev. 1185, 1205 (1992) (quoting *Roe*, 410 U.S. at 140); *see also* Ginsburg, *Thoughts on Autonomy*, *supra*, at 384 ("The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting."). But the Court's "[h]eavy-handed judicial intervention was

difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, *Thoughts on Autonomy*, *supra*, at 384-85. Unlike the Court's previous decisions concerning gender classifications, *Roe* provoked backlash because it "invited no dialogue with legislators" and "seemed to remove the ball from the legislators' court." Ginsburg, *Judicial Voice*, *supra*, at 1205.

Not only did *Roe* produce conflict, it was also an ineffective engine of social change. The Court's abrupt adjustment of national policy "may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus." Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751, 766 (1991). Professor Sunstein observed that *Roe*'s effectiveness "has been limited, largely because of its judicial source." *Id.* at 766-67.

The Court's bold substantive-rights approach in *Roe* invites comparison with *Lochner v. New York*, 198 U.S. 45 (1905). The decision reminded Professor John Hart Ely "of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" John Hart Ely, *The Wages of Crying*

*Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 937-39 (1973) (quoting *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)). For "*precisely* the point of the *Lochner* philosophy," Ely remarked, is to "grant unusual protection to those 'rights' that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them." *Id.* at 939 (emphasis in original).

Particularly with regard to the creation of individual rights that would preclude legislative policymaking at all levels, appropriate judicial restraint cautions courts to recognize that "they participate in a dialogue with other organs of government, and with the people as well." Ginsburg, *Judicial Voice*, *supra*, at 1198; *see also* Jack M. Balkin, Roe v. Wade*: An Engine of Controversy*, *in* What *Roe v. Wade* Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 3, 24 (2005) ("Courts do recognize rights and defend them from legislative abridgement. But those rights also arise out of politics; they are tested by politics, and they are modified by courts as a result of politics."). Leaving room for legislatures to exercise their policymaking authority is particularly important amidst a

dynamic process of citizen dialogue and legislative response. *See* Ginsburg, *Judicial Voice*, *supra*, at 1206.

Shifting poll numbers on marriage policy and frequent political activity bearing on state marriage laws reveal a robust national debate on this very fundamental issue. Far from resolving anything, a judicial mandate without warrant in the constitutional text that centralizes the controversy is likely to entrench social differences, undermine public confidence in courts as policy-neutral guardians of both republican governance and well-understood core political rights, and trigger a political backlash that could be with us for years.

## III. It Is Legitimate and Rational for States—and Congress—to Adhere to the Traditional Definition of Marriage

In *Massachusetts v. U.S. Dep't of Health & Human Servs.*, --- F.3d ---, 2012 WL 1948017, at *9-11 (1st Cir. May 31, 2012), the First Circuit concluded that DOMA reflects hundreds of years of marriage tradition, not animus toward homosexuals, yet invalidated Section 3 on the grounds that none of the proffered rationales (save for moral objections to homosexuality, which the court deemed off limits) justified precluding same-sex couples from claiming federal marriage benefits. In particular, the First Circuit dismissed the "responsible procreation"

rationale for civil marriage as a justification for DOMA because withholding marriage benefits from same-sex couples does not affirmatively help opposite-sex couples raise children. *Id.* at *9. The question, however, is not: why shouldn't government grant same-sex couples marriage benefits? Rather, the question is: why does government grant marriage benefits to opposite-sex couples, but not same-sex couples? Only by first understanding why societies set apart opposite-sex couples for special treatment can one determine whether extending that treatment to other groups undermines or promotes the purpose for which the treatment exists.

States that choose to preserve the traditional definition of marriage do so based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the *only* procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for. The First Circuit in *Massachusetts* side-stepped this rationale, but in doing so underscored that no other government interest justifies civil recognition of marriages of *any* sort. Ultimately,

rejection of the responsible procreation rationale is not an argument *for* same-sex marriage, but an argument *against* civil marriage recognition generally.

### A. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

Civil recognition of marriage historically has not been based on a state interest in adult relationships in the abstract. Marriage instead is predicated on the positive, important and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. It is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society

at large. Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 781-82 (2002). "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

Marriage also perfectly joins the full biological mother-father-child relationship to the original mother-father *legal* responsibility for the child. In doing so, marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 792 (2001).

This ideal does not disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. States may rationally conclude that, all things being equal, it is better for the biological parents also to be the legal parents.

### B. Courts have long recognized the responsible-procreation rationale for marriage

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

This analysis remains dominant in our legal system. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of Dept. of Children & Fam. Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451, 464-65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337

(D.C. 1995); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (lead opinion); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. Ct. App. 2010); *Anderson v. King County*, 138 P.3d 963, 982-83 (Wash. 2006).

State and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *See Massachusetts*, 2012 WL 1948017, at *11 ("[W]e do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality."); *Kandu,* 315 B.R. at 147-48 (upholding the federal Defense of Marriage Act as explained by legitimate governmental interests and not homosexual animus); *Standhardt*, 77 P.3d at 465 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting argument that limiting marriage and divorce to opposite-sex couples is "explicable only by class-based animus").

The plurality in *Hernandez*, 855 N.E.2d at 8, observed that "the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." Those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, 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. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

The only appellate opinions to say that refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge*, 798 N.E.2d at 961 (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.) and *Perry v. Brown*, 671 F.3d 1052, 1080-95 (9th Cir. 2012).[12] The *Goodridge* opinion rejected the responsible procreation

[12] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Id.* at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa and Vermont invalidated their states' statutes limiting marriage to the traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 441-46 (Cal. 2008); *Kerrigan v. State,* 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009); *Baker v. State*, 744 A.2d 864, 878-80 (Vt. 1999). The New Jersey Supreme Court held in

theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents), considerations that are ordinarily irrelevant to rational-basis analysis. *Goodridge*, 798 N.E.2d at 961-62. And *Perry* purports to turn on the circumstances of California law, which confers on same-sex civil unions the same benefits accorded to married couples. *See Perry*, 671 F.3d at 1076-80; *see also Perry v. Brown*, --- F.3d ---, 2012 WL 1994574, at *1 (9th Cir. 2012) (opinion of Reinhardt and Hawkins, JJ., concurring in the denial of en banc rehearing) ("We held only that under the particular circumstances relating to California's Proposition 8, that measure was invalid."). In contrast, while the First Circuit invalidated Section 3 of DOMA in *Massachusetts*, it did so only under a *sui generis* standard where the responsible procreation theory was *rational,* yet insufficient. *Massachusetts,* 2012 WL 1948017, at*9-10.

What is more, neither *Goodridge* nor *Perry* (nor *Massachusetts*) identified an alternative coherent justification for *any* marriages. *Goodridge* equated same-sex and opposite-sex couples because "it is the

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*Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge*, 798 N.E.2d at 961. *Perry* similarly located the significance of marriage in "stable and committed lifelong relationships." *Perry*, 671 F.3d at 1078. Having identified mutual dedication as one of the central *incidents* of marriage, however, neither opinion explained why the state should care about that commitment in a sexual context anymore than it cares about other voluntary relationships. *See Morrison*, 821 N.E.2d at 29 (lead opinion).

Because a commitment rationale does not assume a sexual, much less a procreative, component to the marriage relationship, it could encompass a variety of platonic relationships—even those that States may unquestionably prohibit from being sexual, such as incestuous or kinship relationships. A brother and sister, a father and daughter, an aunt and nephew, two business partners, or simply two friends could decide to form an "exclusive and permanent" household partnership featuring no sex whatever.

Nor does commitment provide any inherent basis for limiting marriage to *couples*. Groups of three or more adults may desire to form

a household and to remain exclusive and committed to one other based on mutual affection. Once the link between marriage and procreation is severed, there is no reason for government to prefer couples over larger groups.

Similarly, if the purpose of marriage is to promote stability and other social goods, there is still no governmental objective vindicated by limiting marriages to couples or unrelated individuals. Polyamorous or platonic kinship relationships might provide the same level of family stability and care for members of the family unit as that provided by same-sex couples. And government can facilitate governance, public order, and property ownership by recognizing social units of more than two adults perhaps even more efficiently than by recognizing couples only.

If the purpose of marriage is to recognize adult commitment or secure a broad array of social goods, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning. The theory of traditional marriage, by contrast, focuses on the unique qualities of the male-female couple, particularly for purposes of procreating and rearing children under optimal circumstances. As

such, it not only reflects and maintains the deep-rooted traditions of our Nation, but also furthers public policy objectives, while containing an inherent limitation on the types of relationships warranting civil recognition.

### C. "Overbreadth" arguments do not undermine the responsible procreation theory

The fact that heterosexual couples may marry even if they do not plan to have children or are unable to have children does not undermine this norm or invalidate the states' interest in traditional marriage. *See Singer*, 522 P.2d at 1195 (holding that marriage is justified by reference to procreation "even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Even heterosexual couples who are infertile or desire no children reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Furthermore, it would be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

Fundamentally, even if childless married couples, no-fault divorce laws, or any other phenomena of contemporary society tend to cast doubt on the responsible procreation rationale, that still does not logically require recognition of same-sex marriages. Proponents of same-sex marriage must either articulate a coherent rationale for government recognition of *their* preferred relationships or be satisfied with arguing against *any* recognition of civil marriage.

### D. Parenting by same-sex couples does not implicate the same state interests

The availability of adoption and reproductive technology for same-sex partners does not undermine the responsible procreation theory or enable parallel claims for state recognition of the partners' relationship. *See Standhardt*, 77 P.3d at 462-63. Legislatures may reasonably

understand that, while other arrangements exist, the traditional family context is the best environment for procreating and raising children.

Moreover, same-sex parents can never become parents unintentionally through sexual activity. Whether through adoption, surrogacy or reproductive technology, a same-sex couple can become parents only by deliberately choosing to do so and by devoting a serious investment of time, attention, and resources. *Morrison*, 821 N.E.2d at 24. Consequently, same-sex couples do not present the same potential for unintended children and the state does not have the same need to provide such parents with the incentives of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677 ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

Again, Congress and the States may look to the entire history of civilization to see what problems arise for children when there is no social institution to encourage biological parents to remain together. By comparison, it has had only a relative blink-of-an-eye to evaluate whether society suffers when unmarried same-sex couples become

parents. If over time society concludes that the children of same-sex couples would do better if some incentive existed for such couples to remain together, then States can address that need. But the mere existence of children in households headed by same-sex couples does not put such couples on the same footing vis-à-vis the state as opposite-sex couples, whose general ability to procreate, even unintentionally, legitimately gives rise to state policies encouraging the legal union of such sexual partners.

## CONCLUSION

The Court should uphold Section 3 of the Defense of Marriage Act.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Wood 2003 word processing software in 14-point Century Schoolbook font.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2012.

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