Vet. App. No. 11-3083

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN J. CARDONA,
Appellant

v.

ERIC K. SHINSEKI,
Secretary of Veterans Affairs,
Appellee

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Appellee

On Appeal from the
Board of Veterans' Appeals

BRIEF OF INTERVENOR-APPELLEE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. Jurisdictional Statement 3

II. Ms. Cardona's Claim for Additional Dependent Spouse Compensation 3

BACKGROUND 5

I. DOMA Section 3 5

A. DOMA's Legislative Branch History 7

B. DOMA's Executive Branch History 12

II. Section 101(31) of Title 38 14

A. Section 101's Legislative History 14

B. The Secretary and the Defense of Section 101 16

III. 38 C.F.R. § 3.50 18

ARGUMENT 20

I. Congressional Enactments Are Entitled to a Strong Presumption of Constitutionality. 20

II. Binding Supreme Court Precedent Forecloses an Equal Protection Challenge to Traditional Marriage Provisions. 21

III. Rational Basis Review Governs Ms. Cardona's Challenge to Section 101 and DOMA Section 3. 24

A. This Court Must Apply Rational Basis Review to Sexual Orientation Classifications. 24

B. Neither Section 101 nor DOMA Section 3 Classifies on the Basis of Gender. 28

IV. Traditional Marriage Provisions Satisfy Rational Basis Review. 29

A. Uniquely Federal Interests..... 32

1. Maintaining a Uniform Federal Definition of Marriage. 33

2. Preserving the Public Fisc and Previous Legislative Judgments. 36

3. Caution in Facing the Unknown Consequences of a Novel Redefinition of a Foundational Social Institution. 39

B. Common Federal-State Interests: Congress Rationally Sought to Encourage Responsible Procreation.. 42

1. Section 101 and DOMA Section 3 Rationally Focus on Opposite-Sex Couples in Subsidizing the Begetting and Raising of Children. 44

2. DOMA Rationally Encourages and Subsidizes the Raising of Children by Their Own Biological Mothers and Fathers. 47

3. DOMA Section 3 Rationally Encourages Childrearing in a Setting with Both a Mother and a Father. 48

V. Any Redefinition Of Marriage Should Be Left to the Democratic Process. 49

CONCLUSION 50

CERTIFICATE OF SERVICE

EXHIBIT A

TABLE OF AUTHORITIES

Cases

Able v. United States,
155 F.3d 628 (2d Cir. 1998) 27

Adams v. Howerton,
486 F. Supp. 1119 (C.D. Cal. 1980) 6

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 22

Andersen v. King Cnty.,
138 P.3d 963(Wash. 2006) 44

Ass'n of Residential Res. in Minn., Inc. v. Gomez,
51 F.3d 137 (8th Cir. 1995) 37

Aufort v. Aufort, 49 P.2d 620
(Cal. Dist. Ct. App. 1935) 43

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 7

Baker v. Nelson,
191 N.W.2d 185 (Minn. 1971) 21

Baker v. Nelson,
409 U.S. 810 (1972) 1, 2, 22

Ballard v. United States,
329 U.S. 187 (1946) 49

Ben-Shalom v. Marsh,
881 F.2d 454 (7th Cir.1989) 27

Bowen v. Owens,
476 U.S. 340 (1986) 37

Buzinski v. Brown,
6 Vet. App. 360 (1994) 3

Christian Legal Society v. Martinez,
130 S. Ct. 2971 (2010) 26

Citizens for Equal Prot. v. Bruning,
455 F.3d 859 (8th Cir. 2006) 24, 27, 44

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 26, 27

City of Dallas v. Stanglin,
490 U.S. 19 (1989) 29

Conaway v. Deane,
932 A.2d 571 (Md. 2007) 44

Cook v. Gates,
528 F.3d 42 (1st Cir. 2008) 27

Cooper-Harris v. United States,
No. 12-cv-00887 (C.D. Cal.) 17

Dailey v. Veneman,
No. 01-3146, 2002 WL 31780191 (6th Cir. Dec. 3, 2002) 35

Dandridge v. Williams,
397 U.S. 471 (1970) 37

Davis v. Prison Health Servs.,
679 F.3d 433 (6th Cir. 2012) 27

Dean v. District of Columbia,
653 A.2d 307 (D.C. 1995) 6

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 29, 30

Fischer v. West,
11 Vet. App. 121 (1998) 20

Giancaterino v. Brown,
7 Vet. App. 555 (1995) 3

Golinski v. U.S. Office of Pers. Mgmt.,
824 F. Supp. 2d 968 (N.D. Cal. 2012) 28

Hassan v. Wright,
45 F.3d 1063 (7th Cir. 1995) 37

Heller v. Doe,
509 U.S. 312 (1993) 29

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006) 43, 48

Hicks v. Miranda,
422 U.S. 332 (1975) 22, 23

High Tech Gays v. Def. Indus. Sec. Clearance Office,
895 F.2d 563 (9th Cir. 1990) 27

Hunt v. Ake,
No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35) 13

In re Cardelucci,
285 F.3d 1231 (9th Cir. 2002) 33

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 13

Jimenez v. Weinberger,
417 U.S. 628 (1974) 30

Johnson v. Johnson,
385 F.3d 503 (5th Cir. 2004) 27

Johnson v. Robison,
415 U.S. 361 (1974) 31

Lawrence v. Texas,
539 U.S. 558 (2003) 23, 25, 42

Lofton v. Sec'y of Dep't of Children & Family Servs.,
358 F.3d 804 (11th Cir. 2004) 27

Loomis v. United States,
68 Fed. Cl. 503 (2005) 25

Lyng v. Castillo,
477 U.S. 635 (1986) 27

Mandel v. Bradley,
432 U.S. 173 (1977) 22

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463 U.S. 783 (1983) 41

Mass. Bd. of Ret. v. Murgia,
427 U.S. 307 (1976) 27

Massachusetts v. U.S. Dep't of HHS,
682 F.3d 1 (1st Cir. 2012) 24, 27, 33, 36

Massachusetts v. U.S. Dep't of HHS,
Nos. 10-2204, 10-2207, & 10-2214 (1st Cir.) 14

Mathews v. Diaz,
426 U.S. 67 (1976) 30

McLaughlin v. Panetta,
No. 11-cv-11905 (D. Mass.) 17

Mullins v. Oregon,
57 F.3d 789 (9th Cir. 1995) 47

Murphy v. Ramsey,
114 U.S. 15 (1885) 9

Nat'l Gay Task Force v. Bd. of Educ'n of City of Okla. City,
729 F.2d 1270 (10th Cir. 1984) 27

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 41

Nunez-Reyes v. Holder,
602 F.3d 1102 (9th Cir. 2010) 35

Nunez-Reyes v. Holder,
646 F.3d 684 (9th Cir. 2011) 35

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 20

Padula v. Webster,
822 F.2d 97 (D.C. Cir. 1987) 27

Perry v. Brown,
671 F.3d 1052 (9th Cir. 2012) 27

Plyler v. Doe,
457 U.S. 202 (1982) 37

Price-Cornelison v. Brooks,
524 F.3d 1103 (10th Cir. 2008) 27

Raugust v. Shinseki,
23 Vet. App. 475 (2010)..... 2, 3

Reed v. Reed,
404 U.S. 71 (1971) 37

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 32

Regan v. Time, Inc.,
468 U.S. 641 (1984) 20

Reynolds v. United States,
98 U.S. 145 (1878) 7

Rinaldi v. Yeager,
384 U.S. 305 (1966) 37

Robinson v. Brown,
9 Vet. App. 398 (1996) 3

Rodriquez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 24

Romer v. Evans,
517 U.S. 620 (1996) 23, 24

Rostker v. Goldberg,
453 U.S. 57 (1981) 20

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 27

Santosky v. Kramer,
455 U.S. 745 (1982) 47

Schweiker v. Wilson,
450 U.S. 221 (1981) 29, 30

Smelt v. Cnty. of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005) 13, 49

Stanley v. Illinois,
405 U.S. 645 (1972) 47

Sullivan v. Bush,
No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) 13

Talon v. Brown,
999 F.2d 514 (Fed. Cir. 1993) 20

Tenet v. Doe,
544 U.S. 1 (2005) 23

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) 27

Tigner v. Texas,
310 U.S. 141 (1940) 31

Tuan Anh Nguyen v. INS,
533 U.S. 53 (2001) 46

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 30

United States v. Five Gambling Devices,
346 U.S. 441 (1953) 20

United States v. Virginia,
518 U.S. 515 (1996) 49

V.W. v. R.W.,
Docket. No. FA 0541135S (Conn. Super. Ct. Feb. 25, 1997) 4

Vance v. Bradley,
440 U.S. 93 (1979) 29

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 31

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 20

Washington v. Glucksberg,
521 U.S. 702 (1997) 50

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005) 13, 22, 23

Witt v. Dep't of Air Force,
527 F.3d 806 (9th Cir. 2008).....23

Witt v. Dep't of Air Force,
527 F.3d 806 (9th Cir. 2008) 27

Woodward v. United States,
871 F.2d 1068 (Fed. Cir. 1989).....2, 25, 26, 27

Zuniga v. Shinseki,
No. 09-815, 2010 WL 3824172 (Vet. App. Sept. 28, 2010).....16

Statutes

1 U.S.C. § 7 1

5 U.S.C. § 8101 6

5 U.S.C. § 8341 6

8 U.S.C. § 1186a.....6

26 U.S.C. § 7703 6

28 U.S.C. § 1257 21

38 U.S.C. § 101 .....*passim*

38 U.S.C. § 103 33

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Don't Ask, Don't Tell Repeal Act of 2010,
Pub. L. No. 111-321, 124 Stat. 3515 (2010) 50

Fla. Const. art. I, § 27 35

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Pub. L. No. 94-169, Title I, § 101(1), 89 Stat. 1013 (1975) 15

Regulations

38 C.F.R. § 3.1 33

38 C.F.R. § 3.205 4

38 C.F.R. § 3.50 ..... 2, 4, 5

41 Fed. Reg. 18299 (May 3, 1976) 18

62 Fed. Reg. 5528 (Feb. 6, 1997) 18

The Family and Medical Leave Act, 60 Fed. Reg. 2,180, 2,190-91 (1995) 6

Legislative Documents

121 Cong. Rec. (1975) 15

142 Cong. Rec. (1996) ..... *passim*

150 Cong. Rec. (2004) ..... *passim*

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RBA at 8 (3-14) (Bd. of Vet. Appeals Decision) 4, 5, 19

RBA at 17 (Marriage Certificate) 4

RBA at 142 (132-42) (Statement of the Case) 5, 19

RBA at 147 (147-48) (Claims Decision 2010) 4, 19

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Letter from Andrew Fois, Ass't Att'y Gen., to Hon. Charles T. Canady (May 29, 1996) 13

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Re: Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, N.J. Att'y Gen. Op. No. 3-2007, 2007 WL 749807 (Feb. 16, 2007) 34-35

Schalk & Kopf v. Austria, No. 30141/04 E.U. Ct. H. R. 2010 44

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INTRODUCTION

Claimant-Appellant Carmen Cardona seeks to have this Court declare unconstitutional two federal statutes: Section 101(31) of Title 38 of the United States Code ("Section 101"), and Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA Section 3"). Ms. Cardona's challenges arise in the context of a denial of dependency benefits for her same-sex spouse. Ms. Cardona asserts three bases for her constitutional challenges to these two statutes: that they violate the equal protection component of the Due Process Clause of the Fifth Amendment; that they violate the Tenth Amendment; and that they constitute unconstitutional bills of attainder. Having abdicated his responsibility to defend duly enacted statutes related to veterans' benefits, Appellee Secretary of Veterans Affairs Eric K. Shinseki ("Secretary") also argues that Section 101 and DOMA Section 3 violate the equal protection component of the Due Process Clause of the Fifth Amendment.[1]

Intervenor-Appellee the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("House") submits this brief in support of the constitutionality under the Fifth Amendment of Section 101 and DOMA Section 3 (and the corresponding regulation).[2] These statutes (and the regulation) fully comport with the equal protection

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[1] The Secretary, however, defends both statutes against Ms. Cardona's Tenth Amendment and bill of attainder claims, which, accordingly, are not addressed in this brief.

[2] The Bipartisan Legal Advisory Group, which speaks for the House in litigation matters, is currently comprised of the Honorable John A. Boehner, Speaker of the House,

(*Continued . . .*)

component of the Due Process Clause.[3] *Baker v. Nelson*, 409 U.S. 810 (1972) squarely controls this case. In *Baker*, the Supreme Court summarily rejected arguments that equal protection requires the extension of marriage rights to same-sex couples. *Id.* at 810. Moreover, the Federal Circuit has held that rational basis review governs classifications based on sexual orientation. *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). That form of review is extraordinarily deferential, and here, myriad rational bases (some uniquely federal; some analogous to the bases that underlie state provisions defining marriage in the traditional manner) support the constitutionality of Section 101 and DOMA Section 3.

STATEMENT OF THE CASE

I. Jurisdictional Statement

The Court has jurisdiction to hear this case pursuant to 38 U.S.C. § 7252(a), which authorizes this Court to review final decisions of the Board of Veterans' Appeals ("Board"). Additionally, the Secretary notes that "the Court has held that it has the authority to review the constitutionality of statutes." Br. of Appellee Sec'y of Vet. Affairs at 2 (June 11, 2012) ("Secretary's Brief") (citing *Raugust v. Shinseki*, 23 Vet.

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the Honorable Eric Cantor, Majority Leader, the Honorable Kevin McCarthy, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip. The Democratic Leader and the Democratic Whip have declined to support the filing of this brief.

[3] Neither Ms. Cardona's brief nor the Secretary's brief addresses the regulatory basis (and arguably the only basis below) for the denial of Ms. Cardona's request for additional dependency compensation: 38 C.F.R. § 3.50 ("Regulation 3.50"). For the same reasons that Section 101 comports with equal protection, the regulation does as well.

App. 475, 479 (2010)). In *Raugust*, the Court stated that it "has jurisdiction to consider constitutional challenges to statutes and regulations pursuant to 38 U.S.C. § 7261(a)(3)(B)."[4] *Id.*

II. Ms. Cardona's Claim for Additional Dependent Spouse Compensation

In September 2002, Ms. Cardona was granted disability benefits based on the Department of Veterans Affairs ("VA")'s finding that she had service-related carpal tunnel syndrome. RBA at 525 (523-27). Based on the records available to it, the House

[4] The House recognizes that, in addition to *Raugust*, this Court has held in a number of other cases that it has the authority to decide constitutional claims, including passing on the constitutionality of statutes, *see e.g., Robinson v. Brown*, 9 Vet. App. 398, 400-01 (1996); *Giancaterino v. Brown*, 7 Vet. App. 555, 557 (1995); *Buzinski v. Brown*, 6 Vet. App. 360, 364-65 (1994), and so is unlikely to hold differently here. However, the House is aware of no case in which this Court actually has struck down as unconstitutional an Act of Congress, let alone a statute, like DOMA Section 3, that is not specific to the veterans' benefit context. Moreover, the House notes that a plain reading of 38 U.S.C. § 7261(a)(3)(B) suggests that this Court's authority does not extend to deciding challenges to the constitutional validity of Acts of Congress. Section 7261(a)(3)(B) authorizes the Court to "hold unlawful and set aside *decisions, findings* (other than those described in clause (4) of this subsection), *conclusions, rules, and regulations* issued or adopted *by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board* found to be . . . contrary to constitutional right, power, privilege, or immunity." 38 U.S.C. § 7261(a)(3)(B) (emphasis added). Conspicuously absent from the list provided in section 7261(a)(3)(B) are *statutes*. *Cf.* 38 U.S.C. § 7292(c) (providing that the "United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any *statute* or regulation or any interpretation thereof brought under this section . . . "; enacted at the same time as 38 U.S.C. § 7261 as part of a comprehensive revision to the judicial review process for veterans' benefits claims). Moreover, the Court's review provided for in section 7261(a)(3)(B) is limited to sources of law "issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board." Plainly, neither Section 101 nor DOMA Section 3 were issued or adopted by the Secretary, the Board, or the Chairman of the Board. They are duly enacted laws passed by both houses of Congress and signed into law by the President.

understands Ms. Cardona's current bilateral disability rating to be 80%. RBA at 234 (224-35).[5]

Ms. Cardona obtained a marriage certificate with R.H., another woman, on May 17, 2010. RBA at 17.[6] Later that month, Ms. Cardona filed a claim seeking additional compensation for a dependent same-sex spouse. RBA at 151 (149-52). The VA Regional Office denied Ms. Cardona's claim "because 38 Code of Federal Regulations (CFR) 3.50(a) states that 'spouse' means a person of the opposite sex whose marriage to the veteran meets the requirements of 3.1(j)." RBA at 147 (147-48). After Ms. Cardona filed a Notice of Disagreement, the Regional Office issued a Statement of the Case,

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[5] As a party to this case, the House sought, but was denied, full access to the Record Before the Agency ("RBA"). *See* Order at 2-3, 4, 5 (Aug 13, 2012). Instead, the Court granted the House only limited access to the RBA and excluded the House from access to "medical records." *Id*. at 2, 5 (permitting the House access only to non-medical records notwithstanding this Court's Rule 10(d), which provides that the Secretary "shall permit a *party* . . . to inspect and copy . . . any original material in the record before the agency . . . "). The House maintains its objection to being granted only limited access to the RBA. Notably, the House's access to non-medical documents was based on the review and categorization of documents in the RBA by the Secretary, an adverse party to the House in this case.

[6] The Board appears to have been satisfied that this marriage certificate established a valid marriage. RBA at 8 (3-14). However, Ms. Cardona's marriage certificate reflects that R.H. was previously married. RBA at 17. The VA's regulations require that there be a certified statement from the claimant regarding the date, place, and circumstances of the dissolution of the prior marriage, or other proof of the dissolution of the marriage. 38 C.F.R. § 3.205(b). Although there is a statement in the record about R.H.'s prior marriage, it is unclear whether the statement was certified because it was not signed by Ms. Cardona. RBA at 150 (149-52). There were no other records regarding R.H.'s prior marriage, or its dissolution, in the RBA records provided to the House. As a result, the House confirmed through a review of public court records that R.H.'s prior marriage was dissolved in in 1997. *See V.W. v. R.W.*, Docket. No. FA 0541135S (Conn. Super. Ct. Feb. 25, 1997).

which reiterated Regulation 3.50 as the basis for the denial of Ms. Cardona's request for additional compensation. RBA at 142 (132-42) ("We had to deny your claim for additional benefits for [R.H.] because 38 Code of Federal Regulations (CFR) 3.50(a) states that 'spouse' means a person of the opposite sex whose marriage to the veteran meets the requirements of 3.1(j).").

On August 30, 2011, the Board affirmed the Regional Office's denial. RBA at 3-14. The Board denied Ms. Cardona's claim based on Regulation 3.50. RBA at 8 (3-14) ("Under the facts and controlling law, the Board must deny this claim for additional dependency compensation for a spouse because the requirement of 38 C.F.R. § 3.50(a) that a spouse be a person of the opposite sex has not been met."). Although the Board acknowledged Ms. Cardona's constitutional challenges to Section 101 and DOMA Section 3, it correctly noted that it had no jurisdiction to rule on those challenges. RBA at 8 (3-14).

BACKGROUND

I. DOMA Section 3

DOMA Section 3 defines "marriage" and "spouse" for purposes of federal law (i.e., not only for veterans' benefits but for all federal purposes) as follows:

> 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.

In DOMA, Congress merely codified and confirmed what Congress always has meant in using the words "marriage" and "spouse." Even before DOMA, whenever

Congress used terms connoting a marital relationship, it meant a traditional male-female couple. *See infra* p. 14 (discussing the history of Section 101); *see also, e.g.*, Revenue Act of 1921, § 223(b)(2), 42 Stat. 227, 250 (permitting "a husband and wife living together" to file a joint tax return); *see also The Family and Medical Leave Act*, 60 Fed. Reg. 2,180, 2,190-91 (1995) (final rule) (rejecting, as inconsistent with congressional intent, proposed definition of "spouse" that would include "same-sex relationships"); *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) ("Congress, as a matter of federal law, did not intend that a person of one sex could be a 'spouse' to a person of the same sex for immigration law purposes . . . ."), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 314 (D.C. 1995) (Congress, in enacting D.C. marriage statute, intended "that 'marriage' is limited to opposite-sex couples").

Congress has a long history of defining marital terms for purposes of federal law. *See, e.g.*, 26 U.S.C. § 7703(b) (excluding some couples "living apart" from marriage for tax purposes regardless of state-law status); 42 U.S.C. § 416 (detailed definitions of "spouse," "wife," "husband," "widow," "widower," and "divorce" for social-security purposes, inevitably varying from state definitions); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A), (a)(2)(A) (federal employee-benefits statutes); 8 U.S.C. § 1186a(b)(1) (anti-fraud criteria in immigration law). Congress at various times has enacted comprehensive regulations of marriage: for instance, it banned polygamy in U.S. territories. Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (codified as amended at U.S. Rev. Stat. § 5352) (repealed prior to codification in U.S.C.); 150 Cong. Rec. 15318 (2004) (Sen. Inhofe) ("Congress would not admit Utah into the Union unless

it abolished polygamy and committed to the common national definition of marriage as one man and one woman."); *see Reynolds v. United States*, 98 U.S. 145, 165-67 (1878).

Congress designed DOMA to apply comprehensively to all manner of federal programs. According to the Government Accountability Office ("G.A.O."), as of 2004, there were 1,138 provisions in the U.S. Code "in which marital status is a factor in determining or receiving benefits, rights, and privileges." Letter from G.A.O. to Senator Bill Frist 1 (Jan. 23, 2004), GAO-04-353R, *Defense of Marriage Act*, *available at* http://www.gao.gov/new.items/d04353r.pdf. DOMA reaffirms the definition of marriage already reflected in prior statutes, namely, the traditional definition of marriage as between one man and one woman.

A. DOMA's Legislative Branch History

The 104th Congress enacted DOMA in 1996 with overwhelming, bipartisan support. DOMA passed by a vote of 342-67 in the House and 85-14 in the Senate. *See* 142 Cong. Rec. 17093-94 (1996) (House vote); *id*. at 22467 (Senate vote). In all, 427 Members of Congress voted for DOMA. President Clinton signed DOMA into law on September 21, 1996. *See* 32 Weekly Comp. Pres. Doc. 1891 (Sept. 30, 1996).

DOMA was enacted in response to the Hawaii Supreme Court's opinion in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that the denial of a marriage license to a same-sex couple was subject to strict scrutiny under the Hawaii Constitution. *See* H.R. Rep. No. 104-664 at 4-5 (1996) ("House Rep."). The Hawaii courts "appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples." *Id.* at 2. DOMA was enacted to preserve the federal-law status quo in light of *Baehr*. Section 2 of

DOMA addressed a concern about the Hawaii decision being given preclusive effect in other states. With Section 3, Congress ensured that, no matter what any state might do to redefine marriage as a matter of state law, the definition for purposes of federal law would remain, as it always has been, the union of one man and one woman.

The legislative history confirms that, even in statutes enacted before DOMA, Congress never intended for the word "marriage" to include same-sex couples. *See id.* at 10 ("[I]t can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); *id.* at 29 ("Section 3 merely restates the current understanding of what those terms mean for purposes of federal law."); 142 Cong. Rec. 16969 (1996) (Rep. Canady) ("Section 3 changes nothing; it simply reaffirms existing law."). In enacting DOMA, Congress was concerned with more than semantics: It intended to ensure that the meaning of existing federal statutes, and the legislative judgments of earlier Congresses, would be respected. *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 32 (1996) ("House Hr'g") (Rep. Sensenbrenner) ("When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages . . . ."). It also intended to protect the ability of each sovereign to define terms such as "marriage" and "spouse" for purposes of its own law. To that end, Section 2 of DOMA clarified that full faith and credit does not require states to recognize foreign same-sex marriages even if Hawaii or some other state chose to do so; and

Section 3 reaffirmed the United States' authority, as a separate sovereign in our federal system, to define marriage for purposes of federal law, regardless of how states might choose to redefine it under their own law.

During its deliberations over DOMA, Congress emphasized "[t]he enormous importance of marriage for civilized society." House Rep. at 13 (quoting Council on Families in America, *Marriage in America: A Report to the Nation* 10 (1995)). The House Report quoted approvingly from *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), in which the Supreme Court referred to "'the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization.'" *Id.* at 12; *see also* 142 Cong. Rec. 16799 (1996) (Rep. Largent); *id.* at 16970 (Rep. Hutchinson) (marriage "has been the foundation of every human society"); *id.* at 22442 (Sen. Gramm) ("There is no moment in recorded history when the traditional family was not recognized and sanctioned by a civilized society . . . ."); *id.* at 22454 (Sen. Burns) ("[M]arriage between one man and one woman is still the single most important social institution.").

Congress also recognized that, historically in American law, the institution of marriage consisted of the union of one man and one woman. *See* House Rep. at 3 ("[T]he uniform and unbroken rule has been that only opposite-sex couples can marry."); House Hr'g at 1 (statement of Rep. Canady) ("Simply stated, in the history of our country, marriage has never meant anything else."); 142 Cong. Rec. 16796 (1996) (Rep. McInnis) ("If we look at any definition, whether it is Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as [a] union between a man and a woman,

and that should be upheld . . . .”). This historical definition was by no means a singling out of homosexual relationships. Rather, it identified one type of relationship (traditional marriage) as especially important, and excluded *every* other kind of relationship from the definition of “marriage.” And Congress concluded that such an important institution should not be radically redefined at the federal level to include same-sex relationships. Senator Dorgan expressed the views of many Members of Congress when he stated, “[f]or thousands of years, marriage has been an institution that represents a union between a man and a woman, and I do not support changing the definition of marriage or altering its meaning.” *Id.* at 23186; *see id*. at 22452 (Sen. Mikulski) (DOMA “is about reaffirming the basic American tenet of marriage”).

Congress also expressed concern that expanding marital benefits to same-sex couples would create great fiscal uncertainty and strain in a manner not foreseen by the Congresses that originally enacted those benefits. *See* House Rep. at 18 (“legislative response” to same-sex marriage necessary to “preserve scarce government resources”). It desired to avoid a “huge expansion” in marital benefits, 142 Cong. Rec. 17072 (1996) (Rep. Sensenbrenner), which “ha[d] not been planned or budgeted for under current law,” *id.* at 22443 (1996) (Sen. Gramm). Congress was concerned that state recognition of same-sex marriages would “create . . . a whole group of new beneficiaries—no one knows what the number would be . . .—who will be beneficiaries of newly created survivor benefits under Social Security, Federal retirement plans, and military retirement plans,” *id.*, and that these additional costs had not even been calculated, let alone weighed, in the earlier

legislative debates that preceded the enactment of those programs, *id.* at 22448 (Sen. Byrd) ("[T]hink of the potential cost involved . . . .).

In clarifying a single definition of marriage to govern all federal laws, Congress decided that eligibility for federal benefits should not vary geographically depending on how the several states might choose to define marriage. As Senator Ashcroft stated, a federal definition "is very important, because unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently . . . , people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." *Id.* at 22459.

Congress also explained that marriage is afforded a special legal status because only a man and a woman can beget a child together, and because historical experience has shown that a family consisting of a married father and mother—particularly the child's own biological mother and father—is an effective social structure for raising children. For example, the House Report states that the reason "society recognizes the institution of marriage and grants married persons preferred legal status" is that it "has a deep and abiding interest in encouraging responsible procreation and child-rearing." House Rep. at 12, 13. Many Members of Congress supported DOMA on that basis. *See, e.g.*, 142 Cong. Rec. 22446 (1996) (Sen. Byrd) ("The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere in which a man and a woman pledge themselves exclusively to one another and who bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large."); House Hr'g at 1 (Rep. Canady) ("[Marriage] is inherently

and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children."); 142 Cong. Rec. 17081 (1996) (Rep. Weldon) ("[M]arriage of a man and woman is the foundation of the family. The marriage relationship provides children with the best environment in which to grow and learn.").

Congress received and considered advice on DOMA's constitutionality, including thrice from the Department of Justice ("Department"), and determined that DOMA is constitutional. *See, e.g.*, House Rep. at 33 (DOMA "plainly constitutional"); *id.* at 33-34 (letters to House from Department advising that DOMA is constitutional); House Hr'g at 87-117 (testimony of Professor Hadley Arkes); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1, 2 (1996) ("Senate Hr'g") (Sen. Hatch) (DOMA "is a constitutional piece of legislation"); *id.* at 2 (Department letter to Senate advising that DOMA is constitutional); *id.* at 56-59 (letter from Professor Michael W. McConnell) (advising that DOMA is constitutional); *cf.* 150 Cong. Rec. 14942 (2004) (Sen. Hatch) (considering the constitutionality of a Constitutional amendment to the definition of marriage).

B. DOMA's Executive Branch History

The Clinton Administration's Department three times advised Congress that DOMA was constitutional, stating, for example, that it "continues to believe that [DOMA] would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. . . . [T]he Supreme Court's ruling in *Romer v. Evans* does not affect the Department's analysis."

Letter from Andrew Fois, Ass't Att'y Gen., to Hon. Charles T. Canady (May 29, 1996), *reprinted in* House Rep. at 34; *see also* Letters from Andrew Fois, Ass't Att'y Gen., to Hon. Henry J. Hyde (May 14, 1996), *reprinted in* House Rep. at 33, and to Hon. Orrin G. Hatch (July 9, 1996), *reprinted in* Senate Hr'g at 2.

During the Bush Administration, the Department successfully defended DOMA against several constitutional challenges, prevailing in every case that reached final judgment. *See Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part for lack of standing*, 477 F.3d 673 (9th Cir. 2006); *Sullivan v. Bush*, No. 04-cv-21118 (S.D. Fla. Mar. 16, 2005) (ECF No. 68) (granting voluntary dismissal after defendants moved to dismiss); *Hunt v. Ake*, No. 04-cv-1852 (M.D. Fla. Jan. 20, 2005) (ECF No. 35); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

During the first two years of the Obama Administration, the Department continued to defend DOMA, albeit without defending all of Congress's stated justifications for the law. However, in February of 2011, the Executive Branch abruptly reversed course. The Attorney General notified Congress that the Department had decided "to forgo the defense" of DOMA. Letter from Eric H. Holder, Jr., Att'y Gen., to the Hon. John A. Boehner, Speaker of the U.S. House of Representatives, at 5 (Feb. 23, 2011) ("Holder Letter"), attached to [Secretary's] Notice to the Court (May 9, 2012). Attorney General Holder stated that he and President Obama now are of the view "that a heightened standard [of review] should apply [to DOMA], that Section 3 is unconstitutional under

that standard and that the Department will cease defense of Section 3." *Id.* at 6. In so concluding, the Attorney General acknowledged that:

(1) at least ten federal courts of appeals (the exact number is eleven) have issued binding precedent holding that sexual orientation classifications are properly judged under the highly deferential rational basis test, not "heightened" scrutiny, *id.* at 3-4 nn.4-6;

(2) in light of "the respect appropriately due to a coequal branch of government," the Department "has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense," *id.* at 5; and

(3) in fact, "a reasonable argument for Section 3's constitutionality *may be proffered* under that permissive [rational basis] standard," *id.* at 6 (emphasis added).

In short, the Attorney General effectively conceded that abandoning the defense of DOMA Section 3 was a sharp departure from past precedent and was not predicated primarily on constitutional or other legal considerations.

Since the Department abandoned its constitutional responsibility for defending DOMA, it nonetheless repeatedly has affirmed that there is a rational basis for DOMA Section 3. *See, e.g.*, Superseding Br. for the U.S. Dep't of Health & Human Servs. at 46 n.20, *Massachusetts v. U.S. Dep't of HHS*, Nos. 10-2204, 10-2207, & 10-2214 (1st Cir. Sept. 22, 2011) (ECF No. 5582082) ("[I]f this Court holds that rational basis is the appropriate standard, as the government has previously stated, a reasonable argument for the constitutionality of DOMA Section 3 can be made under that permissive standard.").

II. Section 101(31) of Title 38

A. Section 101's Legislative History

Title 38 of the United States Code provides certain federal benefits in connection with status as a 38 U.S.C. § 101(2) "veteran." Subsection 101(31) defines "spouse" for

purposes of determining eligibility for those benefits: "The term 'spouse' means a person of the opposite sex who is a wife or husband."

Congress enacted subsection 101(31) as part of the Veterans and Survivors Pension Interim Adjustment Act of 1975, Pub. L. No. 94-169, Title I, § 101(1), 89 Stat. 1013 (1975), without a single dissenting vote. *See* 121 Cong. Rec. 34941 (1975) (House vote on H.R. 10355, 400-0); *Id.* at 41316 (amendment and passage in Senate by unanimous consent); *Id.* at 41758 (House agreement to Senate Amendment by unanimous consent). President Ford signed the bill into law on December 23, 1975. *See* 11 Weekly Comp. Pres. Doc. 1397 (Dec. 29, 1975).

The legislative history indicates that Section 101 was only a portion of a substantial restructuring of the veterans' benefits system—a restructuring that had been pending before Congress for several years prior to its enactment. *See, e.g.*, S. Rep. No. 94-568, at 1 (1975). With respect to Section 101 specifically, the committee report, committee hearings, and floor debate all reveal that Congress intended to "remove unnecessary gender references," *id.* at 20; *see also Hr'gs on S. 2635 and Related Bills before the Subcomm. on Compensation and Benefits of the S. Comm. on Veterans' Affairs*, 94th Cong. 956 (1975) (gender references eliminated as "unnecessary"); 121 Cong. Rec. 40600, 40601 (1975) (gender references were "unwarranted" and "inappropriate").

The House is aware of nothing in the legislative history (or otherwise) suggesting that any member of Congress, or President Ford, was motivated in enacting Section 101 by any prejudice against gays or lesbians. *Cf.* S. Rep. No. 94-568 (1975) (no mention of sexual orientation); *Miscellaneous Bill Proposing Changes in Non-Service Connected*

Pension Laws: Hr'gs Before the Subcomm. on Compensation and Pension of the H. Comm. on Veterans' Affairs, 93d Cong. (1973) (same); *Veterans and Survivors Non-Service-Connected Pension Legislation: Hr'g Before the Subcomm. on Compensation and Pension of the S. Comm. on Veterans' Affairs*, 93d Cong. (1974) (same). Indeed, neither Ms. Cardona nor the Department contends otherwise. *See* Secretary's Br. at 32 ("The particular provision was added to eliminate unnecessary gender referenced in the language of title 38. *Beyond that, however, no further purpose for its enactment is apparent from the legislative history*." (quotation marks and citation omitted; emphasis added)); Appellant's Principle Br. (April 19, 2012) ("Appellant's Brief"). Rather, Section 101 reflects the only form of marriage (and the only type of spouse) known in American law at the time, and indeed through 2004 (i.e., traditional marriage between one man and one woman). *See supra* p. 7.

B. The Secretary and the Defense of Section 101

Insofar as the House is aware, there were no constitutional challenges to 38 U.S.C. § 101(31) prior to 2010. This case appears to have been the first to challenge the constitutionality of that subsection of the statute and, insofar as we are aware, the Secretary defended the statute (as well as DOMA Section 3) against Ms. Cardona's equal protection claims until May 4, 2012.[7]

[7] The Secretary defended 38 U.S.C. § 101(3) and its implementing regulation 38 C.F.R. § 3.50, both of which define the term "surviving spouse," against challenge beginning in 2009. *See Zuniga v. Shinseki*, No. 09-815, 2010 WL 3824172, at *2 (Vet. App. Sept. 28, 2010). Included in subsection 101(3)'s definition, as with 38 U.S.C. §

(*Continued . . .*)

In the past ten months, two other constitutional challenges to Section 101 have been filed in Article III courts. *See* Compl., *Cooper-Harris v. United States*, No. 12-cv-00887 (C.D. Cal. Feb. 1, 2012) (ECF No. 1); Compl. for Declaratory, Inj. & Other Relief, *McLaughlin v. Panetta*, No. 11-cv-11905 (D. Mass. Oct. 27, 2011) (ECF No. 1). As a result of the filing of the *Cooper-Harris* and *McLaughlin* complaints, the Attorney General informed the House on February 17, 2012, that the Department also would not defend Section 101 against claims that it violates the equal protection component of the Fifth Amendment. *See* Letter from Eric H. Holder, Jr., Att'y Gen., to the Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 17, 2012) ("Second Holder Letter"), attached to [Secretary's] Notice to the Ct. (May 9, 2012). As before, the Attorney General articulated the Department's interest in "providing Congress a full and fair opportunity to participate in the litigation" in those cases. *Id*. at 2. Consistent with its prior decision to defend DOMA Section 3 against equal protection challenges, the House then determined that it also would defend Section 101 in cases in which that statute's constitutionality has been challenged.[8]

101(31), is the requirement that a spouse be "of the opposite sex." *See* 38 U.S.C. § 101(3).

[8] *Cooper-Harris* is currently proceeding through discovery. *See* In Chambers [Order], No. 12-cv-00887 (C.D. Cal. Aug. 3, 2012) (ECF No. 50) (denying motion to stay). The House has raised a jurisdictional concern in that case regarding the exclusivity of the Secretary's jurisdiction over benefits claims under 38 U.S.C. § 511, which the House will brief together with its equal protection arguments in the House's dispositive-motion brief. *See* Joint Conference Rep. Pursuant to Fed. R. Civ. P. 26(f) at 3, *Cooper-Harris v. United States*, No. 12-cv-00887 (C.D. Cal. Aug. 17, 2012) (ECF No. 51). *McLaughlin* is currently stayed. *See* Electronic Order, No. 1:11-cv-11905 (D. Mass. June 6, 2012) (docket text with no ECF No.) (granting motion to stay).

On May 4, 2012, the Secretary followed the Department's lead in refusing to further defend DOMA Section 3 and Section 101 against Ms. Cardona's equal protection challenges in this case. *See* [Secretary's] Notice to the Ct. (May 9, 2012) (attaching May 4, 2012 Letter from Eric K. Shinseki, Secretary of Veterans Affairs, to the Hon. John A. Boehner, Speaker of the U.S. House of Representatives).

III. 38 C.F.R. § 3.50

Section 3.50 of title 38 of the Code of Federal Regulations provides the following definition of "spouse" for the purpose of awarding veterans' benefits: "Spouse means a person of the opposite sex whose marriage to the veteran meets the requirements of § 3.1(j)." 38 C.F.R. §3.50(a).

Regulation 3.50 was amended in 1976, shortly after the enactment of Section 101. 41 Fed. Reg. 18299, 18299-300 (May 3, 1976). The revision to Section 3.50 replaced certain references to "wife" with "spouse." This revision reflected the same intent behind the amendments to Section 101, namely, an intent to clarify that spousal benefits were available equally to male and female veterans with opposite-sex spouses.[9]

Although the Secretary makes no mention of Regulation 3.50 in his May 9 Notice to the Court, it appears that the Secretary also has abdicated his duty to defend his own regulation. The Secretary also makes no mention of Regulation 3.50 in his brief, notwithstanding that the VA Regional Office, the Statement of the Case, and the Board's

[9] Regulation 3.50 was further amended in 1997 to reflect the current language and format. 62 Fed. Reg. 5528, 5528-30 (Feb. 6, 1997). The 1997 revisions were not substantive for purposes of this case.

decision all cite Regulation 3.50 as the basis for the denial of Ms. Cardona's dependent spouse compensation. *See* RBA at 147 (147-48) ("We had to deny your claim for additional benefits for [R.H.] because 38 Code of Federal Regulations (CFR) 3.50(a) states that 'spouse' means a person of the opposite sex whose marriage to the veteran meets the requirements of 3.1(j)."); RBA at 142 (132-42) ("We had to deny your claim for additional benefits for [R.H.] because 38 Code of Federal Regulations (CFR) 3.50(a) states that 'spouse' means a person of the opposite sex whose marriage to the veteran meets the requirements of 3.1(j)."); RBA at 8 (3-14) ("Under the facts and controlling law, the Board must deny this claim for additional dependency compensation for a spouse because the requirement of 38 C.F.R. § 3.50(a) that a spouse be a person of the opposite sex has not been met.").[10]

[10] In fact none of these decisions appear to base their denial of Ms. Cardona's request for additional compensation for a dependent spouse on Section 101 or DOMA Section 3. The Regional Office decision and the Statement of the Case do not reference Section 101 or DOMA Section 3 at all. *See* RBA at 132-42, 147-48. The Board's decision refers to Section 101 and DOMA Section 3 in its discussion of the arguments raised by Ms. Cardona before the Board, *see* RBA at 9-11 (3-14), but, as noted above, the Board's denial appears to be predicated on the regulation only. RBA at 8 (3-14) ("[T]he Board must deny this claim for additional dependency compensation for a spouse *because the requirement of 38 C.F.R. § 3.50(a)* that a spouse be a person of the opposite sex has not been met.") (emphasis added).

ARGUMENT

I. Congressional Enactments Are Entitled to a Strong Presumption of Constitutionality.

Duly enacted federal laws are entitled to a strong presumption of constitutionality. "[J]udging the constitutionality of an Act of Congress is the gravest and most delicate duty that th[e] Court[s] [are] called on to perform." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (citation and quotation marks omitted). "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Id.* at 205 (citation omitted). Because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984), the "Court[s] do[] and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality). This deference "is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981); *see supra* p. 12, and "must be afforded even though the claim is that a statute" violates the Fifth Amendment, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985). Moreover, as this Court has noted, there is a "'strong presumption of constitutionality attending laws providing for governmental payment of monetary benefits.'" *Fischer v. West*, 11 Vet. App. 121, 123 (1998), quoting *Talon v. Brown*, 999 F.2d 514, 517 (Fed. Cir. 1993) (citations omitted).

II. Binding Supreme Court Precedent Forecloses an Equal Protection Challenge to Traditional Marriage Provisions.

This Court has no occasion to undertake the "grave and delicate" task of considering the constitutionality of an Act of Congress because binding Supreme Court precedent forecloses an equal protection challenge to Section 101 and to DOMA Section 3. No matter how a court might view those provisions as a matter of first impression, the Supreme Court already squarely has held that defining marriage as between one man and one woman comports with equal protection. Only that Court can reconsider that determination.

In *Baker*, two men challenged a state law defining marriage as a "union between persons of the opposite sex," and the state's denial of a marriage license "on the sole ground that [they] were of the same sex." *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971). The Minnesota Supreme Court rejected their federal constitutional claims "that the right to marry without regard to the sex of the parties is a fundamental right . . . and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Id.* at 186.

The two men appealed to the Supreme Court under former 28 U.S.C. § 1257(2) (repealed in 1988). They argued the question "[w]hether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker v. Nelson*, No. 71-1027 (1972), attached as Exhibit A hereto. In addition to arguing that the State had engaged in

unconstitutional sex discrimination, *id.* at 16-17, the plaintiffs argued that "there is no justification in law for the discrimination against homosexuals," and that they were "similarly situated" to "childless heterosexual couples" and therefore entitled to the same "benefits awarded by law," *id.* at 10. The Supreme Court rejected these arguments, and summarily and unanimously dismissed the appeal for want of a substantial federal question. *Baker*, 409 U.S. at 810.

Such a disposition is a decision on the merits, and no mere denial of certiorari. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("[L]ower courts are bound by summary actions on the merits by this Court."); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). While the Court's certiorari jurisdiction is discretionary, its appellate jurisdiction under § 1257(2) was mandatory. Thus "the Supreme Court had no discretion to refuse to adjudicate [*Baker*] on its merits," *Wilson*, 354 F. Supp. 2d at 1304, and its "dismissal[] for want of a substantial federal question without doubt reject[ed] the specific challenges presented in the statement of jurisdiction," *Mandel*, 432 U.S. at 176—i.e., the contention that prohibiting same-sex marriages violates equal protection.

Because *Baker* holds that a state may define marriage as the union of one man and one woman without violating the Fourteenth Amendment's equal protection clause, and because "[the Supreme] Court's approach to Fifth Amendment Equal Protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (quotation marks omitted), it necessarily follows that Section 101 and DOMA Section 3 do not

violate the equal protection component of the Fifth Amendment by defining marriage in the manner that *Baker* found constitutional.

Accordingly, because "[t]he Supreme Court has not explicitly or implicitly overturned its holding," *Wilson*, 354 F. Supp. 2d at 1305, this Court is obligated to follow *Baker*. The relevant questions are not whether a majority of current Justices would agree with *Baker*, or whether later cases suggest a different trend in the Court's jurisprudence—rather they are whether *Baker* is on point, which it is, and whether it has been overturned by the Court, which it has not. Neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *Lawrence v. Texas*, 539 U.S. 558 (2003), has undermined *Baker*. In *Lawrence*—decided after *Romer*—the Supreme Court expressly *declined* to reach the question "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578; *see also Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (recognizing that *Lawrence* "declined to address equal protection"). Indeed, Justice O'Connor stated expressly that statutes "preserving the traditional institution of marriage" remain valid. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). There is no warrant for second-guessing the *Lawrence* Court's own statement about what it was and was not deciding. It could not be clearer that *Lawrence* left *Baker*'s holding unimpaired.

In short, "lower courts are bound by summary decisions by [the Supreme] Court until such time as the [Supreme] Court informs them they are not." *Hicks*, 422 U.S. at 344-45 (quotation marks and parentheses omitted); *see also Tenet v. Doe*, 544 U.S. 1 (2005) (Supreme Court precedent binds lower courts until the Court overrules its own

decision); *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (same). And the Supreme Court has declined to inform anyone that *Baker* is no longer binding, which ends the matter here: Section 101 and DOMA Section 3 plainly are constitutional under *Baker*.

III. Rational Basis Review Governs Ms. Cardona's Challenge to Section 101 and DOMA Section 3.

Even if the constitutionality of traditional marriage provisions under the Fifth Amendment were an open question (which it is not), that question would have to be resolved in favor of the constitutionality of such provisions because, as explained below, rational basis review applies and is easily satisfied.

A. This Court Must Apply Rational Basis Review to Sexual Orientation Classifications.

The practice of the Supreme Court precedent dictates that rational basis review governs Ms. Cardona's equal protection challenge to Section 101 and DOMA Section 3. "[T]he Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006), and not for lack of opportunities to do so. In *Romer*, the Supreme Court struck down, on equal protection grounds, a state law classifying based on sexual orientation. 517 U.S. at 635-36. *Romer* "could readily have been disposed by" recognizing gays and lesbians as a suspect class and applying heighted scrutiny. *Massachusetts v. U.S. Dep't of HHS*, 682 F.3d 1, 9 (1st Cir. 2012). But the *Romer* Court "conspicuously" declined to take that route, *id*., and instead applied the "conventional inquiry" whether the law "bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631, 632.

Moreover, binding Federal Circuit precedent requires that Ms. Cardona's claims be evaluated under rational basis review. *See Woodward*, 871 F.2d at 1076 (applying rational basis review of equal protection claim brought against alleged discriminatory action based on sexual orientation). Even the Secretary has acknowledged that Federal Circuit precedent requires application of rational basis scrutiny. *See* Secretary's Br. at 9-10.[11] Thus, while Ms. Cardona's and the Secretary's extending discussions of the factors for determining whether sexual orientation is a suspect classification, *see* Appellant Br. at 5-16; Secretary's Br. at 8-23, are incorrect in numerous ways, the Court need not even consider them because the issue has already been decided by higher tribunals: Rational-basis review applies.

Although the Federal Circuit's decision in *Woodward* relied on *Bowers*, its conclusions regarding rational-basis review were consistent with and not overruled by *Lawrence*—which is not surprising, since the *Lawrence* Court did not purport to prescribe heightened scrutiny even for the substantive due process claims it did address, let alone for the equal protection claims it passed over. *See Loomis v. United States*, 68 Fed. Cl. 503, 517-23 (2005) (applying *Woodward* after *Lawrence* and noting that *Lawrence* did not disturb the application of rational basis review even to substantive due process claims based on sexual orientation, nor disturb the equal protection component of the *Bowers* decision); *see also Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (noting that majority decision decided only substantive due process claim, not equal

[11] Even under heightened scrutiny, traditional marriage provisions are constitutional.

protection claim). In addition, Ms. Cardona's attempted contention that "the analysis in *Woodward* derived entirely from *Bowers*," Appellant's Br. at 15, cannot be squared with the *Woodward* Court's entirely independent observation that "[h]omosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes" because "[t]he conduct or behavior of the members of a recognized suspect or quasi-suspect class has no relevance to the identification of those groups," whereas sexual orientation is *defined* by an individual's conduct or behavioral predilections.[12] 871 F.2d at 1076 (emphasis added).

The Federal Circuit's *Woodward* decision is far from an outlier—in fact it is part of a unanimous body of Circuit precedent, reinforced by the Supreme Court's regular admonitions. The Supreme Court has warned that the judiciary must be "reluctant" to establish new suspect classes. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The Supreme Court itself has not done so for nearly forty years, and it has repeatedly rejected the reasoning of lower courts that have attempted to take on this

[12] DOMA plaintiffs sometimes maintain that the behavioral or predilection-based nature of sexual orientation was made irrelevant to the heightened scrutiny analysis by the Supreme Court's dictum in *Christian Legal Society v. Martinez* ("*CLS*") that "[o]ur decisions have declined to distinguish between status and conduct in this context." 130 S. Ct. 2971, 2990 (2010). But the *CLS* Court was discussing what sorts of antidiscrimination policies the First Amendment permits a university to establish for student groups; it did not address equal protection at all. In any event, the *CLS* Court's observation, as translated to the equal-protection context, merely reflects that sexual-orientation classifications actually *are* classifications despite their predilection-based nature, and therefore are not invisible to equal protection principles—a proposition that the *Woodward* court did not remotely question. *CLS* says nothing at all about whether the predilection-based nature of a classification can or cannot render it unsuitable for suspect or quasi-suspect status, and thus cannot possibly have disturbed *Woodward*'s holding on that point.

task themselves, including proposals to designate as suspect or quasi-suspect legislative distinctions based on mental handicap, *see id*. at 442-47, kinship, *Lyng v. Castillo*, 477 U.S. 635, 638-39 (1986), age, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976), and poverty, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

Eleven Circuits—that is, every court of appeals to have considered the question, including the Federal Circuit in *Woodward*—have held in precedents spanning nearly 30 years that sexual orientation classifications are not subject to strict or heightened scrutiny. *See, e.g.*, *Woodward*, 871 F.2d at 1076; *Massachusetts*, 682 F.3d at 9 (1st Cir. 2012); *Cook v. Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir.1989); *Citizens for Equal Prot.*, 455 F.3d at 867 (8th Cir. 2006); *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012); *Witt*, 527 F.3d at 806 (9th Cir. 2008); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Nat'l Gay Task Force v. Bd. of Educ'n of City of Okla. City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985) (per curiam); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987);. No Court of Appeals has disagreed.[13] Only one district

[13] The Second Circuit and the Third Circuit have not considered the question of the appropriate standard of review. *Cf. Able v. United States*, 155 F.3d 628, 632 (2d Cir.

(*Continued . . .*)

court has held to the contrary. *Golinski v. U.S. Office of Pers. Mgmt*., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (appeal pending, 9th Cir., Nos. 12-15388, 15-15409; petition for certiorari before judgment pending, No. 12-16, 2012 WL 596938) (although holding that DOMA Section 3 violates equal protection principles based on application of heightened scrutiny, reaching that result only by setting aside *Baker*, and purporting to overrule binding Ninth Circuit precedent to the contrary).

This unanimous view of the courts of appeals is a thoroughly sound one. Whether or not sexual orientation classifications might someday be recognized as quasi-suspect, they are not today, and cannot be in this Court unless and until the *en banc* Federal Circuit or the Supreme Court chooses to revisit the issue. Rational basis scrutiny applies.

B. Neither Section 101 nor DOMA Section 3 Classifies on the Basis of Gender.

Ms. Cardona also argues that Section 101 and DOMA Section 3 discriminate on the basis of gender because they "create gender-based classifications based on the sex of the person the veteran has married." Appellant's Br. at 19. In fact, however, neither statute discriminates against couples comprised of two females, in favor of couples comprised of two males. Each gender—male and female—is treated equally under Section 101 and DOMA Section 3. The Secretary agrees. Secretary's Br. at 7 n.4.

1998) (applying rational basis review to sexual orientation classification where plaintiff did not seek application of heightened scrutiny).

IV. Traditional Marriage Provisions Satisfy Rational Basis Review.

Rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). Under such review, a statute receives "a strong presumption of validity" and must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993).

"[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 decision maker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The government "has no obligation to produce evidence to sustain the rationality of a statutory classification," and "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 320, 321 (1993). "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Indeed, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* "[T]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it, whether or not that basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (quotation marks, brackets, and citations omitted) (emphasis added). Furthermore, the courts may not "substitute [their] personal notions of good public policy for those of Congress." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

So strong is the presumption of validity under rational basis review that only once (to our knowledge) has the Supreme Court applied it to strike down a federal statute as an equal protection violation. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[14] That striking fact is a direct product of the deferential nature of rational basis review and how extraordinarily difficult it is for a federal court to conclude the coordinate branches which enacted and signed a law were not just unwise, but wholly irrational.

This deferential standard is at its zenith when it comes to statutory definitions and other line-drawing exercises (like Section 101 and DOMA Section 3). The Supreme Court has recognized a broad category of regulations in which "Congress had to draw the line somewhere," *Beach Commc'ns*, 508 U.S. at 316, and which "inevitably require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); *see Schweiker*, 450 U.S. at 238 (prescribing extra deference for statutory distinctions that "inevitably involve[] the kind of line-drawing that will leave some comparably needy person outside the favored circle") (footnote omitted). In such cases, Congress's decision where to draw the line is "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316.

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[14] *Cf. Jimenez v. Weinberger*, 417 U.S. 628 (1974) (finding unconstitutional under any standard a classification based on illegitimacy, which the Court was then in the process of recognizing as quasi-suspect). The lone exception of *Moreno* is readily distinguishable. The classification there could not further the interests identified by the government because the vast majority of individuals who it excluded could easily rearrange their affairs to become eligible, while the neediest people would not be able to do so. *See Moreno*, 413 U.S. at 538. There are no analogous difficulties with Section 101 or DOMA Section 3.

The Supreme Court has long recognized that governmental definitions of who or what constitutes a family are precisely this kind of exercise in line-drawing. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), the Court upheld on rational basis review a zoning regulation defining unmarried couples as "families" permitted to live together, but prohibiting cohabitation by larger groups. The Court rejected the argument "that if two unmarried people can constitute a 'family,' there is no reason why three or four may not," noting that "every line drawn by a legislature leaves some out that might well have been included." *Id.* In such cases, said the Court, "the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* n.5 (quotation omitted). Thus, Section 101 and DOMA Section 3 can be struck down as irrational only if the line they draw between a relationship between one man and one woman and every other relationship—a line that virtually every society everywhere has drawn for all of recorded history—is "very wide of any reasonable mark." *Id.* To the contrary, Section 101 and DOMA Section 3 and their traditional definition of marriage are supported by multiple rational bases.[15]

In an equal protection challenge, a classification is rational if "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); *see Tigner v. Texas*, 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or

[15] The same rational bases that support the constitutionality of Section 101 discussed below also support the constitutionality of Regulation 3.50, which is substantively identical to Section 101.

opinion to be treated in law as though they were the same."). The question, therefore, is not whether the denial of benefits to relationships other than opposite-sex couples serves any particular government interest when considered in a vacuum—nor, as Ms. Cardona seems to assume, whether it by itself will encourage opposite-sex couples to marry or have children. *See* Appellant's Br. at 26-27. Rather, it is whether there is a rational reason for extending such benefits to opposite-sex couples that does not apply in the same way, or to the same degree, with respect to same-sex couples. If Congress could not rationally offer a benefit to one class of people but not to others unless the denial itself confers some *additional* benefit on the first class, then a vast host of government benefits would have to be either extended to virtually everyone, or else eliminated.[16]

A. Uniquely Federal Interests.

In defining marriage for purposes of federal law, Congress could and did consider the interests that motivate the states' traditional definitions of marriage. *See infra* p. 42. But Congress also was motivated by several interests peculiar to the federal government: Creating uniformity in federal marital status across state lines, protecting the public fisc and preserving the judgments of previous Congresses, preserving the authority of the United States, as a separate sovereign, to enact its own definition of marriage for purposes of its own laws, and exercising caution in considering the unknown but surely significant

[16] For instance, in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550-51 (1983), the Supreme Court held it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations," despite the obvious fact that offering a tax benefit to other charities would have little if any effect on the benefit to veterans' groups. The same could be said of most other government benefits.

effects of an unprecedented change in our most fundamental social institution. *See Massachusetts*, 682 F.3d at 12 ("Congress surely has an interest in who counts as married. The statutes and programs that [DOMA] governs are federal regimes . . . .").

1. Maintaining a Uniform Federal Definition of Marriage.

Section 101 and DOMA Section 3 manifestly serve the federal interest in uniform eligibility for federal benefits—that is, in ensuring that similarly-situated couples will be eligible for the same federal marital status regardless of which state they happen to live in. *See, e.g.*, 142 Cong. Rec. 10468 (1996) (Sen. Nickles) (DOMA "will eliminate legal uncertainty concerning Federal benefits"); *id.* 22459 (1996) (Sen. Ashcroft) (finding it "very important" to prevent "people in different States [from having] different eligibility to receive Federal benefits"); *see also* 150 Cong. Rec. 15318 (2004) (Sen. Inhofe) (the issue "should be handled on a Federal level [because] people constantly travel and relocate across State lines throughout the Nation"). Congress has "legitimate interests in efficiency, fairness, predictability, and uniformity" in federal programs. *In re Cardelucci*, 285 F.3d 1231, 1236 (9th Cir. 2002).

As to Section 101, it assures uniform treatment of same-sex couples in the military, no matter whether those spouses happen to reside in a state that permits or recognizes same-sex marriage. This is particularly important in light of the requirements found in 38 U.S.C. § 103(c) and 38 C.F.R. § 3.1(j) which state that marriage means a marriage valid under "the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued." Ms. Cardona's proposal, on the other hand, would result in the arbitrary

provision of dependent spouse benefits only to those same-sex couples who happen to reside in a state that recognizes same-sex marriage at the time they are married or at the time the rights to benefits accrue. It is certainly rational for the government to prefer a regime that treats same-sex couples uniformly.

The Hawaii Supreme Court's *Baehr* decision presented Congress with three choices with respect to the substantive eligibility criteria for federal marital benefits. Congress could have (a) adopted the approach of the overwhelming majority of the states and limited marriage to opposite-sex couples for purposes of federal law, (b) incorporated a patchwork of state rules into federal law, meaning that federal benefits for same-sex couples would depend on which state they lived in, or (c) flouted the majority state approach and recognized same-sex marriage nationwide for federal purposes. Any of these choices would have been rational—including (a), the one that Congress opted for in DOMA.

Plainly, Congress legitimately could conclude that a uniform nationwide definition was desirable, and thus reject option (b). It was more than rational for Congress to avoid treating same-sex couples differently for purposes of federal law based on their state of residence. Even greater confusion would have arisen regarding same-sex couples who married in a state or country that permitted it, but resided in a state that does not recognize foreign same-sex marriages:[17] Congress would have been forced to either

[17] *E.g.*, 152 Cong. Rec. 10067 (2006) (Sen. Carper) (if a Delaware same-sex couple "go[es] to another country or another place where same-sex marriages are allowed . . . they are not married in my State"). *Compare* N.M. Att'y Gen. Op. No. 11-01, 2011

(*Continued* . . .)

recognize such marriages, in conflict with the couple's own state government, or else to be willing to wipe out a previously federally-recognized marriage if the couple moved to a non-recognition state.

Congress also rationally declined option (c), which would have ensured uniformity by treating same-sex couples as married for federal law purposes, contrary to the laws of the vast majority of states. Rather than treat same-sex couples differently based on the happenstance of where they reside or override the approach of the vast majority of states, Congress rationally chose to preserve uniformity by adopting the rule of the vast majority of states as its own. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc) (where some states confer a certain status and others do not, it is rational for Congress "in the strong interest of uniformity" not to recognize the state-law status for federal purposes "rather than adopt a piecemeal approach") (quoting *Nunez-Reyes v. Holder*, 602 F.3d 1102, 1107 (9th Cir. 2010) (Graber, J., concurring)); *Dailey v. Veneman*, No. 01-3146, 2002 WL 31780191, at *3 (6th Cir. Dec. 3, 2002) (describing "Congress's interest in uniformity" as a rational basis and noting as to the program at issue that "Congress may have wanted to avoid confusion by establishing a uniform standard").

WL 111243 (Jan. 4, 2011) (predicting that New Mexico would recognize out-of-state same-sex marriages despite not issuing its own licenses to same-sex couples), *with, e.g.*, Re: Recognition in New Jersey of Same-Sex Marriages, Civil Unions, Domestic Partnerships and Other Government-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, N.J. Att'y Gen. Op. No. 3-2007, 2007 WL 749807 (Feb. 16, 2007) (foreign same-sex marriages recognized as civil unions), *and with, e.g.*, Fla. Const. art. I, § 27 (declining recognition).

Once it became clear that some states might begin recognizing same-sex marriage, Congress had to choose between uniformity in either (i) the substantive eligibility criteria for federal marital benefits, or (ii) the procedural practice of simply deferring to state-law marital determinations. Congress reasonably chose substantive uniformity, and reasonably chose to adopt the majority definition of marriage among the states. In the context of nationwide programs such as veterans' benefits, it surely is rational to treat two same-sex couples in different states the same, rather than offering one distinct benefits based on differences in state marriage law. Moreover, avoiding difficult choice of law questions that could arise if federal benefits turned on state law recognition of out-of-jurisdiction marriages is a sufficient basis to support DOMA Section 3.

2. Preserving the Public Fisc and Previous Legislative Judgments.

By maintaining the traditional definition of marriage in Section 101 and DOMA Section 3, Congress preserved both the public fisc and the legislative judgments of countless earlier Congresses, which used terms like "marriage" and "spouse" on the understanding that the programs they created conferred benefits or imposed duties solely for those in traditional marriages. *See* House Rep. at 18; *supra* pp. 8-11.

Section 101 applies solely to the application of veterans' benefits, and thus naturally a narrower definition of marriage in the statute preserves of the federal fisc. Although DOMA Section 3 applies to federal marital burdens as well as benefits, on balance, Congress reasonably could have concluded that a more restricted definition of marriage would preserve the federal fisc. *See Massachusetts*, 682 F.3d at 14 (Congress's decision based on preserving scarce government resources "may well be true, or at least

might have been thought true"). In statutes apportioning benefits, saving money by declining to expand pre-existing eligibility requirements or avoiding massive fiscal uncertainty are themselves rational bases. *See, e.g.*, *Ass'n of Residential Res. in Minn., Inc. v. Gomez*, 51 F.3d 137, 141 (8th Cir. 1995) ("Preserving the fiscal integrity of welfare programs is a legitimate state interest."); *Hassan v. Wright*, 45 F.3d 1063, 1069 (7th Cir. 1995) ("[P]rotecting the fisc provides a rational basis for Congress's line drawing in this instance."); *Bowen v. Owens*, 476 U.S. 340, 347-48 (1986); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

To be sure, when government *withdraws* benefits that it previously offered to a class of people, or affirmatively penalizes a class of people or imposes extra financial obligations on them, saving money (or in the latter case, obtaining money) alone may not justify the deprivation. *See Plyler v. Doe*, 457 U.S. 202, 205, 227 (1982); *Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1966).[18] But neither Section 101 nor DOMA does either of these things. When Congress declines to extend benefits to those not previously eligible, the Supreme Court has recognized that this is justified by the government interest in proceeding "cautiously" and protecting the fisc. *Bowen*, 476 U.S. at 348 ("A

[18] Ms. Cardona also cites *Reed v. Reed*, 404 U.S. 71 (1971), a sex-discrimination case from the period when the Supreme Court was in the process of recognizing such discrimination as quasi-suspect. *See* Appellant's Br. at 22. In any event, the government interest involved in *Reed* was administrative efficiency, not the cost savings of not further extending a benefit. 404 U.S. at 76. As the Supreme Court's decisions in *Bowen* and *Dandridge* indicate, the two are not comparable.

constitutional rule that would invalidate Congress'[s] attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all. The Due Process Clause does not impose any such constitutional straitjacket.") (citation and quotation marks omitted).[19]

Congress expressly relied on this cost-saving rationale in enacting DOMA. House Rep. at 18; *see supra* pp. 10-11. Indeed, Congress's realization that recognizing same-sex marriage for federal purposes would have a large and unpredictable effect on the budgets of various federal agencies—benefitting some agency budgets and substantially burdening others—would be a rational reason to avoid such budgetary turmoil even were there some question whether the overall net effect would be positive or negative. It was perfectly rational for Congress to avoid that uncertainty by maintaining the traditional definition.

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[19] Ms. Cardona notes, Appellant's Br. at 23, that in 2004, the Congressional Budget Office (the "CBO") opined that treating same-sex couples as married under federal law would result in so many of them becoming ineligible for federal means-tested benefits (after the incomes of their same-sex partners were included) that it would result in a net benefit to the Treasury, even after consideration of the resultant tax revenue decrease. Douglas Holtz-Eakin, Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf. This report assumes that same-sex couples who would suffer a net reduction in federal benefits nonetheless would marry and self-identify to the federal government at the same rate as couples receiving a net benefit from marriage. That is a critical but highly dubious assumption. If same-sex couples who stand to benefit get married and self-identify to the federal government as married more frequently than those who stand to lose federal benefits by virtue of being married, then Congress's concern about the impact on the federal fisc would be fully justified. In the absence of any hard data in 1996 (or 2004) about this dynamic, Congress rationally could have concluded that the net effect would be negative. More broadly, the CBO report is little more than nine pages in length, lacks detailed analysis, and its estimate—and that is all it is—that being married would constitute a net financial *detriment* to same-sex couples as a class is implausible enough that Congress rationally could have rejected it even had it existed in 1996, which of course it did not.

Additionally, in enacting DOMA Congress recognized that a host of pre-existing federal statutes allocated marital burdens and benefits based on the traditional definition of marriage—because there had never been any other definition. The Congresses that enacted these programs therefore reached legislative judgments exclusively with opposite-sex couples in mind. *See, e.g.*, H.R. Rep. No. 94-601, at 2 (1975) (recognizing prior system of veterans' benefits available "to the veteran with a wife and children"). It was reasonable for the Congress that enacted DOMA to preserve those legislative judgments and to allow those programs to operate in the manner initially intended. In the context of federal regulation and spending, that is surely a rational basis.

3. Caution in Facing the Unknown Consequences of a Novel Redefinition of a Foundational Social Institution.

Marriage is the Nation's most important social institution and one of the foundations of our society. *See* 150 Cong. Rec. 15347 (2004) (Sen. Clinton) (marriage is "the fundamental bedrock principle that exists between a man and a woman, going back into the mi[]st of history as one of the foundational institutions of history and humanity and civilization"). Accordingly, in enacting Section 101 and then DOMA Section 3, Congress had a supremely rational basis to proceed with caution in considering whether to drop a criterion—opposite-sex couples—that until now has been an essential element of such an enormously important social concept as marriage. *See supra* pp. 7-12.

No human society has experienced the long- or even medium-term effects of widespread acceptance of same-sex relationships as marriages. There thus is ample room for a wide range of predictions about the likely effect of such recognition. As two

supporters of same-sex marriage put it, "whether same-sex marriage would prove socially beneficial, socially harmful, or trivial is an empirical question . . . . There are plausible arguments on all sides of the issue, and as yet there is no evidence sufficient to settle them." William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 Future of Children 97, 110 (Fall 2005), http://futureofchildren.org/futureofchildren/publications/docs/15_02_06.pdf (endorsing a "limited, localized experiment" at the state level).

In enacting DOMA, Congress reasonably could have compared the ancient and well-established benefits of traditional marriage with the near complete lack of information about the consequences of recognizing same-sex marriages and concluded that no basis had been identified to support such a major and unprecedented redefinition of such an important institution.[20] Particularly in light of the traditional role of states serving as "laborator[ies] … [of] novel social and economic experiments without risk to

[20] *See, e.g.*, 150 Cong. Rec. 4684 (2004) (Sen. Cornyn) ("The institution of marriage is just too important to leave to chance . . . . The burden of proof is on those who seek to experiment with traditional marriage, an institution that has sustained society for countless generations."); *id.* 14942 (Sen. Hatch) ("The jury is out on what the effects on children and society will be . . . . [G]iven the uncertainty of a radical change in a fundamental institution like marriage, popular representatives should be given deference on this issue."); *id.* 14949 (Sen. Frist) (calling same-sex marriage "a vast untested social experiment for which children will bear the ultimate consequences"); *id.* 14951 (Sen. Sessions) ("I think anybody ought to be reluctant to up and change [the traditional definition of marriage]; to come along and say, well, you know, everybody has been doing this for 2000 years, but we think we ought to try something different."); *id.* 15444 (Sen. Smith) (expressing reluctance to "tinker[] with the foundations of our culture, our civilization, our Nation, and our future"); 152 Cong. Rec. 10058 (2006) (Sen. Talent) ("[T]he evidence is not even close to showing that we can feel comfortable making a fundamental change in how we define marriage so as to include same-sex marriage within the definition.").

the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 309 (1932) (Brandeis, J., dissenting), Congress rationally could decide to let states experiment, while the federal government continued to apply the traditional definition for federal law purposes. Congress's decision to neither attempt to override state law definitions for state purposes nor adopt novel state re-definitions for purposes of federal law surely is a rational response to a change in the definition of a foundational social institution.

Ms. Cardona implausibly states that Section 101 and DOMA Section 3 "do not preserve the status quo" because by enacting them Congress declined to adopt state-law marital determinations in some cases. Appellant's Br. at 25. Even if that were indeed what Congress had always done in the past—and it emphatically was not, *see supra* 6-7 (noting Congress's long history of defining marital terms in federal law)—there is no dispute that when the statutes were enacted, no same-sex couples were eligible for federal marital benefits. DOMA plainly preserved that traditional understanding of marriage and that status quo. Ms. Cardona would like Congress to have preferred preserving a choice-of-law rule over preserving our fundamental social institution, but such an approach is the antithesis of rational-basis review.

To be sure, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). In considering the definition of marriage, Congress recognized that marriage between man and woman "is deeply embedded in the history and tradition of this country" and "has become part of the fabric of our society," in a way that has produced countless immeasurable benefits. *Id.* at 786,

792. DOMA thus was born not of a reflexive adherence to tradition but of an appreciation for these vast benefits and a reluctance to change the institution of marriage in a way that would have unpredictable consequences for them. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("preserving the traditional institution of marriage" is a rational basis for "laws distinguishing between heterosexuals and homosexuals").

B. Common Federal-State Interests: Congress Rationally Sought to Encourage Responsible Procreation.

In addition to these uniquely federal rationales, Section 101 and DOMA Section 3 also are supported by the rationales that justified the states' adoption of the traditional definition of marriage in the first place. Congress would not have needed to engage in any fact-finding of its own to come to this conclusion: At Section 101's enactment and DOMA Section 3's enactment, no state recognized same-sex marriage. And even now the great majority of states recognize only opposite-sex relationships as marriages. This section articulates some of the rationales that reasonably justify the decisions made by the great majority of states, and that thus also could have motivated Congress to recognize only traditional marriages.

The traditional definition recognizes the close relationship between opposite-sex marriages and child-rearing. Until recent scientific advances, children could be conceived only though the union of one woman and one man, and this remains the nearly exclusive means by which new lives are brought into existence. Likewise, "[u]ntil 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." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). Although marriage fills other functions as well, its defining purpose is the creation of a social structure to deal with the inherently procreative nature of the male-female relationship—the word "matrimony" itself implicates parenthood. Marriage attempts to promote permanence and stability, which are vitally important to the welfare of the children of marriages.

Congress specifically recognized this purpose in enacting DOMA, noting that "[s]imply put, government has an interest in marriage because it has an interest in children." House Rep. at 13. This accords with the long tradition of our law, recognizing the tie between marriage and children.[21] Opposite-sex relationships have inherent procreative aspects that can produce unplanned offspring. For this reason, heterosexual relationships implicate the state interest in responsible procreation in a different way, and to a different degree, than do homosexual relationships, and therefore rationally may be

[21] *E.g.*, 1 William Blackstone, *Commentaries on the Laws of England* *447 (citing Puffendorf that "[t]he duty of parents to provide for the maintenance of their children[] is a principle of natural law"; citing Montesqueiu for the proposition "that the establishment of marriage in all civilized states is built on this natural obligation"); *id*. *455 ("the main end of marriage" is "the protection of infants"); Institute for American Values, *Marriage and the Law: A Statement of Principles* 6, 18 (2006) (large group of family and legal scholars who "do not all agree substantively on . . . whether the legal definition of marriage should be altered to include same-gender couples," stating that "[m]arriage and family law is fundamentally oriented towards creating and protecting the next generation."). California law reflects the same principle. *Aufort v. Aufort*, 49 P.2d 620 (Cal. Dist. Ct. App. 1935) ("[P]rocreation of children is the most important end of matrimony . . .").

treated differently by the government. Numerous courts have upheld states' traditional marriage laws on this basis.[22] Foreign governments have expressed the same view.[23]

1. Section 101 and DOMA Section 3 Rationally Focus on Opposite-Sex Couples in Subsidizing the Begetting and Raising of Children.

Opposite-sex relationships are unique in their inherent biological tendency to produce children: Opposite-sex couples can, and frequently do, conceive children regardless of their intentions or plans. The State thus has an interest in channeling potentially procreative heterosexual activity into the stable, permanent structure of marriage, for the sake of the children, especially unplanned children, that may result. Moreover, when a heterosexual relationship between unmarried individuals produces

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[22] *See Citizens for Equal Prot.*, 455 F.3d at 867-68; *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006).

[23] *See* 1 French National Assembly, No. 2832: Report Submitted on Behalf of the Mission of Inquiry on the Family and the Rights of Children 68 (Jan. 25, 2006), *English translation at* http://www.preservemarriage.ca/docs/France_Report_on_the_Family_Edited.pdf ("[I]t is not possible to consider marriage and filiation separately, since . . . marriage [is] built around children."); *id.* at 77 ("The institution of Republican marriage is inconceivable absent the idea of filiation and the sex difference is central to filiation. It corresponds to a biological reality—the infertility of same-sex couples . . . . 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."); *Schalk & Kopf v. Austria* ¶¶ 44, 63, No. 30141/04 E.U. Ct. H. R. 2010, (same-sex couple claimed that "the procreation and education of children was no longer a decisive element" of marriage; Austria and the United Kingdom opposed and the Court found no right to same-sex marriage); *Joslin v. New Zealand* ¶¶ 3.2, 8.2, 8.3, No. 902/1999 H.R. Comm. 2002, *in* 2 Report of the Human Rights Comm., U.N. Doc. A/57/40, 214 (2002), *available at* http://archive.equal-jus.eu/109/1/Schalk_and_Kopf.pdf (New Zealand argued, *inter alia*, "that marriage centres on procreation, and homosexuals are incapable of procreation;" and "that marriage is an optimum construct for parenting;" the Committee found no right to same-sex marriage).

unplanned offspring, the government has an interest in encouraging marriage to provide a stable environment for the raising of children. Same-sex couples simply do not present this concern.

Unsurprisingly, only a tiny fraction of all children are raised in households headed by same-sex couples,[24] meaning that the overwhelming majority either are raised by opposite-sex couples or were conceived in an opposite-sex relationship. Thus, Congress rationally could desire to support and stabilize by offering marital benefits to the parents of such children. Similarly, opposite-sex couples continue to raise children in significantly greater proportions than same-sex couples.[25] And, in all events, same-sex couples do not raise the same issues with unplanned pregnancies.

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[24] UCLA's Williams Institute estimates that "[a]s of 2005 . . . 270,313 of the U.S.'s children are living in households headed by same-sex couples," Adam P. Romero et al., *Census Snapshot* 2 (Dec. 2007), http://escholarship.org/uc/item/6nx232r4, or 0.37% of the 73,494,000 children in the United States that year. *See Living Arrangements of Children Under 18 Years Old: 1960 to Present*, U.S. Census Bureau, *available at* http://www.census.gov/hhes/families/data/children.html (download "Table CH-1") (number of children).

[25] 2010 Census data indicate that only one in six same-sex couples are raising children. Daphne Lofquist et al., *Housholds and Families: 2010*, Census Br. C2010BR-14, tbl. 3 (Apr. 2012) (*see* "Same-sex partner preferred estimates" data), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf. This compares with the approximately 40% of opposite-sex couples (both married and unmarried) raising children. *Id.* ("Husband-wife households" and "Opposite-sex partner" data). Another Williams Institute scholar estimates that the proportion of same-sex couples raising children is falling over time, as "[d]eclines in social stigma toward [gay, lesbian and bisexual] people mean that more are coming out earlier in life and are becoming less likely to have children with different-sex partners" before starting a household with a same-sex partner. Gary J. Gates, *Family formation and raising children among same-sex couples*, Family *Focus on . . . LGBT Families* (Winter 2011), at F2, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf.

Thus, the government rationally can limit an institution designed to facilitate child-rearing to relationships in which the vast majority of children are raised and which implicate unique concerns about unplanned pregnancies. Notably, the rationality of this interest can be determined without inquiring whether the traditional mother-father childrearing arrangement is in any sense "better" than any other. Therefore, while government may and does recognize other relationships in more limited fashions, Congress rationally chose to apply a special set of benefits and duties to traditional marriages.

Ms. Cardona's observations that married couples are not *required* to have children, and that unmarried couples are *permitted* to have children, Appellant's Br. 26-27, do not change any of this. Since only a man and a woman can beget a child together, logically, making those same parties the only ones eligible for marriage is a rational way of linking the two. *Cf. Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001) (even under heightened scrutiny, where a statute classifies based on a genuine biological difference, the courts have not "required that the statute . . . be capable of achieving its ultimate objective in every instance"). This is particularly true where most opposite-sex couples' ability and willingness to raise children cannot be determined in advance without intolerable and possibly unconstitutional intrusions on their privacy—and even then could not be determined with much reliability in many cases. And surely the government's acceptance of unmarried parents does not make it irrational for it to *encourage* parents to marry, and stay married.

2. DOMA Rationally Encourages and Subsidizes the Raising of Children by Their Own Biological Mothers and Fathers.

One of the strongest presumptions known to our culture and law is that a child's biological mother and father are the child's natural and most suitable guardians and caregivers, and that this family relationship will not lightly be interfered with. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 760 n.11, 766 (1982).[26] Our tradition offers the same protections for an adoptive parent-child relationship, once it is formed—but the stringent standards imposed for eligibility to adopt, which never would be required as a condition of custody of one's own biological offspring, demonstrate the unique value we place on the biological parent-child relationship. *See Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) (no fundamental liberty interest in adopting a child); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting the protected interest of "a man in the children he has sired and raised"). And there is a sound logical basis for this bedrock assumption: Biological parents have a genetic stake in the success of their children that no one else does.

It is rational for government to encourage relationships that result in mothers and fathers jointly raising their biological children. By offering benefits to opposite-sex couples in enacting DOMA, and imposing the marital expectations of fidelity, longevity, and mutual support, that is what Congress did. Because same-sex relationships are incapable of creating families of mother, father, and biological children, the legitimate

[26] International law recognizes the same principle. *See* United Nations Convention on the Rights of the Child, art.7, 28 I.L.M. 1456, 1460 (Nov. 20, 1989) (a child has a right, "as far as possible, . . . to know and be cared for by his or her parents").

state interest in promoting a family structure that facilitates the rearing of children by both biological parents is distinctively served by the traditional definition.

Ms. Cardona claims, in cursory fashion, that parenting by same-sex couples is interchangeable with parenting by a child's biological mother and father. Appellant's Br. 26. But this proposition is, to say the least, far from so clear that it would be irrational for Congress to disagree. The cases Ms. Cardona cites purport to rely on social-science research to establish as much. But the state of this research was well summarized by two self-described supporters of same-sex marriage in 2005: "[T]hose who say the evidence shows that many same-sex parents do an excellent job of parenting are right. Those who say the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are also right." Meezan & Rauch, *supra* p. 39-40, at 104; *cf. Hernandez*, 855 N.E. 2d at 8 ("What [the studies] show, at most, is that rather limited observation has detected no marked differences.")

Many states permit same-sex couples to raise children, and Congress has not interfered. But Congress still rationally could find a unique degree of federal government encouragement appropriate for arrangements where children are raised by the man and woman who brought them into the world.

3. DOMA Section 3 Rationally Encourages Childrearing in a Setting with Both a Mother and a Father.

Even aside from the biological link between parents and children, biological differentiation in the roles of mothers and fathers makes it fully rational to encourage family situations that allow children have one of each. As the Supreme Court recognizes

in other contexts, "[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946) (brackets omitted)).

Common sense, and the experience of countless parents, informs us that children relate and react differently to mothers and fathers based on the typical differences between men and women in parenting style, size, and voice tone. Moreover, the different challenges faced by boys and girls as they grow to adulthood make it eminently rational to think that children benefit from having role models of both sexes in the home.

Finally, Congress also could have rationally concluded that opposite-sex couples are more likely to remain together in committed relationships than are same-sex couples, as recent empirical evidence tends to suggest. *E.g.*, Matthijs Kalmijn et al., *Income Dynamics in Couples and the Dissolution of Marriage and Cohabitation*, 44 Demography 159, 170 (2007); Gunnar Andersson, et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 Demography 79, 93 (2006).

V. Any Redefinition Of Marriage Should Be Left to the Democratic Process.

When it comes to same-sex marriage, "it is difficult to imagine an area more fraught with sensitive social policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt*, 447 F.3d at 681. Fortunately, there is an alternative: Same-sex marriage is being actively debated in legislatures, in the press, and at every level of government and society across the country.

That is how it should be. These fora require participants on both sides to persuade those who disagree, rather than labeling them irrational or bigoted. Importantly, gay-rights supporters have ample and increasing clout in Congress and the Executive Branch. Congress's recent repeal of "Don't Ask, Don't Tell" is one prominent example. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010). And bills to repeal DOMA are pending in both houses of Congress, and have passed the Senate Judiciary Committee. *See* Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); The Respect for Marriage Act, S. 598, 112th Cong. (2011).

By contrast, the courts can intervene in the debate only to cut it short, and only by denouncing the positions of the hundreds of Members of Congress who voted for DOMA, of the President who signed it, and of a vast swathe of the American people as not just mistaken or antiquated, but as wholly irrational. That conclusion plainly is unwarranted as a matter of constitutional law, and judicially constitutionalizing the issue of same-sex marriage is unwarranted as a matter of sound social and political policy while the American people are so actively engaged in working through this issue for themselves. Instead, this Court should "permit[] this debate to continue, as it should in a democratic society." *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

CONCLUSION

For all the foregoing reasons, the Court should affirm the denial of Ms. Cardona's application for the benefits at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2012, a copy of foregoing Brief of Intervenor-Appellee Bipartisan Legal Advisory Group of the U.S. House of Representatives for Leave to Intervene was filed electronically via e-mail to the clerk's office and served by mail on anyone unable to accept electronic filing. Parties may access this filing through the court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system.

/s/ Mary Beth Walker
Mary Beth Walker

EXHIBIT A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1027

FILED
FEB 10 1972
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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REPRODUCED AT THE NATIONAL ARCHIVES

INDEX

PAGE

JURISDICTIONAL STATEMENT

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 3

Statement of the Case 3

How the Federal Questions Were Raised 6

The Questions Are Substantial 6

I. Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses 11

II. Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments 18

CONCLUSION 19

APPENDIX

Statutes Involved

Chapter 517, Minnesota Statutes 1a

Alternative Writ of Mandamus 10a

REPRODUCED AT THE NATIONAL ARCHIVES

PAGE

Order Quashing the Writ 12a

Amended Order, Findings and Conclusions 14a

Opinion of the Minnesota Supreme Court, Hennepin County 18a

TABLE OF AUTHORITIES

Cases:

Bates v. City of Little Rock, 361 U.S. 516 (1960) 12
Boddie v. Connecticut, 401 U.S. 371 (1971) 11, 12, 13, 19

Cohen v. California, 403 U.S. 15 (1971) 14

Griswold v. Connecticut, 381 U.S. 479 (1965) 11, 12, 13, 14, 18, 19

Jones v. Hallihan, W-152-70 (Ct. Apps. Ky. 1971) 10

Loving v. Virginia, 388 U.S. 1 (1967) 11, 12, 13, 14, 15, 16, 18, 19

McLaughlin v. Florida, 379 U.S. 184 (1964) 13, 16, 18
Meyer v. Nebraska, 262 U.S. 535 (1923) 11, 12, 13
Mindel v. United States Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970) 18

Reed v. Reed, 92 S. Ct. 251, 30 L. ed.2d 225 (1971) 13, 16, 17, 18
Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 17

Shapiro v. Thompson, 394 U.S. 618 (1969) 16
Shelton v. Tucker, 364 U.S. 479 (1960) 14
Skinner v. Oklahoma, 316 U.S. 535 (1942) 11, 12, 13
Street v. New York, 394 U.S. 576 (1969) 14

PAGE

Constitutional Provisions:

United States Constitution

First Amendment 5, 6

Eighth Amendment 5, 6

Ninth Amendment 3, 5, 6, 18, 19

Fourteenth Amendment 3, 5, 6, 11, 13, 17, 18, 19

Rule:

Minn. R. Civ. P. 52.01 5

Federal Statute:

28 U.S.C. §1257(2) 2

State Statute:

Minnesota Statutes
Chapter 517 .....2, 4, 6, 13

Other Authorities:

Abrahamsen, Crime and the Human Mind 117 (1944) 9

Churchill, Homosexual Behavior Among Males 19 (1969) 8

Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969 9

Finger, *Sex Beliefs and Practices Among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947) 7

Freud, 107 Am. J. of Psychiatry 786 (1951) (reprinted) 10

REPRODUCED AT THE NATIONAL ARCHIVES

PAGE

Hart, Law, Liberty and Morality 50 (1963) 9

James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902) 8

KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) 7

Westermarck, 2 Origin and Development of the Moral Idea 484 (1926) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

RICHARD JOHN BAKER, *et al.*,

Appellants,

—v.—

GERALD R. NELSON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Minnesota, entered on October 15, 1971, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 191 N.W.2d 185. The opinion of the District Court for Hennepin County is unreported. Copies of the opinions are set out in the Appendix, *infra,* pp. 10a-17a and 18a-23a.

REPRODUCED AT THE NATIONAL ARCHIVES

Jurisdiction

This suit originated through an alternative writ of mandamus to compel appellee to issue the marriage license to appellants. The writ of mandamus was quashed by the Hennepin County District Court on January 8, 1971. On appeal, the judgment of the Supreme Court of Minnesota affirming the action of the District Court was entered on October 15, 1971. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Minnesota on January 10, 1972. The time in which to file this Jurisdictional Statement was extended on January 12, 1972, by order of Justice Blackmun.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2).

Statutes Involved

Appellants have never been advised by appellee which statute precludes the issuance of the marriage license to them, and the Supreme Court of Minnesota cites only Chapter 517, Minnesota Statutes, in its opinion. Accordingly, the whole of Chapter 517 is reproduced in App., *infra,* pp. 1a-9a.

Questions Presented

1. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.
2. Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.
3. Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Statement of the Case[1]

Appellants Baker and McConnell, two persons of the male sex, applied for a marriage license on May 18, 1970 (T. 9; A. 2, 4) at the office of the appellee Clerk of District Court of Hennepin County[2] (T. 10).

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[1] T. refers to the trial transcript. A. refers to the Appendix to appellants' brief before the Minnesota Supreme Court.

[2] Appellant McConnell is also petitioner before this Court in *McConnell* v. *Anderson,* petit. for cert. filed, No. 71-978 in which he seeks review of the decision of the United States Court of Appeals for the Eighth Circuit, allowing the Board of Regents of the University of Minnesota to refuse him employment as head of the catalogue division of the St. Paul Campus Library on the grounds that "His personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

The efforts of appellants to get married evidently percipitated the Regents' decision not to employ Mr. McConnell.

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Upon advice of the office of the Hennepin County Attorney, appellee accepted appellants' application and thereupon requested a formal opinion of the County Attorney (A. 7-8) to determine whether the marriage license should be issued. In a letter dated May 22, 1970, appellee Nelson notified appellant Baker he was "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons" (A. 1; T. 11). However, neither appellant has ever been informed that he is individually incompetent to marry, and no specific reason has ever been given for not issuing the license.

Minnesota Statutes, section 517.08 states that *only* the following information will be elicited concerning a marriage license: name, residence, date and place of birth, race, termination of previous marriage, signature of applicant and date signed. Although they were asked orally at the time of application which was to be the bride and which was to be the groom (T. 15; T. 18), the forms for application for a marriage license did not inquire as to the sex of the applicants. However, appellants readily concede that both are of the male sex.

Subsequent to the denial of a license, appellants consulted with legal counsel. On December 10, 1970, appellants applied to the District Court of Hennepin County for an alternative writ of mandamus (A. 2), and such a writ was timely served upon appellee. Appellee Nelson continued to refuse to issue the appellants a marriage license. Instead, he elected to appear in court, show cause why he had not done as commanded, and make his return to the writ (A. 4).

The matter was tried on January 8, 1971, in District Court, City of Minneapolis, Judge Tom Bergin presiding (T. 1). Appellants Baker and McConnell testified on their own behalf (T. 9; T. 15) as the sole witnesses. After closing arguments, he quashed the writ of mandamus and ordered the Clerk of District Court "not to issue a marriage license to the individuals involved" (T. 19). An order was signed to that effect the same day (App. *infra*, p. 12a).

Subsequent to the trial, counsel for appellants moved the court to find the facts specially and state separately its conclusions of law pursuant to Minn. R. Civ. P. 52.01. Judge Bergin then made certain findings of fact and conclusions of law (App. *infra*, p. 14a) in an amended order dated January 29, 1971. Such findings and conclusions were incorporated into and made part of the order signed January 8, 1971. The Court found that the refusal of appellee to issue the marriage license was not a violation of M.S. Chapter 517, and that such refusal was not a violation of the First, Eighth, Ninth or Fourteenth Amendments to the U. S. Constitution.

A timely appeal was made to the Supreme Court of Minnesota. In an opinion filed October 15, 1971, the Supreme Court of Minnesota affirmed the action of the lower court.[3]

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[3] In early August, 1971, Judge Lindsay Arthur of Hennepin County Juvenile Court issued an order granting the legal adoption of Mr. Baker by Mr. McConnell. The adoption permitted Mr. Baker to change his name from Richard John Baker to Pat Lynn McConnell. On August 16, Mr. Michael McConnell alone applied for a marriage license in Mankato, Blue Earth County, Minnesota for himself and Mr. Baker, who used the name Pat Lynn McConnell. Under Minnesota law, only one party need apply for a marriage license. Since the marriage license application does not inquire as

REPRODUCED AT THE NATIONAL ARCHIVES

How the Federal Questions Were Raised

Appellants contended that if Minnesota Statutes, Chapter 517, were construed so as to not allow two persons of the same sex to marry, then the Statutes were in violation of the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution in their Alternative Writ of Mandamus (App. *infra,* pp. 10a-11a), at the hearing before the Hennepin County District Court on January 8, 1971 (App. *infra,* p. 12a), and to the Supreme Court of Minnesota (App. *infra,* p. 18a). These constitutional claims were expressly considered and rejected by both courts below.

The Questions Are Substantial

The precise question is whether two individuals, solely because they are of the same sex, may be refused formal legal sanctification or ratification of their marital relationship.

At first, the question and the proposed relationship may well appear bizarre—especially to heterosexuals. But

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to sex, the bisexual name of Pat Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties. Shortly after the license issued, Mr. McConnell's adoption of Mr. Baker was made public by Judge Arthur—contrary to Minnesota law. The County Attorney for Blue Earth County then discovered that a marriage license had issued to the appellants, and on August 31, he "declared the license void on statutory grounds." Nevertheless, on September 3, the appellants were married in a private ceremony in South Minneapolis. About a week later the license was sent to the Blue Earth County Clerk of District Court. It is not known whether he filed it, but under the Minnesota statute filing is not required. Further, filing does not affect validity.

neither the question nor the proposed relationship is bizarre. Indeed, that first impulse provides us with some measure of the continuing impact on our society of prejudice against non-heterosexuals. And, as illuminated within the context of this case, this prejudice has severe consequences.

The relationships contemplated is neither grotesque nor uncommon. In fact, it has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. Numerous single sex marital relationships exist de facto. See, e.g., A. Kinsey, Sexual Behavior in the Human Male (1948); Finger, *Sex Beliefs and Practices Among Male College Students,* 42 J. Abnormal and Social Psych. 57 (1947). The refusal to sanction such relationships is a denial of reality. Further, this refusal denies to many people important property and personal interests.

This Jurisdictional Statement undertakes to outline the substantial reasons why persons of the same sex would want to be married in the sight of the law. Substantial property rights, and other interests, frequently turn on legal recognition of the marital relationship. Moreover, both the personal and public symbolic importance of legal ratification of same sex marriages cannot be underestimated. On the personal side, how better may two people pledge love and devotion to one another than by marriage. On the public side, prejudice against homosexuals, which tends to be phobic, is unlikely to be cured until the public acknowledges that homosexuals, like all people, are entitled to the full protection and recognition of the law.

REPRODUCED AT THE NATIONAL ARCHIVES

Only then will the public perceive that homosexuals are not freaks or unfortunate abberations, to be swept under the carpet or to be reserved for anxious phantasies about one's identity or child rearing techniques.

A vast literature reveals several hypotheses to explain the deep prejudice against homosexuals. One authority maintained that hostility to homosexual conduct was originally an "aspect of economics," in that it reflected the economic importance of large family groupings in pastoral and agricultural societies. E. Westermarck, 2 Origin and Development of the Moral Idea 484 (1926). A second theory suggests that homosexuality was originally forbidden by the "early Hebrews" as part of efforts to "surround the appetitive drives with prohibitions." W. Churchill, Homosexual Behavior Among Males 19 (1969). Under this theory, opposition to homosexuality was closely related to religious imperatives, in particular the need to establish moral superiority over pagan sects. *Id.,* at 17; see also W. James, The Varieties of Religious Experience, lectures XI, XII, XIII (1902).

Whatever the appropriate explanation of its origins, psychiatrists and sociologists are more nearly agreed on the reasons for the persistence of the hostility. It is one of those "ludicrous and harmful" prohibitions by which virtually all sexual matters are still reckoned "socially taboo, illegal, pathological, or highly controversial." W. Churchill, *supra,* at 26. It continues, as it may have begun, quite without regard to the actual characteristics of homosexuality. It is nourished, as are the various other sexual taboos, by an amalgam of fear and ignorance. *Id.,* at 20-35. It is supported by a popular conception of the causes and characteristics of homosexuality that is no more deserving of our reliance than the Emperor Justinian's belief that homosexuality causes earthquakes. H. Hart, Law, Liberty and Morality 50 (1963).

There is now responsible evidence that the public attitude toward the homosexual community is altering. Thus, the Final Report of the Task Force on Homosexuality of the National Institute of Mental Health, October 10, 1969, states (pp. 18-19):

> "Although many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives."

To a certain extent the new attitudes mirror increasing scientific recognition that homosexuals are "normal," and that accordingly to penalize individuals for engaging in such conduct is improper. For example, in D. Abrahamsen, Crime and the Human Mind 117 (1944), it is stated:

> "All people have originally bisexual tendencies which are more or less developed and which in the course of time normally deviate either in the direction of male or female. This may indicate that a trace of homosexuality, no matter how weak it may be, exists in every human being."

Sigmund Freud summed up the present overwhelming attitude of the scientific community when he wrote as follows in 1935:

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"Homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime and cruelty too." Reprinted in 107 Am. J. of Psychiatry 786-87 (1951).

In the face of scientific knowledge and changing public attitudes it is plainly, as Freud said, "a great injustice" to persecute homosexuals.

This injustice is compounded, we suggest, by the fact that there is no justification in law for the discrimination against homosexuals. Because of abiding prejudice, appellants are being deprived of a basic right—the right to marry. As a result of this deprivation, they have been denied numerous benefits awarded by law to others similarly situated—for example, childless heterosexual couples.

Since this action has been filed, others have been instituted in other states.[4] This Court's decision, therefore, would affect the marriage laws of virtually every State in the Union.

[4] See, e.g., *Jones* v. *Hallihan,* W-152-70 (Ct. Apps. Ky. 1971).

I.

Respondent's refusal to sanctify appellants' marriage deprives appellants of liberty and property in violation of the due process and equal protection clauses.

The right to marry is itself a fundamental interest, fully protected by the due process and equal protection clauses of the Fourteenth Amendment. See *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Meyer* v. *Nebraska,* 262 U.S. 535 (1923). In addition, significant property interests, also protected by the due process clause, flow from the legally ratified marital relationship. In his testimony at the trial, the appellant Baker enumerated six such interests which he cannot enjoy because of the State's refusal to recognize his marriage to the appellant McConnell:

1. The ability to inherit from one another by intestate succession.
2. The availability of legal redress for the wrongful death of a partner to a marriage.
3. The ability to sue under heartbalm statutes where in effect.
4. Legal (and consequently community) recognition for their relationship.
5. Property benefits such as the ability to own property by tenancy-by-the-entirety in states where permitted.
6. Tax benefits under both Minnesota and federal statutes. (Among others, these include death tax benefits

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and income tax benefits—even under the revised Federal Income Tax Code.)

There are innumerable other legal advantages that can be gained only in the marital relationship. Only a few of these will be listed for illustrative purposes. Some state criminal laws prohibit sexual acts between unmarried persons. Many government benefits are available only to spouses and to surviving spouses. This is true, for example, of many veterans benefits. Rights to public housing frequently turn on a marital relationship. Finally, when there is a formal marital relationship, one spouse cannot give or be forced to give evidence against the other.

The individual's interests, personal and property, in a marriage, are deemed fundamental. See, e.g., *Boddie* v. *Connecticut, supra; Loving* v. *Virginia, supra; Griswold* v. *Connecticut, supra; Skinner* v. *Oklahoma, supra; Meyer* v. *Nebraska, supra.* Thus marriage comprises a bundle of rights and interests, which may not be interfered with, under the guise of protecting the public interest, by government action which is arbitrary or invidious or without at least a reasonable relation to some important and legitimate state purpose. E.g. *Meyer* v. *Nebraska, supra.* In fact, because marriage is a fundamental human right, the state must demonstrate a subordinating interest which is compelling, before it may interfere with or prohibit marriage. Cf. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960).

In a sense, the analysis presented here involves a mixing of both due process and equal protection doctrines. As they are applied to the kind of government disability at issue in this case, however, they tend to merge. Refusal to sanctify a marriage solely because both parties to the

relationship are of the same sex is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the refusal to sanctify can be shown to further some legitimate government interest, important personal and property rights of the persons who wish to marry are arbitrarily denied without due process of law, and the class of persons who wish to engage in single sex marriages are being subject to invidious discrimination. With regard to the due process component, see *Boddie* v. *Connecticut, supra; Griswold* v. *Connecticut, supra* (all the majority opinions); *Meyer* v. *Nebraska, supra.* With regard to the equal protection component of this argument, see *Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Skinner* v. *Oklahoma, supra;* cf. *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971).

Applying due process notions, in this case, the state has not shown any reason, much less a compelling one, for refusing to sanctify the marital relationship. Its action, therefore, arbitrarily invades a fundamental right.

Separately, each appellant is competent to marry under the qualifications specified in Minnesota Statutes Sections 517.08, subd. 3, 517.02-517.03. Compare *Loving* v. *Virginia, supra.* Why, then, do they become incompetent when they seek to marry each other?

The problem, according to the Minnesota Supreme Court, appears to be definitional or historical. The institution of marriage "as a union of a man and a woman, uniquely involving the procreation and rearing of children within a family, is as old as the Book of Genesis" (App., *infra,* pp. 20a-21a). On its face, however, Minnesota law neither

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states nor implies this definition. Furthermore, the antiquity of a restriction certainly has no bearing on its constitutionality, and does not, without anything additional, demonstrate that the state's interest in encumbering the marital relationship is subordinating and compelling. Connecticut's restriction on birth control devices had been on its statute books for nearly a century before this Court struck it down on the ground that it unconstitutionally invaded the privacy of the marital relationship. *Griswold* v. *Connecticut, supra.*

Surely the Minnesota Supreme Court cannot be suggesting that single sex marriages may be banned because they are considered by a large segment of our population to be socially reprehensible. Such a governmental motive would be neither substantial, nor subordinating nor legitimate. See, e.g., *Loving* v. *Virginia, supra; Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969).

Even assuming that government could constitutionally make marriageability turn on the marriage partners' willingness and ability to procreate and to raise children, Minnesota's absolute ban on single sex marriages would still be unconstitutional. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). There is nothing in the nature of single sex marriages that precludes procreation and child rearing. Adoption is quite

clearly a socially acceptable form of procreation. It already renders procreative many marriages between persons of opposite sexes in which the partners are physically or emotionally unable to conceive their own children. Of late, even single persons have become eligible to be adoptive parents.

Appellants submit therefore, that the appellee cannot describe a legitimate government interest which is so compelling that no less restrictive means can be found to secure that interest, if there is one, than to proscribe single sex marriages. And, even if the test to be applied to determine whether the Minnesota proscription offends due process involves only questions of whether Minnesota has acted arbitrarily, capriciously or unreasonably, appellants submit that the appellee has failed under that test too. Minnesota's proscription simply has not been shown to be rationally related to any governmental interest.

The touchstone of the equal protection doctrine as it bears on this case is found in *Loving* v. *Virginia,* 388 U.S. 1 (1967). The issue before the Court in that case was whether Virginia's anti-miscegenation statute, prohibiting marriages between persons of the Caucasian race and any other race was unconstitutional. The Court struck down the statute saying:

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification as measures designed to maintain White Supremacy. We have consistently

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> denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. *Loving* v. *Virginia,* 388 U.S. at 11-12.

The Minnesota Supreme Court ruled that the *Loving* decision is inapplicable to the instant case on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" (App., *infra,* p. 23a). It is true that the inherently suspect test which this Court applied to classifications based upon race (see, e.g., *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra*), has not yet been extended to classifications based upon sex (see *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971)). However, this Court has indicated that when a fundamental right—such as marriage—is denied to a group by some classification, the denial should be judged by the standard that places on government the burden of demonstrating a legitimate subordinating interest that is compelling. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). As we have already indicated neither a legitimate nor a subordinating reason for this classification has been or can be ascribed.

Even if we assume that the classification at issue in this case is not to be judged by the more stringent "constitutionally suspect" and "subordinating interest" standards, the Minnesota classification is infirm.

The discrimination in this case is one of gender. Especially significant in this regard is the Court's recent decision in *Reed* v. *Reed,* 92 S. Ct. 251, 30 L. ed.2d 225 (1971),

which held that an Idaho statute, which provided that as between persons equally qualified to administer estates males must be preferred to females, is violative of the equal protection clause of the Fourteenth Amendment. There the Court said (30 L. ed.2d at 229):

> In applying that clause, this Court has consistently recognized that the Fourteenth amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

Childless same sex couples, for example, are "similarly circumstanced" to childless heterosexual couples. Thus, under the *Reed* and *Royster* cases, they must be treated alike.

Even when judged by this less stringent standard, the Minnesota classification cannot pass constitutional muster. First, it is difficult to ascertain the object of the legislation construed by the Minnesota courts. Second, whatever objects are ascribed for the legislation do not bear any fair and substantial relationship to the ground upon which the

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difference is drawn between same sex and different sex marriages.[5]

II.

Appellee's refusal to legitimate appellants' marriage constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

Marriage between two persons is a personal affair, one which the state may deny or encumber only when there is a compelling reason to do so. Marriage and marital privacy are substantial rights protected by the Ninth Amendment as well as the Fourteenth Amendment due process clause. By not allowing appellants the legitimacy of their marriages, the state is denying them this basic right and unlawfully meddling in their privacy.

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranted in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Griswold v. *Connecticut,* 381 U.S. 479, 491-492 (Goldberg, J., concurring); see also, *Mindel* v. *United States Civil Service Commission,* 312 F. Supp. 485 (N.D. Cal. 1970). Accordingly, Minnesota's refusal to legitimate the appellants' marriage merely because of the sex of the applicants is

[5] The fact that the parties to the desired same sex marriage are not barred from marriage altogether is irrelevant to the constitutional issue. See *Reed* v. *Reed, supra; Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra.*

a denial of the right to marry and to privacy reserved to them of the Ninth and Fourteenth Amendments. See *Griswold* v. *Connecticut, supra; Loving* v. *Virginia,* 388 U.S. 1 (1967); cf. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Indeed, it is the most fundamental invasion of the privacy of the marital relationship for the state to attempt to scrutinize the internal dynamics of that relationship. Absent a showing of compelling interest, or an invitation from a party to the relationship, it is none of the state's business whether the individuals to the relationship intend to procreate or not. Nor is it the state's business to determine whether the parties intend to engage in sex acts or any particular sex acts. Cf., e.g., *Griswold* v. *Connecticut, supra.*

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

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Statutes Involved

CHAPTER 517

[Minnesota Statutes]

517.01 MARRIAGE A CIVIL CONTRACT. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

517.02 PERSONS CAPABLE OF CONTRACTING. Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent. A male person of the full age of 18 years may, with the consent of his parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry. A female person of the full age of 16 years may, with the consent of her parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, her application for a license is approved by the judge of the juvenile court of the county in which she resides. If the judge of juvenile court of the county in which she resides is absent from the county and has not by order assigned another probate judge or a retired probate judge to act in his stead, then the court commissioner or any judge of

district court of the county may approve her application for a license.

517.03 Marriages Prohibited. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; or between parties who are nearer than second cousins; whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age of 16 years; provided, however, that mentally deficient persons committed to the guardianship of the commissioner of public welfare may marry on receipt of written consent of the commissioner. The commissioner may grant such consent if it appears from his investigation that such marriage is for the best interest of the ward and the public. The clerk of the district court in the county where the application for a license is made by such ward shall not issue the license unless and until he has received a signed copy of the consent of the commissioner of public welfare.

517.04 Solemnization. Marriages may be solemnized by any justice of the peace in the county in which he is elected, and throughout the state by any judge of a court of record, the superintendent of the department for the deaf and dumb, in the state school for the deaf and blind,

or any licensed or ordained minister of the gospel in regular communion with a religious society.

517.05 Credentials of Minister. Ministers of the gospel, before they are authorized to perform the marriage rite, shall file a copy of their credentials of license or ordination with the clerk of the district court of some county in this state, who shall record the same and give a certificate thereof; and the place where such credentials are recorded shall be endorsed upon and recorded with each certificate of marriage granted by a minister.

517.06 Parties Examined. Every person authorized by law to perform the marriage ceremony, before solemnizing any marriage, may examine the parties on oath, which oath he is authorized to administer, as to the legality of such intended marriage, and no such person shall solemnize a marriage unless he is satisfied that there is no legal impediment thereto.

517.07 License. Before any persons shall be joined in marriage, a license shall be obtained from the clerk of the district court of the county in which the woman resides, or, if not a resident of this state, then from the clerk of the district court of any county and the marriage need not take place in the county where the license is obtained.

517.08 Application for License. Subdivision 1. Application for a marriage license shall be made at least five days before a license shall be issued. Such application shall be made upon a form provided for the purpose and shall contain the full names of the parties, their post office addresses and county and state of residence, and their full

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ages. The clerk shall examine upon oath the party applying for license relative to the legality of such contemplated marriage and, if at the expiration of this five-day period, he is satisfied that there is no legal impediment thereto, he shall issue such license, containing the full names of the parties and county and state of residence, with the district court seal attached, and make a record of the date of issuance thereof, which license shall be valid for a period of six months. In case of emergency or extraordinary circumstances, the judge of the probate court, the court commissioner, or any judge of the district court, of the county in which the application is made, may authorize the license to be issued at any time before the expiration of the five days. If a male person intending to marry shall be under the age of 21 and shall not have had a former wife, such license shall not be issued unless the consent of the parents or guardians or the parent having the actual care, custody and control of said party shall be given under the hand of such parent or guardian and duly verified by an officer duly authorized to take oaths and duly attested by a seal, where such officer has a seal. Provided, that if there be no parent or guardian having the actual care, custody and control of said party, then the judge of the juvenile court, the court commissioner, or any judge of the district court in the county where the application is pending may, after hearing, upon proper cause shown, make an order allowing the marriage of said party. The clerk shall collect from the applicant a fee of $10 for administering the oath, issuing, recording, and filing all papers required, and preparing and transmitting to the state registrar of vital statistics the reports of marriage required by this section. If the license should not be used within the period of six months

due to illness or other extenuating circumstances, it may be surrendered to the clerk for cancellation, and in such case a new license shall issue upon request of the parties of the original license without fee therefor. Any clerk who shall knowingly issue or sign a marriage license in any other manner than in this section provided shall forfeit and pay for the use of the parties aggrieved not to exceed $1,000.

Subd. 2. On or before the 11th day of each calendar month, the clerk of the district court shall prepare and transmit to the state registrar of vital statistics, on a form prescribed and furnished by the state registrar of vital statistics, a certified summary of the identifying information and statistical data concerning persons for whom certificates of marriage were filed in the office of the clerk of the district court during the previous month. The state registrar of vital statistics shall prepare and maintain a state-wide index of such identifying information and compile therefrom data for statistical purposes.

Subd. 3. The personal information necessary to complete the report of marriage shall be furnished by the applicant prior to the issuance of the license. The report shall contain only the following information:

(a) Personal information on bride and groom.

1. Name.
2. Residence.
3. Date and place of birth.
4. Race.
5. If previously married, how terminated.
6. Signature of applicant and date signed.

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(b) Information concerning the marriage.

1. Date of marriage.
2. Place of marriage.
3. Civil or religious ceremony.

(c) Signature of clerk of court and date signed.

517.09 SOLEMNIZATION. In the solemnization of marriage no particular form shall be required, except that the parties shall declare in the presence of a person authorized by section 517.04 to solemnize marriages, and the attending witnesses that they take each other as husband and wife. In each case at least two witnesses shall be present besides the person performing the ceremony.

517.10 CERTIFICATE; WITNESSES. The person solemnizing a marriage shall prepare under his hand three certificates thereof. Each certificate shall contain the full names and county and state of residences of the parties and the date and place of the marriage. Each certificate shall also contain the signatures of at least two of the witnesses present at the marriage who shall be at least 16 years of age. The person solemnizing the marriage shall give each of the parties one such certificate, and shall immediately make a record of such marriage, and file one such certificate with the clerk of the district court of the county in which the license was issued within five days after the ceremony. The clerk shall record such certificate in a book kept for that purpose.

517.11, 517.12 [Repealed, 1951 c 700 s 5]

517.13 PENALTY FOR FAILURE TO DELIVER AND FILE CERTIFICATE. Every person solemnizing a marriage who shall neglect to make and deliver to the clerk a certificate thereof within the time above specified shall forfeit a sum not exceeding $100, and every clerk who neglects to record such certificate shall forfeit a like sum.

517.14 ILLEGAL MARRIAGE; FALSE CERTIFICATE; PENALTY. If any person authorized by law to join persons in marriage shall knowingly solemnize any marriage contrary to the provisions of this chapter, or wilfully make any false certificate of any marriage, or pretended marriage, he shall forfeit for every such offense a sum not exceeding $500, or may be imprisoned not exceeding one year.

517.15 UNAUTHORIZED PERSON PERFORMING CEREMONY. If any person undertakes to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be guilty of a gross misdemeanor; and, upon conviction thereof, punished by imprisonment of not more than one year, or by a fine of not more than $500, or by both such fine and imprisonment.

517.16 IMMATERIAL IRREGULARITY OF OFFICIATING PERSON NOT TO VOID. No marriage solemnized before any person professing to be a judge, justice of the peace, or minister of the gospel shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed officer or person; provided, the marriage is consummated with the full belief on the part of the persons

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so married, or either of them, that they have been lawfully joined in marriage.

517.17 Solemnizing Unlawful Marriages. Every minister or magistrate who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which, within his knowledge, a legal impediment exists, shall be guilty of a gross misdemeanor.

517.18 Marriage Among Quakers; Baha'is; Hindus; Muslims. All marriages solemnized among the people called Friends or Quakers, in the form heretofore practiced and in use in their meetings, shall be valid and not affected by any of the foregoing provisions; and the clerk of the meeting in which such marriage is solemnized, within one month after any such marriage, shall deliver a certificate of the same to the clerk of the district court of the county where the marriage took place, under penalty of not more than $100, and such certificate shall be filed and recorded by the clerk under a like penalty; and, if such marrage does not take place in such meeting, such certificate shall be signed by the parties and at least six witnesses present, and filed and recorded as above provided under a like penalty, and marriages may be solemnized among members of the Baha'i faith by the Chairman of an incorporated local Spiritual Assembly of the Baha'is, according to the form and usage of such society, and marriages may be solemnized among Hindus or Muslims by the person chosen by a local Hindu or Muslim association, according to the form and usage of their respective religions, but in the presence of at least two witnesses be-

sides the person performing the ceremony, and who shall issue and record a certificate thereof as provided by Minnesota Statutes 1945, Section 517.10.

517.19 Illegitimate Children. Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other, and the issue of marriages declared null in law shall nevertheless be legitimate.

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Alternative Writ of Mandamus

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Petitioners Richard John Baker and James Michael McConnell show to the Court as follows:

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota statutes, section 517.08.

2. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

3. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, section 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

4. That on the above date, pursuant to Minnesota Statutes, section 517.08, subdivision (3), petitioners were not questioned as to which physical sex classification they belonged.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license which petitioners had duly and truthfully completed.

6. That the refusal of Clerk Gerald R. Nelson to issue the marriage to petitioners violated Minnesota Statutes, sections 517.02 and 517.08, subdivision (3), and was therefore an unlawful act.

7. That in the alternative, the refusal of Clerk Gerald R. Nelson to issue the marriage license to petitioners violated the First Amendment, the Eighth Amendment, the Ninth Amendment and the Fourteenth Amendment of the United States Constitution.

WHEREFORE: Gerald R. Nelson, Clerk of District Court of Hennepin County, is hereby commanded to issue to Richard John Baker or James Michael McConnell on or before the 22 day of December, 1970 a marriage license or show cause before Special Term Judge Donald T. Barbeau, on the 22 day of December, 1970 at 9:30 a.m./p.m. at the Hennepin County Courthouse why he has not done so, and that he then and there make his return to this writ, with his certificate thereon of having done as commanded.

Signed: /s/ .....

Donald T. Barbeau

District Court Judge

Dated this 10 day
of December, 1970

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Order Quashing the Writ

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL MCCONNELL,

Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on January 8, 1971, on the motion of plaintiffs for the issuance of an alternative writ of mandamus to require defendant, Clerk of District Court of Hennepin County, to issue a marriage license to plaintiffs.

R. Michael Wetherbee, Esq., appeared for and on behalf of plaintiffs and in support of said motion. George M. Scott, County Attorney of Hennepin County, by David E. Mikkelson, Esq., Assistant County Attorney, appeared for and on behalf of defendant, and in opposition thereto.

The Court having heard the evidence adduced and the arguments of counsel, and on all the files, records and

proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the alternative writ of mandamus be and the same hereby is quashed.

IT IS FURTHER ORDERED That the defendant, Gerald R. Nelson, Clerk of District Court in and for the County of Hennepin, Minnesota, is specifically ordered not to issue a marriage license to the petitioners Richard John Baker and James Michael McConnell.

BY THE COURT,

/s/ TOM BERGIN
Judge

Dated: January 8, 1971

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Amended Order, Findings and Conclusions

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

File No. 672384

RICHARD JOHN BAKER and JAMES MICHAEL MCCONNELL,

Plaintiffs,

vs.

GERALD R. NELSON,

Defendant.

The above entitled matter came on before the undersigned, one of the Judges of the above named Court, on Friday, January 29, 1971, on the motion of Plaintiffs requesting that Findings of Fact be specifically set forth, together with Conclusions of Law, and that the same be incorporated into the Order of the Court issued in the above entitled matter on January 8, 1971, which Order quashed the Alternative Writ of Mandamus and directed the Defendant, Gerald R. Nelson, specifically to not issue a marriage license sought by the Petitioners.

R. Michael Wetherbee, Esquire, appeared for and on behalf of the Plaintiffs and in support of said motion. George M. Scott, County Attorney for Hennepin County

by David E. Mikkelson, Assistant County Attorney, appeared for and on behalf of the Defendant.

The Court having heard the evidence, arguments of counsel, and on all the files, records and proceedings herein, the Court hereby grants the motion of the Plaintiffs and directs that the following Findings of Fact and Conclusions of Law be incorporated into and made a part of the earlier Order of this Court in this matter dated January 8, 1971:

FINDINGS OF FACT

1. That on or about May 18, 1970, petitioners applied for a marriage license at the Hennepin County Courthouse in Minneapolis, Minnesota pursuant to Minnesota Statutes, Section 517.08.

2. That the petitioners-plaintiffs, Richard John Baker and James Michael McConnell, were both of the male sex and that they presented themselves to the Clerk of District Court as such in making their application for marriage license.

3. That on the above date both petitioners had attained the full age of 21 years; that neither petitioner had a husband or wife living nor had either been divorced from a former spouse within six months; that petitioners were not related to each other nearer than second cousins; that neither petitioner was a mentally deficient person committed to the guardianship of the commissioner of public welfare.

4. That on the above date, application forms were furnished to petitioners pursuant to Minnesota Statutes, Sec-

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tion 517.08, subdivisions (1) and (3), and that petitioners completed said forms, paid the fee required by law, and attested to the truthfulness of all answers in the furnished forms.

5. That on the above date, defendant Gerald R. Nelson, Clerk of Hennepin County District Court, accepted the petitioners' applications for a marriage license, however, the said defendant, Gerald R. Nelson, subsequently refused to issue such marriage license on the grounds that there was a legal impediment to such contemplated marriage in that both parties were of the same sex. Such denial to issue the marriage license was based in part on an opinion of the County Attorney of Hennepin County which had been requested by said defendant, Gerald R. Nelson.

Based upon the foregoing Findings of Fact, the Court does hereby make the following

Conclusions of Law

1. That the refusal of the Defendant, Gerald R. Nelson, Clerk of Hennepin County District Court, to issue the marriage license to the Plaintiffs Richard John Baker and James Michael McConnell was not a violation of Minnesota Statutes, Chapter 517.

2. That such refusal to issue the marriage license applied for by the Plaintiffs was not in violation of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

It is therefore ordered That the foregoing Findings of Fact and Conclusions of Law be incorporated into and made a part of the Order of this Court heretofore made in the above entitled matter and dated January 8, 1971.

By the Court,

/s/ Tom Bergin
Tom Bergin
Judge of District Court

Dated: January
29, 1971

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Opinion of the Minnesota Supreme Court, Hennepin County

No. 201 HENNEPIN COUNTY PETERSON, *J.*

RICHARD JOHN BAKER, *et al.*,

Appellants,

43009 vs.

GERALD NELSON, Clerk of Hennepin County District Court,

Respondent.

Endorsed
Filed October 15, 1971
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Minn. St. c. 517, which prohibits the marriage of persons of the same sex, does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

Heard and considered en banc.

OPINION

PETERSON, *Justice.*

The questions for decision are whether a marriage of two persons of the same sex is authorized by state statutes

and, if not, whether state authorization is constitutionally compelled.

Petitioners, Richard John Baker and James Michael McConnell, both adult male persons, made application to respondent, Gerald R. Nelson, clerk of Hennepin County District Court, for a marriage license pursuant to Minn. St. 517.08. Respondent declined to issue the license on the sole ground that petitioners were of the same sex, it being undisputed that there were otherwise no statutory impediments to a heterosexual marriage by either petitioner.

The trial court, quashing an alternative writ of mandamus, ruled that respondent was not required to issue a marriage license to petitioners and specifically directed that a marriage license not be issued to them. This appeal is from those orders. We affirm.

1. Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages. We think, however, that a sensible reading of the statute discloses a contrary intent.

Minn. St. c. 517, which governs "marriage," employs that term as one of common usage, meaning the state of union between persons of the opposite sex.[1] It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would

[1] Webster's Third New International Dictionary (1966) p. 1384 gives this primary meaning to marriage: "1 a: the state of being united to a person of the opposite sex as husband or wife."

Black, Law Dictionary (4 ed.) p. 1123 states this definition: "Marriage * * * is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."

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have used the term in any different sense. The term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as "husband and wife" and "bride and groom" (the latter words inserted by L. 1969, c. 1145, § 3, subd. 3).

We hold, therefore, that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.

2. Petitioners contend, second, that Minn. St. c. 517, so interpreted, is unconstitutional. There is a dual aspect to this contention: The prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.[2]

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of

[2] We dismiss without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution.

children within a family, is as old as the book of Genesis. Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942), which invalidated Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, stated in part: "Marriage and procreation are fundamental to the very existence and survival of the race." This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965), upon which petitioners rely, does not support a contrary conclusion. A Connecticut criminal statute prohibiting the use of contraceptives by married couples was held invalid, as violating the due process clause of the Fourteenth Amendment. The basic premise of that decision, however, was that the state, having authorized marriage, was without power to intrude upon the right of privacy inherent in the marital relationship. Mr. Justice Douglas, author of the majority opinion, wrote that this criminal statute "operates directly on an intimate relation of husband and wife," 381 U. S. 482, 85 S. Ct. 1680, 14 L. ed. 2d 513, and that the very idea of its enforcement by police search of "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives * * * is repulsive to the notions of privacy surrounding the marriage relationship," 381 U. S. 485, 85 S. Ct. 1682, 14 L. ed. 2d 516. In a separate opinion for three justices, Mr. Justice Goldberg similarly abhorred this state disruption of "the traditional relation of the family—a

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relation as old and as fundamental as our entire civilization." 381 U. S. 496, 85 S. Ct. 1688, 14 L. ed. 2d 522.[3]

The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the Griswold rationale, the classification is no more than theoretically imperfect. We are reminded, however, that "abstract symmetry" is not demanded by the Fourteenth Amendment.[4]

Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. ed. 2d 1010 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's anti-miscegenation statute, prohibiting interracial marriages,

[3] The difference between the majority opinion of Mr. Justice Douglas and the concurring opinion of Mr. Justice Goldberg was that the latter wrote extensively concerning this right of marital privacy as one preserved to the individual by the Ninth Amendment. He stopped short, however, of an implication that the Ninth Amendment was made applicable against the states by the Fourteenth Amendment.

[4] See, Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 S. Ct. 281, 282, 58 L. ed. 539, 543 (1914). As stated in Tigner v. Texas, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. ed. 1124, 1128, 130 A. L. R. 1321, 1324 (1940), and reiterated in Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535, 540, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1659, "[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."

was invalidated solely on the grounds of its patent racial discrimination. As Mr. Chief Justice Warren wrote for the court (388 U. S. 12, 87 S. Ct. 1824, 18 L. ed. 2d 1018):

> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U. S. 535, 541 (1942). See also Maynard v. Hill, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."[5]

Loving does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

We hold, therefore, that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.

Affirmed.

[5] See, also, McLaughlin v. Florida, 379 U. S. 184, 85 S. Ct. 283, 13 L. ed. 2d 222 (1964), in which the United States Supreme Court, for precisely the same reason of classification based only upon race, struck down a Florida criminal statute which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.

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