No. 12-307

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CATO INSTITUTE AND CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA
Counsel of Record
DAVID H. GANS
JUDITH E. SCHAEFFER
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

ROBERT A. LEVY
ILYA SHAPIRO
JAMES R. SCHINDLER
SOPHIE J. M. COLE
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

INTEREST OF *AMICI CURIAE*[1]

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato's interest in this case lies in enforcing the age-old principle of "equality under the law," as enshrined in the Constitution through the Fifth and Fourteenth Amendments.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the Constitution's guarantee of the equal protection of the laws.

---

[1]Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its very design and purpose, Section 3 of the Defense of Marriage Act ("DOMA") violates the basic constitutional requirement of equality under the law, establishing an across-the-board rule—applicable to more than 1,000 federal legal protections—denying to legally-married same-sex couples the full range of federal rights and benefits that exist to help support committed, loving couples form enduring, life-long bonds. Under DOMA's sweeping mandate of discrimination, legally-married same-sex couples do not stand equal before the law and do not receive its equal protection. The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") cannot offer any legitimate reason—independent of the purpose of demeaning gay and lesbian married couples that pervades DOMA—that rationalizes this system of government-sponsored discrimination.

Under any standard of review, DOMA's sweeping discrimination against married gay men and lesbians contravenes the plain, well-established meaning of the guarantee of the equal protection of the laws. The Fifth Amendment's guarantee of the equal protection of the laws extends to all persons, including legally-married gay men and lesbians, who, despite having "political power to participate in the democratic process," BLAG Br. at 50, have been subjected to arbitrary, invidious discrimination by the government. There is only one standard of equal protection, and it requires the state "to govern impartially," *Craig v. Boren*, 429 U.S 190, 211 (1976) (Stevens, J., concurring), respecting the equal dignity of *all* persons.

BLAG attempts to portray this case as a "quite narrow" dispute, BLAG Br. at 19, that raises no issue of constitutional first principles and turns solely on whether DOMA's Section 3 was a rational solution to a legitimate federal problem within Congress' purview. Urging this Court to ratify an unprecedented system of discrimination against legally-married gay and lesbian couples, BLAG's submission never confronts the essential meaning of the Constitution's guarantee of the equal protection of the laws, which this Court has long held is an element of due process binding on the federal government. At every step of its argument, BLAG would give the federal government broad, sweeping power to discriminate against individual Americans, refusing to honor the Constitution's universal guarantee of equality under the law that protects all Americans from being treated as inferior, second-class persons.

If this Court concludes that it has jurisdiction, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. This Court Has Consistently Ruled That The Constitution's Equal Protection Guarantee Secures Equal Rights For All And Forbids Invidious Discrimination.

A. The Constitution Forbids the Federal Government From Enacting Laws Singling Out a Class of Individuals For Disfavored Legal Status.

The Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment guarantee to all persons the equal protection of the laws. While, of course, the text of the Fifth Amendment "is not as explicit a guarantee of equal treatment as the Fourteenth Amendment," this Court has repeatedly held that "the Constitution imposes upon federal, state, and local government actors, the same obligation to respect the personal right to equal protection of the laws." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 231-32 (1995); *see also Lyng v. Castillo,* 477 U.S. 635, 636 n.2 (1986) ("The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.") (quoting *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100 (1976)); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1976) (observing that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"). These repeated holdings reflect that

"equality of citizenship is the essence of our Republic." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

"The Fifth and Fourteenth Amendments to the Constitution protect *persons*, not groups," *Adarand*, 515 U.S. at 227, reflecting "our constitutional tradition" that "an individual possesses rights that are protected against lawless action by the government." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). As a personal right that belongs to all individuals, the right of equal protection secures equality to all persons—whether black or white, man or woman, gay or straight, native-born or immigrant. "'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial or sexual . . . class.'" *Id.* at 152-53 (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

As this Court's precedents reflect, laws that discriminate and treat any group of persons as inferior, whether enacted by a state government or by Congress, are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Indeed, even intentional and arbitrary discrimination by the government against a "class of one"—whose only distinguishing characteristic is the fact of being singled out by the government for adverse treatment—violates the Constitution's guarantee of equal protection. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

The plain, well-established meaning of "equal protection" is composed of equality under the law and equality of rights for all persons. The Court's earliest equal protection cases, decided nearly 150 years ago, establish that the constitutional guarantee of the equal protection of the laws "extends its protections to race and classes," prohibiting any legislation "which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *Civil Rights Cases*, 109 US 3, 24 (1883). Time and again, this Court has confirmed that the guarantee of the equal protection of the laws "is a pledge of the protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), that forbids all forms of "class legislation." *Civil Rights Cases*, 109 US at 24. As the first Justice Harlan put it, the Constitution "neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

This Court's precedents today firmly establish that the constitutional guarantee of equal protection demands "neutrality where the rights of persons are at stake," forbidding the government from "singling out a certain class of citizens for disfavored legal status or general hardships," *Romer v. Evans*, 517 U.S. 620, 623, 633 (1996), and requiring the state "to govern impartially," *Craig*, 429 U.S. at 211 (Stevens, J., concurring). As *Romer* teaches, these settled equal protection principles apply with full force to legislation, such as DOMA, that discriminates against gay men and lesbians on account of their sexual orientation. The Constitution's guarantee of the equal protection of the laws means that the government may not deny gay men and lesbians

rights basic to "ordinary civic life in a free society," *Romer*, 517 U.S. at 631, in order "to make them equal to everyone else." *Id.* at 635.

B. Laws That Discriminate Arbitrarily or Based on Animus Are Subject to Meaningful Judicial Review, Whether Under Strict Scrutiny or Rational Basis Review.

In giving effect to the constitutional requirement of equal protection, this Court has consistently held that when legislation discriminates on account of race, alienage, or national origin—factors "so seldom relevant to the achievement of any legitimate state interest" and often "reflect[ing] prejudice and antipathy," *City of Cleburne, Tex., v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)—the law must be subject to strict scrutiny and will be struck down unless narrowly tailored to a compelling state interest. *See, e.g.*, *Adarand*, 515 U.S. at 223-30; *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984). Likewise, this Court demands heightened scrutiny of laws that discriminate on account of gender and illegitimacy, establishing a "strong presumption that [such] classifications are invalid." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring). *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even in the instances in which legislative classifications are subject to rational basis review, requiring "a rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe*, 509 U.S. 312, 320 (1993), the rational basis test does not permit the government "to divide citizens into expanding numbers of

permanent classes," *Zobel*, 457 U.S. at 64, act on the basis of prejudice or animus, or single out individuals for adverse treatment in an arbitrary manner. *See Allegheny Pittsburgh Coal Co. v. Webster*, 488 U.S. 336 (1989).

In striking down Section 3 of DOMA, the Second Circuit applied heightened scrutiny, concluding that sexual orientation is properly treated as a quasi-suspect class. As Windsor and the government demonstrate in their briefs, the Second Circuit's comprehensive analysis of the four factors bearing on suspect-class status fully supports application of heightened scrutiny in this case. Windsor Br. at 17-31; U.S. Br. at 18-36. But this Court need not reach the question of the proper standard of review in order to invalidate Section 3; as discussed further in Part II of this brief, *infra*, Section 3 violates the essential meaning of the equal protection guarantee and cannot be sustained even under the most forgiving of the Court's doctrinal formulations.

This Court's cases applying rational basis review recognize that, at a minimum, the Constitution's equal protection guarantee establishes equality under the law for all persons and prohibits "'indiscriminate imposition of inequalities' . . . born of animosity toward the class of persons affected." *Romer,* 517 U.S. at 633, 634 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)). Under any standard of review, class legislation that singles out individuals and treats them as inferior persons, "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violates the personal, individual right to the equal protection of the laws. Where, as here, Congress subjects individuals to invidious

discrimination that results in "injury . . . to personal dignity," *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring), this Court has a constitutional obligation to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S, at 633. Thus, while BLAG is correct that rational basis scrutiny is deferential to congressional policy judgments, *see* BLAG Br. at 22-23, this measure of deference has *never* entailed judicial abdication in the face of arbitrary, invidious discrimination inconsistent with the equal protection guarantee. *See Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (explaining that "deference in matters of policy cannot . . . become abdication in matters of law").

Indeed, this Court, when applying the rational basis standard of review, has always insisted that government—whether state or federal—act consistent with the most fundamental principle underlying the personal guarantee of equal protection: that all persons are entitled to equality before the law and may not be subject to arbitrary and invidious discrimination based on their status or personal characteristics. In so doing, the Court has required a focused inquiry into the challenged statute's discrimination and the particular, concrete justifications offered to explain the adverse treatment. *See Cleburne*, 473 U.S. at 453 (Stevens, J., concurring).

For example, in *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court struck down a federal statutory provision that denied federal food stamp benefits to a household composed of unrelated

individuals living together as a violation of the equal protection guarantee. Finding that the provision had been designed to deny food stamps to "hippies" and served no other conceivable purpose independent of discrimination, this Court held that the statute was inconsistent with the constitutional guarantee of equality under the law. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id.* at 534.

Similarly, in *Cleburne Living Center*, this Court held unconstitutional a municipal zoning ordinance that required a special-use permit for homes for mentally disabled persons, but not for other group homes. Finding that the discriminatory permit requirement rested on "negative attitudes," "fear," and "irrational prejudice," 473 U.S. at 448, 450, this Court held the ordinance violated the constitutional guarantee of equality under the law. "The City may not avoid the strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some fraction of body politic. 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Most relevant here, applying rational basis review, this Court in *Romer* held unconstitutional a state constitutional amendment that prohibited state or local government action to protect gay men and lesbians from discrimination. Stressing that the government had "impos[ed] a broad and undifferentiated disability on a single named group,"

this Court held the amendment was a patent violation of the venerable principle of equality before the law: "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 632, 634-35. The amendment was a denial of equal protection, a "status-based enactment" that denied equal rights to gay men and lesbians, "not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635. Even under rational basis review, "[i]t is not within our constitutional traditions to enact laws of this sort . . . 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" *Id.* at 633 (quoting *Sweatt*, 339 U.S. at 635).

As these cases hold, rational basis scrutiny, while properly deferential, does not require a reviewing court to abdicate its constitutional responsibility to enforce the guarantee of equal protection for all persons. This Court's cases applying rational basis scrutiny do not permit the government to subject any group of persons to adverse treatment "born of animosity toward the class of persons affected." *Id.* at 634. For that reason, this Court has been "especially vigilant in evaluating the rationality of any classification involving a group that has been subject to a 'tradition of disfavor'" in order to prevent use of a "stereotyped reaction that may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.'" *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting)).

II. Under Any Standard Of Review, Section 3 Of DOMA Violates The Fifth Amendment's Equal Protection Guarantee.

DOMA's Section 3 cannot be squared with basic equal protection principles because it discriminates against married same-sex couples in virtually every aspect of their lives. Affecting more than 1,000 federal statutory provisions, Section 3 denies federal legal recognition of the marriages of gay men and lesbians recognized under state law, denying to these couples the many important legal protections, rights and benefits that the federal government provides to all other married couples. On matters from Social Security to taxation, from health care and employee benefits to immigration, DOMA commits the federal government and all its agencies to a policy of prejudiced discrimination vast in its reach. *See* Windsor Br. at 6-7. Furthermore, Section 3 governs the interpretation of federal statutes, such as the Employee Retirement Income Security Act, and thus imposes discriminatory costs on private-sector employers who choose to provide benefits to employees with same-sex spouses. The provision violates the essential meaning of the equal protection guarantee and cannot be sustained even under the most relaxed standard of review, let alone heightened scrutiny. "Freedom extends beyond spatial bounds," *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), and marriage equality is properly an aspect of liberty, upon which the government cannot adequately justify discriminatory restrictions.

The ability to marry the person of one's choosing and partake of the legal protections and benefits of

civil marriage are rights basic to "ordinary civic life in a free society," even if they are "protections taken for granted by most people," *Romer*, 517 U.S. at 631. Never before in our nation's history has the federal government enacted a legal regime of marriage discrimination. "The absence of precedent for [DOMA] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 130 S. Ct. 3138, 3159 (2010) (observing that sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress' actions). DOMA cannot survive this "careful consideration."

"If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring). Here, as BLAG all but concedes, DOMA's classifications were "drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. Driven by the purpose to deny basic legal equality to married same-sex couples, *e.g.*, 142 Cong. Rec. 17,089 (1996), DOMA was enacted in order to ensure that gay men and lesbians in state-recognized marriages would not receive *federal* recognition of those same marriages—and thus would be denied the important federal legal protections, rights, and benefits that attach to all other marriages in this country. Against the backdrop of fear that states would recognize

marriage equality, Congress wrote into federal law a sweeping rule mandating discrimination against married same-sex couples. *See* BLAG Br. at 30 (explaining that DOMA was enacted to respond to judicial decisions that "raised the prospect" of state recognition of "same sex couples").

Section 3 was not, as BLAG argues, a rational solution to a legitimate federal problem. BLAG Br. at 19. Instead, as the debates in Congress reflect, DOMA was "born of animosity towards the class of persons affected," seeking to make married gay and lesbian couples "unequal to everyone else." *Romer*, 517 U.S. at 634, 635. By enacting DOMA, federal legislators sought to "express their disapprobation through the law," 142 Cong. Rec. 17,089 (1996), asserting that same-sex couples were "immoral," depraved," "unnatural," "based on perversion," and "an attack on God's principles." *Id.* at 16,972, 17,074, 17, 082. *See generally* Windsor Br. at 8-10. The very point of DOMA was to make the "general announcement that, gays and lesbians shall not have any particular protections from the law" when it comes to marriage, inflicting on committed, loving married same-sex couples "immediate, continuing, and real injuries" to their equal dignity and status as equal citizens. *Romer*, 517 U.S. at 635. Section 3 violates the constitutional requirement of the equal protection of the law, carving out one group of people from the protection of federal laws that help support and sustain the institution of marriage. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental

interest." *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

BLAG argues that Section 3 is justified by the need to encourage responsible procreation by married heterosexual couples as well as by other ostensible federal goals, but it was only when same-sex couples sought to fulfill the Constitution's promise of freedom and equality by entering into loving, committed marriages that Congress enacted DOMA. *Cf. LULAC v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination . . . ."). Both the provision's vast reach and the context of its passage condemn it as a "status-based enactment" that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer,* 517 U.S. at 635.

The governmental interests suggested by BLAG do not suffice to justify Section 3 even under rational basis scrutiny. BLAG argues that Section 3 is a permissible effort to establish a uniform standard for federal benefits and programs based on marital status that supports responsible procreation and conserves federal resources. BLAG Br. at 28-48. But BLAG has not advanced, and cannot advance, any legitimate reason—independent of invidious discrimination—for establishing, for the first time in our nation's history, a uniform federal definition of marriage that denies legal recognition to the marriages of one group of citizens. A concern for uniformity or for the "preservation of resources . . . can hardly justify the classifications used in allocating those resources. The State must do more

than justify its classification with a concise expression of intention to discriminate." *Plyler v. Doe,* 457 U.S. 202, 227 (1982).

Uniformity and cost-savings are undoubtedly legitimate government interests, but the constitutional guarantee of equal protection takes discrimination against disfavored persons "off the table," *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), as a means of furthering these federal ends. Were it otherwise, the federal government would have the power to "divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible." *Zobel*, 457 U.S. at 64. BLAG cannot explain why it was reasonable to take the extreme step of "singling out a certain class of citizens for disfavored legal status," *Romer*, 517 U.S. at 633, in order to pursue these purported governmental ends. *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (finding that state goal of encouraging in-state investment was not a "legitimate state purpose when furthered by discrimination").

This is no small matter—it goes to the heart of why Section 3 cannot be squared with the constitutional requirement of equal protection. "The search for the link between classification and objective gives substance to the Equal Protection Clause . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 632, 633. DOMA, whose "sheer breadth . . . seems inexplicable by anything but

animus toward the class it affects," *id.* at 632, fails this basic inquiry.

BLAG also argues that the government has a federal interest in adopting what it calls the "traditional definition of marriage" in order to foster a governmental interest in responsible procreation. BLAG Br. at 43-48. This, too, fails even the minimum test of rationality. In the first place, there is absolutely no reason to believe that excluding same-sex couples from the institution of marriage has any impact at all on the likelihood that opposite-sex couples will get married. Moreover, there are many classes of persons who cannot procreate, such as the elderly, infertile, or incarcerated, in addition to those opposite-sex couples who may be able to bear children but choose not to—yet DOMA singles out only gay men and lesbians. As the First Circuit observed, "DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. . . . This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14-15 (1st Cir. 2012).

Perhaps more important, "tradition" alone does not provide a legitimate government interest sufficient to justify a statute that denies the equal protection of the laws to gay men and lesbians in marriages recognized by state law. "Ancient lineage

of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326; *see also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority . . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Inequality rooted in "tradition" is as much a blot on the Constitution's guarantee of equal protection as novel forms of discrimination. *Compare Plessy*, 163 U.S. at 550-51 (upholding the constitutionality of segregation based on "the established usages, customs, and traditions of the people"), *with Lawrence*, 539 U.S. at 577-78 (explaining that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

In short, DOMA's "breadth . . . is so far removed from these particular justifications that . . . it [is] impossible to credit them." *Romer*, 517 U.S. at 635. Section 3 is "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632. For same-sex and heterosexual couples alike, the "State cannot demean their existence or control their destiny." *Lawrence*, 539 U.S. at 578. Accordingly, Section 3 cannot survive equal protection scrutiny and must be invalidated as inconsistent with the Constitution's guarantee of equality under law.

CONCLUSION

If this Court concludes that it has jurisdiction, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA
Counsel of Record
DAVID H. GANS
JUDITH E. SCHAEFFER
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

ROBERT A. LEVY
ILYA SHAPIRO
JAMES R. SCHINDLER
SOPHIE J. M. COLE
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

March 1, 2013