UNITED STATES STATUTES AT LARGE

CONTAINING THE

LAWS AND CONCURRENT RESOLUTIONS
ENACTED DURING THE SECOND SESSION OF THE
ONE HUNDRED FOURTH CONGRESS
OF THE UNITED STATES OF AMERICA

1996

AND

PROCLAMATIONS

VOLUME 110

IN SIX PARTS

PART 1

PUBLIC LAWS 104–90 THROUGH 104–128

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1997

Public Law 104–199
104th Congress

An Act

To define and protect the institution of marriage.

Sept. 21, 1996
[H.R. 3396]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Defense of Marriage Act.
1 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defense of Marriage Act".

SEC. 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.—Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

"§ 1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 115 of title 28, United States Code, is amended by inserting after the item relating to section 1738B the following new item:

"1738C. Certain acts, records, and proceedings and the effect thereof.".

SEC. 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

"§ 7. Definition of 'marriage' and 'spouse'

"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.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'.".

Approved September 21, 1996.

LEGISLATIVE HISTORY—H.R. 3396:

HOUSE REPORTS: No. 104–664 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 142 (1996):
July 11, 12, considered and passed House.
Sept. 10, considered and passed Senate.

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–664

DEFENSE OF MARRIAGE ACT

JULY 9, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 3396]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3396) to define and protect the institution of marriage, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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★29–006

PURPOSE AND SUMMARY

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

To achieve these purposes, H.R. 3396 has two operative provisions. Section 2, entitled "Powers Reserved to the States," provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex. And Section 3 defines the terms "marriage" and "spouse," for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to "marry" in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.

More specifically, if Hawaii (or some other State) recognizes same-sex "marriages," other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions. With regard to federal law, a decision by one State to authorize same-sex "marriage" would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. H.R. 3396 anticipates these complicated questions by laying down clear rules to guide their resolution, and it does so in a manner that preserves each State's ability to decide the underlying policy issue however it chooses.

I. THE LEGAL CAMPAIGN FOR SAME-SEX "MARRIAGE"

Before discussing the Hawaiian lawsuit, the Committee believes it is important to place that development in its larger context. In particular, it is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual

marriage by gay rights groups and their lawyers. Only then can the Committee's concerns that motivated H.R. 3396 be fully explained and understood.

The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and H.R. 3396 in no way changes that fact. And while state laws may differ in some particulars—for example, with regard to minimum age requirements, the degree of consanguinity, and the like—the uniform and unbroken rule has been that only opposite-sex couples can marry. No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.[1]

Some in our society, however, are not satisfied that marriage should be an exclusively heterosexual institution. In particular, same-sex "marriage" has been an explicit goal of many in the gay rights movement for at least twenty-five years. In 1972, for example, the National Coalition of Gay Organizations called for the "[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or numbers."[2] This campaign, which has also included mass "weddins," has been waged on religious, cultural, and legal fronts.[3]

Beginning in the early 1970s, gay rights advocates periodically filed lawsuits seeking to win the right to same-sex "marriage." According to one commentator, "[o]ver the past twenty-five years, same-sex marriage advocates have mounted over a dozen substantial litigation campaigns seeking judicial legalization of same-sex marriages or judicial recognition of same-sex unions for purposes of qualifying for certain marital benefits."[4] Prior to the Hawaii case, none of these legal challenges succeeded.

In addition to lack of success in the courts, these efforts faced other difficulties. The most important of these has been a persistent reluctance by some within the gay and lesbian movement to embrace the objective of same-sex "marriage."[5] Initially, the major

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[1] In this, the United States is hardly unique; indeed, one authority on family law recently conducted an international survey of marriage laws and concluded that "[a]ll nations permit only heterosexual marriage. At present, same-sex marriage is allowed in no country or state in the world. . . ." *See* Lynn D. Wardle, "International Marriage and Divorce Regulation and Recognition: A Survey," 29 Family L.Q. 497, 500 (Fall 1995).

[2] *Quoted in* William N. Eskridge, Jr., "The Case for Same-Sex Marriage" 54 (Free Press 1996). More recently, the Platform of the 1993 "March on Washington" called for the "legalization of same-sex marriage." *Quoted in* Mark Blasius, "Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic" 175–78 (Temple Univ. Press 1994).

[3] *See generally,* Suzanne Sherman (ed.), "Lesbian and Gay Marriage: Private Commitments, Public Ceremonies" (Temple Univ. Press 1992); *see also* Eskridge, "The Case for Same-Sex Marriage" at 44–62.

[4] See Lynn D. Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage," 1996 B.Y.U. L. Rev. 1, 9. Among the leading cases are: *Baker* v. *Nelson,* 191 N.W.2d 185, 186 (Minn. 1971) (state law limiting marriage to heterosexual unions does not violate Ninth or Fourteenth Amendment to the U.S. Constitution); *Jones* v. *Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (refusal to grant marriage license to lesbian couple does not violate constitutional right to marry, to associate freely, or to the free exercise of religion); *Singer* v. *Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (traditional marriage law does not violate either state or federal constitution); *De Santo* v. *Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (declining to recognize right to common law same-sex marriage); and *Dean* v. *District of Columbia*, 653 A.2d 307 (D.C. 1995) (D.C. Court of Appeals rejected statutory and federal due process and equal protection challenges to traditional marriage law).

[5] Notwithstanding the advances gay rights legal groups have made, the debate within the homosexual community continues, as prominent advocates of same-sex "marriage" still find it necessary to seek to persuade other homosexual activists to support their efforts. *See, e.g.,* Eskridge,

Continued

national gay rights organizations—including the Lambda Legal Defense and Education Fund, a gay and lesbian legal group founded in 1973, and the American Civil Liberties Union, which launched a Lesbian and Gay Rights Project in 1984—were unwilling to make same-sex "marriage" a priority.[6]

But when a lawsuit filed by local gay activists in Hawaii began to show signs of promise, Lambda, the ACLU, and eventually the nation as a whole began to pay attention.[7]

II. THE HAWAII LAWSUIT: *BAEHR* V. *LEWIN*

The legal assault against traditional heterosexual marriage laws achieved its greatest breakthrough in the State of Hawaii in 1993. Because H.R. 3396 was motivated by the Hawaiian lawsuit, the Committee thinks it is important to discuss that situation in some detail.

In December 1990, three homosexual couples—two lesbian and one gay men—filed applications for marriage with the Hawaiian Department of Health ("DOH"), the agency responsible for administering the State's marriage laws.[8] The State denied the applications on the ground that its marriage laws did not permit same-sex couples to marry. In 1991, the three couples filed suit in state court challenging the denial of the marriage licenses as a violation of the Hawaii Constitution.

After the state trial court granted the State's motion for judgment on the pleadings, the plaintiffs appealed to the Hawaii Supreme Court. In May 1993, a highly-fractured five justice Court issued an opinion that has already had profound implications—in Hawaii, to be sure, but also in the other States and, with the introduction of H.R. 3396, in the United States Congress.

Three of the five justices who heard oral arguments in the case before the Hawaii Supreme Court held that the trial court's dismissal on the pleadings had to be reversed.[9] In an opinion for himself and Acting Chief Justice Moon, Justice Levinson held that the denial of marriage licenses to same-sex couples constitutes discrimination on the basis of sex.[10] The two-judge plurality also held that sex is a "suspect category" under the Equal Protection Clause of the Hawaii Constitution, and so ruled that the marriage statute (Haw. Rev. Stat. § 572–1) could be upheld only if the State could satisfy the strict scrutiny test. As Judge Levinson summarized:

"The Case for Same-Sex Marriage," Chapter 3 (entitled "The Debate Within the Lesbian and Gay Community"), and Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique," 21 N.Y.U. Rev. L. & Soc. Change 567 (1994–95).

[6] *See generally* Patricia A. Cain, "Litigating for Lesbian and Gay Rights," 79 Va. L. Rev. 1551, 1586 (1993) (noting that "[t]ogether with the ACLU, Lambda has helped to shape gay rights litigation across the country.").

[7] *See* Paul M. Barrett, "I Do/No You Don't: How Hawaii Became Ground Zero in Battle Over Gay Marriages," *Wall Street Journal,* June 17, 1996, at A1 (describing reluctance of major gay rights legal organizations to support lawsuit seeking to win right of same-sex "marriage"). Despite this initial caution, Lambda has now signed on as co-counsel for the homosexual plaintiffs in the Hawaiian case, *id.,* and, as explained below, has emerged as the leading strategist in seeking to maximize the impact that case might have.

[8] Because Hawaii does not authorize common law marriages, *see* Haw. Rev. Stat. § 572–1 (1985), the only way to get legally married in that state is to obtain a marriage license from the DOH.

[9] *Baehr* v. *Lewin,* 852 P.2d 44 (Haw. 1993).

[10] *Id.* at 60.

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the State] to overcome the presumption that HRS § 572–1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.[11]

A third justice joined the plurality in voting to reverse the trial court's dismissal,[12] and one justice filed a dissenting opinion.[13]

Following the Supreme Court's ruling in *Baeher,* then, the State confronts a situation whereby their existing heterosexual-only marriage law is "presumed to be unconstitutional,"[14] and the case has been sent back to the trial court to see whether the State can satisfy the very demanding strict scrutiny test. The trial date has been set for September 1996, and there is a strong possibility that the Hawaii courts will ultimately require the State to issue marriage licenses to same-sex couples.

It is, of course, no business of Congress how the Hawaiian Supreme Court interprets the Hawaiian Constitution, and the Committee expresses no opinion on the propriety of the ruling in *Baehr.* But the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers. As Hawaiian State Representative Terrance Tom, Chairman of the House Judiciary Committee, testified at a hearing on H.R. 3396:

> Same-sex marriage was not an issue that arose by submission of proposed legislation to the people's representatives. Instead, it arose because in May of 1993, two members of our state Supreme Court issued an opinion unprecedented in the history of jurisprudence.[15]

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[11] *Id. at* 68, 74.

[12] The third justice to vote for reversal, Justice Burns, concurred only in the result reached in Justice Levinson's opinion. Justice Burns ruled that the "case involves genuine issues of material fact"—namely, whether or not homosexuality is "biologically fated"—that warranted further proceedings by the trial court. *Id.* at 70.

[13] Justice Heen—who, like Justice Burns, was sitting by designation to fill temporary vacancies on the Supreme Court—rejected the plurality's conclusion that heterosexual-only marriage laws constitute sex discrimination because, he wrote, "all males and females are treated alike. . . . Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has." *Id.* at 71 (emphasis in original). Accordingly, Justice Heen believed that the marriage law had only to pass the rational basis test; he would have held that it "is clearly designed to promote the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage and bears a reasonable relationship to that purpose." *Id.* at 74. Finally, he noted that, to the extent the plaintiffs were complaining about the inability to receive certain statutory benefits associated with marriage, "redress of those deprivations is a matter for the legislature. . . . Those benefits can be conferred without rooting out the very essence of a legal marriage." *Id.* at 74.

Justice Heen's dissent indicates that the fifth Justice, Retired Justice Hayashi, whose temporary appointment to the Court expired prior to the filing of the opinion, would have joined the dissent. *Id.* at 48. However, after the initial opinion was issued, the State filed a motion for reconsideration or clarification; by the time the Court ruled on that motion, a new Justice—Justice Nakayama—had joined the Court, and Justice Nakayama joined in Justice Levinson's clarification of the mandate. *Id.* at 74–75. Accordingly, it appears that the final disposition was three justices forming a majority, with Justice Burns concurring in the result only, and Justice Heen dissenting.

[14] *Id.* at 67.

[15] Prepared Statement of Terrance Tom, Member and Chairman of Judiciary Committee, Hawaii House of Representatives ("Tom Prepared Statement"), at Hearing on H.R. 3396, the Defense of Marriage Act, before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (May 15, 1996) ("Subcommittee Hearing").

Rep. Tom also testified that the Supreme Court's ruling has been met with strong resistance on the part of the Hawaiian public and their elected representatives:

> In response to this judicial activism, the 1994 Hawaii Legislature, Democrat and Republican alike, overwhelmingly voted to reject this clearly erroneous interpretation of our State Constitution, and amended our marriage statutes to make clear that a legal marriage in our State can be entered into only by a man and a woman.[16]
>
> This decision by the Legislature followed extensive public hearings throughout the Islands. Thousands of Hawaii citizens have submitted testimony to the state legislature over the last three years. *It was clear then, and it is clear now, that the people of Hawaii do not want the State to issue marriage licenses to couples of the same-sex.*
>
> This Committee should understand that the people of Hawaii are not speaking out of ignorance or uncertainty. Both of our daily newspapers are strong supporters of same-sex marriage and have editorialized repeatedly in favor of issuing marriage licenses to couples of the same sex.
>
> Yet polls commissioned by the newspapers themselves show that *opposition to same-sex marriages has grown as the trial on this issue nears.*
>
> The most recent poll taken in February shows that 71% of the Hawaii public believe that marriage licenses should be issued only to male-female couples. Only 18% believe the state should license same-sex marriages.[17]

Just as it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual "marriage" upon an unwilling Hawaiian public, the Hawaii lawsuit also presents the possibility that other States could, through the protracted and complex process of litigation, be forced to follow suit. The Defense of Marriage Act is an effort by Congress to clarify the extremely complicated situation that may result from one State's recognition of same-sex "marriage." The Committee turns now to a brief description of the implications of *Baehr* v. *Lewin* for other States and the federal government.[18]

III. INTERSTATE IMPLICATIONS OF *BAEHR* V. *LEWIN*: THE FULL FAITH AND CREDIT CLAUSE

H.R. 3936 is inspired, again, not by the effect of *Baehr* v. *Lewin* inside Hawaii, but rather by the implications that lawsuit threat-

[16] Here, Rep. Tom is referring to the Legislature's enactment of a 1994 law which amended the marriage law to make it unmistakably clear that the Legislature intended to permit marriage only between one man and one woman. The Legislature also asserted that the marriage statute was "intended to foster and protect the propagation of the human race through male-female marriages." 1994 Haw. Sess. Laws 217.

[17] Tom Prepared Statement at 2.

[18] It has been suggested by some opponents of this Act that the legislation is premature on the ground that no State currently recognizes same-sex "marriage." Of course, to argue that this bill is premature concedes that such a measure at the right time might be appropriate. The Committee believes the right time is now. *Baehr* v. *Lewin* is poised for a final resolution, and the Committee believes it would be profoundly unwise—and even irresponsible—to permit the attendant uncertainty to stand.

ens to have on the other States and on federal law. The Committee will briefly explain here the interstate implications that the Hawaiian homosexual marriage case might have.

Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex "marriage." And the primary mechanism for nationalizing their break-through in Hawaii will be the Full Faith and Credit Clause of the U.S. Constitution.

In a memorandum entitled "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr* v. *Lewin*?," Evan Wolfson, Director of the Marriage Project for the Lambda Legal Defense and Education Fund, Inc. ("Lambda"), sets forth the organization's strategy for seeking to extend their impending victory in Hawaii nationwide.[19] The memorandum is noteworthy both for what it reveals about the strategy the gay rights groups intend to pursue, and because it shows how plausible that strategy is.

First, as indicated by the title of the memorandum, Lambda is clearly optimistic that they will ultimately prevail in Hawaii. Second, the gay rights groups and gay men and lesbians across the country are preparing to take advantage of the Hawaii victory. As the Lambda memorandum states:

> Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions.[20]

Third, Lambda and other gay rights legal organizations are standing ready to assist same-sex couples who travel to Hawaii to obtain a marriage license to win full legal recognition of their newly-acquired status in their home State.[21]

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[19] This March 20, 1996, memorandum ("Lambda Memorandum"), is included in the report of the May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution.

[20] Lambda Memorandum at 2. In addition to Lambda's expectations, there have been numerous media reports that gays and lesbians throughout the United States are eagerly awaiting the opportunity to "marry" in Hawaii. *See, e.g.,* Dunlap, "Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door," *New York Times,* March 6, 1996, at A13 (quoting one lesbian activist as stating that "California is going to have literally thousands of couples who are going to come back from Hawaii expecting their marriage to be treated with the respect and dignity given every other marriage.")

[21] In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got "married," returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian "marriage" license. As we discuss below, a state or federal court confronting such a claim would probably be justified in declining to give effect to the Hawaiian license. But assuming (as it seems reasonable to do) that gay rights groups will find a judge somewhere in Ohio to accept their arguments, what would the result be? In general, the Committee believes that at least two things would occur.

First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. Upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality—these and other important legitimate governmental purposes would be undermined by forcing another State to recognize same-sex unions. Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of government marital benefits. For example, in *Baehr* v. *Lewin*, the court listed fourteen specific "rights and benefits" that are available only to married couples. 852 P.2d at 59 (listing benefits relating to income tax; public assistance; community property; dower, courtesy, and inheritance; probate; child custody and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others). The Committee would add that recognizing same-sex "marriages" would almost certainly have implications on the ability of homosexuals to adopt children as well.

Of course, in the likely event Hawaii ultimately is forced by its courts to issue marriage licenses to same-sex couples, it will be the only State in the country to do so. Accordingly, when homosexual couples from other States travel to Hawaii, obtain a marriage license, and return home demanding recognition of their license, an important and complex legal situation will be presented. At bottom, the issue reduces to a choice-of-law question: Which law governs—Hawaii's, as represented by the "marriage" license, or the law of the forum state, which does not recognize same-sex "marriage"? That is, must a sister State adopt Hawaii's policy, or may it follow its own?

Lambda phrases the issue slightly differently: "Will these [same-sex couples'] validly-contracted [Hawaiian] marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?" Their response—"We at Lambda believe that the correct answer to these questions is 'Yes.'"[22]—is not without support.

The general rule for determining the validity of a marriage is *lex celebrationis*—that is, a marriage is valid if it is valid according to the law of the place where it was celebrated.[23] States observing that rule would, of course, presumptively recognize as valid a same-sex "marriage" license from Hawaii. There is, however, an important exception to the general rule, well captured by the relevant section of the Restatement of Conflicts:

> A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.[24]

It is thus possible that a State, confronted with a resident same-sex couple possessing a "marriage" license from Hawaii, could decline to recognize that "marriage" on the grounds that to do so would offend that State's "strong public policy."

Because no State in the United States has ever recognized same-sex "marriages," it would seem that courts in other States would be justified in invoking this exception. The matter is somewhat more complicated, however, as the U.S. Constitution speaks to this issue. The first sentence of the Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[25] Lambda believes, quite sensibly, that this clause provides

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[22] Lambda Memorandum at 2. The memorandum then proceeds to survey "the legal grounds for gaining nationwide recognition of the marriages same-sex couples contract in Hawaii. These grounds include the U.S. Constitution, the common law, and statutory law." *Id.* at 2–3.

[23] For example, the Uniform Marriage and Divorce Act, which has been adopted by twenty-three States, provides that "[a]ll marriages contracted . . . outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted . . . are valid in this State." Unif. Marriage and Divorce Act § 210, 9A U.L.A. 147.

[24] *Restatement (Second) of Conflicts of Law* § 283(2) (1971).

[25] U.S. Const. art. IV, § 1. The second sentence of the Full Faith and Credit Clause states: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Committee will discuss this provision in detail below.

both their strongest and most advantageous argument for forcing other States to recognize same-sex "marriage" licenses issued by Hawaii.[26]

Notwithstanding the seemingly mandatory terms of the Full Faith and Credit Clause, the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State's laws.[27] Indeed, despite the presumption created by *lex celebrationis* and reinforced by the Full Faith and Credit Clause, the Committee believes that a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to a same-sex "marriage" license from another State.[28]

But even as the Committee believes that States currently possess the ability to avoid recognizing a same-sex "marriage" license from another State, it recognizes that that conclusion is far from certain. For example, there is a burgeoning body of legal scholarship—some of it inspired directly by the Hawaiian lawsuit—to the effect that the Full Faith and Credit Clause does mandate extraterritorial recognition of "marriage" licenses given to homosexual couples.[29] More significantly, Lambda agrees with that analysis, and clearly intends to press that argument in the course of its post-Hawaii, state-by-state litigation to nationalize same-sex "marriage."[30]

Most important of all, however, is the evident disquiet in the various States created by the Hawaii situation. The Committee is struck by the fact that so many States have been moved by the uncertain interstate implications of the Hawaii litigation to attempt to bolster their own public policy regarding traditional, heterosexual-only marriage laws. As of July 1, 1996, the Committee is informed that 14 States have enacted new laws designed to protect

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[26] Lambda Memorandum at 3–4 ("Successfully establishing that the Full Faith and Credit Clause requires all states to recognize a marriage legally contracted in another State would yield the most sweeping possible outcome, and, as a constitutional holding, the one most immune from legislative tampering. *We believe that full faith and credit recognition is mandated by the plain meaning of the Full Faith and Credit Clause,* and by basic federalist imperatives that unite this into one country and permit us to travel, work, and live in America as we have come to today. Simply put, all Americans, gay and non-gay alike, would be best served by assuring full faith and credit for marriages validly contracted in any U.S. state.") (emphasis added); *see also, e.g.,* Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 Col. L. Rev. 249, 296 (1992) ("[T]he Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives it own law—to treat the law of sister states as equal in authority to its own").

[27] *See, e.g., Nevada* v. *Hall,* 440 U.S. 410, 424 (1979) ("the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 294 U.S. 532, 547 (1935) ("A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum [State], would lead to the absurd result that, whenever conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.").

[28] The Committee endorses, therefore, the conclusion of Professor Lynn Wardle, who testified before the Subcommittee on the Constitution that, in his professional opinion, "it would not violate the full faith and credit clause . . . for a second state to refuse to recognize a same-sex marriage legalized in Hawaii when the second state has a strong public policy against same-sex marriage and when the same-sex couple lives in or has some other significant contact with the second state." *See* Prepared Statement of Lynn Wardle, Professor of Law, Brigham Young University ("Wardle Prepared Statement"), Subcommittee hearing.

[29] For a partial list of such articles, *see* Wardle, 1996 B.Y.U. L. Rev. at 17, n.65.

[30] *See* Lambda Memorandum at 9 ("[W]hen state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of *specific parties,* the other states *must* give those acts, records, or proceedings the same effect they would have at home. . . . Since a marriage . . . falls into the category of such adjudications or creations, there can be no policy balancing regarding their recognition.") (Emphasis in original) That is to say, Lambda will argue that there can be no "public policy" exception to the claim that other States must give effect to the Hawaiian "marriage" licenses.

against an impending assault on their marriage laws.[31] In addition, legislation has been defeated, withdrawn, or vetoed in 16 States, and is pending in 7 States.[32]

The fact that these States are sufficiently concerned about their ability to defend their marriage laws against the threat posed by the Hawaii situation is enough to persuade the Committee that federal legislation is warranted. The States, after all, are best-positioned to assess the legal situation within their own State; that so many of them are not content to rely on the amorphous "public policy" exception reveals that congressional clarification and assistance is both necessary and appropriate.[33] Section 2 of H.R. 3396 responds to this need.

IV. IMPLICATIONS OF *BAEHR* v. *LEWIN* ON FEDERAL LAW

Recognition of same-sex "marriages" in Hawaii could also have profound implications for federal law as well. The word "marriage" appears in more than 800 sections of federal statutes and regulations, and the word "spouse" appears more than 3,100 times. With very limited exceptions,[34] these terms are not defined in federal law.

With regard to the issue of same-sex "marriages," federal reliance on state law definitions has not, of course, been at all problematic. Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married. And the Committee believes it 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.[35]

But if Hawaii does ultimately permit homosexuals to "marry," that development could have profound practical implications for federal law.[36] For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits. While there are literally hundreds of examples that would illus-

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[31] The States are: Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah.

[32] The Committee heard testimony from two state legislators regarding their efforts to enact legislation that would strengthen their State's public policy against same-sex "marriage." See Prepared Statement of Marilyn Musgrave, Member, Colorado State House of Representatives ("Musgrave Prepared Statement"), Subcommittee Hearing; Prepared Statement of Deborah Whyman, Member, Michigan State House of Representatives, Subcommittee Hearing.

[33] Such assistance seems particularly appropriate in situations like Colorado. The Colorado Legislature passed legislation clarifying that their marriage laws restricted marriage to unions between one man and one woman, and would have declared that same-sex "marriage" offends the public policy of the States. Governor Romer, however, vetoed the bill. Accordingly, Colorado now stands particularly exposed to an argument—sure to be made by gay rights groups—that its laws currently do not evince a public policy sufficiently strong to ward off a Hawaiian same-sex "marriage" license. *See* Musgrave Prepared Statement at 2.

[34] *See, e.g.,* 29 U.S.C. 2611(13) (1965) (provision of the Family and Medical Leave Act defining "spouse" as "a husband or wife, as the case may be.").

[35] Wardle Prepared Statement at 9 ("[I]t is beyond question that Congress has never actually intended to include same-sex unions when it used the terms 'marriage' and 'spouse.'").

[36] *See id.* ("Since the differences in state marriage laws (though numerous) were relatively minor, and since no state allowed such radical reconstruction of marriage as same-sex marriage, the passive presumption of adoption of state law has worked quite well. If some state legalized same-tax marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely, the essential fungibility of the concepts of marriage from one state to another.").

trate this point, the Committee will recount two that relate to events that have actually occurred.

In the 1970s, Richard Baker, a male, demanded increased veterans' educational benefits because he claimed James McConnell, another male, as his dependent spouse. When the Veterans Administration turned down his request, Baker filed suit. The outcome turned on the federal statue (38 U.S.C. § 103(c)) that made eligibility for the benefits contingent on his State's (Minnesota's) definition of "spouse" and "marriage." The federal courts rejected the claim for additional benefits on the ground that the Minnesota Supreme Court has already determined that marriage (which it defined as "the state of union between persons of the opposite sex") was not available to persons of the same sex.[37]

In a similar fashion, the Family and Medical Leave Act of 1993, Pub. L. 103–3, 107 Stat. 6, requires that employees be given unpaid leave to care for a "spouse" who is ill. Shortly before passage of the Act in the Senate, Senator Nickles attached an amendment defining "spouse" as "a husband or wife, as the case may be."[38] The amendment proved essential when the regulations were written.

When the Secretary of Labor published the proposed implementing regulations, he noted that a "considerable number of comments" were received urging that the definition of "spouse" "be broadened to include domestic partners in committed relationships, including same-sex relationships." The Nickles amendment, however, precluded such an expansive redefinition of "spouse." The Secretary quoted Sen. Nickles' floor statement on the amendment:

> This is the same definition [of "spouse"] that appears in Title 10 of the United States Code [10 U.S.C. § 101]. Under this amendment, an employer would be required to give an eligible female employee unpaid leave to care for her husband and an eligible male employee unpaid leave to care for his wife. No employer would be required to grant an eligible employee unpaid leave to care for an unmarried domestic partner. This simple definition will spare us a great deal of costly and unnecessary litigation. Without this amendment, the bill would invite lawsuits by workers who unsuccessfully seek leave on the basis of illness of their unmarried adult companions.

"Accordingly," the Secretary continued, "given this legislative history, the recommendations that the definition of spouse be broadened cannot be adopted."[39]

These two episodes highlight the potential impact that a change in Hawaiian marriage law could have on federal law.[40] Section 3 of H.R. 3396 responds to these considerations.

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[37] *See McConnell* v. *Nooner*, 547 F.2d 54 (8th Cir. 1976) (relying on *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971)).

[38] 29 U.S.C. § 2611(13)(1995).

[39] 60 Fed. Reg. 2180, 2191–92 (Jan. 6, 1995).

[40] For some other examples, *see* Wardle Prepared Statement at 10–14.

V. THE GOVERNMENTAL INTERESTS ADVANCED BY H.R. 3396

Of course, the foregoing discussion would hardly support—much less necessitate—congressional action if the Committee were supportive of (or even indifferent to) the notion of same-sex "marriage." But the Committee does not believe that passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process. H.R. 3396 is a modest effort to combat that strategy.

In this section of the Report, the Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.

A. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING AND NURTURING THE INSTITUTION OF TRADITIONAL, HETEROSEXUAL MARRIAGE

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony;* the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[41]

When Justice Scalia recently quoted this passage in his dissenting opinion in *Romer* v. *Evans,* he wrote: "I would not myself indulge in such official praise for heterosexual monogamy, because I think it is no business of the courts (*as opposed to the political branches*) to take sides in this culture war."[42] Congress, of course, is one of the "political branches," and the Committee believes that it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.

H.R. 3396, is appropriately entitled the "Defense of Marriage Act." The effort to redefine "marriage" to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.[43] To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status.[44] Is it, as many advocates of same-sex

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[41] *Murphy* v. *Ramsey,* 114 U.S. 15, 45 (1885) (emphasis added)(rejecting constitutional challenge to a federal statute that denied the right to vote in federal territories to persons involved in polygamous relationships).

[42] *Romer* v. *Evans,* 116 S. Ct. 1620, slip op. at 18 (1996) (Scalia, dissenting) (emphasis added).

[43] *See, e.g.,* William J. Bennett, "But Not a Very Good Idea, Either," *The Washington Post,* May 21, 1996, at A19 ("Recognizing the legal union of gay and lesbian couples would represent a profound change in the meaning and definition of marriage. Indeed, it would be the most radical step ever taken in the deconstruction of society's most important institution.").

[44] *See, e.g., Baehr,* 852 P.2d at 59 (providing partial list of marital benefits provided under Hawaiian law).

"marriage" claim, to grant public recognition to the love between persons?[45] We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified:

> There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.[46]

No, as Professor Arkes continued:

> The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage.[47]

And to discover the "ends of marriage," we need only reflect on this central, unimpeachable lesson of human nature:

> We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, *it is hard to detach marriage from what may be called the "natural teleology of the body": namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child*.[48]

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the connection between marriage and children:

> The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throughout history. Why is marriage our most universal social institution, found prominently in

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[45] *See, e.g.,* Prepared Statement of Andrew Sullivan ("Sullivan Prepared Statement") at 2, Subcommittee hearing (gay advocate of same-sex "marriage" stating: "People ask us why we want marriage, but the answer is obvious. It is the same reason that anyone would want marriage. After the crushes and passions of adolescence, some of us are lucky enough *to meet the person we truly love.* And we want to commit to that person in front of our family and country for the rest of our lives. It's the most natural, the most simple, the most human instinct in the world.") (emphasis added).

[46] Prepared Statement of Hadley Arkes, Ney Professor of Jurisprudence and America Institutions, Amherst College ("Arkes Prepared Statement") at 11, Subcommittee Hearing.

[47] *Id.*

[48] *Id.* at 11–12 (emphasis added); *see also* Bennett, *The Washington Post,* May 21, 1996, at A19 ("'Marriage' is not an arbitrary construct; it is an 'honorable estate' based on the different, complementary nature of men and women—and how they refine, support, encourage, and complete one another.").

> virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.[49]

And from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:

> Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.[50]

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

There are two standard attacks on this rationale for opposing a redefinition of marriage to include homosexual unions. First, it is noted that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children.[51] But this is not a serious argument. Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so. Such steps would be both offensive and unworkable. Rather, society has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.

Second, it will be objected that there are greater threats to marriage and families than the one posed by same-sex "marriage," the most prominent of which is divorce. There is great force in this argument—as the Council on Families has noted:

> The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed par-

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[49] *"Marriage in America: A Report to the Nation"* 10 (Council on Families in America 1995), *reprinted in* David Popenoe, et al., eds., "Promises To Keep: Decline and Renewal of Marriage in America" 303 (Rowman & Littlefield 1996).

[50] *Id.; see also* Arkes Prepared Statement at 12 ("We do not need a marriage to mark the presence of love, but a marriage marks something matchless in a framework for the begetting and nurturance of children. It means that a child enters the world in a framework of lawfulness, with parents who are committed to her care and nurturance for the same reason that they are committed to each other."); Barbara Dafoe Whitehead, "The War Between the Sexes," *The American Enterprise* 26 (May/June 1996) ("Marriage is the central cultural resource for reconciling men and women's separate natures and different reproductive strategies. Indeed, the most important purpose of marriage is to unite men and women in a formal partnership that will last through the prolonged period of dependency of a human child."); Hillary Rodham Clinton, "It Takes a Village" 50 (Simon & Schuster 1995) ("Although the nuclear family, consisting of an adult mother and father and the children to whom they are biologically related, has proven the most durable and effective means of meeting children's needs over time, it is not the only form that has worked in the past or the present.").

[51] *See, e.g.* Sullivan Prepared Statement at 4 ("You will be told that marriage is only about the rearing of children. But we know that isn't true. We know that our society grants marriage licenses to people who choose not to have children, or who, for some reason, are unable to have children.").

> enthood—has failed. It has created terrible hardships for children, incurred insupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

But the fact that marriage is embattled is surely no argument for opening a new front in the war. Indeed, it is precisely now, when marriage and the family are most in need of nurturing and care, that we should be most wary of conducting new experiments with the institution. As William Bennett, commenting on same-sex "marriage," has observed:

> The institution of marriage is already reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births. We have reaped the consequences of its devaluation. It is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the keystone in the arch of civilization.[52]

In short, government has an interest in defending and nurturing the institution of traditional marriage, and H.R. 3396 advances that interest.[53]

B. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN DEFENDING TRADITIONAL NOTIONS OF MORALITY

There are, then, significant practical reasons why government affords preferential status to the institution of heterosexual marriage. These reasons—procreation and child-rearing—are in accord with nature and hence have a moral component. But they are not—or at least are not necessarily—moral or religious in nature.

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This

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[52] Bennett, *The Washington Post,* May 21, 1996, at A19.

[53] Closely related to this interest in protecting traditional marriage is a corresponding interest in promoting heterosexuality. While there is controversy concerning how sexual "orientation" is determined, "there is good reason to think that a very substantial number of people are born with the potential to live either gay or straight lives." E.L. Pattullo, "Straight Talk About Gays," *Commentary* 21 (December 1992). "[R]eason suggest[s] that we guard against doing anything which might mislead wavering children into perceiving society as indifferent to the sexual orientation they develop." *Id.* at 22; *see also* Bennett, *The Washington Post* A19 (May 21, 1996) ("Societal indifference about heterosexuality and homosexuality would cause a lot of confusion."); Deneen L. Brown, "Teens Ponder: Gay, Bi, Straight? Social Climate Fosters Openness, Experimentation," *The Washington Post* A1 (July 15, 1993) (recounting interviews with dozens of teenagers, school counselors, and parents regarding increased "sexual identity confusion" apparently reflecting increasing social acceptance of homosexuality). Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality, for as Dr. Pattullo notes, "to the extent that society has an interest both in reproducing itself and in strengthening the institution of the family . . . there is warrant for resisting the movement to abolish all societal distinctions between homosexual and heterosexual." Pattullo, *Commentary* at 23.

judgment entails both moral disapproval of homosexuality,[54] and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: "[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate. . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral." [55]

It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

C. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PROTECTING STATE SOVEREIGNTY AND DEMOCRATIC SELF-GOVERNANCE

The Committee is struck by the fact that this entire issue of same-sex "marriage," like so much of the debate related to matters of sexual morality, is being driven by the courts. Of course, by declaring the right to an abortion to be constitutionally protected, the federal courts have largely assumed control over the course of abortion law in this country. And whether one agrees or disagrees with the Court's jurisprudence in that area, all must concede that as the degree of court involvement increases, to that extent democratic self-governance over such matters is diminished.

In some contexts, of course, it is legitimate for courts to take precedence over decision-making by the representative branches of government. But what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-assigned or authorized role. As Professor Arkes testified before the Subcommittee on the Constitution, in the area of sexual morality, "we have a campaign [being] waged to transform the culture through the law, or through the control of the courts." He suggests, further, that this "program of cultural change cannot be accompanied through legislatures and elections."

> No voting public in this country has ever voted to install abortion on demand at every stage of pregnancy, and it is hard to imagine a scheme of same-sex marriage voted in

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[54] *See, e.g., Bowers* v. *Hardwick* 478 U.S. 186, 196 (1986) (rejecting constitutional challenge to Georgia law criminalizing homosexual sodomy and holding that the law served the rational purpose of embodying "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."); "The Homosexual Movement; A Response by the Ramsey Colloquium," *First Things* 15 (March 1994) (noting that "the Jewish and Christian traditions have, in a clear and sustained manner, judged homosexual behavior to be morally wrong.").

[55] "*Markup Session: H.R. 3396, the Defense of Marriage Act,*" Committee on the Judiciary, Subcommittee on the Constitution, 104th Cong., 2d Sess. 87 (May 30, 1996) (Statement of Chairman Hyde); *see also* Remarks by President Bill Clinton at the National Prayer Breakfast, 32 Weekly Comp. Pres. Doc. 135 (Feb. 5, 1996) (emphasis added):

> [W]e know that ultimately this is an affair of the heart—an affair of the heart that has enormous economic and political and social implications for America, but, most importantly, *has moral implications, because families are ordained by God as a way of giving children and their parents the chance to live up to the fullest of their God-given capacities.* And when we save them and strengthen them, we overcome the notion that self-gratification is more important than our obligations to others; we overcome the notion that is so prevalent in our culture that life is just a series of response to impulses, and instead is a whole pattern, with a fabric that should be pleasing to God.

> by the public in a referendum. These things must be imposed by the courts, if they are to be imposed at all, and that concert to impose them has been evident, on gay rights, over the past few years.[56]

The Defense of Marriage Act is motivated in part by a desire to protect the ability of elected officials to decide matters related to homosexuality, Again, Professor Arkes captures the point:

> Against the concert of judges, remodeling on their own laws on marriage and the family, the Congress weighs in to supply another understanding, and a rival doctrine. But it happens, at the same time, to be an ancient understanding and a traditional doctrine. The Congress would proclaim it again now, and suggest that the courts take their bearing anew from this doctrine, state anew, brought back and affirmed by officers elected by the people.[57]

By taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation, Congress will to that extent protect the ability of the elected officials in each State to deliberate on this important policy issue free from the threat of federal constitutional compulsion.

The Committee was favorably impressed by Rep. Tom's testimony on this point of democratic self-governance:

> . . . I do know this: No single individual, no matter how wise or learned in the law, should be invested with the power to overturn fundamental social policies against the will of the people.
>
> If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states, *failure to act is a dereliction of the responsibility you were invested with by the voters*.[58]

And again:

> Changes to public policies are matters reserved to legislative bodies, and not to the judiciary. It would indeed be a fundamental shift away from democracy and representative government should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several states, based upon a fun-

[56] Arkes Prepared Statement at 18. Professor Arkes' statement was prepared before the Supreme Court issued its decision in *Romer* v. *Evans,* 116 S. Ct. 1620 (1996), a decision that must serve as Exhibit A is supported of the phenomenon he describes. *See infra* "A Short Note on *Romer* v. *Evans"; see also Romer,* slip op. at 1 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite."); *id.* at 2 ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are elected, pronouncing that 'animosity' toward homosexuality is evil.").

[57] Arkes Prepared Statement at 25; *see also id.* at 26 ("The Congress, with this move, brings this issue back into a public arena of deliberation; it makes this a subject of discussion on the part of citizens, and not merely of judges and lawyers.").

[58] Tom Prepared Statement at 3 (emphasis added).

damentally flawed interpretation of the Hawaii State Constitution.

Federal legislation to prevent this result is both necessary and appropriate.[59]

The Committee fully endorses the views expressed by Rep. Tom. It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. H.R. 3396 advances this most important government interest.

D. H.R. 3396 ADVANCES THE GOVERNMENT'S INTEREST IN PRESERVING SCARCE GOVERNMENT RESOURCES

Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government.[60] For example, survivorship benefits paid to the surviving spouse of a veteran of the Armed Services plainly cost the federal government money.

If Hawaii (or some other State) were to permit homosexuals to "marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and surviving spouses of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses. To deny federal recognition to same-sex "marriages" will thus preserve scarce government resources, surely a legitimate government purpose.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.R. 3396 on May 15, 1996. Testimony was received from thirteen witnesses: Honorable Terrance W.H. Tom, Hawaii State House of Representatives; Honorable Edward Fallon, Iowa State House of Representatives; Honorable Marilyn Musgrave, Colorado State House of Representatives; Honorable Ernest Chambers, Nebraska State Senate; Honorable Deborah Whyman, Michigan State House of Representatives; Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College; Andrew Sullivan, Editor, The New Republic; Dennis Prager, Author and Radio Talk Show Commentator, KABC/Los Angeles; Nancy McDonald, Tulsa, Oklahoma; Lynn Wardle, Professor of Law, Brigham Young University Law School; Elizabeth Birch, Executive Director, Human Rights Campaign; Rabbi David Saperstein, Director, Religious Action Center, Union of American Hebrew Congregations; Jay Alan Sekulow, Chief Counsel, American Center For Law and Justice; with additional material submitted by Maurice Holland, Professor of Law, University of Oregon School of Law.

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[59] Tom Prepared Statement at 4.

[60] For a partial list of federal government programs that might be affected by state recognition of same-sex "marriage," *see* "Compilation and Overview of Selected Federal Laws and Regulations Concerning Spouses," American Law Division, Congressional Research Service to the Honorable Tom DeLay, June 20, 1996.

COMMITTEE CONSIDERATION

On May 30, 1996, the Subcommittee on the Constitution met in open session and ordered reported the bill H.R. 3396, by a vote of 8 to 4, a quorum being present. On June 11 and 12, 1996, the Committee met in open session and ordered reported favorably the bill H.R. 3396 without amendment by a vote of 20 to 10, a quorum being present.

VOTE OF THE COMMITTEE

The committee then considered the following amendments, none of which was adopted.

1. An amendment by Mr. Frank to strike the definition of "marriage" and "spouse" (Section 3) from the bill. The amendment was defeated by a 13–19 rollcall vote.

ROLLCALL VOTE NO. 1

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mr. Conyers	Mr. Moorhead
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Reed	Mr. Coble
Mr. Nadler	Mr. Smith (TX)
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Becerra	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson-Lee	Mr. Buyer
Ms. Waters	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher

2. An amendment by Mrs. Schroeder, as amended by Ms. Jackson-Lee, to modify the definition of "marriage" as set forth in the bill. The amendment was defeated by a 9–20 rollcall vote (1 vote present).

ROLLCALL VOTE NO. 2

AYES	NAYS	PRESENT
Mrs. Schroeder	Mr. Hyde	Mr. Frank
Mr. Berman	Mr. Moorhead	
Mr. Boucher	Mr. Sensenbrenner	
Mr. Reed	Mr. McCollum	
Mr. Scott	Mr. Gekas	
Mr. Becerra	Mr. Coble	
Ms. Lofgren	Mr. Smith (TX)	
Ms. Jackson-Lee	Mr. Gallegly	
Ms. Waters	Mr. Canady	
	Mr. Goodlatte	
	Mr. Buyer	
	Mr. Hoke	
	Mr. Bono	
	Mr. Heineman	
	Mr. Bryant (TN)	
	Mr. Chabot	
	Mr. Flanagan	
	Mr. Barr	
	Mr. Nadler	
	Mr. Watt	

3. An amendment by Mr. Flanagan to strike the words "between persons of the same sex" from Section 2 of the bill, thereby authorizing States to decline to give effect to any marriage celebrated in another State. The amendment was defeated by a 9–19 rollcall vote.

ROLLCALL VOTE NO. 3

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mrs. Schroeder	Mr. Sensenbrenner
Mr. Frank	Mr. McCollum
Mr. Berman	Mr. Gekas
Mr. Nadler	Mr. Coble
Mr. Scott	Mr. Smith (TX)
Mr. Becerra	Mr. Gallegly
Ms. Jackson-Lee	Mr. Canady
Ms. Waters	Mr. Goodlatte
	Mr. Buyer
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher
	Mr. Watt
	Ms. Lofgren

4. An amendment by Mr. Frank to insert language which would suspend the bill's definition of "marriage" and "spouse" in any State that has, by legislation or citizen initiative or referendum, otherwise defined the terms. The amendment was defeated by a rollcall vote of 8–14.

ROLLCALL VOTE NO. 4

AYES	NAYS
Mr. Flanagan	Mr. Hyde
Mrs. Schroeder	Mr. Gekas
Mr. Frank	Mr. Coble
Mr. Berman	Mr. Smith (TX)
Mr. Reed	Mr. Gallegly
Mr. Nadler	Mr. Canady
Mr. Scott	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Boucher

5. An amendment by Mrs. Schroeder. The Schroeder amendment would have disqualified legal unions following a "no fault" divorce of either husband or wife from the definition of "marriage" for purposes of the bill. The amendment was defeated by a 3–22 rollcall vote (1 vote present).

ROLLCALL VOTE NO. 5

AYES	NAYS	PRESENT
Mrs. Schroeder	Mr. Hyde	Mr. Frank
Mr. Reed	Mr. Moorhead	
Ms. Jackson-Lee	Mr. Sensenbrenner	
	Mr. McCollum	
	Mr. Gekas	
	Mr. Coble	
	Mr. Smith (TX)	
	Mr. Gallegly	
	Mr. Canady	
	Mr. Goodlatte	
	Mr. Buyer	
	Mr. Hoke	
	Mr. Bono	
	Mr. Heineman	
	Mr. Bryant (TN)	
	Mr. Chabot	
	Mr. Flanagan	
	Mr. Barr	
	Mr. Berman	
	Mr. Nadler	
	Mr. Scott	
	Mr. Watt	

6. Final passage. Mr. Hyde moved to report H.R. 3396 favorably to the whole House. The bill was adopted by a rollcall vote of 20–10.

ROLLCALL VOTE NO. 6

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorhead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Berman
Mr. Gekas	Mr. Nadler
Mr. Coble	Mr. Scott
Mr. Smith (TX)	Mr. Watt
Mr. Gallegly	Mr. Becerra
Mr. Canady	Ms. Lofgren
Mr. Goodlatte	Ms. Jackson-Lee
Mr. Buyer	
Mr. Hoke	
Mr. Bono	
Mr. Heineman	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Flanagan	
Mr. Barr	
Mr. Boucher	
Mr. Reed	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3396, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 18, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3396, the Defense of Marriage Act, as ordered reported by the House Committee on the Judiciary on June 12, 1996. CBO estimates that enacting H.R. 3396 would result in no cost to the federal government. Because enactment of H.R. 3396 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would define "marriage" under federal law as the legal union between one man and one woman. H.R. 3396 also would allow each state to decide for itself what legal status it would give to another state's same-sex marriages. Under current law, the federal government recognizes marriages as defined by state laws for purposes of providing certain federal benefits to spouses. Currently, no states recognize same-sex marriages. Enacting this bill would prohibit any future federal recognition of such marriages and would maintain the current status of federal programs that provide benefits to spouses. Hence, CBO estimates that enacting H.R. 3396 would result in no cost to the federal government.

This bill would impose no intergovernmental or private-sector mandates as defined in Public Law 104–4, and would have no direct impact on the budgets of state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3396 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section provides that this Act may be cited as the "Defense of Marriage Act."

SECTION 2. POWERS RESERVED TO THE STATES

Section 2 of the Defense of Marriage Act would amend chapter 115 of Title 28 of the United States Code by adding after section 1738B a new section—section 1738C—entitled "Certain acts, records, and proceedings and the effect thereof." This section authorizes States to decline to give effect to marriage licenses from another State if they relate to "marriages" between persons of the same sex.

This section provides that "[n]o State . . . shall be required to give effect" to same-sex "marriage" licenses issued by another State. The Committee would emphasize the narrowness of this provision. Section 2 merely provides that, in the event Hawaii (or some other State) permits same-sex couples to "marry," other States will not be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize that "marriage," or any right or claim arising from it. It will not forestall or in any way affect developments in Hawaii, or, for that matter, in any other State. Indeed, nothing in this (or any other) section of the Act would either prevent a State on its own from recognizing same-sex "marriages," or from choosing to give binding legal effect to same-sex "marriage" licenses issued by another State.[61]

Instead, Section 2 is concerned exclusively with the potential interstate implications that might result from a decision by one State to issue marriage licenses to same-sex couples. The Committee is concerned that, if Hawaii recognizes same-sex "marriages," gay and lesbian couples will fly to Hawaii, get "married," and return to their home State to seek full legal recognition of their new status. In furtherance of that strategy, gay rights lawyers will argue that such recognition is required by the terms of the Full Faith and Credit Clause.

This may or may not be the case. Because no State has ever recognized homosexual "marriage," we simply cannot know exactly how courts will rule on the Full Faith and Credit Clause issue. As a result, we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States.[62] While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex "marriages" celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

The Committee therefore believes that this situation presents an appropriate occasion for invoking our congressional authority under the second sentence of the Full Faith and Credit Clause to enact legislation prescribing what (if any) effect shall be given by the States to the public acts, records, or proceedings of other States relating to homosexual "marriage." The Full Faith and Credit Clause reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every

[61] The effect of Section 2 flows from its purpose. Section 2 is intended to permit each State to decide this important policy issue for itself, free from any possible constitutional compulsion that might result from the Full Faith and Credit Clause. Thus, if a State were ever to choose (either through the legislative process or by popular vote) to permit homosexual couples to marry, Section 2 would have no effect on that decision in that State. Section 2 would simply mean that no other State would be required to give effect to the resulting same-sex "marriage" licenses. Likewise, if a State is forced by its own courts to issue "marriage" licenses to homosexual couples (as Hawaii's courts are prepared to do), again, Section 2 in no way affects that development. Finally, if a State, applying its own choice of law or other principles, decides (legislatively or through the judicial process) to recognize as valid same-sex "marriages" celebrated in a different State, in that situation too Section 2 has no effect.

[62] *See, e.g.,* Wardle Prepared Statement at 22–24; Prepared Statement of Jay Alan Sekulow, Chief Counsel, The American Center for Law and Justice, at 10–11, Subcommittee hearing, ("It is not possible to predict with certainty, however, how courts will apply this [public policy] exception to same-sex marriages.").

> other State. *And the Congress may by general Laws prescribe* the Manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof.*[63]

The second sentence of this Clause—the "Effects Clause"—has not been frequently invoked by Congress;[64] indeed, as one respected treatise notes regarding the Effects Clause, "there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause."[65]

But this much is clear: The Effects Clause is an express grant of authority to Congress to enact legislation to "prescribe" the "effect" that "public acts, records, and proceedings" from one State shall have in sister States. To state it slightly differently, Congress is empowered to specify by statute how States are to treat laws from other States. Read together, the two sentences of Article IV, section 1 logically suggest this interpretation: While full faith and credit is the rule—that is, while States are generally obligated to treat laws of other States as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.[66] Professor Maurice Holland summarized the role of the Effects Clause as follows:

> [The Framers] understood that there would be occasions when the legislative power of two or more states would overlap, thus engendering actual or potential conflict. The delicate, and largely political, task of resolving such conflicts was therefore [assigned] to Congress, with the expectation that it would function as a kind of referee for their settlement when required.[67]

The Founders, in short, wanted to encourage, even to require the States to respect the laws of sister States, but they were aware that it might be necessary to protect against the laws of one State effectively being able to undermine the laws of others under force of the Full Faith and Credit Clause.

That is precisely the situation we now confront with regard to the Hawaii homosexual "marriage" lawsuit. Gay rights lawyers are intending to try to use their victory in Hawaii to undermine the marriage laws of the other 49 States. Because none of the other

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[63] U.S. Const. art. IV, § 1 (emphasis added).

[64] *See* Act of May 26, 1790, ch. 11, 1 Stat. 122, codified at 28 U.S.C. § 1738; Parental Kidnapping Prevention Act of 1980, Pub. L. 96–611, 94 Stat. 3569, codified at 28 U.S.C. § 1738A (requiring States to grant full faith and credit to child custody determinations of other States if consistent with criteria established by Congress); Full Faith and Credit for Child Support Orders Act of 1994, Pub. L. 103–383, 108 Stat. 4064, codified at 28 U.S.C. § 1738B (same with respect to child support orders); Safe Homes for Women Act of 1994, Pub. L. 103–322, title IV, § 40221(a), 108 Stat. 1930, codified at 18 U.S.C. § 2265 (full faith and credit to be given to protective orders issued against a spouse with respect to domestic violence).

[65] "*The Constitution of the United States of America Annotated*," Doc. No. 99–16, 99th Cong. 1st Sess. at 870 (1987).

[66] *See, e.g.*, James D. Sumner, Jr., "*The Full Faith and Credit Clause—Its History and Purpose*," 34 Ore. L. Rev. 224, 239 (1955) ("The writer is of the opinion that the members of the Constitutional Convention meant the clause to be self-executing, but subject to such exceptions, qualifications, and clarifications as Congress might enact into law."); Walter Wheeler Cook, "*The Powers of Congress Under the Full Faith and Credit Clause*," 28 Yale L. J. 421, 421–26 (1919) (discussing framing history of the Clause in manner consistent with this interpretation); Laycock, 92 Colum. L. Rev. at 292 (the effect of the language ultimately adopted at the Convention "was to make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary").

[67] *See* Prepared Statement of Maurice J. Holland, Professor, University of Oregon School of Law ("Holland Prepared Statement") at 3, Subcommittee Hearing.

States currently recognize same-sex "marriage," they will be confronted with a classic choice-of-law question—which law governs the validity of a Hawaiian same-sex "marriage" license, Hawaii's or their own?[68] Consistent with the governmental interests described above, the Committee believes that it is important that States be able to apply their own laws, expressing their own public policy, on this matter. Section 2 does not, of course, determine the choice-of-law issue; when a State that does not itself permit homosexual couples to "marry" is confronted with a same-sex "marriage" license from another State, that State will still have to decide whether to recognize the couple as "married." But Section 2 does mean that the Full Faith and Credit Clause will play no role in that choice of law determination, thereby improving the ability of various States to resist recognizing same-sex "marriages" celebrated elsewhere. This, the Effects Clause plainly authorizes Congress to do.[69]

Notwithstanding the seemingly incontrovertible conclusion that the Section 2 of the Defense of Marriage Act falls within Congress' authority under the Effects Clause of the Full Faith and Credit Clause, it has been argued by some Members (for example, during the Subcommittee and Full Committee markups) and by some commentators that Section 2 is unconstitutional. The arguments advanced by those who take this view are well-summarized in a letter dated May 24, 1996, from Professor Laurence Tribe of the Harvard University Law School to Senator Edward M. Kennedy of Massachusetts.[70]

Professor Tribe's somewhat perplexing analysis has two central themes. On the one hand, Professor Tribe believes that Section 2 of the Defense of Marriage Act is ". . . plainly unconstitutional,"

> both because of the basic "limited-government" axiom that ours is a National Government whose powers are confined to those that are delegated to the federal level in the Constitution itself, and because of the equally fundamental

[68] Indeed, the Committee believes that Section 2 is best understood as a choice-of-law provision. Professor Laycock has argued that the Full Faith and Credit Clause "requires full faith and credit to applicable law required under choice-of-law rules that are presupposed but not codified". Laycock, 92 Colum, L. Rev. at 300–01. And of the Effects Clause, he writes that "[t]he Constitution expressly grants Congress power to specify the 'Effect' of sister-state law, and almost everyone agrees that that includes power to specify choice-of-law rules." *Id.* at 301.

[69] Twice during the Committee's consideration of H.R. 3396, the Department of Justice has indicated that it believes the Defense of Marriage Act to be constitutional. *See* Letter from Assistant Attorney General Andrew Fois to The Honorable Henry J. Hyde, May 14, 1996, and Letter from Assistant Attorney General Andrew Fois to The Honorable Charles T. Canady, May 29, 1996. Both letters are reproduced in full in the section of this Report entitled "Agency Views." *See also* Holland Prepared Statement at 1 ("There seems to me not the slightest room for doubt but that the enactment of Section 2 would be within the constitutional authority of the Congress"); Wardle Prepared Statement at 27 ("[I]t is clear that Congress has the authority under the Constitution to declare the 'effect' which the acts, records or judicial proceedings of states that legalize same-sex marriage must be given in other states, and that is precisely what Section 2 of H.R. 3396 would do.").

[70] Senator Kennedy subsequently entered Professor Tribe's letter into the Congressional Record. *See* 142 Cong. Rec. S5931–33 (June 6, 1996) (statement of Sen. Kennedy). In the course of introducing the letter into the record, Senator Kennedy stated that Professor Tribe "has concluded unequivocally that enactment of S.1740 [the Senate version of F.R. 3396] would be an unconstitutional attempt by Congress to limit the full faith and credit clause of the Constitution", and, in a reference to the bill's title, suggested that "assaulting the Constitution is hardly defending marriage". *Id.* Many of the same points made in the letter to Senator Kennedy are also included in an editorial Professor Tribe published in the *New York Times*. See Laurence H. Tribe, "Toward a Less Perfect Union, *New York Times,* May 26, 1996, at A11.

> "states'-rights" postulate that all powers not so delegated are reserved to the States and their people.[71]

The premise for this line of argument is that the Full Faith and Credit Clause was intended to be the Constitution's "most vital unifying provision," and that Section 2 is "legislation that does not unify or integrate but divides and disintegrates."[72]

But even as we are told that Section 2 is flagrantly unconstitutional and constitutes a fundamental assault on the Constitution's grand project of unifying the States into one union—even as, in other words, we are warned of the cataclysmic implications of this narrow, targeted relaxation of the Full Faith and Credit Clause—Professor Tribe also tells us that, in light of the "public policy" exception to the Full Faith and Credit Clause, Section 2 is probably unnecessary. In light of that exception, he writes, Section 2, if enacted, would "be entirely redundant and indeed altogether devoid of content."[73]

A few brief points in response are in order. First, Professor Tribe believes that although the States are authorized under the nebulous "public policy" exception to decline to recognize certain sister-state laws, Congress may not invoke its express constitutional power to clarify that the States have that authority. But the result is the same in both cases, and so there cannot be a constitutionally significant difference between these mechanisms. The Committee, however, believes that it is far preferable to have Congress set forth specific statutory guidelines to direct the courts in this complicated area, rather than to leave it to the uncertain and inefficient prospect of litigation to determine what the States are authorized or obligated to do. That is what the Constitution contemplates, and that is what Section 2 constitutes.

But what is most striking about Professor Tribe's analysis in his effort to portray the Defense of Marriage Act as an assault on state sovereignty. He claims, for example, that it is the "basic axiom" expressed in the Tenth Amendment—that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"—

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[71] 142 Cong. Rec. at S5932. Professor Tribe rejects, therefore, the Committee's view that Section 2 falls within the scope of Congress' powers under the Effects Clause. Indeed, he characterizes that argument as "a play on words, not a legal argument," for it is, he believes, "as plain as words can make it that congressional power to 'prescribe . . . effect' of sister-state acts, records, and proceedings . . . includes no congressional power to prescribe that some acts, records, and proceedings that would otherwise be entitled to full faith and credit under the Full Faith and Credit Clause as judicially interpreted shall instead be entitled to no faith or credit at all!" *Id.* Put aside the fact, which Professor Tribe apparently recognizes, that, at least in some contexts, the "public policy" exception permits precisely that outcome. What is most wrongheaded about Professor Tribe's *ipse dixit* is his facile assumption—wholly unsupported by common usage, constitutional history, or case law—that the power of Congress to "prescribe the effects" of sister-state laws only authorizes Congress to impose on States obligations above and beyond those inherent in the full faith and credit obligation. But the power "to prescribe" does not distinguish between laws that would *add to* and those that would *detract from* the force of that obligation; indeed, it seems to the Committee as plain as words can be that the express grant of congressional authority permits both types of laws. It is even clearer that the Effects Clause authorizes the type of law proposed here, which, in the Committee's understanding, neither augments nor relaxes the free-standing constitutional obligation, but merely clarifies a very murky and complicated legal situation.

[72] *Id.* at S5933.

[73] *Id.* Professor Tribe elaborates as follows: "The essential point is that States need no congressional license to deny enforcement of whatever sister-state decisions might fall within any judicially recognized full faith and credit exception." *Id.*

that "most clearly condemns the proposed statute."[74] He elaborates as follows:

> The claim of [the bill's] supporters that this measure would somehow defend states' rights by enlarging the constitutional authority of States opposing same-sex marriage at the expense of the constitutional authority of States accepting same-sex marriages rests on a profound misunderstanding of what a dedication of "states' rights" means.[75]

The Committee respectfully suggests that it is Professor Tribe who fails to understand state sovereignty. To the extent our disagreement turns on the precise question of whether Section 2 is within Congress' delegated powers, we simply have a different understanding of the Effects Clause, and it suffices to repeat that the Committee is confident that this legislation falls within that grant of congressional authority.

But on the more general question of which position comports with a decent respect for state sovereignty, there can be no reasonable dispute. Recall the situation we confront: Hawaii is on the verge of being forced by its courts to issue marriage licenses to homosexual couples, many of whom will come from States that choose not to recognize same-sex "marriages." In Professor Tribe's view, a concern for state sovereignty entails forcing the other 49 States—States, it must be emphasized, that have made the democratic choice not to recognize same-sex "marriage"—to suppress their policy preferences and to honor those licenses. Apparently, Professor Tribe believes that respecting state sovereignty means supporting the "right" of Hawaii (and in particular, three justices on the Hawaii Supreme Court) to decide this most sensitive issue for the entire country, and to do so in a way the overwhelming majority of the American public rejects.

The Committee takes a different view. The Committee believes that Section 2 of the Defense of Marriage Act strongly supports a proper understanding of federalism and state sovereignty. Section 2 is an effort to protect the right of the various States to retain democratic control over the issue of how to define marriage. It does so in a moderate fashion, intruding only to the extent necessary to forestall the impending legal assault on traditional state marriage laws. It does so in reliance on an express constitutional grant of congressional authority. And it does so by making clear the fact that States, in this narrow context, do not have to abandon their settled public policy.

In addition to the issue of constitutional authority for enacting Section 2, there is one particular interpretive issue that should be addressed. Section 2 applies to "any public act, record, or judicial proceeding" of another State respecting same-sex "marriage." The Committee is aware, of course, that "public records"—for example, marriage licenses—are typically accorded less weight by sister States than are judicial proceedings.[76] While the Committee expects that the issue of sister-state recognition affected by Section

[74] *Id.* at S5932.
[75] *Id.*
[76] *Compare, e.g., Fauntleroy* v. *Lum,* 210 U.S. 230 (1908) *with Williams* v. *North Carolina*, 317 U.S. 287 (1942).

2 will typically concern marriage licenses, it is possible that homosexual couples could obtain a judicial judgment memorializing their "marriage," and then proceed to base their claim of sister-state recognition on that judicial record.[77] Accordingly, Section 2 applies by its terms to all three categories of sister-state laws to which full faith and credit must presumptively be given.

But the Committee would emphasize two points regarding Section 2's application to judicial orders. First, as with public acts and records, the effect of Section 2 is merely to authorize a sister State to decline to give effect to such orders; it does not mandate that outcome, and, indeed, given the special status of judicial proceedings, the Committee expects that States will honor judicial orders as long as it can do so without surrendering its public policy against same-sex "marriages." Second, and relatedly, if—notwithstanding a sister State's policy objections to homosexual "marriage"—there is some constitutional compulsion (whether under the Due Process Clause or otherwise) to give effect to a judicial order, Section 2 obviously can present no obstacle to such recognition.

SECTION 3. DEFINITION OF MARRIAGE

Section 3 of the Defense of Marriage Act amends Chapter 1 of title 1 of the United States Code by adding a new Section 7 entitled, "Definition of 'marriage' and 'spouse'." The most important aspect of Section 3 is that it applies to federal law only; in the words of the statute, these definitions apply only "[i]n 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." It does not, therefore, have any effect whatsoever on the manner in which any State (including, of course, Hawaii) might choose to define these words. Section 3 applies only to federal law, and will provide the meaning of these two words only insofar as they are used in federal law.

In defining "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "only a person of the opposite sex who is a husband or a wife," Section 3 merely restates the current understanding of what those terms mean for purposes of federal law. Prior to the Hawaii lawsuit, no State has ever permitted homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex "marriage." And as Professor Wardle has noted, "it is beyond question that Congress never actually intended to include same-sex unions when it used the terms 'marriage' and 'spouse'."[78] But now that Hawaii is prepared to redefine "marriage" (and, presumably, "spouse") as a matter of Hawaiian law, the federal government should adopt explicit federal definitions of those words.

[77] Again, this is no mere fanciful scenario. Lambda has expressly indicated that it would pursue this strategy if sister States decline to recognize same-sex "marriages" based solely on a marriage license. *See* Lambda Memorandum at 9–10 "([P]eople could easily have a 'judgment' outright were Hawaii to accompany its celebration of marriages with a mechanism whereby married couples could speedily obtain . . . a declaratory judgment of marriage. Couples could then return home with their certificate, their newly-wed status, their snapshots, *and* a court order.") (emphasis in original).

[78] Wardle Prepared Statement at 9.

There is, of course, nothing novel about the definitions contained in Section 3. The definition of "marriage" is derived from a case from the State of Washington, *Singer* v. *Hara,* 522 P.2d 1187, 1191–92 (Wash. App. 1974); that definition—a "legal union of one man and one woman as husband and wife"—has found its way into the standard law dictionary.[79] It is fully consistent with the Supreme Court's reference, over one hundred years ago, to the "union for life of one man and one woman in the holy estate of matrimony." *Murphy* v. *Ramsey,* 114 U.S. 15, 45 (1885). The definition of "spouse" obviously derives from and is consistent with this definition of "marriage."[80]

If Hawaii or some other State eventually recognizes homosexual "marriage," Section 3 will mean simply that that "marriage" will not be recognized as a "marriage" for purposes of federal law. Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law. Whether and to what extent benefits available to married couples under state law will be available to homosexual couples is purely a matter of state law, and Section 3 in no way affects that question.

A SHORT NOTE ON *ROMER* V. *EVANS*

In the wake of the Supreme Court's recent decision in *Romer* v. *Evans,*[81] it has been suggested that laws distinguishing between heterosexuality and homosexuality are constitutionally suspect.[82] Because traditional marriage laws plainly grant preferred status to heterosexual unions, the Committee believes a brief discussion of the *Romer* case is warranted.

In *Romer*, the Court held that Amendment 2, a popularly-enacted amendment to the Colorado Constitution, violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Amendment 2 would have prohibited the State or any of its political subdivisions from granting homosexuals protected class status or any form of preferential treatment. By a 6–3 vote, the Court held that Amendment 2 failed to satisfy the rational basis test—that is, that it bore no rational relation to a legitimate government purpose. The majority was dismissive of Colorado's assertion that Amendment 2 served the interest of "respect[ing] . . .

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[79] *Black's Law Dictionary* 972 (6th ed. 1990). The definition of "marriage" in *Black's* continues: Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, 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. A contract, according to the form prescribed by law, by which a man and a woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in state of union which ought to exist between a husband and wife.

Id.

[80] The word "marriage" is defined, but the word "spouse" is not actually defined, but rather "refers . . . to." This distinction is used because the word "spouse" is defined at several places in the United States Code to include substantive meanings, *see e.g.,* 42 U.S.C. §§ 416(a), (b) and (f) (containing long definition of "spouse"), and Section 3 is not meant to affect such substantive definitions. Rather, Section 3 is meant to ensure that whatever substantive definition of "spouse" may be used in Federal law, the word "refers only to" a person of the opposite sex.

[81] 116 S. Ct. 1620 (1996).

[82] For example, in his letter to Senator Kennedy, Professor Tribe refers to *Romer* and raises but does not answer the question whether the Defense of Marriage Act "violate[s] . . . the Due Process Clause of the Fifth Amendment . . . on the ground that it singles out same-sex relationships for unfavorable legal treatment for no discernable reason beyond public animosity to homosexuals." 142 Cong. Rec. at S5932.

other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[83] Indeed, the Court said, Amendment 2 was so unrelated to this rationale as to "raise the inevitable inference" that it was "born of animosity" toward homosexuals.[84] The Court concluded that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."[85]

Romer is, to put it charitably, an elusive decision. Under the Court's own recent articulation of the rational basis test, a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[86] Parties challenging such laws have the burden of negating "every conceivable basis which might support it," regardless of whether each rationale was actually relied upon by the enacting authority.[87] In short, federal courts considering an equal protection challenge may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[88]

It is difficult to fathom how, applying this standard, the Court majority concluded that Amendment 2 is unconstitutional. As even the majority recognized, Amendment 2 was motivated by the enactment in several Colorado municipalities (and several agencies at the State level) of laws or policies outlawing discrimination against homosexuals. As a result of those laws, Colorado citizens who have moral, religious, or other objections to homosexuality could be forced to employ, rent an apartment to, or otherwise associate with homosexuals. It is most assuredly "conceivable" that Amendment 2 would advance the State's interest in protecting the associational freedom of such persons. And as the freedom of association is a constitutionally protected right, it is self-evident that protecting that freedom is a legitimate government purpose. On this ground alone, it is inconceivable how Amendment 2 could fail to meet the rational basis test.

But the Court in *Romer* did not undertake even a cursory analysis of the interests Amendment 2 might serve. Rather, in an opinion marked more by assertions—highly questionable ones, at that—than analysis, the Court simply concluded that Amendment 2 "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons for its own sake, something the Equal Protection Clause does not permit."[89]

What makes *Romer* even more unsettling is the Court's failure to distinguish or even to mention its prior opinion in *Bowers* v. *Hardwick*.[90] In *Bowers,* of course, the Court only ten years earlier held that there was no constitutional objection to a Georgia law

[83] *Romer,* slip op. at 14 (May 20, 1996).
[84] *Id.* at 13.
[85] *Id.* at 14.
[86] *Federal Communications Comm'n* v. *Beach Communications, Inc.,* 113 S. Ct. 2096, 2101 (1993); *see also Heller* v. *Doe,* 113 S. Ct. 2637, 2642–43 (1993).
[87] *Beach Communications,* 113 S. Ct. at 2102.
[88] *Heller,* 113 S. Ct. at 2642 (quoting *New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976)).
[89] *Romer,* slip op. at 14.
[90] 478 U.S. 186 (1986).

criminalizing homosexual sodomy. *Bowers* would seem to be particularly relevant to the issues raised in *Romer,* for in the earlier case, the Court expressly held that the anti-sodomy law served the rational purpose of expressing "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[91] If (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals preferred status as a protected class under antidiscrimination laws.

The Committee belabors these aspects of *Romer* to highlight the difficulty of analyzing any law in light of the Court's decision in that case. But of this much, the Committee is certain: nothing in the Court's recent decision suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus toward homosexuals. Rather, they have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing.

By extension, the Defense of Marriage Act is also plainly constitutional under *Romer.* The Committee briefly described above at least four legitimate government interests that are advanced by this legislation—namely, defending the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self-governance; and preserving government resources. The Committee is satisfied that these interests amply justify the enactment of this bill.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 14, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Attorney General has referred your letter of May 9, 1996 to this office for response. We appreciate your inviting the Department to send a representative to appear and testify on Wednesday, May 22 at a hearing before the Subcommittee on the Constitution concerning H.R. 3396, the Defense of Marriage Act. We understand that the date of the Hearing has now been moved forward to May 15.

H.R. 3396 contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would essentially provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one

[91] *Id.* at 196.

woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that H.R. 3396 would be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department.

Sincerely,

ANDREW FOIS, *Assistant Attorney General.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 29, 1996.

Hon. CHARLES T. CANADY,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of May 28 requesting updated information regarding the Administration's analysis of the constitutionality of H.R. 3396, the Defense of Marriage Act.

The Administration continues to believe that H.R. 3396 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. As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer* v. *Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable), and the President "would sign the bill if it was presented to him as currently written."

Please feel free to contact this office if you have further questions.

Sincerely,

ANN M. HARKINS
(For Andrew Fois, Assistant Attorney General).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART V—PROCEDURE

* * * * * * *

CHAPTER 115—EVIDENCE; DOCUMENTARY

§ 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

* * * * * * *

TITLE 1, UNITED STATES CODE

* * * * * * *

CHAPTER 1—RULES OF CONSTRUCTION

§ 7. Definition of "marriage" and "spouse"

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.

* * * * * * *

DISSENTING VIEWS ON H.R. 3396

Supporters of the legislation which they have named the "Defense of Marriage Act" assert that it is necessary essentially as a states rights measure. That is, they claim that if we do not pass this bill into law this year, states all over the country will be compelled by a decision of the courts in Hawaii to legalize same sex marriage. Very little of this is in fact true, and one of the major problems with this bill is that, contrary to its supporters assertions that it is intended to defend the rights of states, the bill will severely undercut state authority in the area of marriage, in part explicitly and in part implicitly.

DESCRIPTION OF LEGISLATION AND SUMMARY

H.R. 3936 has two distinct parts. Sec. 2 amends 28 U.S.C. 1738 by adding a new section, 1738C, to provide that "[n]o State, territory or possession shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

Sec. 3 defines marriage for Federal purposes, by providing that "'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."

The first thing that should be noted is that there is no emergency here. The legislation is offered as a "response" to a Hawaii Supreme Court case, *Baehr* v. *Lewin*,[1] issued more than three years ago, which remanded a same sex marriage claim back to a Hawaii trial court for a determination of whether denial of a marriage license was a violation of the Hawaii Constitution's equal protection guarantee based on gender. The trial court is not scheduled to begin hearing the case until September of this year, with appeals continuing for well beyond next year. Thus, while H.R. 3396 is characterized as a response to an "imminent" threat of same sex marriage being forced on the nation by several judges of the Hawaii Supreme Court (and to the rest of the nation through the claimed legal compulsion of the of the Full Faith and Credit clause), in fact there is nothing imminent. There is no likelihood that Hawaii will complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis.

In no jurisdiction in this nation is same sex marriage recognized by law. To the contrary, as of today, 14 states have enacted laws which in some fashion make explicit those states' objection to same

[1] 852 P.2d 44 (Haw. 1993)

sex marriages. This federal legislation is therefore an unwarranted response to a non-issue.

Second, the argument that if Hawaii does finally decide to recognize same sex marriages, this legislation is necessary—or even useful—in helping other states reject that as their own policy is not only wrong, it is a proposition which the sponsors of this legislation do not themselves genuinely believe.

The legal history of the full faith and credit clause which is central to this dispute is a sparse one, and no one can speak with absolute certainly about all aspects of this matter. But one thing is quite clear: whatever powers states have to reject a decision by another state to legalize same sex marriage, and to refuse to recognize such marriages within its own borders, derives directly from the Constitution and nothing Congress can do by statute either adds to or detracts from that power. That is, the prevailing view today is that states can by adopting their own contrary policies deny recognition to marriages of a type of which they disapprove, and it is incontestable that states have in fact done this on policy grounds in the past. Support for this fact is so clear that constitutional scholars not often in agreement on this point agree. See, e.g., Professor Laurence Tribe's letter to Senator Kennedy, May 23, 1996, and Bruce Fein's "Defending a Sacred Covenant," The legal Times, June 17, 1996. And most relevant for the purposes of this discussion is that states have in the past been free to reject the demand that they recognize marriages from other states because of policy reasons without any intervention whatsoever by the federal government.

Indeed, given that the power that states have to reject marriages of which they disapprove on policy grounds derives directly from the Constitution and has never previously been held to need any Congressional authorization, the fact that Congress in this proposed statute presumes to give the states permission to do what virtually all states think they already now have the power to do undercuts states rights. If entities—individuals, states, or any other—have a Constitutional right to take certain actions, then the effect of Congress passing a statute which gives them permission to do what they already have the right to do serves not to empower them, but to undercut in the minds of some the power they already have. This point has been argued with particular force by Professor Laurence Tribe in the letter he sent to Senator Kennedy, a copy of which has been inserted into the record of the proceedings on this bill in the Judiciary Committee. A more detailed legal analysis of this matter is as follows.

TREATMENT OF OUT OF STATE MARRIAGES GOVERNED GENERALLY BY CHOICE OF LAW RULES

Notwithstanding the language of the Full Faith and Credit clause, Article IV, Section 1:

> Full Faith and Credit shall be given in each State to the public Act, Records, and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

The clause has had its principal operation in relation only to judgments.

It is settled constitutional law that the final judgment of one state must be recognized in another state, and that a second state's interest in the adjudicated matter is limited to questions of authenticity, and personal jurisdiction, i.e., notwithstanding the first court's assertion of jurisdiction, proof that the first court lacked jurisdiction may be collaterally impeached in a second state's court.[2]

Again, notwithstanding the plain language of the clause, recognition of rights based upon State Constitutions, statutes and common laws are treated differently than judgments. "With regard to the extrastate protection of rights which have not matured into final judgments, the full faith and credit clause has never abolished the general principal of the dominance of local policy over the rules of comity."[3]

Alaska Packers Assn v. *Comm,*[4] elaborated on this doctrine, holding that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly.

Marriage licensure is not a judgment.[5] Therefore, the Full Faith and Credit clause does not, under traditional analysis, have anything to say about sister state recognition of marriage.

The Supreme Court has not yet passed on the manner in which marriages per se are entitled to full faith and credit, even though it would appear from the face of the clause they should be afforded full faith and credit as either Acts or Records. In the absence of an express constitutional protection under full faith and credit, state courts (and Federal courts) rely on traditional choice of law/conflict of law rules. The general rule for determining the validity of a marriage legally created and recognized in another jurisdiction is to apply the law of the state in which the marriage was performed.[6]

There are two strong exceptions to this choice of law rule: first, a court will not recognize a marriage performed in another state if a statute of the forum state clearly expresses that the general rule of validation should not be applied to such marriages, and, second, a court will refuse to recognize a valid foreign marriage if the recognition of that marriage would violate a strongly held public policy of the forum state.[7]

Those states which desire to avoid the general rule favoring application of the law where the marriage was celebrated will rely on an enumerated public policy exception to the rule: through state

[2] *Williams* v. *North Carolina* II, 325 U.S. 226 (1945). See also, *Esenwein* v. *Commonwealth,* 325 U.S. 279 (1945).

[3] Congressional Research Serv., Library of Congress, The Constitution of the United States of America, Analysis and Interpretation, at 859 (1987), citing, *Bond* v. *Hume,* 243 U.S. 15 (1917).

[4] 294 U.S. 532 (1935).

[5] That is not to say that marriage could not in some cases be converted to a judgment, as when a marriage is in dispute and the parties go to court and seek a decree validating the marriage.

[6] Ehrenzweig, A Treatise on the Conflict of Laws, sec. 138 (1961).

[7] Restatement (Second) Conflict of Laws sec. 283 (1971).

statute, common law, or practice the state will show that honoring a sister state's celebration of marriage "would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense."[8] The rhetoric notwithstanding, the public policy exception has not been a difficult hurdle to overcome for states, subject to the limitations of other constitutional provisions, to wit, equal protection, substantive due process, etc. States could show their public policy exception to same sex marriage by offering gender specific marriage laws, anti-sodomy statutes, common law, etc.

Different courts have required different levels of clarity in their own states expression of public policy before that exception could be sustained in that states' court. Some have required explicit statutory expression,[9] while others much less clearly so.[10]

Courts have considered a marriage offensive to a state's public policy either because it is contrary to natural law or because it violates a positive law enacted by the state legislature. Courts have invalidated incestuous, polygamous, and interracial foreign marriages on the ground that they violate natural law.[11] For invalidation based on positive law, some courts have required clear statutory expressions that the marriages prohibited are void regardless of where they are performed,[12] and sometimes a clear intent to preempt the general rule of validation.[13] Other courts have set up not so high a hurdle, such that a statutory enactment against the substantive issue was sufficient.[14] Those states that are enacting anti-same sex marriage statutes may well find they have satisfied the first exception to the choice of law rule validating a marriage where celebrated.

Interracial marriages were, before *Loving* v. *Virginia,* treated with the above choice of law analysis, and "courts frequently determined the validity of interracial marriages based on an analysis of the public policy exception. Early decisions treated such marriages as contrary to natural law, but later courts considered the question one of positive law interpretation."[15]

Other examples of common public policy exception analyses include common law marriages, persons under the age permitted by a forum's marriage statute, and statutes which prohibit persons from remarrying within a certain period.

The Uniform Marriage and Divorce Act, effective in at least seventeen states, provides that "[a]ll marriages contracted within this State prior to the effective date of the act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State."[16] The Act specifically drops the public policy exception: "the section expressly

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[8] *Intercontinental Hotels Corp.* v. *Golden,* 203 N.E.2d 210, 212 (N.Y. 1964).
[9] *Etheridge* v. *Shaddock,* 706 S.W.2d 396 (Ark. 1986).
[10] *Condado Aruba Caribbean Hotel* v. *Tickel,* 561 P.2d 23, 24 (Colo. Ct. App. 1977).
[11] See, e.g., *Earle* v. *Earle,* 126 N.Y.S. 317, 319 (1910).
[12] *State* v. *Graves* 307 S.W.2d 545 (Ark. 1957).
[13] See, e.g., Estate of Loughmiller, 629 P.2d 156 (Kas. 1981).
[14] *Catalano* v. *Catalano,* 170 A.2d 726 (Conn. 1961)(finding express prohibitions in a marriage statute and the criminalization of incestuous marriages sufficient to invalidate an out of state marriage).
[15] Hovermill, 53 Md. L. Rev. 450 (1994), at 464.
[16] 9A U.L.A. sec. 210 (1979).

fails to incorporate the 'strong public policy' exception to the Restatement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated of many marriages which would have been invalidated in the past."[17] Of course, any state that wants to reassert a public policy exception for same sex marriages retains the right to so legislate, or not. The proposed federal bill has no effect on that.

CONSTITUTIONAL RESTRAINTS

There are several possible Constitutional limits on a states' ability to invoke a public policy exception to the general rule of validating foreign marriages: the due process clause, equal protection, the effects clause of the Full Faith and Credit clause, or substantive due process.

For due process, the second state must before it can apply its own law satisfy that it has "significant contact or a significant aggregation of contracts" with the parties and the occurrence or transaction to which it is applying its own law.[18] The contacts necessary to survive a due process challenge have been characterized as "incidental."[19]

Substantive due process and equal protection can bar a state's application of a public policy exception as well. For the former, a court would have to find that there is a fundamental right for homosexuals to marry. There is complete agreement that there is a fundamental right to marry,[20] and the argument will be pursued that this incorporates marriage of homosexuals to each other. There has been never been such a holding in any federal or state court, including even the Hawaii case, *Baehr* v. *Lewin.*[21]

For equal protection analysis a state's anti same sex marriage statute could be subjected to one of three levels of scrutiny.[22] If it is viewed as almost all statutory enactments, under rational basis, the state will in all likelihood have to show more than animus motivates the restrictive legislation. If an argument can be persuasive that the anti same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny. No court has been persuaded that anti same sex marriage laws are gender based discrimination.[23] For strict scrutiny, the court would have to for the first time elevate classifications based on homosexuality to that of strict scrutiny, a level which may be due, but nowhere operative.

If the Full Faith and Credit clause requires recognition, as it does for judgments, there is no Constitutional exception to that requirement, and most certainly Congress could not create one by statute. Professor Tribe makes this point and then argues that the attempt to do so legislatively is itself unconstitutional. And Congress' disability is the same for substantive due process: if there were found to exist a substantive due process bar to a state's prohibition of same-sex marriage, no Congressional enactment could af-

[17] Id., official comment.
[18] *Allstate Ins. Co.* v. *Hague,* 449 U.S. 302 (1981).
[19] 53 Md. L. Rev. at 467.
[20] *Zablocki* v. *Redhail,* 434 U.S. 374 (1978).
[21] 852 P.2d 44, 57 (Haw. 1993).
[22] *City of Cleburne* v. *Cleburne Living Center,* 473 U.S. 432 (1985).
[23] See, e.g., *Baker* v. *Nelson,* 191 N.W.2d 185 (Minn. 1971).

fect that, it would be a matter between the States and the Supreme Court interpreting the United States Constitution.

The policy/doctrinal analog to Professor Tribe's constitutional argument is the following: while the proponents purport to be protecting States' rights and interests, they are in fact diluting those rights and interests. The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to conservative philosophy and the Tenth Amendment: that powers not enumerated for the Federal Government are reserved to the States. This legislation enumerates a Federal power, namely the power to deny sister state recognition, grants that power to the state, and therefore dangerously pronounces, expressio unius est exclusio alterius, that the Federal government in fact retains the power to limit full faith and credit. And it only need express that power substantive issue by substantive issue. This is an arrogation of power to the federal government which one would have assumed heretical to the expressed philosophy of conservative legislating. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government.

As to the second prong of Full Faith and Credit, only rarely has Congress exercised the implementing authority which the Clause grants to it. The first, passed in 1790,[24] provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government. The second, dating from 1804, provides methods of authenticating non-judicial records.[25]

Since 1804 these provisions have been amended only twice, the Parental Kidnapping Prevention Act of 1980[26], which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A. Sec. 1738B, "Full Faith and Credit for Child Support Orders" (1994). Neither of these statutes purported to limit full faith and credit; to the contrary, each of these statutes reinforced or expanded the faith and credit given to states' court orders.

Full Faith and Credit, discussed above, provides little break on the application of a sister states' policies, as opposed to judgments.[27] Again, full faith and credit with respect to states' policies (not judgments) has merged with due process analysis, and as long as a state has significant contacts it may apply its own law.

The privileges and immunities clause[28] is irrelevant here because of the various interpretations one could imbue to the face of the language, the Supreme Court has settled on that which merely forbids any State to discriminate against citizens of other States in

[24] 28 U.S.C.A. sec. 1738.
[25] 28 U.S.C.A. sec. 1739.
[26] 28 U.S.C.A. sec. 1739A.
[27] *Carroll* v. *Lanza,* 349 U.S. 408 (1955)("Arkansas can adopt Missouri's policy if she likes. Or * * * she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned").
[28] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

favor of its own. It is this narrow interpretation which has become the settled one.[29]

Section three of the bill, ironically for legislation which has been hailed as a defender of states rights, represents for the first time in our history a Congressional effort, if successful, to deny states full discretion over their own marriage laws. Section three of this bill says that no matter what an individual state says, and no matter by what procedure it does it, Congress will refuse to recognize same sex marriages. In debating against an amendment by Congresswoman Schroeder, described below, one of the Senior Republicans on the Committee said that her amendment would make certain marriages "second class marriages" by denying them federal recognition. This acknowledgment that denying a marriage federal recognition substantially diminishes its legal force applies to this bill. If Hawaii or any other state were to allow people of the same sex who were deeply and emotionally attached to each other to regularize that relationship in a marriage, this bill says that the federal government would refuse to recognize it. Note that this is the case whether such decision is made by a State Supreme Court, a referendum of the state's population, a vote of the state's legislature, or some combination thereof. Thus, the bill is exactly the opposite of a states rights measure: the only real force it will have will be to deny a state and the people of that state the right to make decisions on the question of same sex marriage.

Our final ground for opposing this bill is our vehement disagreement with the notion that same sex marriages are a threat to marriage. By far the weakest part of this bill logically is its title, but its title is not simply accidental, but rather reflects the calculated political judgment that went into introducing this bill at this time, months before a national election, and rushing it through with inadequate analysis of its impact. That this bill's consequences are not adequately analyzed was conceded by members of the majority who spoke in its defense, when they argued that we must deny recognition to same sex marriages declared by states to be legal because we do not know what the implications of this will be for various federal programs. In a rational legislative atmosphere not shaped largely by electoral considerations, committees of the Congress would be holding hearings on the various aspects of this so that we would not have to use ignorance as an excuse for haste.

The notion that allowing two people who are in love to become legally responsible to and for each other threatens heterosexual marriage is without factual basis. Indeed, when pressed during Subcommittee and Committee debate, majority Members could give no specific content to this assertion. The attraction that a man and a woman feel for each other, which leads them to wish to commit emotionally and legally to each other for life, obviously could not be threatened in any way, shape or form by the love that two other people feel for each other, whether they be people of the same sex or opposite sexes. There are of course problems which men and women who seek to marry, or seek to maintain a marriage, confront in our society. No one anywhere has produced any evidence, or even argued logically, that the existence of same sex cou-

[29] *Whitfield* v. *Ohio,* 297 U.S. 431 (1936).

ples is one of those difficulties. And to prove that this is simply an effort to capitalize on the public dislike of the notion of same sex marriages, as noted below, when Congresswoman Schroeder attempted to offer amendments that deal more directly with threats to existing heterosexual marriages, the majority unanimously and vehemently objected.

JUDICIARY COMMITTEE CONSIDERATION

During Judiciary Committee consideration of the legislation, four amendments were offered, none of which was approved. One amendment, offered by Mr. Frank of Massachusetts, would have struck from the bill Section 3, which defines for Federal purposes marriage as a legal union between a man and woman.

Supporters of this amendment recognized that the Federal government has always relied on the states' definition of marriage for Federal purposes, and that it is unwarranted and an intrusion on states rights to change that practice now. The Federal government has no history in determining the legal status of relationships, and to begin to do so now is a derogation of states' traditional right to so determine. One objection to this amendment centered around the argument that several justices of the Hawaii Supreme Court could possibly determine policy for the nation (which assumes an interpretation of the Full Faith and Credit Clause with respect to marriages which has no current foundation), so the Federal government must put the brakes on "judicial activism."

Mr. Frank met this objection with a subsequent amendment, which provided that were a state to determine by citizen initiative, referendum or legislation that the definition of marriage for that state would be different than that which is enumerated in H.R. 3396, that states' definition would apply for its own residents for Federal purposes. This amendment obviated the non-argument about "judicial activism," and placed a clear question of states rights before the Judiciary Committee. That is, were a state to decide through its normal legislative process that same sex marriage was valid in that state, Federal application would follow accordingly for citizens of that state.

In addition to the fact that nowhere is same sex marriage ready to be enacted into law, if the citizens of Hawaii determine that they disagree with their Supreme Court, the mechanism to undo that possible Supreme Court ruling is clear: Hawaii law provides that a constitutional amendment may go to the voters if both Chambers of the Hawaii legislature pass it by 2/3 majority, or, if in two successive sessions both Chambers pass it by simple majority. In fact, the legislature of Hawaii has responded to the pending litigation there. In 1996 the Hawaii House of Representatives passed, 37–14, an amendment to Hawaii's constitution which would have defined marriage as a lawful union between a man and a woman. The Hawaii Senate then defeated the House passed amendment, 15–10.

The second Frank amendment was defeated in Committee, and the supporters of H.R. 3396 were confronted with the unadorned core of their motives: they are not at all interested in giving citizens the effect of their democratic choices or even in respecting what are historically states rights, rather, supporters of the legislation are using the Congressional process as a platform to express

their moral objection to people of the same sex committing to each other, loving each other, expressing love and mutual responsibility for each other, and agreeing to provide for each other.

Mrs. Schroeder offered two amendments which were intended to address real threats to marriage. One amendment would have modified the Federal definition of marriage within the legislation to include "monogamous", such that a marriage, otherwise a legal union in a state, would not be eligible for that status for Federal purposes if the relationship between the man and the woman was not monogamous. Ms. Jackson Lee offered a friendly amendment to the amendment, which modified "monogamous" with the words "non-adulterous". Mrs. Schroeder argued that same sex relationship were no threat to heterosexual marriages, but non-monogamous and adulterous relationships were.

Mrs. Schroeder offered a second amendment which would have also narrowed the Federal definition of marriage of exclude those legal unions between man and women in which either of the parties has previously been granted a divorce which was not determined on fault grounds and in which property and support issues were not resolved in accordance with fault findings. Mrs. Schroeder argued, again, that same sex marriage was no threat to any heterosexual marriage, but that if supporters of the legislation in fact wanted to "defend" marriage, that the ease with which people could exit marriage should be examined. Her argument was that too lax rules ("no-fault", in some circumstances) permitted a system in which significant numbers of people were abandoned by former spouses who then were left without financial contributions from the departing spouse, coupled with too lax intervention by state and federal governments for the collection of alimony and child support left many people without adequate support, and relying on the Government for their welfare. If one was truly interested in defending the institution of marriage, Mrs. Schroeder argued, then support for tightening the procedure for exiting that institution, or in this case, narrowing the Federal status of marriage for any person who benefited from the lax exit rules, was in order. Her amendment was defeated, but in the process supporters of the legislation admitted that their purported motivation to "defend" marriage was somewhat narrower than the title of the legislation implies.

CONCLUSION

The "Defense of Marriage Act" is insupportable. It is legally unnecessary and as a policy matter unwise. The effect of the legislation will be not to protect heterosexual marriage, an institution we strongly support, but rather to divide people needlessly and to diminish the power of states to determine their own laws with respect to marriage. For these reasons, we oppose the measure.

JOHN CONYERS, Jr.
BARNEY FRANK.
HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
ZOE LOFGREN.
MAXINE WATERS.
PATRICIA SCHROEDER.
XAVIER BECERRA.

○

IN THE SUPREME COURT OF THE UNITED STATES

- x

UNITED STATES, :

Petitioner : No. 12-307

v. :

EDITH SCHLAIN WINDSOR, IN HER :

CAPACITY AS EXECUTOR OF THE ESTATE:

OF THEA CLARA SPYER, ET AL. :

- x

Washington, D.C.

Wednesday, March 27, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

VICKI C. JACKSON, ESQ., Cambridge, Massachusetts; for Court-appointed amicus curiae.

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for Petitioner, supporting affirmance.

PAUL D. CLEMENT, ESQ., Washington, D.C.; for Respondent Bipartisan Legal Advisory Group of the United States House of Representatives.

DONALD B. VERRILLI, JR., ESQ., Solicitor General,

Department of Justice, Washington, D.C.; for Petitioner, supporting affirmance.

ROBERTA A. KAPLAN, ESQ., New York, New York; for Respondent Windsor.

C O N T E N T S

C O N T E N T S

P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 12-307, United States v. Windsor, and we will begin with the jurisdictional discussion.

Ms. Jackson?

ORAL ARGUMENT OF VICKI C. JACKSON

ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

MS. JACKSON: Mr. Chief Justice, and may it please the Court:

There is no justiciable case before this Court. Petitioner, the United States, does not ask this Court to redress the injuries it asserts. The House of Representatives' Bipartisan Legal Advisory Group, the BLAG, which does seek redress in the form of reversal, asserts no judicially cognizable injury.

While it is natural to want to reach the merits of such a significant issue, as in Raines v. Byrd, this natural urge must be put aside because, however important the constitutional question, Article III prevents its decision here and requires this Court to await another case, another day, to decide the question.

In the district court, Ms. Windsor alleged

classical Article III injury for which she sought redress. Other persons injured by DOMA's operation could likewise sue in a first instance court and, if their challenge succeeds, obtain relief. But to exercise jurisdiction on this appeal when the United States asked for the judgment below, fully agrees with it, and --

JUSTICE SOTOMAYOR: Who else is going to be aggrieved if she is not? Meaning another person who is -- whose benefits are withheld, tax refund is withheld, is going to be in an identical situation to her? Who else could come in?

MS. JACKSON: Your Honor, it is possible that in district courts where other taxpayers sue the United States on similar relief, that the district courts will rule differently. At least one district court that I'm aware of, in a case called Louie v. Holder, ruled against -- upheld DOMA even though the Government had switched its position at that time.

In addition, the issue of DOMA --

JUSTICE SCALIA: Excuse me. If there is no jurisdiction here, why was there jurisdiction at the trial level?

MS. JACKSON: Your Honor --

JUSTICE SCALIA: I mean, the Government comes in and says "I agree" -- or if there was jurisdiction, why did the Court ever have to get to the merits?

If you have a, let's say, a lawsuit on an -- on an indebtedness and the alleged debtor comes in and says, yeah, I owe them money, but I'm just not gonna pay it, which is the equivalent of the Government saying, yeah, it's unconstitutional but I'm going to enforce it anyway.

What would happen in that -- in that indebtedness suit is that the court would enter judgment and say, if you agree that you owe it, by God, you should pay it. And there would be a judgment right there without any consideration of the merits, right? Why didn't that happen here?

MS. JACKSON: Your Honor, the -- the two questions that you asked me, why did the district court have jurisdiction, the first answer is that the party invoking the district court's jurisdiction was Ms. Windsor, who did have an injury.

As to why the district court didn't enter judgment when the United States switched its position, I -- I imagine that the Court was -- would have wanted to have development of that issue, which was achieved

through the intervention of the BLAG in the trial court, so that the judgment of unconstitutionality and of refund would have had a robust hearing --

JUSTICE SCALIA: Really, that's very peculiar. When -- when both parties to the case agree on what the law is? What, the -- just for fun, the district judge is -- is going to have a hearing?

MS. JACKSON: Well, Your Honor, the jurisdiction of the Court, it seems to me, is not affected by the length of the proceedings it undertook. In Kentucky --

JUSTICE SCALIA: I'm not talking about jurisdiction now. I'm talking about why the district court, without getting to the merits, should not have entered judgment against the Government.

MS. JACKSON: I am not sure I have a wonderful answer to that question, Justice Scalia, but I do think the case bears some similarities to Kentucky against Indiana, which was discussed by the parties, where Kentucky sued Indiana in this Court's original jurisdiction on a contract. The two States had a contract. Indiana agreed it was obligated to perform, but it wasn't performing. There -- it was worried about a State court lawsuit. This Court exercised original jurisdiction to give Kentucky relief. And I think

that's analogous to what the district court did there.

The issue before us today, I think, is an issue of appellate jurisdiction. And the U.S. is seeking to invoke the appellate jurisdiction of Article III courts, notwithstanding that it doesn't seek relief; it seeks affirmance.

JUSTICE ALITO: Well, the Solicitor General's standing argument is very abstract. But here is one possible way of understanding it, perhaps the Solicitor General will disavow it, but it would go like this: The President's position in this case is that he is going to continue to enforce DOMA, engage in conduct that he believes is unconstitutional, until this Court tells him to stop.

The judgment of the Second Circuit told the Executive Branch to comply with the Equal Protection Clause immediately. The President disagrees with the temporal aspect of that, so the Executive is aggrieved in the sense that the Executive is ordered to do something prior to the point when the Executive believes it should do that thing.

Now, wouldn't that be sufficient to make -- to create injury in the Executive and render the Executive an aggrieved party?

MS. JACKSON: I think not, Your Honor. I

think not, because I don't see how that would be any different from any party saying, well, we really don't want to pay this judgment until we're sure all of the courts agree. And I think this Court's -- this Court doesn't have a lot of case law where a party seeks review to get affirmance.

But in the Princeton University against Schmidt case, there was a State court conviction, Ohio State Court overturns it, Princeton University seeks review, because its regulations were at issue. New Jersey joins in seeking review, but does not ask for relief; does not take a position on what relief would be appropriate.

JUSTICE BREYER: Why -- why wouldn't -- imagine -- there in Article II, it says that the President shall take care that the laws be faithfully executed. So the President has worked out -- I, personally, and for reasons in -- in my department, others think that this law is unconstitutional, but I have this obligation. And because I have this obligation, I will not, I will continue to execute this law. I will continue to execute it though I disagree with it. And I execute it until I have an authoritative determination not to.

Now, how is that different from a trustee

who believes that he has an obligation to a trust to do something under a certain provision that he thinks doesn't require that, but, you know, there's a debate about it, but he says, I have the obligation here. I'm going to follow this through.

There'd be standing in the second case for any fiduciary, despite his personal beliefs, to continue. We'd understand that and say there was standing. Why don't we here?

MS. JACKSON: Well, the trustee, I think, would be able to go to a court of first instance to get an adjudication of the claim. What I'm submitting to you that the trustee could not do, after getting the first -- the judgment in the court of first instance stating what the remedy -- what the liability is, then seek review of that judgment, but ask only for it to be affirmed.

JUSTICE BREYER: And that's the part I don't understand. For -- if, in fact, as you agree, the trustee or other fiduciary in my example would indeed have standing to act according to the law, even though he thinks that that law is unconstitutional because of his obligation such as under Section 2. You agree he has the -- he has -- there is standing when he goes into court in the first place, which surely he could

interpret Article II as saying and you follow it through as long as you can do it, which includes appeals, until the matter is determined finally and authoritatively by a court. If you could do the first, what suddenly stops you from doing the second?

MS. JACKSON: In the first instance, the obligations are uncertain the trustee is presumably subject to potentially adverse competing claims on his or her action.

CHIEF JUSTICE ROBERTS: Well, I would have thought --

MS. JACKSON: Those are --

CHIEF JUSTICE ROBERTS: I would have thought your answer would be that the Executive's obligation to execute the law includes the obligation to execute the law consistent with the Constitution. And if he has made a determination that executing the law by enforcing the terms is unconstitutional, I don't see why he doesn't have the courage of his convictions and execute not only the statute, but do it consistent with his view of the Constitution, rather than saying, oh, we'll wait till the Supreme Court tells us we have no choice.

MS. JACKSON: Mr. Chief Justice, I think that's a hard question under Article II. But I think the Article III questions that this Court is facing turn

on what the parties in the case have alleged, what relief they're seeking, and what the posture is.

JUSTICE KENNEDY: In Federal court's jurisprudence, are you saying there's a lack of adversity here?

MS. JACKSON: I am saying primarily --

JUSTICE KENNEDY: Can you give us a pigeonhole?

MS. JACKSON: I -- it's a little difficult, because the circumstance is unusual, Justice Kennedy, but I think the most apt of the doctrines, although they are overlapping and reinforce each other, the most apt is standing.

This Court has made clear that a party on appeal has to meet the same Article III standing requirements of injury caused by the action complained of and redressable by the relief requested by the parties.

JUSTICE KENNEDY: But it seems to me there -- there's injury here.

MS. JACKSON: Well, Your Honor, I do not agree that the injuries alleged by the United States should be cognizable by the Article III courts, because those injuries are exactly what it asked the courts below to -- to produce. But even if we treat the

injuries as sufficiently alleged, Article III requires that the party complaining of injury ask the court to remedy that injury. And that's a very important requirement, I think, under Article III for several reasons.

The idea of the case or controversy limitation, as I understand it, is part of a broader separation of powers picture, to make sure the Federal courts perform their proper role. Their proper role is the redress of injury, and it is the need to redress injury in ordinary litigation that justifies judicial review of constitutional issues. But --

JUSTICE KAGAN: But, Ms. Jackson, I mean, to go back to Justice Kennedy's point, we have injury here in the most classic, most concrete sense. There's $300,000 that's going to come out of the Government's treasury if this decision is upheld, and it won't if it isn't.

Now, the Government is willing to pay that $300,000, would be happy to pay that $300,000, but whether the Government is happy or sad to pay that $300,000, the Government is still paying the $300,000, which in the usual set of circumstances is the classic Article III injury.

Why isn't it here?

MS. JACKSON: Justice Kagan, there is a three-prong test. Even if you treat that as injury, it does not meet the requirements for standing on appeal, because the Government has not asked this Court to remedy that injury. The Government has not asked this Court to overturn the rulings below so it doesn't have to pay the $365,000. It has asked this Court to affirm. And the case or controversy requirement that we're talking about are nested in an adversarial system where we rely on the parties to state their injuries and make their claims for relief.

If the Government or any party is not bound with respect to standing by its articulated request for a remedy, what that does is it enables the Court to fill in, to reshape. And for a doctrine that is supposed to be limiting the occasions for judicial review of constitutionality, that is troubling.

JUSTICE KAGAN: But don't we often separate those two things, ask whether there's injury for Article III purposes and causation and redressability, as you say, but then say, well, sometimes when all of those are met, there's not going to be adequate presentation of the arguments, and so we will appoint an amicus or we'll restructure things? And we do that when the Government confesses error, often. I mean, we do that several

times a year in this courtroom.

MS. JACKSON: Yes, Your Honor. But concession of error cases, with respect, are quite different, because in concession of error cases typically both parties at the appellate level end up being adverse to the judgment below and they are asking relief from this Court from the judgment below.

But here we have a situation where, putting BLAG to one side for the moment, between the United States and Ms. Windsor there is no adversity, they're in agreement, and neither of them is asking this Court to reverse or modify the judgment below. And so I think the confession of error cases are quite different from the perspective of Article III.

JUSTICE BREYER: No, they're -- they're not in agreement about whether to pay the money or not. They are in agreement about what arguments are correct legal arguments, and I can't think of a case other than the sham cases which -- which this isn't, where -- where you would find no standing or other obstacle. And I can think of one case, which you haven't mentioned, namely, Chadha, which seems about identical.

MS. JACKSON: Your Honor, I don't think that Chadha is identical, with respect. In -- for two main reasons. In Chadha, the Court was I think quite careful

to avoid deciding whether the United States had Article III standing. It intensively analyzed a statute, since repealed, 1252, which gave this Court mandatory jurisdiction in cases in which a Federal statute was held unconstitutional and the U.S. was a party. And it framed its analysis of whether the statute permitted the appeal. What I think was -- oh, may I reserve my time for rebuttal?

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MS. JACKSON: Thank you.

What was -- what was going on there was the Court said: Well, the statute wanted to reach very broadly, perhaps implicit, not stated, perhaps more broadly than Article III.

Congress said whenever you have this configuration, you go up to the Supreme Court. Then the Supreme Court in Chadha says, of course, in addition to the statute, there must be Article III case or controversy, the presence of the congressional intervenors here provides it. And that --

CHIEF JUSTICE ROBERTS: Thank you, counsel. That was more than a sentence.

MS. JACKSON: Oh, I'm sorry. I'm sorry, Your Honor. Thank you.

CHIEF JUSTICE ROBERTS: Mr. Srinivasan?

ORAL ARGUMENT OF SRI SRINIVASAN,

ON BEHALF OF THE PETITIONER, SUPPORTING AFFIRMANCE

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has jurisdiction in this case based on the petition filed by the United States for the same reasons it had jurisdiction in parallel circumstances in Chadha and Lovett. There are two issues that have been -- that have been brought up this morning and I'd like to address each in turn.

One is whether there's a concrete case or controversy -- case or controversy in the sense of adversity in this Court; and the second is the question of whether there's Article III standing for the Government to bring this case before the Court.

CHIEF JUSTICE ROBERTS: On the first one, is there any case where all the parties agreed with the decision below and we upheld appellate jurisdiction? Any case?

MR. SRINIVASAN: Where the parties agreed --

CHIEF JUSTICE ROBERTS: All the parties agreed with the decision below and we nonetheless upheld appellate jurisdiction.

MR. SRINIVASAN: Well, you didn't speak to

it in Lovett, Your Honor, but that was the circumstance in Lovett.

CHIEF JUSTICE ROBERTS: No, it wasn't raised -- it wasn't raised or addressed, and that had the distinct situation of an appeal, direct appeal from an Article I tribunal.

MR. SRINIVASAN: Well, I don't -- I don't know that that matters, because you had to satisfy Article III prerequisites to have the case in this Court. Now, Your Honor is, of course, correct that the -- the Court didn't affirmatively engage on the issue of jurisdiction, but that is a scenario --

CHIEF JUSTICE ROBERTS: Okay. So putting Lovett aside, since none of this was discussed, is there any, any case?

MR. SRINIVASAN: No, I don't know of one. But these -- but, Mr. Chief Justice, with all due respect --

CHIEF JUSTICE ROBERTS: So this is totally unprecedented. You're asking us to do something we have never done before to reach the issue in this case.

MR. SRINIVASAN: Let me say two things about that if I might, Your Honor. First is that it's -- it's unusual, but that's not at all surprising, because the --

CHIEF JUSTICE ROBERTS: No, it's not just -- it's not unusual. It's totally unprecedented.

MR. SRINIVASAN: Well, it's totally unprecedented in one respect, Your Honor. If you look at Chadha -- okay, the second point I'd make. Let me make one point at the outset, though, which is that whether it's totally unusual or largely unusual, I grant you that it doesn't happen. But the reason it doesn't happen is because -- I wouldn't confuse a numerator with a denominator. This set of circumstances just doesn't arise very often.

Now, it's true that when this set of circumstances --

JUSTICE SCALIA: It has not arisen very often in the past, because in the past, when I was at the Office of Legal Counsel, there was an opinion of the Office of Legal Counsel which says that the Attorney General will defend the laws of the United States, except in two circumstances: Number one, where the basis for the alleged unconstitutionality has to do with presidential powers. When the presidential powers are involved, he's the lawyer for the President. So he can say, we think the statute's unconstitutional, I won't defend it.

The second situation is where no possible

rational argument could be made in defense of it. Now, neither of those situations exists here. And I'm wondering if we're living in this new world where the Attorney General can simply decide, yeah, it's unconstitutional, but it's not so unconstitutional that I'm not willing to enforce it, if we're in this new world, I -- I don't want these cases like this to come before this Court all the time.

And I think they will come all the time if that's -- if that's -- if that's the new regime in the Justice Department that we're dealing with.

MR. SRINIVASAN: Justice Scalia, one recognized situation in which an act of Congress won't be defended in court is when the President makes a determination that the act is unconstitutional. That's what happened here. The President made an accountable legal determination that this Act of Congress is unconstitutional.

JUSTICE KENNEDY: But then why does he enforce the statute?

MR. SRINIVASAN: Well, that's an option that's available to him, Justice Kennedy. In certain circumstances, it makes sense not to enforce. But I don't think the take-care responsibility is an all or nothing proposition such that when the President reaches

a determination that a statute is unconstitutional, it necessarily follows that he wouldn't enforce it. That's not what happened in Lovett. That's not --

JUSTICE KENNEDY: But let me ask you, suppose that constitutional scholars have grave doubts about the practice of the President signing a bill but saying that he thinks it's, unconstitutional -- what do you call it, signing statements or something like that. It seems to me that if we adopt your position that that would ratify and confirm and encourage that questionable practice, because if the President thinks the law is unconstitutional he shouldn't sign it, according to some view. And that's a lot like what you're arguing here. It's very troubling.

MR. SRINIVASAN: I -- in the -- in the signing statement situation, Your Honor, one example in the past is Turner Broadcasting. In Turner Broadcasting, that was a circumstance in which it was -- it was a veto, but in the course of the veto the President made the determination that a particular aspect of that statute was unconstitutional.

And what happened as a result of that is that the Department of Justice didn't defend that aspect of the statute in litigation. Now, a subsequent President reached a contrary conclusion. But -- but my

point is simply that when the President makes a determination that a statute is unconstitutional, it can follow that the Department of Justice won't defend it in litigation.

CHIEF JUSTICE ROBERTS: Sometimes you do and sometimes you don't. What is the test for when you think your obligation to take care that the laws be faithfully executed means you'll follow your view about whether it's constitutional or not or you won't follow your view?

MR. SRINIVASAN: Mr. Chief Justice, I'd hesitate to give you a black-and-white algorithm. There are -- there are several considerations that would factor into it. One of the considerations --

JUSTICE SCALIA: Excuse me. It's not your view. It's the President's. It's only when the President thinks it's unconstitutional that you can decline to defend it? Or what if the Attorney General thinks it's unconstitutional?

MR. SRINIVASAN: No, no. Of course --

JUSTICE SCALIA: Or the Solicitor General, is that enough?

MR. SRINIVASAN: 28 U.S.C. 530(d) presupposes -- Congress presupposes that there are going to be occasions in which a statute is -- is not defended

because of a conclusion by the Attorney General that it's unconstitutional.

JUSTICE SCALIA: Oh, it can be either the Attorney General or the Solicitor General?

MR. SRINIVASAN: It could be, but this is a situation in which the President made the determination. And when the President makes that determination, there are a few considerations that I think would factor into the mix in determining whether enforcement will follow. One of them would be the consequences of enforcement for the individuals who are affected.

And so, for example, I would assume that if it's a criminal statute that we're talking about, an enforcement would require criminal enforcement against somebody and -- which would beget criminal sanctions. That may be --

JUSTICE SCALIA: So when Congress enacts a statute, it cannot be defended, it has no assurance that that statute will be defended in court, if the Solicitor General in his view thinks it's unconstitutional?

MR. SRINIVASAN: There have -- Justice Scalia --

JUSTICE SCALIA: Is that right?

MR. SRINIVASAN: -- there have been occasions in the past.

JUSTICE SCALIA: Yes or no?

MR. SRINIVASAN: Yes. Yes, it's true. And 28 U.S.C. 530(d) exactly presupposes that. That's the exact occasion in which that process is -- is occasioned. Congress knew that this would happen. Now, it can happen also when -- in the rare instance in which the President himself makes that determination. And I don't think that the take-care clause responsibility has this all or nothing capacity to it. It can be that the President decides --

JUSTICE GINSBURG: Mr. Srinivasan --

JUSTICE SCALIA: It's not what the OLC opinion said, by the way.

MR. SRINIVASAN: It can be that the President decides to enforce it. That's what happened in Lovett and that's the course of events that was sought -- that happened in Chadha. And there's --

JUSTICE GINSBURG: But when the Government -- when the -- when the case is adjudicated in the first instance -- we're talking here about appellate authority.

MR. SRINIVASAN: Correct.

JUSTICE GINSBURG: The Government sometimes loses cases in the first instance and then it doesn't appeal. If it agrees with the result that the court

reached, it doesn't appeal and then the judgment in the first instance where there was adversity is -- is the last word. So, when does the Government decide, yes, we agree with the -- the adjudication in the court of first instance and so we'll leave it there, and when does it say, yeah, we agree, but we want higher authority to participate?

MR. SRINIVASAN: Well, there are -- there are a number of considerations that could factor into it, Justice Ginsburg. You're right that either of those scenarios is possible. The reason that the Government appealed in this case is because the President made the determination that this statute would continue to be enforced, and that was out of respect for the Congress that enacted the law and the President who signed it, and out of respect for the role of the judiciary in saying what the law is.

The point of taking an appeal here is that the Government suffered an injury because a judgment was entered against the Government in the court of appeals. That's a classic case for injury.

JUSTICE SOTOMAYOR: Counsel, could you not run out of time on the BLAG standing? I know we -- we didn't permit Ms. Jackson to -- to address it. So don't run out of time on that.

MR. SRINIVASAN: I -- I won't, Your Honor. I'll be happy to turn -- turn to BLAG standing. I would like to make a couple of points on the question of our own standing to bring the petition before the Court.

And I think Justice Breyer was right. The key precedent here is Chadha. Chadha establishes a couple of things. First, Chadha establishes that there is aggrievement in the circumstances of this case. And I don't see what the difference is between aggrievement for purposes of statutory -- the statutory analysis at issue in Chadha, and injury for purposes of Article III.

JUSTICE ALITO: Well, how are you aggrieved? "Aggrieved" means that you are deprived of your legal rights. And you don't think that you've been deprived of your legal rights because your rights -- your obligations under the Constitution supercede DOMA, and you haven't been deprived of anything that you're entitled to under the Constitution. So how are you aggrieved?

MR. SRINIVASAN: I guess we'd -- I'd subscribe to the aggrievement analysis that the Court made in Chadha at pages 929 to 931 of its opinion. And what the Court said is this: "When an agency of the United States is a party to a case in which an act of Congress that it administers is held unconstitutional,

it is an aggrieved party. The agency's status as an aggrieved party is not altered by the fact that the Executive may agree with the holding that the statute in question is unconstitutional." That description is on all fours with the circumstances of this case.

JUSTICE ALITO: Could I just -- before you go on to the House group, could I just clear up something? In your brief, you argue that you are representing all three branches of the Government, is that right?

MR. SRINIVASAN: Correct.

JUSTICE ALITO: You're -- you're representing the Judiciary as you stand before us here today --

MR. SRINIVASAN: Well --

JUSTICE ALITO: -- trying to persuade the Court, you're representing the Court?

MR. SRINIVASAN: We represent the sovereign interests of the United States. Of course, in a case like this, the -- the -- we're submitting the dispute to the Judiciary for resolution, so in that sense, we -- I'm not going to stand here and tell you that I can dictate the -- that the Judiciary comes out in one direction or the other. I certainly would like to be able to do that, but I don't think I can, in all

fairness, do that. But I --

JUSTICE ALITO: It seems very strange. So in -- in a criminal case where it's the United States v. Smith, appearing before an Article III judge, the United States, the prosecutor is representing the court as well?

MR. SRINIVASAN: Well, I think -- I guess what I would say is this: The United -- the United States -- the Executive Branch represents the sovereign interests of the United States before the Court. It's not -- I think the point of this is that it's not that the Executive Branch is representing the Executive Branch alone.

The Executive Branch is representing the sovereign interests of the United States, and those interests would include the interests of the Congress that enacted the law, the interests of the President that signed it, and the interests of the Judiciary in pronouncing on what the law is. And the course of action that the President chose to undertake here is in keeping with all of those considerations.

JUSTICE KAGAN: Mr. Srinivasan, Chadha says what you said it said about what it means to be aggrieved --

MR. SRINIVASAN: Yes.

JUSTICE KAGAN: -- but Chadha also left open the Article III question. Why did Chadha leave it open if it's the same thing?

MR. SRINIVASAN: I don't -- I don't know why Chadha didn't engage on it in particular. I think part of it, Justice Kagan, is that the Court didn't have the methodology at that point in time that it does now. I don't know that it neatly divided between those questions in the same way. So yes, it left the Article III question open, but I think the question of Article III injury necessarily follows from aggrievement and I haven't -- I haven't heard a persuasive argument to the contrary.

If we were aggrieved in the circumstances of Chadha, it seems to me it necessarily follows that we're injured. We're injured in a couple of ways. An act of Congress has been declared unconstitutional, which Chadha itself says constitutes aggrievement and therefore constitutes injury. In this case also, we're required to pay a judgment --

JUSTICE SCALIA: Didn't Chadha -- didn't Chadha suggest that Congress could have standing in -- in Chadha?

MR. SRINIVASAN: I'm sorry?

JUSTICE SCALIA: In Chadha, there was an

argument that Congress had standing, because what was at issue in the case was precisely a prerogative of Congress to exercise the one-house or two-house veto.

MR. SRINIVASAN: There wasn't a -- there -- that was an issue in Chadha. I don't know that that issue was joined, actually, Justice Scalia. The Court did say at page 939 of its opinion that Congress is a proper party to defend the constitutionality of the Act and a proper petitioner, and I think that's the best language for the other side on this issue.

CHIEF JUSTICE ROBERTS: So you say we shouldn't be concerned about that part of Chadha because the issue wasn't joined there?

MR. SRINIVASAN: Well, I don't -- I don't read the --

CHIEF JUSTICE ROBERTS: But we should take Lovett as a binding precedent even though the issue wasn't addressed at all?

MR. SRINIVASAN: I didn't -- to be -- to be fair or, as was suggested this morning, to be cricket, I -- I didn't mean to suggest that Lovett is binding precedent, Mr. Chief Justice. What I'm saying is Lovett is a case in which this same scenario as happens here occurred. That's my -- that's my point about Lovett.

JUSTICE SOTOMAYOR: All right. Let's go to

the BLAG issue.

MR. SRINIVASAN: So -- sure.

JUSTICE SOTOMAYOR: And the issue wasn't joined. So what do you think we meant? And I know Justice Scalia doesn't care what you think we meant.

MR. SRINIVASAN: Right. Well --

JUSTICE SOTOMAYOR: But what is your reading of what that means, that Congress can --

MR. SRINIVASAN: I think that --

JUSTICE SOTOMAYOR: -- intervene in situations in which its interests are injured?

MR. SRINIVASAN: Sure. So there are two aspects of Chadha that are relevant on pages 939 and 940. The second discussion at page 940, I think, deals with prudential considerations that this Court ought to take into account to make sure that it has a sufficient adverse presentation of the competing arguments before it.

And that's accounted for by an amicus type role, and I think that's what the Court had in mind in Chadha, because the two cases that are cited in support of that proposition were both cases in which there was an appointed amicus. So that -- that deals with that aspect of Chadha.

The other aspect of Chadha is the sentence

that I alluded to earlier. And I guess I'm not -- I'm not going to tell you that that sentence doesn't bear on the issue at all, but I will say this: What's cited in that is 28 U.S.C. 1254.

So I think the point that was directly -- directly being made is that the House and Senate were parties for purposes of the statute and they were parties because they had intervened and so they had party status.

JUSTICE SOTOMAYOR: So are you accepting the amici's formulation that somehow the representative has to be of both houses and not just one?

MR. SRINIVASAN: No. I guess my -- my point is a little bit different. My point is that this was talking about whether they're a party for statutory purposes under 1254. I don't read this to address the question of Article III standing.

On the question of Article III standing, I guess what I would say is this: Chadha at most, if it says anything about Article III standing -- and I don't know that it does with respect to the House or Senate -- at most what it would say was in the unique circumstances of that case, where you had a legislative veto that uniquely affected a congressional prerogative --

JUSTICE SOTOMAYOR: So you take the position that Congress --

MR. SRINIVASAN: -- there might be standing in that situation. Even that I don't want to concede, but --

JUSTICE SOTOMAYOR: Well, I want to know what you're conceding.

MR. SRINIVASAN: I'm conceding that at most --

JUSTICE SOTOMAYOR: Let's assume this very case. Would -- who would ever have standing on behalf of Congress? Anyone? Or are you saying there's never standing?

MR. SRINIVASAN: Well, there are two different cases. This case is different, because this case doesn't involve the kind of unique congressional prerogative that was at issue in Chadha. Chadha involved a legislative veto.

Here, if I could just finish this --

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MR. SRINIVASAN: -- this thought. Thank you, Mr. Chief Justice.

Here, I don't think the interest that's being asserted is even in the same plane as the one that

was asserted and found deficient in Raines v. Byrd.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Clement?

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES

MR. CLEMENT: Thank you, Mr. Chief Justice, and may it please the Court:

This Court not only addressed the issue of the House's standing in Chadha; it held that the House is the proper party to defend the constitutionality of an Act of Congress when the executive agency charged with its enforcement agrees with plaintiff that the statute is unconstitutional.

JUSTICE SOTOMAYOR: Mr. Clement, Chadha was somewhat different because there was a unique House prerogative in question. But how is this case any different than enforcing the general laws of the United States? There's no unique House power granted by the legislation.

MR. CLEMENT: Well, Justice Sotomayor --

JUSTICE SOTOMAYOR: It's a law of the United States and the person who defends it generally is the Solicitor -- Solicitor General.

MR. CLEMENT: Sure, generally, unless and until they stop defending it, at which point we submit --

JUSTICE SOTOMAYOR: Well, then, why shouldn't -- why shouldn't taxpayers have a right to come in? And we say they don't.

MR. CLEMENT: Because the House is very -- in a very different position in a case like this and in Chadha from just the general taxpayer. Now, in a case like Chadha, for example, you're right, it was the one-house veto, if you will, that was at issue. But it would be a strange jurisprudence that says that the House has standing to come in and defend an unconstitutional one-house veto, but it doesn't have standing to come in and defend its core Article I prerogative, which is to pass statutes and have those statutes --

JUSTICE KENNEDY: Well, that -- that assumes the premise. We didn't -- the House didn't know it was unconstitutional. I mean --

MR. CLEMENT: Well, with all due respect, Justice Kennedy, I think the House --

JUSTICE KENNEDY: We are talking about ex ante, not ex post, what is standing at the outset? And the House says this is constitutional.

MR. CLEMENT: Sure. And there is a presumption that its acts are constitutional. That presumption had real life here because when Congress was considering this statute it asked the Justice Department three times whether DOMA was constitutional, and three times the Justice Department told them that it was in fact constitutional. So I think it's a fair assumption that they at least have standing to have that determination made by the courts, and this Court has held that in the context of State legislatures and the courts have --

JUSTICE KENNEDY: So you don't think that there is anything to the argument that in Chadha the House had its own unique institutional responsibilities and prerogatives at stake, either the one-house veto or the legislative veto?

MR. CLEMENT: Well, I would say two things.

JUSTICE KENNEDY: That's irrelevant?

MR. CLEMENT: I don't think -- I don't think it's irrelevant. I would say two things. One is, I don't think there was anything particularized about the fact that it was the House that exercised the one-house veto, because the Court allowed the Senate to participate as well and the Senate's interest in that was really just the constitutionality of the legislation

and perhaps the one-house veto going forward.

But what I would say is I just -- I would continue to resist the premise, which is that the House's prerogatives aren't at stake here. The House's single most important prerogative, which is to pass legislation and have that legislation, if it's going to be repealed, only be repealed through a process where the House gets to fully participate.

CHIEF JUSTICE ROBERTS: What if you -- what if you disagree with -- the executive is defending one of your laws, if that's the way you insist on viewing it, and you don't like their arguments, you say, they are not making the best argument. Is that a situation in which you have standing to intervene to defend the law in a different way than the executive?

MR. CLEMENT: No, I would say we would not, Mr. Chief Justice. I would say in that circumstance the House would have the prerogative to file an amicus brief if it wanted to, but that's because of a sound prudential reason, which is when the Executive is actually discharging its responsibility, its traditional obligation to defend an Act of Congress, if Congress comes in as a party it has the possibility of second-guessing the way that they are actually defending it.

But if the Executive is going to vacate the premises or, in a case like this, not just vacate the premises, but stay in court and attack the statute, you don't have that prudential concern. And that's why --

JUSTICE KAGAN: How about a couple of cases sort of in the middle of the Chief Justice's and this one? So let's say that the Attorney General decides that a particular application of the statute is unconstitutional and decides to give up on that application. Or even let's say the Attorney General decides that the application of the statute might be unconstitutional, so decides to interpret the statute narrowly in order to avoid that application. Could Congress then come in?

MR. CLEMENT: Well, I think -- if in a particular case, which is obviously not this case, the Executive decides, we are not going to defend the statute as applied I think in that situation the House could come in. I think as a matter of practice it probably wouldn't.

And it's not like the House and the Senate are very anxious to exercise this prerogative. In the 30 years since the Chadha decision, there's only been 12 instances in which the -- in which the House has come in and intervened as a party. And I think it's very

important to recognize that whatever --

JUSTICE GINSBURG: Does that include the -- does that include the courts of appeals or just this Court?

MR. CLEMENT: That includes all courts, but excluding the DOMA cases. So from the point of Chadha until the DOMA cases, there were a total of 12 cases where the House intervened as a party.

And I do think that particularly in the lower court cases, it's very important to understand that party status is critical. I mean, in this case it doesn't make a huge differences if you are an amicus with argument time versus a party. But in the district court that makes all the difference. Only a party can take a deposition.

JUSTICE BREYER: This is what -- we have always had the distinction between the public action and the private action. A public action, which does not exist under the Federal Constitution, is to vindicate the interest in the law being enforced. Now, when the government, State or Federal, in fact has the interest, a special interest in executing the law, here given to the President, and they can delegate that interest to Congress, if they did, which arguably they didn't do here. But to say that any legislator has an interest on

his own without that delegation to defend the law is to import in that context the public action into the Federal Government.

Now, that -- it hasn't been done, I don't think, ever. I can see arguments for and against it, but I can't think of another instance where that's happened.

MR. CLEMENT: Well, I would -- a couple of things, Justice Breyer. I mean, I would point you to Chadha and I realize you can distinguish Chadha.

JUSTICE BREYER: Chadha is really different because of course there is an interest in the legislature in defending a procedure of the legislature. Now, that's -- that isn't tough. But this is, because the only interest I can see here is the interest in the law being enforced.

MR. CLEMENT: Well, if I --

JUSTICE BREYER: And that's -- I'm afraid of opening that door.

MR. CLEMENT: Well, it's understandable. I mean, obviously nobody's suggesting, at least in the Legislative Branch, that this is a best practices situation.

JUSTICE BREYER: No, no. But think of another instance where that's happened, where in all of

the 12 cases or whatever that what this Court has said, without any special delegation of the power of the State or Federal Government to execute the law, without any special delegation, a legislator simply has the power, which a private citizen wouldn't have, to bring a lawsuit as a party or defend as a party to vindicate the interest in the law being enforced, the law he has voted for?

Now I can imagine arguments on both side, so I'm asking you only, is there any case you can point me to which will help?

MR. CLEMENT: I can point to you a couple of cases that will help but may not be a complete solution for some of the reasons you built into your question. The cases I would point to help are Coleman v. Miller, Karcher v. May, and Arizonans for Official English. And all of those -- I don't think Coleman involved any specific legislative authorization, but you can distinguish it, I suppose.

But in trying to distinguish it, keep in mind that this Court gave those 20 Senators not just standing to make the argument about the role of the lieutenant governor, but also gave them standing to make the separate argument, which is the only one this Court reached, because it was divided four to four on the

lieutenant governor's role, the only issue that the Court reached is the issue whether prior ratification disabled them from subsequent legislation action, which is just a way of saying what they did was unconstitutional.

So I think Coleman is quite close. Karcher, Arizonans against English, there was an authorization. We would say H. Res. 5 is enough of authorization for these purposes.

JUSTICE SOTOMAYOR: Can you tell me where the authorization is here? I know that there is a statute that gives the Senate specifically authorization to intervene and that there was consideration of extending that right to the House. But the appointment of BLAG is strange to me, because it's not in a statute, it's in a House rule.

So where -- how does that constitute anything other than a private agreement among some Senators, the House leadership? And where -- from where do they derive the right, the statutory right, to take on the power of representing the House in items outside of the House? I know they control the procedures within the House, but that's a very different step from saying that they can decide who or to create standing in some way, prudential or otherwise, Article III or otherwise.

MR. CLEMENT: Well, Justice Sotomayor, I can point you to two places. One is the House rules that are pursuant to the rulemaking authority and approved by the institution. They're approved in every Congress. Rule 2.8.

JUSTICE SOTOMAYOR: What other House Rule creates the power of the majority leaders to represent the House outside of the functions of the House?

MR. CLEMENT: I'm not sure there is another one, but that's the sole purpose of Rule 2.8. It creates the Office of the General Counsel --

JUSTICE SOTOMAYOR: This would be, I think, sort of unheard of, that --

MR. CLEMENT: I don't think so, Justice Sotomayor. That's the same authority that gave the House, essentially a predecessor to it -- - it would be the same authority that has had the House appear in litigation ever since Chadha. In Chadha there was a vote that authorized it specifically, but we have that here in H. Res. 5, which is the second place I would point you.

JUSTICE SOTOMAYOR: We don't even have a vote here.

MR. CLEMENT: We do. We do have a vote in H. Res. 5. At the beginning of this Congress in

January, the House passed a resolution that passed, that authorized the BLAG to continue to represent the interests of the House in this particular litigation. So I think if there was a question before H. Res. 5, there shouldn't be now.

I would like to --

JUSTICE KENNEDY: Under your view, would the Senate have the right to have standing to take the other side of this case, so we have the House on one side and the Senate on the other?

MR. CLEMENT: No, Justice Kennedy, they wouldn't have the standing to be on the other side of this case. They would have standing to be on the same side of this case, and I think that's essentially what you had happen in the Chadha case.

JUSTICE KENNEDY: Well, why not? They're concerned about the argument and you say that the House of Representatives standing alone can come into the court. Why can't the Senate standing alone come into court and intervene on the other side?

MR. CLEMENT: It -- because it wouldn't have the authority to do so under Chadha. What -- Chadha makes the critical flipping of the switch that gives the House the ability to intervene as a party is that the Executive Branch declines to defend the statute. So if

the Senate wants to come in and basically take -- share argument time or something as an amicus, they can, but there's no need for them to participate as -- as a party.

And I would want to emphasize that in the lower courts, participation by a party is absolutely critical. It doesn't make sense to have the party that wants to see the statute invalidated be in charge of the litigation in the district courts, because whether the statute is going to be invalidated is going to depend on what kind of record there is in the district court.

It'd be one thing, Justice Scalia, if all that happened is they entered consent judgment. I suppose then the thing would end, and then in the long run, the Executive would be forced to do their job and actually defend these statutes --

JUSTICE ALITO: Then why is --

MR. CLEMENT: -- but if that's not going to happen --

JUSTICE ALITO: Then why is it sufficient for one house to take the position that the statute is constitutional? The enactment of legislation requires both houses, and usually the signature of the President.

MR. CLEMENT: Justice Alito, I think it makes perfect sense in this context, because every --

each individual house has a constitutional rule before a statute is repealed. And so yes, it takes two of them to make the law. But each of their's participation is necessary to repeal a law. So if the Executive wants to go into court and effectively seek the judicial repeal of a law, it makes sense that one house can essentially vindicate its role in our constitutional scheme by saying, wait a minute, we passed that law; it can't be repealed without our participation.

JUSTICE ALITO: Well, if the law is passed by a bare majority of one of the houses, then each member of that -- of that house who was part of the majority has the same interest in defending its constitutionality.

MR. CLEMENT: I don't think that's right after Raines, Justice Alito. In Raines, this Court carefully distinguished between the situation of an individual legislator and the situation of one of the houses as a whole. And it specifically said this might be a different case if we had that kind of vote. And that's what you have here. That's what you had in Chadha.

And again, I do think that -- I mean, the only alternatives here are really to say that the Executive absolutely must enforce these laws, and if

they don't, I mean, because after all -- you know, I -- I really don't understand why it's -- if they're not going to -- if they've made a determination that the law is unconstitutional, why it makes any sense for them to continue to enforce the law and put executive officers in the position of doing something that the President has determined is unconstitutional.

I mean, think about the qualified immunity implications of that for a minute.

So that's problematic enough. But if they're going to be able to do that and get anything more than a consent judgment, then the House is going to have to be able to play its role, and it's going to have to play the role of a party. An amicus just doesn't get it done. And I really think, in a sense, the Executive gives the game away by conceding that our participation as an amicus here is necessary to solve what would otherwise be a glaring adverseness problem.

Because once you recognize that we can participate as an amicus, you've essentially recognized that there's nothing inherently executive about coming in and defending the constitutionality of an act of Congress. Or more to the point, there's nothing inherently unlegislative about coming in and making arguments in defense of the statute.

And if that's critical, absolutely necessary to ensure there's an adverse presentation of the issues, well, there's no reason the House should have to do that with one hand tied behind its back. If its participation is necessary, it should participate as a full party. And as I say, that's critically important in the lower courts so they can take depositions, build a factual record, and allow for a meaningful defense of the statute.

Because the alternative really puts the Executive Branch in an impossible position. It's a conflict of interest. They're the ones that are making litigation decisions to promote the defense of a statute they want to see invalidated. And if you want to see the problems with their position, look at Joint Appendix page 437. You will see the most anomalous motion to dismiss in the history of litigation: A motion to dismiss, filed by the United States, asking the district court not to dismiss the case.

I mean, that's what you get under their view of the world, and that doesn't serve as separation of powers.

JUSTICE KENNEDY: That -- that would give you intellectual whiplash.

I'm going to have to think about that.

(Laughter.)

MR. CLEMENT: It -- it does. It does. And then -- you know -- and the last thing I'll say is, we saw in this case certain appeals were expedited, certain appeals weren't. They did not serve the interest of defending the statute, they served the distinct interest of the Executive.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Jackson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF VICKI C. JACKSON
ON BEHALF OF THE COURT-APPOINTED AMICUS CURIAE

MS. JACKSON: Thank you, Your Honor.

I have five points I'll try to get to.

Just very quickly, Justice Breyer, I only answered part of a question you asked me earlier, and I just want to say, the U.S. is asking this Court to tell it to pay money.

It's not asking for relief.

Justice Sotomayor, you asked me about how the issue could come up otherwise. I don't think I had a chance to mention, private party litigation, employees against employers, there's an interpleader action right now pending that was cited in the brief of the 287 employers -- on page 32 at note 54 -- giving examples of

how the issue of DOMA's constitutionality could arise in private litigation.

In addition, State and local government employees might have, for example, FMLA claims in which the issue could arise. So I think that there are a number of ways in which the issue could arise.

On the question of what the purpose of 1252 could be if it wasn't to coincide with Article III injury that was raised by my -- my friend in his argument, I wonder whether the Court in Chadha wasn't saying something like this: 1252 was Congress's wish list. It was like -- like a citizen suit provision, to be exercised only to the extent that Article III power was there. That's a way to make sense out of what the Court is doing in the text and footnote there.

As to the question of BLAG, which has been very fully discussed already, I do want to say that after-the-fact authorization seems to me quite troubling and inconsistent with this Court's approach in Summers v. Earth Institute, and in the -- I think it was in the plurality in Lujan, where you -- you -- if a party has standing, they need to have it in the first court that they're in, either when it starts or certainly before judgment.

And the rule as Justice Sotomayor observed

just doesn't seem to say anything about authority to litigate. I think that in addition, the -- the big problem here is the injury being complained of is inconsistent with the separation of powers.

Bowsher and Buckley make very clear that once the litigation is enacted, Congress's authority to supervise it is at an end. It goes over to the Executive Branch. And whether the Executive Branch does it well or badly in the view of Congress, it's in its domain. And separation of powers will not be meaningful if all it means is the Congress has to stay out unless it thinks that the President is doing it badly.

So I think Article II helps give shape to what kinds of injuries alleged by parts of Congress can be cognizable.

Finally, the three -- two or three cases cited by my colleague who last spoke: Coleman, Karcher and Arizona, all involved State level of government, where the Federal separation of powers doctrines articulated in cases like Bowsher and Buckley were not at issue.

Unless there are other questions, I will sit down.

JUSTICE ALITO: Well, could I ask you this question: On the question of the House resolution --

MS. JACKSON: Yes, sir.

JUSTICE ALITO: -- if -- if a house -- if one of the houses passes a resolution saying that a particular group was always authorized to represent us, do you think it's consistent with the separation of powers for us to examine whether that's a correct interpretation of the rules of that House of Congress?

MS. JACKSON: Yes, I do, Your Honor, because that resolution is not something operating only internally within the House. It is having effect in the world of the Article III courts, which this Court, in proceedings in it, is in charge of.

Moreover, in the Smith case, the -- this Court said that when the Senate passed an after-the-fact interpretation of what a prior rule meant, notwithstanding the great respect given to the Senate's interpretation, this Court could reach and did reach an alternative interpretation of the meaning of the Senate rules, and I would urge this Court to do the same thing here.

JUSTICE BREYER: Maybe I -- as long as you have a minute, I -- what did you think of Mr. Clement's argument this way, that -- that the execution -- can I --

CHIEF JUSTICE ROBERTS: Sure.

JUSTICE BREYER: -- to execute the laws is in Article II, but where the President doesn't in a particular law, under those circumstances, a member of the legislature, appropriately authorized, has the constitutional power -- a power that is different than the average person being interested in seeing that the law is carried out; they can represent the power to vindicate the interest in seeing that the law is executed. And that's a special interest, existing only when the Executive declines to do so.

MS. JACKSON: Your Honor, I think that when the Executive declines to do so, it is exercising its Take Care Clause authority. The Take Care Clause says that the Executive shall take care that the laws be faithfully executed. I think the laws include the Constitution.

So I don't think the distinction offered by my colleague is -- is appropriate. I think it would result in a significant incursion on the separation of powers between the legislature and the Executive Branch, and would bring this -- the Federal courts into more controversies that have characteristics of interbranch confrontation, in which this Court has traditionally been very cautious.

CHIEF JUSTICE ROBERTS: Ms. Jackson, before

you sit down, I would like to note that you briefed and argued this case as amicus curiae at the invitation of the Court, and you have ably discharged the responsibility, for which you have the gratitude of the Court.

MS. JACKSON: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you.

We'll now take a very short break and turn to the merits.

(Recess.)

CHIEF JUSTICE ROBERTS: I meant that we would take a break, not that -- we will continue argument in the case on the merits.

Mr. Clement?

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The issue of same-sex marriage certainly implicates profound and deeply held views on both sides of the issue, but the legal question on the merits before this Court is actually quite narrow. On the assumption that States have the constitutional option either to define marriage in traditional terms or to

recognize same-sex marriages or to adopt a compromise like civil unions, does the Federal Government have the same flexibility or must the Federal Government simply borrow the terms in State law?

I would submit the basic principles of federalism suggest that as long as the Federal Government defines those terms solely for purposes of Federal law, that the Federal Government has the choice to adopt a constitutionally permissible definition or to borrow the terms of the statute.

JUSTICE GINSBURG: Mr. Clement, the problem is if we are totally for the States' decision that there is a marriage between two people, for the Federal Government then to come in to say no joint return, no marital deduction, no Social Security benefits; your spouse is very sick but you can't get leave; people -- if that set of attributes, one might well ask, what kind of marriage is this?

MR. CLEMENT: And I think the answer to that, Justice Ginsburg, would be to say that that is a marriage under State law, and I think this Court's cases when it talks about the fundamental right to marriage, I take it to be talking about the State law status of marriage; and the question of what does that mean for purposes of Federal law has always been understood to be

a different matter. And that's been true certainly in a number of situations under a number of statutes, so it's simply not the case that as long as you are married under State law you absolutely are going to be treated as married --

JUSTICE GINSBURG: How about divorce? Same thing? That you can have a Federal notion of divorce, and that that doesn't relate to what the State statute is?

MR. CLEMENT: Well, we've never had that, Your Honor, and I think that there is a difference when it comes to divorce, because with divorce uniquely, you could have the -- possibility that somebody's married to two different people for purposes of State law and Federal law.

But with the basic question of even whether to recognize the marriage -- or probably the best way to put it is just whether the Federal law treats you as married for a particular purpose or not, there always have been differences between the Federal law treatment and the State law treatment.

The Federal treatment, for example, recognizes common law marriages in all States whereas a lot of States don't recognize common law marriages, but Federal law recognizes that for some purposes -- the

Social Security Act, I think it's at page 4 of our brief. And --

JUSTICE SOTOMAYOR: But only if the State recognizes it.

MR. CLEMENT: No, I don't think that is true for purposes of that provision.

JUSTICE SOTOMAYOR: And so there is a common law, Federal common law definition?

MR. CLEMENT: That's my understanding, that's -- as discussed --

JUSTICE SOTOMAYOR: I thought it was reverse, that if the State law recognized common law marriages, the Federal law --

MR. CLEMENT: My understanding is that there is a Federal -- that the Federal law recognizes in -- in the Social Security context even if it doesn't; and in all events, there are other situations -- immigration context, tax consequences. For tax consequences, if you get a divorce every December, you know, for tax consequences, the State may well recognize that divorce. The Federal Government has long said, look, we are not going to allow you get a divorce every December just to get remarried in January so you'll have a filing tax status that works for you that is more favorable to you.

So the Federal Government has always treated

this somewhat distinctly; it always has its own efforts; and I do think for purposes of the federalism issue, it really matters that all DOMA does is take this term where it appears in Federal law and define it for purposes of Federal law. It would obviously be a radically different case if Congress had, in 1996, decided to try to stop States from defining marriage in a particular way or dictate how they would decide it in that way.

JUSTICE KENNEDY: Well, it applies to over what, 1,100 Federal laws, I think we are saying. So it's not -- it's -- it's -- I think there is quite a bit to your argument that if the tax deduction case, which is specific, whether or not if Congress has the power it can exercise it for the reason that it wants, that it likes some marriage it does like, I suppose it can do that.

But when it has 1,100 laws, which in our society means that the Federal Government is intertwined with the citizens' day-to-day life, you are at -- at real risk of running in conflict with what has always been thought to be the essence of the State police power, which is to regulate marriage, divorce, custody.

MR. CLEMENT: Well, Justice Kennedy, two points. First of all, the very fact that there are

1,100 provisions of Federal law that define the terms "marriage" and "spouse" goes a long way to showing that Federal law has not just stayed completely out of these issues. It's gotten involved in them in a variety of contexts where there is an independent Federal power that supported that.

Now, the second thing is the fact that DOMA involves all 1,100 statutes at once is not really a sign of its irrationality. It is a sign that what it is, and all it has ever purported to be, is a definitional provision. And like every other provision in the Dictionary Act, what it does is it defines the term wherever it appears in Federal law in a consistent way. And that was part and parcel of what Congress was trying to accomplish with DOMA in 1996.

JUSTICE KENNEDY: Well, but it's not really uniformity because it regulates only one aspect of marriage. It doesn't regulate all of marriage.

MR. CLEMENT: Well, that's true but I don't think that's a mark against it for federalism purposes, and it -- it addressed a particular issue at a point, remember in 1996, Congress is addressing this issue because they are thinking that the State of Hawaii through its judicial action is about to change the definition of marriage from a way that it had been

defined in every jurisdiction in the United States. And what that meant is that when Congress passed every one of the statutes affected by DOMA's definition, the Congress that was passing that statute had in mind the traditional definition.

And so Congress in 1996 at that point says, the States are about to experiment with changing this, but the one thing we know is all these Federal statutes were passed with the traditional definition in mind. And if rational basis is the test, it has to be rational for Congress then to say, well, we are going to reaffirm what this word has always meant for purposes of Federal law.

JUSTICE ALITO: Suppose we look just at the estate tax provision that's at issue in this case, which provides specially favorable treatment to a married couple as opposed to any other individual or economic unit. What was the purpose of that? Was the purpose of that really to foster traditional marriage, or was Congress just looking for a convenient category to capture households that function as a unified economic unit?

MR. CLEMENT: Well, I think for these purposes actually, Justice Alito, if you go back to the beginning of the estate tax deduction, what Congress was

trying to do was trying to provide uniform treatment of taxpayers across jurisdictions, and if you look at the brief that Senator Hatch and some other Senators filed, they discussed this history, because what was happening in 1948 when this provision was initially put into Federal law was you had community property States and common law States, and actually there was much more favorable tax treatment if you were in a community law State than a common law State.

And Congress didn't want to have an artificial incentive for States to move from common law to community property; it wanted to treat citizens the same way no matter what State they were in. So it said, we will give a uniform Federal deduction based on marriage, and I think what that shows is that when the Federal Government gets involved in the issue of marriage, it has a particularly acute interest in uniform treatment of people across State lines.

So Ms. Windsor wants to point to the unfairness of the differential treatment of treating two New York married couples differently, and of course for purposes of New York law that's exactly the right focus, but for purposes of Federal law it's much more rational for Congress to -- to say, and certainly a rational available choice, for Congress to say, we want to treat

the same-sex couple in New York the same way as the committed same-sex couple in Oklahoma and treat them the same. Or even more to the point for purposes --

JUSTICE SOTOMAYOR: But that's begging the question, because you are treating the married couples differently.

MR. CLEMENT: Well --

JUSTICE SOTOMAYOR: You are saying that New York's married couples are different than Nebraska's.

MR. CLEMENT: But -- but the only way --

JUSTICE SOTOMAYOR: I picked that out of a hat. But the point is that there is a difference.

MR. CLEMENT: But the -- the only way they are different is because of the way the State law treats them. And just to be clear how -- you know, what this case is about, and how sort of anomalous the -- the treatment, the differential treatment in two States is, is this is not a case that is based on a marriage license issued directly by the State of New York after 2011 when New York recognized same-sex marriage. This is -- the status of Ms. Windsor as married depends on New York's recognition of an Ontario marriage certificate issued in 2007.

JUSTICE BREYER: You would say it would be the same thing if the State passed a law -- Congress

passes a law which says, well, there's some States -- they all used to require 18 as the age of consent. Now, a lot of them have gone to 17. So if you're 17 when you get married, then no tax deduction, no medical, no nothing.

Or some States had a residence requirement of a year, some have six months, some have four months. So Congress passes a law that says, well unless you're there for a year, no medical deduction, no tax thing, no benefits of any kind, that that would be perfectly constitutional. It wouldn't be arbitrary, it wouldn't be random, it wouldn't be capricious.

MR. CLEMENT: Well, I guess I would -- I would say two things. I would say that the first question would be what's the relevant level of scrutiny and I assume the level of scrutiny for the things --

JUSTICE BREYER: No, I just want your bottom line. The bottom line here is we can imagine -- you know, I can make them up all day. So can you -- differences between --

(Laughter.)

JUSTICE BREYER: Differences between States have nothing to do with anything, you know, residence requirements, whether you have a medical exam, whether -- we can think them up all day -- how old you

are. And Congress just passes a law which takes about, let's say, 30 percent of the people who are married in the United States and says no tax deduction, no this, no that, no medical -- medical benefits, none much these good things, none of them for about 20, 30 percent of all of the married people.

Can they do that?

MR. CLEMENT: Again, I think the right way to analyze it would be, you know, is -- is there any distinction drawn that implicates what level of scrutiny is implicated. If the level of scrutiny is a rational basis, then my answer to you would be, yes, they can do that. I mean, we'd have to talk about what the rational basis would be --

JUSTICE BREYER: No, there isn't any. I'm trying to think of examples, though I just can't imagine what it is.

MR. CLEMENT: Well, I -- I think the uniform treatment of individuals across State lines --

JUSTICE BREYER: All right. So you're saying uniform treatment's good enough no matter how odd it is, no matter how irrational. There is nothing but uniformity. We could take -- no matter. Do you see what I'm -- where I'm going?

MR. CLEMENT: No, I see exactly where you're

going, Justice Breyer.

JUSTICE BREYER: All right.

(Laughter.)

MR. CLEMENT: And -- and obviously, every one of those cases would have to be decided on its own. But I do think there is a powerful interest when the Federal Government classifies people --

JUSTICE BREYER: Yes, okay. Fine.

MR. CLEMENT: There's a powerful interest in treating --

JUSTICE BREYER: Fine, but once -- the first part. Every one of those cases has to be decided on its own, okay? Now, what's special or on its own that distinguishes and thus makes rational, or whatever basis you're going to have here, treating the gay marriage differently?

MR. CLEMENT: Well, again, if we're -- if we're coming at this from the premise that the States have the option to choose, and then we come at this from the perspective that Congress is passing this not in a vacuum, they're passing this in 1996. And what they're confronting in 1996 is the prospect that one State, through its judiciary, will adopt same-sex marriage and then by operation of the through full faith and credit law, that will apply to any -- any couple that wants to

go there.

And the State that's thinking about doing this is Hawaii; it's a very nice place to go and get married. And so Congress is worried that people are going to go there, go back to their home jurisdictions, insist on the recognition in their home jurisdictions of their same-sex marriage in Hawaii, and then the Federal Government will borrow that definition, and therefore, by the operation of one State's State judiciary, same-sex marriage is basically going to be recognized throughout the country.

And what Congress says is, wait a minute. Let's take a timeout here. This is a redefinition of an age-old institution. Let's take a more cautious approach where every sovereign gets to do this for themselves. And so Section 2 of DOMA says we're going to make sure that on full faith and credit principles that a decision of one State --

JUSTICE SOTOMAYOR: But what gives the Federal Government the right to be concerned at all at what the definition of marriage is? Sort of going in a circle. You're saying -- you're saying, we can create this special category -- men and women -- because the States have an interest in traditional marriage that they're trying to protect. How do you get the Federal

Government to have the right to create categories of that type based on an interest that's not there, but based on an interest that belongs to the States?

MR. CLEMENT: Well, at least two -- two responses to that, Justice Sotomayor. First is that one interest that supports the Federal Government's definition of this term is whatever Federal interest justifies the underlying statute in which it appears. So, in every one of these statutes that affected, by assumption, there's some Article I Section 8 authority --

JUSTICE SOTOMAYOR: So they can create a class they don't like -- here, homosexuals -- or a class that they consider is suspect in the marriage category, and they can create that class and decide benefits on that basis when they themselves have no interest in the actual institution of marriage as married. The State's control that.

MR. CLEMENT: Just to clarify, Justice Sotomayor, I'm not suggesting that the Federal Government has any special authority to recognize traditional marriage. So if -- the assumption is that nobody can do it. If the States can't do it either, then the Federal Government can't do it. So the Federal Government --

JUSTICE SOTOMAYOR: No, I'm -- I'm assuming --

MR. CLEMENT: Okay. So then the question is --

JUSTICE SOTOMAYOR: Assuming I assume the States can --

MR. CLEMENT: So then, if the States can --

JUSTICE SOTOMAYOR: -- what creates the right --

MR. CLEMENT: -- the Federal Government has sort of two sets of authorities that give it sort of a legitimate interest to wade into this debate. Now, one is whatever authority gives rise to the underlying statute. The second and complementary authority is that, you know, the Federal Government recognizes that it's a big player in the world, that it has a lot of programs that might give States incentives to change the rules one way or another.

And the best way -- one way to stay out of the debate and let just the -- the States develop this and let the democratic process deal with this is to just say, look, we're going to stick with what we've always had, which is traditional definition. We're not going to create a regime that gives people an incentive and point to Federal law and say, well, another reason you

should have same-sex marriage is because then you'll get a State tax deduction. They stayed out of it. They've said, look, we're --

JUSTICE KENNEDY: But I -- I understand the logic in your argument. I -- I hadn't thought of the relation between Section 2 and Section 3 in the way you just said. You said, now Section 2 was in order to help the States. Congress wanted to help the States. But then Section 3, that Congress doesn't help the States which have come to the conclusion that gay marriage is lawful. So that's inconsistent.

MR. CLEMENT: No, no. They treat them -- which is to say they -- they are preserving, they are helping the States in the sense of having each sovereign make this decision for themselves.

JUSTICE KENNEDY: We're helping the States do -- if they do what we want them to, which is -- which is not consistent with the historic commitment of marriage and -- and of questions of -- of the rights of children to the State.

MR. CLEMENT: With respect, Justice Kennedy, that's not right. No State loses any benefits by recognizing same-sex marriage. Things stay the same. What they don't do is they don't sort of open up an additional class of beneficiaries under their State law

for -- that get additional Federal benefits. But things stay the same. And that's why in this sense --

JUSTICE GINSBURG: They're not -- they're not a question of additional benefits. I mean, they touch every aspect of life. Your partner is sick. Social Security. I mean, it's pervasive. It's not as though, well, there's this little Federal sphere and it's only a tax question.

It's -- it's -- as Justice Kennedy said, 1100 statutes, and it affects every area of life. And so he was really diminishing what the State has said is marriage. You're saying, no, State said two kinds of marriage; the full marriage, and then this sort of skim milk marriage.

(Laughter.)

MR. CLEMENT: With respect, Justice Ginsburg, that's not what the Federal Government is saying. The Federal Government is saying that within its own realm in Federal policies, where we assume that the Federal Government has the authority to define the terms that appear in their own statute, that in those areas, they are going to have their own definition. And that's --

JUSTICE KAGAN: Mr. Clement, for the most part and historically, the only uniformity that the

Federal Government has pursued is that it's uniformly recognized the marriages that are recognized by the State. So, this was a real difference in the uniformity that the Federal Government was pursuing. And it suggests that maybe something -- maybe Congress had something different in mind than uniformity.

So we have a whole series of cases which suggest the following: Which suggest that when Congress targets a group that is not everybody's favorite group in the world, that we look at those cases with some -- even if they're not suspect -- with some rigor to say, do we really think that Congress was doing this for uniformity reasons, or do we think that Congress's judgment was infected by dislike, by fear, by animus, and so forth?

I guess the question that this statute raises, this statute that does something that's really never been done before, is whether that sends up a pretty good red flag that that's what was going on.

MR. CLEMENT: A couple of responses, Justice Kagan. First of all, I think I would take issue with the premise, first of all, that this is such an unusual Federal involvement on an issue like marriage. If you look at historically, not only has the Federal Government defined marriage for its own purposes

distinctly in the context of particular -- particular programs, it's also intervened in -- in other areas, including in-state prerogatives. I mean, there's a reason that four state constitutions include a prohibition on polygamy. It's because the Federal Congress insisted on them. There is a reason that, in the wake of the Civil War and in Reconstruction, Congress specifically wanted to provide benefits for spouses of freed slaves who fought for the Union.

In order to do it, it essentially had to create state law marriages, because in the Confederacy, the slaves couldn't get married. So they developed their own State -- essentially, a Federal, sort of, condition to define who was married under those laws. So where there was the needs in the past to get involved, the Federal Government has got involved.

The other point I would make -- but I also eventually want to get around to the animus point -- but the other point I would make is: When you look at Congress doing something that is unusual, that deviates from the way they -- they have proceeded in the past, you have to ask, Well, was there good reason? And in a sense, you have to understand that, in 1996, something's happening that is, in a sense, forcing Congress to choose between its historic practice of deferring to the

States and its historic practice of preferring uniformity.

Up until 1996, it essentially has it both ways: Every State has the traditional definition. Congress knows that's the definition that's embedded in every Federal law. So that's fine. We can defer.

Okay. 1996 --

JUSTICE KAGAN: Well, is what happened in 1996 -- and I'm going to quote from the House Report here -- is that "Congress decided to reflect an honor of collective moral judgment and to express moral disapproval of homosexuality."

Is that what happened in 1996?

MR. CLEMENT: Does the House Report say that? Of course, the House Report says that. And if that's enough to invalidate the statute, then you should invalidate the statute. But that has never been your approach, especially under rational basis or even rational basis-plus, if that is what you are suggesting.

This Court, even when it's to find more heightened scrutiny, the O'Brien case we cite, it suggests, Look, we are not going to strike down a statute just because a couple of legislators may have had an improper motive. We're going to look, and under rational basis, we look: Is there any rational basis

for the statute?

And so, sure, the House Report says some things that we are not -- we've never invoked in trying to defend the statute.

But the House Report says other things, like Congress was trying to promote democratic self-governance. And in a situation where an unelected State judiciary in Hawaii is on the verge of deciding this highly contentious, highly divisive issue for everybody, for the States -- for the other States and for the Federal Government by borrowing principle, it makes sense for Congress --

JUSTICE KENNEDY: Well, but your statute applies also to States where the voters have decided it.

MR. CLEMENT: That's true. I -- but again, I don't know that that fact alone makes it irrational. And I suppose if that's what you think --

JUSTICE KENNEDY: Just to be clear, I think your answer is fair and rational.

We've switched now from Federal power to rationality. There is -- there is a difference. We're talking -- I think we are assuming now that there is Federal power and asking about the degree of scrutiny that applies to it. Or are we going back to whether there is a Federal power? They are -- they are

intertwined.

MR. CLEMENT: I think -- I think there is so clearly is a Federal power because DOMA doesn't define any term that appears anywhere other than in a Federal statute that we assume that there is Federal power for. And if there is not Federal power for the statutes in which these terms appear, that is a problem independent of DOMA, but it is not a DOMA problem. So I will assume we have Federal power.

Then the question is --

JUSTICE KENNEDY: Well, I think -- I think it is a DOMA problem. The question is whether or not the Federal government, under our federalism scheme, has the authority to regulate marriage.

MR. CLEMENT: And it doesn't have the authority to regulate marriages, as such, but that's not what DOMA does. DOMA provides certain -- DOMA defines a term as it appears in Federal statutes, many of those Federal statutes provide benefits. Some of those Federal statutes provide burdens. Some of those Federal statutes provide disclosure obligations. It appears in lots of places, and if any one of --

JUSTICE ALITO: Well, Congress could have achieved exactly what it achieved under Section 3 by excising the term "married" from the United States Code

and replacing it with something more neutral. It could have said "certified domestic units," and then defined this in exactly the way that Section 3 -- exactly the way DOMA defines "marriage."

Would that make a difference? In that instance, the Federal Government wouldn't be purporting to say who is married and who is not married; it would be saying who is entitled to various Federal benefits and burdens based on a Federal definition.

MR. CLEMENT: That would make no difference, Justice Alito. It does -- the hypothetical helpfully demonstrates, though, that when the Federal Government is defining this term as it appears in the Federal Code, it is not regulating marriage as such. And it is important to recognize that people that are married in their State, based on either the legislative acts or by judicial recognition, remain married for purposes of State law.

JUSTICE BREYER: When you started, you started by, I think, agreeing -- maybe not -- that uniformity in and of itself with nothing else is not likely to prove sufficient, at least if it's rational basis-plus. And -- and why? Because we can think of weird categories that are uniform.

So you say, Look at it on the merits. Now

that's where you are beginning to get. But so far, what I've heard is, Well, looking at it on the merits, there is certainly a lot of harms. And on the plus side what there is, is, one, We don't want courts deciding this. But of course, as was just pointed out, in some States it's not courts, it's the voters.

Then you say, Ah, but we want -- there are too many courts deciding it. Now, is -- too many courts might decide it. Now what else is there? What else? I want to -- I want to be able to have a list, you know, of really specific things that you are saying justify this particular effort to achieve uniformity. And I want to be sure I'm not missing any.

And so far, I've got those two I mentioned. What else?

JUSTICE SCALIA: I didn't understand that courts were so central to your position. I -- I thought you didn't want the voters in one State to dictate to other States any more than you would want the courts in one State to dictate to other States.

MR. CLEMENT: Well, I -- I think that's true, Justice Scalia. The point about the courts, though, is -- I mean, it's particularly relevant here.

JUSTICE BREYER: That means courts -- the courts, they do dictate in respect to time. They

dictate in respect to age. They dictate in respect to all kinds of things. And what I'm looking for is: What, in your opinion, is special about this homosexual marriage that would justify this, other than this kind of pure uniformity, if there is such a thing?

MR. CLEMENT: Well, let me -- let me just get on record that -- to take issue with one of the premises of this, which is we are at somehow rational basis-plus land, because I would suggest strongly that three levels of scrutiny are enough.

But in all events, if you are thinking about the justifications that defend this statute, that justify the statute, they are obviously in the brief. But it's uniformity -- but it's not -- it's not just that Congress picked this, you know, We need a uniform term, let's pick this out of the air.

They picked the traditional definition that they knew reflected the underlying judgments of every Federal statute on the books at that point. They knew it was the definition that had been tried in every jurisdiction in the United States and hadn't been tried anywhere until 2004. And then, of course, it was, as they correctly predicted, a judicial decision.

And in this context, in particular, they are thinking about an individual -- I mean, this couple goes

to Ontario, they get the -- they get a marriage certificate. A couple could -- from Oklahoma, could have gotten -- gone to Ontario and gotten a marriage certificate that same day and gone back to Oklahoma. And from the Federal law perspective, there is certainly a rational basis in treating those two couples the same way.

If I could reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Clement.

General Verrilli?

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
ON BEHALF OF THE PETITIONER
SUPPORTING AFFIRMANCE

GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court:

The equal protection analysis in this case should focus on two fundamental points: First, what does Section 3 do; and second, to whom does Section 3 do it?

What Section 3 does is exclude from an array of Federal benefits lawfully married couples. That means that the spouse of a soldier killed in the line of duty cannot receive the dignity and solace of an official notification of next of kin.

CHIEF JUSTICE ROBERTS: Suppose your -- you agree that Congress could go the other way, right? Congress could pass a new law today that says, We will give Federal benefits. When we say "marriage" in Federal law, we mean committed same-sex couples as well, and that could apply across the board.

Or do you think that they couldn't do that?

GENERAL VERRILLI: We think that wouldn't raise an equal protection problem like this statute does, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Well, no, my point is: It wouldn't -- you don't think it would raise a federalism problem either, do you?

GENERAL VERRILLI: I don't think it would raise a federalism problem.

CHIEF JUSTICE ROBERTS: Okay.

GENERAL VERRILLI: And I -- but the key for the -- for the -- our purposes is that, in addition to denying these fundamental important -- fundamentally important benefits, is who they are being denied to.

CHIEF JUSTICE ROBERTS: So just to be clear, you don't think there is a federalism problem with what Congress has done in DOMA?

GENERAL VERRILLI: We -- no, we don't, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Okay.

GENERAL VERRILLI: The question is: What is the constitutionality for equal protection purposes, and because it's unconstitutional and it's embedded into numerous Federal statutes, those statutes will have an unconstitutional effect. But it's the equal protection violation from the perspective of the United States that --

JUSTICE KENNEDY: You think Congress can use its powers to supercede the traditional authority and prerogative of the States to regulate marriage in all respects? Congress could have a uniform definition of marriage that includes age, consanguinity, etc., etc.?

GENERAL VERRILLI: No, I'm not saying that, Your Honor. I think if Congress passed such a statute, then we would have to consider how to defend it. But that's not --

JUSTICE KENNEDY: Well, but then there is a federalism interest at stake here, and I thought you told the Chief Justice there was not.

GENERAL VERRILLI: Well, with respect to Section 3 of DOMA, the problem is an equal protection problem from the point of view of the United States.

JUSTICE KAGAN: Yes, but, General, surely the question of what the Federal interests are and

whether those Federal interests should take account of the historic State prerogatives in this area is relevant to the equal protection inquiry?

GENERAL VERRILLI: It's central to the inquiry, Justice Kagan. I completely agree with that point.

CHIEF JUSTICE ROBERTS: Oh, so it would be central to the inquiry if Congress went the other way, too?

GENERAL VERRILLI: Well, the difference is what Section 3 does is impose this exclusion from Federal benefits on a class that has undeniably been subject to a history of terrible discrimination on the basis of --

CHIEF JUSTICE ROBERTS: I understand that. That's your equal protection argument. It's not very responsive to my concern I'm trying to get an answer to. You don't think federalism concerns come into play at all in this, right?

GENERAL VERRILLI: Well, I think -- I just want to clarify. The equal protection question would be different than the other circumstance. That's a matter of --

CHIEF JUSTICE ROBERTS: I know the equal protection argument.

GENERAL VERRILLI: But the federalism concerns come into play in the following way: In that Mr. Clement has made the argument that, look, whatever States can do in terms of recognizing marriage or not recognizing marriage, the Federal Government has commensurate authority to do or not do. We don't think that's right as a matter of our equal protection analysis because we don't think the Federal Government should be thought of as the 51st state. States, as we told the Court, yesterday we believe heightened scrutiny ought to apply even to the State decisions --

JUSTICE KENNEDY: But you're -- you are insisting that we get to a very fundamental question about equal protection, but we don't do that unless we assume the law is valid otherwise to begin with. And we are asking is it valid otherwise. What is the Federal interest in enacting this statute and is it a valid Federal interest assuming, before we get to the equal protection analysis?

GENERAL VERRILLI: Yeah. We think whatever the outer bounds of the Federal Government's authority, and there certainly are outer bounds, would be, apart from the equal protection violation, we don't think that Section 3 apart from equal protection analysis raises a federalism problem. But we do think the federalism

analysis does play into the equal protection analysis because the Federal -- the Federal Government is not the 51st state for purposes of --of the interests that Mr. Clement has identified on behalf of BLAG.

JUSTICE ALITO: Can I take you back to the example that you began with, where a member of the military is injured. So let's say three soldiers are injured and they are all in same-sex relationships, and in each instance the other partner in this relationship wants to visit the soldier in a hospital.

First is a spouse in a State that allows same-sex marriage, the second is a domestic partner in a State that an allows that but not same-sex marriage, the third is in an equally committed loving relationship in a State that doesn't involve either. Now, your argument is that under Federal law the first would be admitted, should be admitted, but the other two would be kept out?

GENERAL VERRILLI: The question in the case, Justice Alito is whether Congress has a sufficiently persuasive justification for the exclusion that it has imposed. And it -- and it does not. The only way in which -- that BLAG's arguments for the constitutionality of this statute have any prospect of being upheld is if the Court adopts the minimal rationality standard of Lee Optical.

JUSTICE ALITO: Let me take you back to the example. Your -- your position seems to me, yes, one gets in, two stay out, even though your legal arguments would lead to the conclusion that they all should be treated the same.

GENERAL VERRILLI: Well, the question before the Court is whether the exclusion that DOMA imposes violates equal protection, and it does violate equal protection because you can't treat this as though it were just a distinction between optometrists and ophthalmologists, as the Lee Optical case did. This is a different kind of a situation because the discrimination here is being visited on a group that has historically been subject to terrible discrimination on the basis of personal --

JUSTICE SCALIA: But that's -- that's the same in the example that we just gave you, that discrimination would have been visited on the same group, and you say there it's okay.

GENERAL VERRILLI: No, I didn't say that. I said it would be subject to equal protection analysis certainly, and there might be a problem.

JUSTICE SCALIA: So you think that's bad as well, that all three of those has to be treated the same, despite State law about marriage.

GENERAL VERRILLI: They have to be analyzed under equal protections principles, but whatever is true about the other situations, in the situation in which the couple is lawfully married for purposes of State law and the exclusion is a result of DOMA itself, the exclusion has to be justified under this Court's equal protection analysis, and DOMA won't do it.

JUSTICE SOTOMAYOR: General Verrilli, I have a question. You think, I think from your brief yesterday and today, that on some level sexual orientation should be looked on an intermediate standard of scrutiny?

GENERAL VERRILLI: Yes, Your Honor.

JUSTICE SOTOMAYOR: All right, heightened in some way. Going back to the Chief's question about a law that was passed recognizing common law heterosexual -- homosexual marriages. I think even under your theory that might be suspect because -- that law might be suspect under equal protection, because once we say sexual orientation is suspect, it would be suspect whether it's homosexual or heterosexual. The law favors homosexuals; it would be suspect because it's based on sexual orientation.

GENERAL VERRILLI: You would have -- you would have to impose the heightened scrutiny equal

protection analysis, sure.

JUSTICE SOTOMAYOR: Exactly. And so when we decided race was a suspect class, people who are not blacks have received --

GENERAL VERRILLI: Yes, that's certainly --

JUSTICE SOTOMAYOR: -- strict scrutiny on whether the use of race as a class, whether they are white or a black, is justified by a compelling interest.

GENERAL VERRILLI: That is certainly true, Your Honor. If I could turn to the interest that BLAG has actually identified as supporting this statute, I think there are -- there are -- I think that you can see what the problem is here.

Now, this statute is not called the Federal Uniform Marriage Benefits Act; it's called the Defense of Marriage Act. And the reason for that is because the statute is not directed at uniformity in the administration of Federal benefits. All -- there is two equally uniform systems, the system of respecting the State choices and the system of -- that BLAG is advocating here.

And what BLAG's got to do in order to satisfy equal protection scrutiny is justify the choice between one and the other, and the difference between the two is that the Section 3 choice is a choice that --

Section 3 choice is a choice that discriminates. So it's not simply a matter sufficient to say, well, uniformity is enough. Section 3 discriminates.

CHIEF JUSTICE ROBERTS: So as soon as one State adopted same sex marriage, the definition of marriage throughout the Federal code had to change? Because there is no doubt that up until that point every time Congress said "marriage" they understood they were acting under the traditional definition of marriage.

GENERAL VERRILLI: Well, I don't know, Mr. Chief Justice, why you wouldn't assume that what Congress was doing when it enacted a statute, particularly a statute that had the word "marriage" in it, was assuming that the normal rule that applies in the vast majority of circumstances of deference to the State definition of marriage would be the operative principle.

CHIEF JUSTICE ROBERTS: So you don't think that when Congress said "marriage" in every one of these provisions that they had in mind same-sex marriages?

GENERAL VERRILLI: No, but they may well have had in mind deferring to the normal State definition of marriage, whatever it is. Not that they were making the specific choice that my friend suggested they were. But whatever is the case, when Congress

enacted DOMA that choice of exclusion has to be justified under appropriate equal protection principles.

So the issue of uniformity just doesn't get you there, because there is no uniformity advantage to Section 3 of DOMA as opposed to the traditional rule. The issue of administration doesn't get you there. I mean, at a very basic level administrative concerns ought not be an important enough interest to justify this kind of a discrimination under the Equal Protection Clause.

But even if you look at them, there are no genuine administrative benefits to DOMA. If anything, Section 3 of DOMA makes Federal administration more difficult, because now the Federal Government has to look behind valid state marriage licenses and see whether they are about State marriages that are out of compliance with DOMA.

It's an additional administrative burden. So there is no -- there is no administrative -- there is no administrative advantage to be gained here by what -- by what Congress sought to achieve. And the fundamental reality of it is, and I think the House report makes this glaringly clear, is that DOMA was not enacted for any purpose of uniformity, administration, caution, pausing, any of that.

It was enacted to exclude same-sex married, lawfully married couples from Federal benefit regimes based on a conclusion that was driven by moral disapproval. It is quite clear in black and white in the pages of the House report which we cite on page 38 of our brief --

CHIEF JUSTICE ROBERTS: So that was the view of the 84 Senators who voted in favor of it and the President who signed it? They were motivated by animus?

GENERAL VERRILLI: No, Mr. Chief Justice. We quoted our -- we quoted the Garrett concurrence in our brief, and I think there is a lot of wisdom there, that it may well not have been animus or hostility. It may well have been what Garrett described as the simple want of careful reflection or an instinctive response to a class of people or a group of people who we perceive as alien or other.

But whatever the explanation, whether it's animus, whether it's that -- more subtle, more unthinking, more reflective kind of discrimination, Section 3 is discrimination. And I think it's time for the Court to recognize that this discrimination, excluding lawfully married gay and lesbian couples from Federal benefits, cannot be reconciled with our fundamental commitment to equal treatment under law.

This is discrimination in its most very basic aspect, and the House Report, whether -- and I certainly would not suggest that it was universally motivated by something other than goodwill -- but the reality is that it was an expression of moral disapproval of exactly the kind that this Court said in Lawrence would not justify the law that was struck down there.

JUSTICE SOTOMAYOR: General, your bottom line is, it's an equal protection violation for the Federal Government, and all States as well?

GENERAL VERRILLI: Yes, Your Honor, and that's the -- we took the position we took yesterday with respect to marriage -- the analysis --

JUSTICE SOTOMAYOR: Is there any argument you can make to limit this to this case, vis-à-vis the Federal Government and not the States?

GENERAL VERRILLI: Well, as we said yesterday, we think it's an open question with respect to State recognition of marriage, and they may well be able to advance interests -- they may be able to advance it. I guess I shouldn't say "may well," because I do think it would be difficult, as we said yesterday. They may be able to advance interests that would satisfy heightened scrutiny and justify non-recognition --

JUSTICE BREYER: Then yet -- but here --

GENERAL VERRILLI: But -- but here, the Federal Government's not in the same position because as BLAG concedes, the Federal Government at the most can act at the margins in influencing these decisions about marriage and child rearing at the State level. And the Second Circuit and the First Circuit both concluded that there's no connection at all, and that's of course because Section 3 doesn't make it any more likely that unmarried men and women in States -- that -- unmarried men and women who confront an unplanned pregnancy are going to get married.

And -- and elimination of Section 3 wouldn't make it any less likely that unmarried men and women are going to get married. It doesn't have any effect at all. It doesn't have any connection at all. So it's not at the margins. There's no interest at all at this -- in DOMA in promoting --

JUSTICE BREYER: Or if there's no interest -- I mean, I'm back where we were yesterday. It seems to me, forgetting your -- your preferable argument, it's a violation of equal protection everywhere. Well, if it is, then all States have to have something like pacts. And if they have to have something like pacts, then you say then they also have

to allow marriage.

So then are you not arguing they all have to allow marriage? And then you say no. So with that point --

GENERAL VERRILLI: But our point here, Justice Breyer, is that whatever -- may I finish?

Thank you.

Whatever the issue is, with -- whatever the outcome is with respect to States and marriage, that the Federal Government's interest in advancing those justifications through Section 3 of DOMA is so attenuated that two Federal courts of appeals have seen it as non-existent, and it cannot justify Section 3.

CHIEF JUSTICE ROBERTS: Thank you, General.

Ms. Kaplan?

ORAL ARGUMENT OF ROBERTA A. KAPLAN

ON BEHALF OF THE RESPONDENT WINDSOR

MS. KAPLAN: Mr. Chief Justice, and may it please the Court:

I'd like to focus on why DOMA fails even under rationality review. Because of DOMA, many thousands of people who are legally married under the laws of nine sovereign States and the District of Columbia are being treated as unmarried by the Federal Government solely because they are gay.

These couples are being treated as unmarried with respect to programs that affect family stability, such as the Family Leave Act, referred to by Justice Ginsburg. These couples are being treated as unmarried for purposes of Federal conflict of interest rules, election laws and anti-nepotism and judicial recusal statutes.

And my client was treated as unmarried when her spouse passed away, so that she had to pay $363,000 in estate taxes on the property that they had accumulated during their 44 years together.

CHIEF JUSTICE ROBERTS: Could I ask you the same question I asked the Solicitor General?

Do you think there would be a problem if Congress went the other way, the federalism problem? Obviously, you don't think there's an equal protection problem --

MS. KAPLAN: Right.

CHIEF JUSTICE ROBERTS: -- but a federalism issue, Congress said, we're going to recognize same-sex couples -- committed same-sex couples -- even if the State doesn't, for purposes of Federal law?

MS. KAPLAN: Obviously, with respect to marriage, the Federal Government has always used the State definitions. And I think what you're --

Mr. Chief Justice, what you're proposing is to extend -- the Federal Government extend additional benefits to gay couples in States that do not allow marriage, to equalize the system.

CHIEF JUSTICE ROBERTS: I just am asking whether you think Congress has the power to interfere with the -- to not adopt the State definition if they're extending benefits.

Do they have that authority?

MS. KAPLAN: I think the question under the Equal Protection Clause is what -- is what the distinction is.

CHIEF JUSTICE ROBERTS: No, no. I know that.

You're following the lead of the Solicitor General and returning to the Equal Protection Clause every time I ask a federalism question.

Is there any problem under federalism principles?

MS. KAPLAN: With the Federal Government --

CHIEF JUSTICE ROBERTS: With Congress passing a law saying, we are going to adopt a different definition of marriage than those States that don't recognize same-sex marriage. We don't care whether you do as a matter of State law, when it comes to Federal

benefits, same-sex marriage will be recognized.

MS. KAPLAN: It has certainly been argued in this case by others that -- whether or not that's in any way the powers of the Federal Government. For the reasons Justice Kagan mentioned, we think the federalism principles go forward a novelty question. I think whether or not the Federal Government could have its own definition of marriage for all purposes would be a very closely argued question.

JUSTICE SCALIA: I don't understand your answer. Is your answer yes or no? Is there a federalism problem with that, or isn't there a federalism problem?

MS. KAPLAN: I -- I think the Federal Government could extend benefits to gay couples to equalize things on a programmatic basis to make things more equal. Whether the Federal Government can have its own definition of marriage, I think, would be -- there's a -- it'd be very closely argued whether that's outside the enumerated approach.

JUSTICE SCALIA: Well, it's just -- all these statutes use the term "marriage," and the Federal Government says in all these statutes when it says marriage, it includes same-sex couples, whether the State acknowledges them to be married or not.

MS. KAPLAN: But that -- I don't know if that would work, because they wouldn't --

JUSTICE SCALIA: What do you mean whether or not it would work? I don't care if it works.

(Laughter.)

JUSTICE SCALIA: Does it -- does it create a federalism problem?

MS. KAPLAN: The power to marry people is a power that rests with the States.

JUSTICE SCALIA: Yes.

MS. KAPLAN: The Federal Government doesn't issue marriage licenses. It never has.

JUSTICE SCALIA: Well, it's not doing that, it's just saying for purposes -- just what it's doing here. It says, for purposes of all these Federal statutes, when we say marriage, we mean -- instead of saying we mean heterosexual marriage, we mean, whenever we use it, heterosexual and homosexual marriage.

If that's what it says, can it do that?

MS. KAPLAN: As long as the people were validly married under State law, and met the requirements of State law to get married --

JUSTICE SCALIA: No, no, no, no. It includes --

MS. KAPLAN: I'm not sure that the Federal

Government -- this answers your question, Justice Scalia -- I'm not sure the Federal Government can create a new Federal marriage that would be some kind of marriage that States don't permit.

JUSTICE ALITO: Well, let me get to the question I asked Mr. Clement. It just gets rid of the word "marriage," takes it out of the U.S. Code completely. Substitutes something else, and defines it as same-sex -- to include same-sex couples. Surely it could do that.

MS. KAPLAN: Yes. That would not be based on the State's --

JUSTICE ALITO: So it's just the word "marriage"? And it's just the fact that they use this term "marriage"?

MS. KAPLAN: Well, that's what the Federal Government has always chosen to do. And that's the way the Federal law is structured, and it's always been structured for 200 years based on the State police power to define who's married. The Federal Government I presume could decide to change that if it wanted, and somehow, it would be very strange for all 1,100 laws, but for certain programs -- you have different requirements other than marriage, and that would be constitutional or unconstitutional depending on the

distinction.

JUSTICE ALITO: But if the estate tax follows State law, would not that create an equal protection problem similar to the one that exists here? Suppose there were a dispute about the -- the State of residence of your client and her partner or spouse. Was it New York, was it some other State where same-sex marriage would not have been recognized? And suppose there was -- the State court said the State of residence is a State where it's not recognized.

Would -- would you not have essentially the same equal protection argument there that you have now?

MS. KAPLAN: Well, let me -- let me answer that question very clearly. Our position is only with respect to the nine States -- and I think there are two others that recognize these marriages. So if my client -- if a New York couple today marries and moves to North Carolina, one of which has a constitutional amendment, a State constitutional amendment -- and one of the spouses dies, they would not -- and estate taxes determine where the person dies, they would not be entitled to the deduction.

That is not our claim here.

Moreover, Justice Alito, in connection with a whole host of Federal litigation, there has been

Federal litigation for hundreds of years with respect to the residency of where people live or don't live, or whether they are divorced or not divorced throughout the Federal system. And the Federal Government has always handled that and has never before -- and we believe this is why it's unconstitutional -- separated out a class of married gay couples solely because they were gay.

JUSTICE ALITO: Just -- if I could follow up with one -- one question. What if the -- the hypothetical surviving spouse, partner in North Carolina, brought an equal protection argument, saying that there is no -- it is unconstitutional to treat me differently because I am a resident of North Carolina rather than a resident of New York. What would be -- would that be discrimination on the basis of sexual orientation? What would be the level of scrutiny? Would it survive?

MS. KAPLAN: That would be certainly a different case. It'd be more similar to the case I think you heard yesterday than the case that we have today. We certainly believe that sexual-orientation discrimination should get heightened scrutiny. If it doesn't get heightened scrutiny, obviously, it'd be rational basis, and the question would be what the State interests were in not allowing couples, for example, in

North Carolina who are gay to get married.

No one has identified in this case, and I don't think we've heard it in the argument from my friend, any legitimate difference between married gay couples on the one hand and straight married couples on the other that can possibly explain the sweeping, undifferentiated and categorical discrimination of DOMA, Section 3 of DOMA.

And no one has identified any legitimate Federal interest that is being served by Congress's decision, for the first time in our nation's history to undermine the determinations of the sovereign States with respect to eligibility for marriage. I would respectfully contend that this is because there is none.

Rather, as the title of the statute makes clear, DOMA was enacted to defend against the marriages of gay people. This discriminatory purpose was rooted in moral disapproval as Justice Kagan pointed out.

JUSTICE BREYER: What -- what do you think of his -- the argument that I heard was, to put the other side, at least one part of it as I understand it said: Look, the Federal Government needs a uniform rule. There has been this uniform one man - one woman rule for several hundred years or whatever, and there's a revolution going on in the States. We either adopt

the resolution -- the revolution or push it along a little, or we stay out of it. And I think Mr. Clement was saying, well, we've decided to stay out of it --

MS. KAPLAN: I don't --

JUSTICE BREYER: -- and the way to stay out of it is to go with the traditional thing. I mean, that -- that's an argument. So your answer to that argument is what?

MS. KAPLAN: I think it's an incorrect argument, Justice Breyer, for the --

JUSTICE BREYER: I understand you do; I'd like to know the reason.

(Laughter.)

MS. KAPLAN: Of course. Congress did not stay out of it. Section 3 of DOMA is not staying out of it. Section 3 of DOMA is stopping the recognition by the Federal Government of couples who are already married, solely based on their sexual orientation, and what it's doing is undermining, as you can see in the briefs of the States of New York and others, it's undermining the policy decisions made by those States that have permitted gay couples to marry.

States that have already resolved the cultural, the political, the moral -- whatever other controversies, they're resolved in those States. And by

fencing those couples off, couples who are already married, and treating them as unmarried for purposes of Federal law, you're not -- you're not taking it one step at a time, you're not promoting caution, you're putting a stop button on it, and you're having discrimination for the first time in our country's history against a class of married couples.

CHIEF JUSTICE ROBERTS: Is the --

JUSTICE SOTOMAYOR: Now, the -- the discriminations are not the sexual orientation, but on a class of marriage; is that what you're --

MS. KAPLAN: It's a class of married couples who are gay.

JUSTICE SOTOMAYOR: So I pose the same question I posed to the General to you. Do you think there's a difference between that discrimination and -- and the discrimination of States who say homosexuals can't get married?

MS. KAPLAN: I think that it's -- they're different cases. I think when you have couples who are gay who are already married, you have to distinguish between those classes. Again, the Federal Government doesn't give marriage licenses, States do, and whatever the issues would be in those States would be what interest the States have, as opposed to here, what

interest -- and we think there is none -- the Federal Government has.

There is little doubt that the answer to the question of why Congress singled out gay people's marriages for disrespect through DOMA. The answer can't be uniformity as we've discussed. It can't be cost savings, because you still have to explain then why the cost savings is being wrought at the expense of married couples who are gay; and it can't be any of the State interests that weren't discussed, but questions of family law in parenting and marriage are done by the States, not by the Federal Government.

The only -- the only conclusion that can be drawn is what was in the House Report, which is moral disapproval of gay people, which the Congress thought was permissible in 1996 because it relied on the Court's Bowers decision, which this Court has said was wrong, not only at the time it was overruled in Lawrence, but was wrong when it was decided.

CHIEF JUSTICE ROBERTS: So 84 Senators -- it's the same question I asked before; 84 Senators based their vote on moral disapproval of gay people?

MS. KAPLAN: No, I think -- I think what is true, Mr. Chief Justice, is that times can blind, and that back in 1996 people did not have the understanding

that they have today, that there is no distinction, there is no constitutionally permissible distinction --

CHIEF JUSTICE ROBERTS: Well, does that mean -- times can blind. Does that mean they did not base their votes on moral disapproval?

MS. KAPLAN: No; some clearly did. I think it was based on an understanding that gay -- an incorrect understanding that gay couples were fundamentally different than straight couples, an understanding that I don't think exists today and that's the sense I'm using that times can blind. I think there was -- we all can understand that people have moved on this, and now understand that there is no such distinction. So I'm not saying it was animus or bigotry, I think it was based on a misunderstanding on gay people and their --

JUSTICE SCALIA: Why -- why are you so confident in that -- in that judgment? How many -- how many States permit gay -- gay couples to marry?

MS. KAPLAN: Today? 9, Your Honor.

JUSTICE SCALIA: 9. And -- and so there has been this sea change between now and 1996.

MS. KAPLAN: I think with respect to the understanding of gay people and their relationships there has been a sea change, Your Honor.

JUSTICE GINSBURG: How many States have civil unions now?

MS. KAPLAN: I believe -- that was discussed in the arguments, 8 or 9, I believe.

JUSTICE GINSBURG: And how many had it in 1996?

MS. KAPLAN: I -- yes, it was much, much fewer at the time. I don't have that number, Justice Ginsburg; I apologize.

CHIEF JUSTICE ROBERTS: I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case?

MS. KAPLAN: I disagree with that, Mr. Chief Justice, I think the sea change has to do, just as discussed was Bowers and Lawrence, was an understanding that there is no difference -- there was fundamental difference that could justify this kind of categorical discrimination between gay couples and straight couples.

CHIEF JUSTICE ROBERTS: You don't doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you?

MS. KAPLAN: With respect to that category,

that categorization of the term for purposes of heightened scrutiny, I would, Your Honor. I don't --

CHIEF JUSTICE ROBERTS: Really?

MS. KAPLAN: Yes.

CHIEF JUSTICE ROBERTS: As far as I can tell, political figures are falling over themselves to endorse your side of the case.

MS. KAPLAN: The fact of the matter is, Mr. Chief Justice, is that no other group in recent history has been subjected to popular referenda to take away rights that have already been given or exclude those rights, the way gay people have. And only two of those referenda have ever lost. One was in Arizona; it then passed a couple years later. One was in Minnesota where they already have a statute on the books that prohibits marriages between gay people.

So I don't think -- and until 1990 gay people were not allowed to enter this country. So I don't think that the political power of gay people today could possibly be seen within that framework, and certainly is analogous -- I think gay people are far weaker than the women were at the time of Frontiero.

CHIEF JUSTICE ROBERTS: Well, but you just referred to a sea change in people's understandings and values from 1996, when DOMA was enacted, and I'm just

trying to see where that comes from, if not from the political effectiveness of -- of groups on your side of the case.

MS. KAPLAN: To flip the language of the House Report, Mr. Chief Justice, I think it comes from a moral understanding today that gay people are no different, and that gay married couples' relationships are not significantly different from the relationships of straight married people. I don't think --

CHIEF JUSTICE ROBERTS: I understand that. I am just trying to see how -- where that that moral understanding came from, if not the political effectiveness of a particular group.

MS. KAPLAN: I -- I think it came -- is, again is very similar to the, what you saw between Bowers and Lawrence. I think it came to a societal understanding.

I don't believe that societal understanding came strictly through political power; and I don't think that gay people today have political power as that -- this Court has used that term with -- in connection with the heightened scrutiny analysis.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Kaplan.

Mr. Clement, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF THE RESPONDENT BIPARTISAN LEGAL
ADVISORY GROUP OF THE UNITED STATES

MR. CLEMENT: Thank you, Mr. Chief Justice, just three points in rebuttal.

First of all, I was not surprised to hear the Solicitor General concede that there is no unique federalism problem with DOMA, because in the Gill litigation in the First Circuit, the State of Massachusetts -- the Commonwealth of Massachusetts invoked the Tenth Amendment, and on that issue the United States continued to defend DOMA because there is no unique federalism problem with it, as the Chief Justice's question suggested. If 10 years from now there are only 9 States left and Congress wants to adopt a uniform Federal law solely for Federal law purposes to going the other way, it is fully entitled to do that. It has the power to do that.

I would say also the Federal Government has conceded in this litigation that there is a rational basis for this statute, something else to keep in mind.

I would also say that this provision is not so unique. The very next provision in the Dictionary Act --

JUSTICE GINSBURG: Rational basis,

Mr. Clement -- is a problem in your briefing. You seem to say and you repeat it today that there is three tiers, and if you get into rational basis then it's anything goes. But the history of this Court is, in the very first gender discrimination case, Reed v. Reed, the Court did something it had never done in the history of the country under rational basis. There was no intermediate tier then. It was rational basis.

MR. CLEMENT: Well --

JUSTICE GINSBURG: And yet the Court said this is rank discrimination and it failed.

MR. CLEMENT: And, Justice Ginsburg, applying rational basis to DOMA, I think that there are many rational bases that support it. And the Solicitor General says, well, you know, the United States is not the 51st State to be sure, but the Federal Government has interests in uniformity that no other entity has.

And we heard today that there's a problem; when somebody moves from New York to North Carolina, they can lose their benefits. The Federal Government uniquely, unlike the 50 States, can say, well, that doesn't make any sense, we are going to have the same rule. We don't want somebody, if they are going to be transferred in the military from West Point to Fort Sill in Oklahoma, to resist the transfer because they are

going to lose some benefits.

It makes sense to have a uniform Federal rule for the Federal Government. It is not so anomalous that the term "marriage" is defined in the U.S. Code. The very next provision of the Dictionary Act defines "child." These terms, although they are the primary province of State governments, do appear in multiple Federal statutes and it's a Federal role to define those terms.

The last point I would simply make is in thinking about animus, think about the fact that Congress asked the Justice Department three times about the constitutionality of the statute. That's not what you do when you are motivated by animus. The first two times they got back the answer it was constitutional. The third time, they asked again in the wake of Romer, and they got the same answer: It's constitutional.

Now the Solicitor General wants to say: Well, it was want of careful reflection? Well, where do we get careful reflection in our system? Generally, careful reflection comes in the democratic process. The democratic process requires people to persuade people.

The reason there has been a sea change is a combination of political power, as defined by this Court's cases as getting the attention of lawmakers;

certainly they have that. But it's also persuasion. That's what the democratic process requires. You have to persuade somebody you're right. You don't label them a bigot. You don't label them as motivated by animus. You persuade them you are right.

That's going on across the country. Colorado, the State that brought you Amendment 2, has just recognized civil unions. Maine, that was pointed to in the record in this case as being evidence of the persistence of discrimination because they voted down a statewide referendum, the next election cycle it came out the other way. And the Federal Congress is not immune. They repealed "Don't Ask, Don't Tell." Allow the democratic process to continue.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel, counsel.

The case is submitted.

(Whereupon, at 12:13 p.m., the case in the above-entitled matter was submitted.)