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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

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

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

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

Brian W. Raum
Dale Schowengerdt
Holly L. Carmichael
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020; (480) 444-0028 (f)

David Austin R. Nimocks
Counsel of Record
Bar No. 1142906
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, D.C. 20001
(202) 393-8690; (480) 444-0028(f)

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INTEREST OF AMICUS CURIAE

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

II. DOMA EASILY SATISFIES RATIONAL BASIS SCRUTINY.

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

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

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

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

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

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

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

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

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

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

Second Treatise of Civil Government § 79 (1690).

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

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

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

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

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

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

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

In short, as Congress aptly explained:

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

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

B. DOMA PLAINLY FURTHERS SOCIETY'S VITAL INTEREST IN RESPONSIBLE PROCREATION AND CHILDREARING.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18 (2008). The district court's confident assertions to the contrary notwithstanding, Congress, in the words of the Eleventh Circuit,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,
this 27th day of January 2011

s/ David Austin R. Nimocks
David Austin R. Nimocks
Attorney for Amici

CERTIFICATE OF COMPLIANCE

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

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

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

CERTIFICATE OF SERVICE

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

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

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