No. 12-307

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,

Respondent,

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

RESPONSE IN SUPPORT OF WRIT OF CERTIORARI BEFORE JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES

OTHER AUTHORITIES

Respondent Edith Windsor respectfully submits this brief in response to the petition for certiorari filed by the United States of America. Ms. Windsor, the United States, and Intervenor the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") all agree that this case presents an issue of exceptional importance that justifies the Court's immediate review—the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"). *See* Pet. at 10; Brief in Opposition at 11-12, *Windsor* v. *United States* (No. 12-63) (Aug. 31, 2012).

Nonetheless, in its petition, the United States suggests that the Court should grant certiorari in this case only if it determines that *United States Department of Health and Human Services* v. *Massachusetts*, Nos. 12-13, 12-15, and 12-97 ("*Massachusetts*"), *Office of Personnel Management* v. *Golinski*, No. 12-16 ("*Golinski*"), and *Office of Personnel Management* v. *Pedersen*, No. 12-231 ("*Pedersen*") are not appropriate vehicles to decide the constitutionality of Section 3 of DOMA. The United States contends that this "tiered" approach is appropriate because of potential questions about Ms. Windsor's standing and because the District Court in this case applied rational basis scrutiny to hold Section 3 unconstitutional.

As discussed below, neither of the government's concerns warrants either delaying consideration of or denying the petitions for certiorari relating to Ms. Windsor. The only thing that truly distinguishes this case from the two other cases in which petitions for certiorari before judgment have been filed (*Golinski* and *Pedersen*) is

that, consistent with "settled principles of constitutional avoidance," the District Court did not reach the question of whether some form of heightened scrutiny should apply to statutes that discriminate on the basis of sexual orientation. Pet. App. at 13a n.2. But that difference in no way prevents this Court from addressing the heightened scrutiny issue if it concludes that reaching that question is necessary. This case thus remains an excellent vehicle for reviewing DOMA's constitutionality.[1]

I. Ms. Windsor Has Standing to Challenge DOMA

Any individual whose marriage is valid under state law, but not recognized because of DOMA, has standing to challenge the statute. Ms. Windsor is such a person. The District Court squarely held that New York recognized Ms. Windsor's marriage and therefore that she has standing to challenge DOMA's discriminatory effects. *See* Pet. App. at 6a-8a. Although the United States notes BLAG's concern that New York might not have considered Ms. Windsor's Canadian marriage to be valid, it both acknowledges "the uniform decisions of [New York's] intermediate appellate courts recognizing foreign same-sex marriages," Pet. at 12 (internal quotation marks omitted), and emphasizes that "BLAG has identified no reason to believe that the State's highest court would reach a [different] conclusion." *Id.* (internal quotation marks omitted).

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[1] The Second Circuit heard oral argument in this case on September 27, 2012, and it is possible that there will be a decision from the Court of Appeals before this Court takes any action on this or any of the other DOMA-related petitions.

Any concern about whether New York recognized Ms. Windsor's out-of-state marriage is misplaced. Well before the passage of New York's marriage statute in 2011, three of the state's four intermediate appellate courts (including the First Department, where Ms. Windsor and her late spouse lived at the time of her spouse's death) had addressed the question of whether New York recognized out-of-state marriages of same-sex couples. All of them concluded that it did. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (2008 Canadian marriage); *Martinez* v. *Cnty. of Monroe*, 50 A.D.3d 189 (4th Dep't 2008) (2004 Canadian marriage); *see also Lewis* v. *N.Y. State Dep't of Civil Serv.*, 60 A.D.3d 216 (3d Dep't 2009), *aff'd on other grounds sub nom. Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009). New York's Attorney General had also concluded in a written opinion that New York would recognize same-sex marriages performed in other jurisdictions as early as 2004. *See* 2004 Ops. N.Y. Atty. Gen. No. 2004-1, at 16 (Mar. 3, 2004), *available at* http://www.ag.ny.gov/sites/default/files/opinion/I%20 2004-1%20pw.pdf; *see also Godfrey*, 13 N.Y.3d at 368 n.3 (discussing views of New York's Governor and Comptroller); *Dickerson* v. *Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010). As the District Court noted, while the New York Court of Appeals has not itself squarely addressed the question, "its 2009 opinion in *Godfrey* v. *Spano* said nothing to cast doubt on the uniform lower-court authority recognizing the validity of same-sex marriages." Pet. App. at 7a-8a (citing 13 N.Y.3d at 377).

Moreover, because New York had no statute in place which had the purpose or effect of voiding

same-sex couples' marriages, it could have refused to recognize Ms. Windsor's marriage only if it concluded that such marriages were "*abhorrent* to New York public policy." *Lewis*, 60 A.D.3d at 219 (emphasis added). Even in *Hernandez* v. *Robles*, a 2006 decision in which the New York Court of Appeals held in a plurality opinion that the New York Constitution did not guarantee the right to marry to same-sex couples, the New York Court of Appeals hardly suggested that marriages between same-sex couples were "abhorrent" to New York public policy. 7 N.Y.3d 338 (2006). To the contrary, the Court of Appeals stated that while it would not "say whether same-sex marriage is right or wrong," it suggested that "of course the Legislature may . . . extend marriage or some or all of its benefits to same-sex couples." *Id.* at 366; *see also id.* at 358-59; *id.* at 379 (Graffeo, J., concurring) ("It may well be that the time has come for the Legislature to address the needs of same-sex couples and their families, and to consider granting these individuals additional benefits through marriage . . . ").

Given that marriages and domestic unions between same-sex couples were given widespread social acceptance and legal respect in New York well prior to 2009, such marriages were clearly not "abhorrent" to New York public policy. After all, it was New York's public policy to recognize out-of-state same-sex marriages well prior to 2009, as discussed above. And by 2006, the New York Legislature had passed legislation giving hospital visitation rights and the ability to make decisions about a spouse's remains to out-of-state same-sex marriages entered into by New York couples. *See* N.Y. Pub. Health Law § 2805-q(2)(a) (McKinney

2004); N.Y. Pub. Health Law § 4201 (McKinney 2006).[2] Additionally, in a clear statement that marriages between same-sex couples were not "abhorrent," the New York Assembly twice passed Governor-sponsored bills granting same-sex couples the right to marry in New York in 2007 and 2009. *See* An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 8590, 230th Legis. Sess., Reg. Sess. (N.Y. 2007); An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, Assemb. B. 7732, 232nd Legis. Sess., Reg. Sess. (N.Y. 2009).

In short, there is no reason to believe that the same New York Court of Appeals that invited the New York Legislature to enact marriages for same-sex couples in 2006 would have concluded in 2009 (when her spouse died), or even in 2007 (when Edie Windsor was married), that such marriages were "abhorrent" to New York public policy. In fact, the New York Legislature accepted the New York Court of Appeals' invitation a mere five years later, when it made marriage for same-sex couples the law in New

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[2] New York law also provided a variety of other protections to same-sex couples, including prohibitions against discrimination based on sexual orientation, N.Y. Civ. Rights Law § 40-c(2) (McKinney 2003); N.Y. Exec. Law § 296 (McKinney 2010); N.Y. Educ. Law § 313(l)(a) (McKinney 2003); N.Y. Ins. Law § 2701(a) (McKinney 1998), increased criminal penalties for offenses involving animus based on sexual orientation, N.Y. Penal Law §§ 240.30(3) (McKinney 2008), 240.31 (McKinney 2008), 485.05(1) (McKinney 2010), eligibility for a partner's credit union services, N.Y. Banking Law § 451(d)(1), protection from eviction, 9 N.Y.C.R.R. § 2204.6(d) (McKinney 2012); *Braschi* v. *Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-13 (1989), and adoption of a partner's biological child, 18 N.Y.C.R.R. § 421.16(h)(2); *Matter of Jacob*, 86 N.Y.2d 651, 656 (1995).

York. *See* N.Y. Dom. Rel. Law §10-a (McKinney 2011).[3]

At the recent oral argument in this case before the Second Circuit on September 27, 2012, the judges had the following observations:[4]

> JACOBS, C.J.: But the New York Court of Appeals [in *Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009)] was presented with that and they declined to decide it. They said it ought to be a matter for the legislature, as I recall. . . . We can't force them to decide anything they don't want to decide, it is purely discretionary on their part and it looks like they have

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[3] Nor would this issue qualify for certification to the New York Court of Appeals, particularly since it is now unlikely to recur. *See, e.g.*, *Rosenberg* v. *MetLife, Inc.*, 453 F.3d 122, 125 (2d Cir. 2006) (in the absence of a New York Court of Appeals decision on an issue of state law, the Second Circuit looks "to the decisions of the Appellate Division of the New York Supreme Court"); *State Farm Mut. Auto Ins. Co.* v. *Mallela*, 372 F.3d 500, 505 (2d Cir. 2004) (certification appropriate where "question is likely to recur").

[4] A transcript that was prepared based on the official CD recording from the Second Circuit of the oral argument on September 27, 2012 is included as part of the Appendix to this Response. *See* App., *infra,* a1-a36. The Second Circuit's determination of this question of purely New York law is not one that is likely to be reconsidered by this Court. *See Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (refusing, in opinion on merits, to review determination of state law by federal court of appeals, because "we ordinarily will not consider such a state-law issue"); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

already exercised that discretion. (App., *infra*, a4.)

. . . .

STRAUB, J.: [T]he simple fact is that the New York legislature has acted and that there is appellate division [case law] regarding that, from which we might believe what the Court of Appeals might say today. (App., *infra*, a5.)

. . . .

DRONEY, J.: The Court [in *Godfrey* v. *Spano*, 13 N.Y.3d 358 (2009)] said it was unnecessary to resolve the issue because the administrators had the authority to treat same sex marriages as other marriages, it was unnecessary, that was the Court of Appeals decision. . . . The [standard for determining whether an] out of state marriage violates an expressed statutory intent to void such a marriage or an aspect of the out of state marriage is abhorrent to New York public policy. How could you conclude that the New York Court of Appeals should decide that? (App., *infra*, a5-a6.)

II. This Case Provides a Vehicle for the Court to Determine the Appropriate Level of Scrutiny for Sexual Orientation Discrimination

The second reason for the United States' "tiered" preference that the Court decide other

petitions before considering those filed in this case is that the District Court in this case applied traditional rational basis scrutiny to hold section 3 of DOMA unconstitutional. Pet. at 12.[5] Unlike the First Circuit in *Massachusetts* and the district courts in *Golinski* and *Pedersen*, the District Court in this case applied only rational basis analysis to evaluate Section 3 and concluded that, because the statute failed to withstand even that standard, it was unnecessary to inquire into whether heightened scrutiny or some form of intensified rational basis scrutiny would be appropriate.

Contrary to the Government's suggestion, the District Court did not "assume[] without deciding that laws that draw distinctions on the basis of sexual orientation are subject to rational basis review." *See* Pet. at 8. Instead, it made it clear that because "the constitutional question presented here may be disposed of under a rational basis review, it need not decide . . . whether homosexuals are a suspect class." Pet. App. at 13a.[6] Thus, rather than making any assumptions about the level of scrutiny that should be applied, the District Court concluded that "[a]ny additional discussion of heightened or

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[5] The United States also mentions that, had it not filed a petition for certiorari in this case, the Court might be called on to decide whether Ms. Windsor, as a prevailing party in the District Court, has standing to seek certiorari before judgment. Pet. at 11. While Ms. Windsor explained in the reply brief in support of her petition that she does have such standing, Reply in Support of Petition for Certiorari Before Judgment at 7-11, *Windsor* v. *United States* (No. 12-63) (Sept. 5, 2012), the Government's petition renders this issue academic.

[6] This is similar to what this Court did in *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("Amendment 2 fails, indeed defies, even this conventional [rational basis] inquiry.").

intermediate scrutiny would be 'wholly superfluous to the decision' and contrary to settled principles of constitutional avoidance." *Id.* at 14a n.2 (quoting *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 456 (1985) (Marshall, J., concurring in part and dissenting in part), and citing *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 n.9 (1982); *Hooper* v. *Bernadillo Cnty. Assessor*, 472 U.S. 612, 618 (1985)).

Ultimately, of course, the level of scrutiny used to evaluate DOMA is a question of law that this Court can determine on its own. Ms. Windsor argued in both the District Court and before the Second Circuit that heightened scrutiny is the most appropriate standard, and she would continue to advance that argument before this Court, which will have the benefit of all lower court decisions on DOMA regardless of which petition(s) for certiorari it chooses to grant. As Ms. Windsor explained in her petition for certiorari before judgment, this case presents a full and clear record which the District Court found to support the conclusion that DOMA could not survive even traditional rational basis scrutiny.

III. This Case Presents an Excellent Vehicle for the Review of Section 3 of DOMA

Finally, it bears repeating that Ms. Windsor's own life experiences compellingly reflect the history of lesbians and gay men in our nation over the past decades and illustrate why, under any standard of review, DOMA cannot survive this Court's review.

For example, when Ms. Windsor, as a mathematics graduate student at New York University in the late 1950's, worked on a computer for the Atomic Energy Commission, she justifiably feared that she would lose her job if she were asked whether she was a lesbian when she was called into an FBI interview relating to her security clearance. Supplemental Affidavit of Edith Schlain Windsor ¶¶ 19-23, *Windsor* v. *United States,* 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No 10-cv-8435), ECF No. 83. Similarly, when Ms. Windsor became engaged to her late spouse Thea Spyer in 1967 (when the possibility of their ever getting married seemed virtually impossible), Thea was forced to propose to Edie with a circular diamond brooch (rather than a ring) so that Ms. Windsor could avoid questions about who her fiancé was when she went to her job as a computer programmer at IBM. Affidavit of Edith Schlain Windsor ¶ 10, *Windsor*, 833 F. Supp. 2d 394 (No 10-cv-8435), ECF No. 31.

Moreover, the record in this case could not be clearer or cleaner—it is undisputed by the parties that solely because she is a lesbian, and was married to a woman (instead of a man), Ms. Windsor had to pay an enormous ($363,000) estate tax bill. *See* App., *infra*, a47-a48. While DOMA causes harm to lesbian and gay married couples in innumerable ways (both concrete and dignitary), a $363,000 federal estate tax bill is surely among the most consequential examples of the type of inequitable and unconstitutional injury caused by DOMA. This case therefore presents an excellent vehicle for this Court's review of DOMA's constitutionality.

Conclusion

For the foregoing reasons, the petition for certiorari before judgment filed in this case by the United States of America should be considered alongside other petitions concerning the constitutionality of Section 3 of DOMA and should be granted.

Respectfully submitted,

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October 10, 2012

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF:
EDITH SCHLAIN WINDSOR,

Plaintiff/Appellee,

vs.

UNITED STATES OF AMERICA,

Defendant/Appellant.

- and -

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

Intervenor-Defendant-Appellant

Docket No.:
12-2335[L]
12-2435[Con]

September 27, 2012

HELD AT: Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

BEFORE: Hon. Dennis Jacobs
[Chief Judge]
Hon. Christopher F. Droney
Hon. Chester J. Straub

APPEARANCES: ROBERTA A. KAPLAN

[For Windsor]

PAUL D. CLEMENT
[For BLAG]

STUART DELERY
[For U.S.]

TRANSCRIBER: Ann Arundel

WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D. J.

E X H I B I T S

PETITIONER	DESCRIPTION	For In I.D.	Ev.

[START RECORDING]

THE COURT: At this time we will hear Windsor versus the United States and the Bipartisan Legal Advisory Group. Good morning, Mr. Clement.

MR. PAUL D. CLEMENT: Good morning, Your Honors and may it please The Court. Congress in 1996 confronted a unique and unprecedented dynamic. While previously every jurisdiction had adopted the traditional definition of marriage, Hawaii appeared to be on the verge of changing the traditional definition to include same sex couples.

In response, Congress did not deem Hawaii's choice irrational or in any way attempt to override Hawaii's decision. Instead, Congress acted to ensure that each sovereign jurisdiction could decide this important issue for itself without having Hawaii's decision govern for them either by the full faith and credit principles or by federal law simply picking up Hawaii's definition.

Thus in Section 2 of DOMA Congress essentially made clear that states could rationally decide to follow Hawaii's lead or rationally decide not to, but each state could decide the matter for itself. And in Section 3, which is principally at issue here, Congress made clear that federal law would not simply pick up Hawaii's definition for U.S. citizens residing in Hawaii, but rather Congress would retain the traditional definition as the federal definition for federal law purposes only.

Now Ms. Windsor attacks DOMA as irrational and violating the equal protection guarantee. Needless to say Ms. Windsor's standing to raise that

objection depends on whether New York law would recognize a same sex couple's foreign marriage at a time when New York State itself had not yet decided to recognize same sex marriages.

JACOBS, C.J.: You are suggesting that we certify that question in the New York Court of Appeals?

MR. CLEMENT: That's correct, Your Honor.

JACOBS, C.J.: But the New York Court of Appeals was presented with that and they declined to decide it. They said it ought to be a matter for the legislature, as I recall.

MR. CLEMENT: Well, that's right, Your Honor, but I mean they didn't say we are not going to decide this and we are never going to decide it. They said--

JACOBS, C.J.: We can't force them to decide anything they don't want to decide, it is purely discretionary on their part and it looks like they have already exercised that discretion.

MR. CLEMENT: Well, I do think that--you are obviously referring to the Godfrey against Spano case, Your Honor, and I think there is a difference there. There, they had two alternative grounds for their decision and they said as a matter of constitutional avoidance, judicial you know minimalism, judicial restraint, we are going to decide on this less controversial ground rather than this more controversial ground. But that doesn't mean to suggest that in a case where that was the critical question they wouldn't decide the issue at all. And,

indeed, I think in a sense the fact that they had that issue up there and they had three judges who were ready to decide that issue, but the court itself said you know that's a difficult issue, let's hold off on that. That's an argument for certification, not against certification.

STRAUB, J.: Well, the simple fact is that the New York legislature has acted and that there is appellate division regarding that, from which we might believe what the Court of Appeals might say today. We have that right, why shouldn't we simply end it there?

MR. CLEMENT: Well, obviously, Judge Straub, you have the right to decide that. It is a discretionary question for this Court and I am not trying to suggest otherwise. What I am trying to suggest though is the critical question is not 2012, the critical question is February 2009. And in circumstances where in November 2009 the New York Court of Appeals, notwithstanding the fact that the you know appellate divisions at that point are all of one view, decides to exercise jurisdiction over the case, so it obviously thought it was an important and close question. It takes the appeal on and then it decides you know nine months after the relevant period here that the question is essentially close enough that it is going to avoid the issue and decide it on an alternative ground. That seems to me to suggest that the standard for certification is satisfied. It is a difficult question. It is a sensitive question of New York law.

DRONEY, J.: The Court said it was unnecessary to resolve the issue because the administrators had the authority to treat same sex

marriages as other marriages, it was unnecessary, that was the Court of Appeals decision.

MR. CLEMENT: Oh, absolutely, and it is to my point, didn't say we will never decide this, they didn't say we are scared to decide this. They said in this case it is not necessary for us to decide it. But it—

DRONEY, J.: Would you agree that is correct that they are not recognizing out of state marriages. The out of state marriage violates an expressed statutory intent to void such a marriage or an aspect of the out of state marriage is abhorrent to New York public policy. How could you conclude that in the New York Court of Appeals should decide that?

MR. CLEMENT: Well, I just think, again I think the critical question is is it a question they should decide or is it a question that this court should decide for them. And it seems to me that the question is again not now. I mean you know it's-- obviously right now it's a question that the New York legislature has determined prospectively. But we have a situation here where the question is in 2009 what's the question and whatever the right standard is under New York law, it hasn't changed since 2009 and you know the court may apply that standard sort of two prong test, they may say actually this is a different situation, we are going to apply a slightly different test. You know I am not here to predict how they would handle that.

I just think--and I don't mean to belabor this point either, but I do want to get the point that you know this is a rather extraordinary case. I mean

usually you have to speculate, is this sort of a close question. Here you don't really have to speculate.

I mean the New York Court of Appeals in November of 2009 after taking this case, the issue up, says you know we are not going to decide that issue. They've expressly reserved it. And it wasn't just one of those you know drop a footnote here, it is not a big deal, we will reserve it. I mean they had three judges of the court saying you know there are affirmative reasons why we should go further and decide that issue and they declined to do it. So that in a nutshell is the argument for certification, is the argument for standing. But I do want to turn to the merits as well.

And on the merits, of course, Ms. Windsor attacks the statute both as irrational and as failing the strict scrutiny test that she suggests should deal with the classifications based on sexual orientation.

Now the first obstacle to her argument is the Supreme Court's summary disposition in Baker against Nelson. Now to be sure a lot has happened since the Supreme Court issued its summary decision, its dismissal for want of a substantial federal question in Baker. But the one thing that hasn't changed is this Court's obligation to follow Supreme Court precedent, including precedent that is the holdings of summary dispositions.

JACOBS, C.J.: Yeah, but it is limited to the precise facts presented by that case.

MR. CLEMENT: Well, it is not limited to its facts; it is limited to the holding essentially necessary to decide that case.

JACOBS, C.J.: Well, the holding is a rule of law that is based upon the circumstances presented.

MR. CLEMENT: Sure, but you know you could say you know sometimes a case is limited to its facts and then it doesn't apply if the plaintiff's name isn't Baker. I don't think that's the test. I think the test is--

JACOBS, C.J.: I absolutely agree with you.

MR. CLEMENT: So the test is just the same legal issue and the legal issue there obviously involve the state statute and that's a difference, but it was an equal protection claim based on both sex and sexual orientation and we would say that that--

JACOBS, C.J.: And the test is the same for federal or state.

MR. CLEMENT: Exactly. The Supreme Court has made that crystal clear. And so we think that really decides the case for a lower court. At a minimum, as the First Circuit recognized, even if you don't think that absolutely decides the case, it certainly affects the analysis because it certainly means at a minimum that the case has to be decided on the premise that the state laws that do not recognize same sex marriage but maintain the traditional definition are free from constitutional infirmity and then the question really becomes why can't the federal government do the same thing when it comes to federal benefit statutes. And that's why I think you know the appellees have a section in their brief about you know kind of what DOMA does and what DOMA doesn't do. And I think it is important to focus on that because as I say this would be a

different case if Congress tried to interfere with state laws that recognized same sex marriage as a matter of state law. They tried to use its preemptive authority to override those state decisions, but that's not what Congress did here. Congress operated exclusively in an area that I would have thought was unquestionably an area of exclusive federal prerogative which is federal benefits laws and it said for purposes of those federal benefit statutes we are going to apply a uniform federal definition and we are going to maintain the traditional definition, the definition that was the then governing law in all fifty states continues to be the majority rule.

I see that my time has expired.

STRAUB, J.: You have observed that the traditional definition as that being the law. Where would I find that in a Supreme Court opinion?

MR. CLEMENT: Well, I mean, I am happy to try to reference you to some Supreme Court opinions that in referring to marriage have referred to it in sort of gender specific or sex specific terms that would suggest that that was their understanding of it. But I was making a slightly different point, which was simply--

STRAUB, J.: I understand that. I was taking you to the point that you were about to speak to. Are there Supreme Court cases that are not defined or at least described or somehow referred to this traditional understanding of marriage?

MR. CLEMENT: Yes, there are, Your Honor. We cited some of them in the briefs. I know there is an old, I think Murphy is an old Supreme Court case.

But I think if you look at you know virtually every one of the Supreme Court's cases that talks about marriage including Loving, for example, it is always talked about in terms of I think would have to be understood as referring to the traditional definition, either there is references to husband and wife or there are references to the unique link between marriage and procreation, that's some of the language in Loving for example. So I think they are thinking about it in terms of the traditional definition.

STRAUB, J.: The Supreme Court has written in 1885 a rather definitive statement and then point out they are having some reference to it over the years. Has the Supreme Court said anything to the contrary?

MR. CLEMENT: Not that I am aware of. As far as I know every reference to marriage is you know at a minimum it would be neutral, so there would be nothing to the contrary and I think most of the references would be made in ways that make clear that what the Court has in mind when it is talking about marriage were in places suggesting there is a fundamental right to marriage, they are talking about the traditional definition. And, of course, that's not surprising because they are talking about it at a time like when Congress acted in 1996, that everybody understands that the traditional definition is the definition. And I would say one thing too, which is you know the one time where the court talks about marriage in a context where they might have had a real reason to distinguish is, of course, in Lawrence, but when they talk about marriage in Lawrence they are talking about it to

make clear in the majority opinion, we are not saying anything that affects the question of same sex marriage. You have Justice O'Connor, who is saying that there in fact is a legitimate government interest in preserving the traditional definition and then you have, of course, the dissenting opinion which is I think you know takes it even further and would say that you know expresses concerns about the logic of the majority but says and it is indeed in response to that dissent that the majority is essentially saying. That's not what this opinion is about. We are not going there. So there is certainly nothing in the Supreme Court's cases that suggest that anything but the traditional definition is the definition that they've had in mind in their cases.

JACOBS, C.J.: Some of the amicus briefs and the other side is arguing that this is a matter that ought to be gauged under intermediate standards of scrutiny and one of the criteria there is immutability, identifiability and so on. Putting aside the issue of immutability, because that is just argued all over the place amongst psychologists and geneticists and everyone else, why is sexual preference not something that is manifested when people apply for this government benefit, like illegitimacy. I mean people don't know that people are illegitimate, people don't walk around with a sign, but when they apply for you know to probate an estate or to get Social Security or whatever it is and they fill out a form and they say well you know my folks are not married, then that raises the issue of illegitimacy. And why is it not the same thing when a same sex couple shows up at the registrar's office and gives their names or their manifesting of the same sex?

MR. CLEMENT: Well, in that sense it may be similar in that one respect, illegitimacy, but I think that's what would take you to the other relevant factors in the analysis with things like political powerlessness for example, where I think there is a radical difference between illegitimacy on the one hand and homosexuality on the other and then you look at some of the other factors as well and I think that's where the distinction would be drawn. But I do think in that sense you do have a dynamic where it would you know to the extent that two people of the same sex want to make a claim for benefits based on marital status, as you say, at that point it is going to be clear.

JACOBS, C.J.: In terms of political power is the test whether they have political power at all or is it whether such political power as they may have is diminished by the fact that it is harder to publicly associate or it is unknown how many people have varied sexual preferences.

MR. CLEMENT: Oh, I think it is the former, Your Honor, and I don't think it is an overly demanding test. I think it is a test that doesn't-- you know it doesn't guarantee successful outcomes. It guarantees--it is a question of whether you can get the attention of legislators.

JACOBS, C.J.: But women can and there is intermediate scrutiny for sex?

MR. CLEMENT: Sure, but I think you know obviously we are talking about one of those classic four factor tests and you can point to, okay, this factor is like sex and this factor is like illegitimacy, but when you take them together I don't think there

is anything like this and I think there is an important difference.

JACOBS, C.J.: There isn't any classification that correlates with sexual preference across the four criteria?

MR. CLEMENT: I think that's right and I do think that you know in a context like sex for example, I mean, you know the political powerlessness probably you could check that box. But on the other hand you have something there which I think is you know in my view there are probably two things that you would really look for in looking for why a classification would qualify for heightened scrutiny. And to me the two things that would make the most sense is one, political powerlessness because if they have access to the legislative process it is not clear why they really need the courts to intervene, why you can't leave this issue for the democratic process. But the other thing which was true of sex and was true of race, but is not true of sexual orientation is if there is a discrimination that takes the form of denying the franchise. I mean if you can't vote precisely because of your sex or precisely because of your race, well then that's like a structural impediment to use the democratic process to get your way and whatever the history of discrimination on the basis of sexual orientation and obviously there is a debate on that in the briefs in the Supreme Court and in Lawrence itself suggested that you know it is a relatively recent phenomenon where it has taken that specific form. But the point is you know we have never had a situation that I am aware of where sexual orientation was a basis for disenfranchisement.

JACOBS, C.J.: Well, the minority members of the Bipartisan Legal Advisory Group, they argue if lesbians and gay men had political power how would DOMA have passed overwhelmingly, you have a neat bit Judo, I guess, but I mean, what's your answer to that?

MR. CLEMENT: Well, I would somewhat rhetorically come back and say if they had no political power how would they get 137 members of Congress or whatever the final tally is to file an amicus brief now. And to be sure, you know I think that I could have made in 1996 an argument that the political power factor argued against recognizing homosexuality as a heightened class, but whatever the strength of my argument in 1996, I think my argument on that is much stronger in 2012 and that fact alone seems to me to speak strongly to the idea that this is an issue that can be left to the democratic process. I mean you know one need look no further than the State of New York where you know the Court of Appeals in Hernandez had this question as a judicial matter, they said we are not going to find a fundamental right to same sex marriage but they wrote in their opinion you know this is--you know they almost you know had implored the legislature, please you know address this issue. And in the same way if this Court applies rational basis, recognizes there is a rational basis for this 1996 statute, then a process can play out where the members of Congress, some of whom voted for DOMA themselves and now are on the other side, that process can continue and the political process can resolve it. And I am not predicting how that will get resolved and when it will get resolved, but the question is in an area like this where there seems so much reason to think that the

legislative process is available to continue to address this issue as people's opinions evolve and the like, why the courts would want to sort of take it off the table, with heightened scrutiny I think is strongly counsels on not applying heightened scrutiny, as does of course the fact that this Court of Appeals would then be the first to do that, notwithstanding this kind of uniform wall of precedent.

DRONEY, J.: A few more questions.

MR. CLEMENT: Sure.

DRONEY, J.: First is has the Supreme Court ever recognized this kind of rational basis review that was applied in the First Circuit and second is, if we were to conclude that DOMA is subject to intermediate scrutiny, what's your position on whether it would survive?

MR. CLEMENT: Well, I will take them both in turn. I mean we would take the position that no, the Supreme Court, you know sort of three levels of scrutiny is enough. There is rational basis, there is intermediate scrutiny and there is strict scrutiny. And so we don't think that there is any support for this notion of kind of rational basis plus or intermediate scrutiny minus. And you know there obviously are some cases you could read where the courts write something down on rational basis, like Cleburne for example and you can think well that must be something other than rational basis. But I don't think the Court's decisions allow us to do that, to recognize that.

And the one thing I would say is, there is no support for a sort of rational basis plus where the

plus comes from federalism principles and I think you know it is just a misfit from an equal protection standpoint. I mean most of our equal protection cases or 14th amendment cases were worried about state action. We are not particularly solicitous in the equal protection realm for states in any particular way.

To answer the second part of your question, you know I do think it is a much more difficult argument to try to say that DOMA passes something other than rational basis. I think that's in part because you know you are talking about a definition. I mean a definition by its very nature it's a little hard to say that having drawn a definitional line one place rather than another is really you know important for a government interest. But that said, I will try it, which is to say I think you know I think the answer then becomes kind of the analysis of Justice O'Connor in her concurrence in Lawrence. She is not applying intermediate scrutiny as such, but you know she says look there is an important government interest in--she uses the word I think legitimate, but I would say important, important government interest in preserving the traditional definition.

There is no other way to preserve the traditional definition than to preserve the traditional definition, it becomes somewhat circular but it gets to the problem that we are talking about a definition.

And so I would say that even if you get out of the basis of rational basis, you know there still is this idea that there is something important about letting each sovereign decide for themselves whether they want to make this important decision. You know I

don't think anybody on either side of this case minimizes what's at stake here and the importance of what is at stake here.

DRONEY, J.: But did she say in her concurrence though, the two that applied rational basis that's what started this, isn't that right?

MR. CLEMENT: Well it--

DRONEY, J.: The rational basis - - would – towards – politically oppressed people she mentions that in her concurrence?

MR. CLEMENT: She mentions that in her concurrence, you know, I agree, that's one vote for that sort of principle. I don't really see that emerging as a majority view in any of these cases. You know as I read and obviously people can read these cases differently, but as I read Romer and as I read Lawrence, I mean, I think Romer is really the most important one here, you know the Court is saying this is rational basis review and you know it is the dissent that is saying this must be something more and they are saying "no", you know and obviously as a component of rational basis they do say that you know--and this is what they said about amendment 2 in Romer, if you go through the analysis and there is no other explanation left than hostility to a group, well that's not a rational basis.

But I don't think you could reach the same conclusion with respect to DOMA as we you know exhaustively cover in the briefs. There are a number of rational bases that would satisfy traditional rational basis review and as I say even the First Circuit recognized that if you were just you know

applying plain vanilla rational basis the justifications the House has offered would be sufficient.

If there are no further questions, thank you.

JACOBS, C.J.: You reserve rebuttal. Ms. Kaplan?

MS. ROBERTA KAPLAN: Thank you, Your Honor.

JACOBS, C.J.: Good morning.

MS. KAPLAN: Good morning. This case presents a single question, is Section 3 of the Defense of Marriage Act or DOMA unconstitutional as applied to Edith Windsor, an eighty-three year old lesbian widow who had to pay a $363,000 estate tax bill and wants her money back. Judge Jones held that it was. The policy underlying the marital exemptions to the federal estate tax as set forth in our brief was to eliminate the so-called widow's tax on surviving spouses so that they could keep all the property accumulated during the marriage after a spouse had died. To quote Barbara, and on this Mr. Clement and I agree, to quote Barbara Underwood's Amicus brief at page 2, "This case does not present the question whether the Constitution requires states to follow the path of New York, Vermont and Connecticut. Instead this case presents a different question, whether when states have chosen to authorize same sex marriage for purposes of state law. There is a sufficient federal interest to justify Congress in disregarding that choice."

Ms. Windsor contends that Section 3 of DOMA should be subject to some form, as I heard you just discussing, some form of heightened or more searching review for a number of reasons.

First, application of the traditional test under Cleburne, the four point test and second, because like the First Circuit, because of federalism concerns and because like the Colorado statute at issue in Romer, DOMA targets a narrowly defined group and then imposes upon that group, and I am using the language of Romer, a change in legal status that is so sweeping and comprehensive as to bear no discernible relationship to any legitimate governmental interest.

We respectfully submit that if there ever were a statute that fits within the holding of DOMA this is it.

Because Mr. Delery, who is speaking next, will principally address the heightened scrutiny arguments, I am going to focus today on rational basis review and the rationales.

When it passed DOMA in 1996, Congress created an unprecedented, one-time, permanent exception for the marriages of gay people that excluded gay married couples from both the protections and the burdens of federal law across the board. I think Mr. Clement conceded it was definitional.

Federal law still depends on state law to determine the existence of a valid marriage for any other purpose except with respect to gay people. Anything other than the most fleeting examination

of either the justifications offered by Congress at the time or those being offered by BLAG today, demonstrates that Congress' rationales are not constitutionally legitimate, are not rational in the sense that they are fairly related to excluding gay married couples or both.

JACOBS, C.J.: Well, what about the justification offered that this does involve money? I mean as you pointed out this case involves a third of a million dollars and no doubt its ramifications if you were to prevail would involve a lot more money than that.

MS. KAPLAN: Sure.

JACOBS, C.J.: And why can't Congress make decisions that involve money?

MS. KAPLAN: Yes. As Judge Jones concluded below, Your Honor, saving money alone is not a sufficient justification unless it is coupled with some other independent reason. And this is particularly true when the classification is drawn against a historically disfavored group.

STRAUB, J.: Can you contest it is your position as well that saving money wouldn't be an appropriate interest if it was also some other interest?

MS. KAPLAN: The cases say, but the cases say that saving money standing alone--

STRAUB, J.: Is it your position—

MS. KAPLAN: Yes, Your Honor.

STRAUB, J.: --that saving money plus another interest would be sufficient?

MS. KAPLAN: Correct, plus another rational interest, yes.

DRONEY, J.: - -

MS. KAPLAN: Yes, correct. So it is actually a very unique situation here. In 1996, this actually was one of the rationales that Congress articulated. They said this. At the very same time though which is pretty extraordinary, they admitted in the record that they didn't know whether DOMA would save money, so they say, "we want to save money, but we don't know whether it going to save money." That's what Senator Byrd said, cited in our brief, who was an expert on these issues.

JACOBS, C.J.: Well, why can't Congress guess about these things? I mean it is not like Congress has never before made an error as to what the cost is in legislation?

MS. KAPLAN: I believe that if Congress at one time is saying we are going to save money and then says at the same time we don't know whether we are going to save money, I think that's very close to the kind of irrational speculation that would offend even the lowest form of rational basis review. It certainly wouldn't satisfy any other form of review.

JACOBS, C.J.: What if one coupled Congress' idea, which may or may not be defective, that this would save money with the idea that it is necessary or useful for the federal government to approach this issue on a uniform basis so that U.S. citizens are not

treated differently by the federal government in Missouri as opposed to Vermont?

MS. KAPLAN: A couple of answers to that, Your Honor. First of all, the true uniformity with respect to marriage, as we have described, was allowing states to define marriage and create it. So this was not uniform with respect to federal law, it was creating a fundamental difference.

Number two, there is no uniformity, it did not promote uniformity because obviously at the time of 1996, there were no states that permitted marriage between same sex couples, today there are six with another two with referenda, which actually is very relevant to political powerlessness, and then DC. So the uniformity here that had always existed for our entire nation's history had been Congress deferring to federal definitions of marriage and this created a radical change to that. Moreover, the federal government has always had a way of dealing with situations for marriages are different in one state than another. In fact, even at the time of Loving, before Loving was decided, in states that did not permit marriages between interracial couples, Congress deferred to those.

The problem that was supposedly going to be solved by uniformity is a problem that our federalist principles already deal with. Let me give you a hypothetical. If Ms. Windsor today--I don't want to use Ms. Windsor, because unfortunately, her spouse is already dead, but if a couple married in New York today moved to North Carolina and the spouse died and they sought the marital exemption, they would not get it. Under this Court's decision in Goldwater, the determination of marriage is based on the

domicile of the decedent at the time of death. And I would implore you to look at that case because you actually reject--not you, the Second Circuit, of course, rejected a uniformity rational proffered in that case, with respect to treating marital deductions for the estate tax the same.

JACOBS, C.J.: So you are saying it would be in every instance it would be known categorically whether a person who is a surviving spouse of the same sex marriage should or should not be able to get the federal benefit?

MS. KAPLAN: Yes, I think it is quite clear today. In fact, again contrary to something that Mr. Clement said, we have I think it is over thirty states today that have passed laws essentially either by statute or by constitution prohibiting same-sex marriage within their jurisdictions. Obviously, those states are crystal clear as to where they stand and where they would stand on this issue. And I think that also goes and I understood there were a lot of arguments about the incredible political power, but I think that certainly goes to the political powerlessness, relative political powerlessness of gay men and lesbians, not only in 1996, but today as well.

JACOBS, C.J.: To jump back to sort of a threshold issue, which is what is the freedom of action of any intermediate federal court in view of Baker, would you concede as Mr. Clement argued that the standard is the same for equal protection by the federal government or the states and that if state action of the kind of issue in Baker did not offend equal protection then the same should be true with

respect to the federal government, in which case all of your arguments would be merely interests.

MS. KAPLAN: No, Your Honor, I wouldn't concede that. Specifically with respect to DOMA and specifically because states control who can get married, who can have children, and as Mr. Clement conceded, DOMA didn't seek to change that. The disconnect between the rationales offered with respect to this statute are very different and have to be conducted under a different analysis than the disconnect in connection with a federal right to marry.

This case is not about the federal right to marry. It is about in circumstances where states define marriage, and were DOMA explicitly said we are going to leave that to the states, and let's take parenting as an example, parenting is actually a good example of this.

With respect to, let's take heterosexual couples first, with respect to heterosexual couples as Judge Jones said, there is nothing, there is absolutely no rational connection to assume that any heterosexual couple is going to change their behavior with respect to either children or getting married because DOMA exists, because my client couldn't get an estate tax exemption.

With respect to gay couples, if somehow there is some interest in discouraging gay couples from getting married, DOMA doesn't do that, didn't do that and it also can't discourage them from having children because those again as Judge Boudin said in the First Circuit, are matters of state law.

So whatever interest a state may have in those issues and that's again not this case, here the disconnect is so attenuated that this is a far different question. I don't think Baker controls for that reason and for a bunch of additional reasons that I would be happy to discuss as well.

Let me move on with respect to uniformity because I heard the Court talking about that. It is very interesting. We talk in our brief about how under uniformity, you would have the same problem with first cousin marriages. In response, the response says "yes", but first cousin marriages don't"--I think the words were-"don't invoke the same feelings" as marriage between gay couples.

Your Honors, I would submit that precisely because we are talking about strong feelings, if that's the rationale, that's why we fit within Romer.

Let me go to saving money.

DRONEY, J.: - -

MS. KAPLAN: Sure, Judge Droney.

DRONEY, J.: You've often - - in your brief say it should be strict scrutiny.

MS. KAPLAN: Yes.

DRONEY, J.: - - as I indicated just said enhanced scrutiny - - . Why do you think strict scrutiny rather than intermediate scrutiny applies, how do you make that call?

MS. KAPLAN: Sure, I will be frank with you, it obviously doesn't matter to the result, I don't think it matters to the result, I don't think--Mr. Clement didn't try to defend it under intermediate scrutiny below. I heard him trying to do it today. I don't think it works. But we believe that being gay and lesbian, being gay or lesbian is closest to being an African American than it is to being--I hate to get so personal about this, than being a woman, because there is nothing about being gay or lesbian that has anything to do with an individual's ability to perform in society and that's essentially what I believe the courts are looking at, that's the first factor, I believe it is the most important factor. Whereas, for women, and I'm obviously a member of that class, there are obviously things, we get pregnant, we are not as strong, there is the firemen cases, things like that, where there could be some kind of differentiation by the legislature that would make sense. With respect to gay and lesbian people, it is very hard if not impossible to conceive of any such differentiation. I can see that my time is up.

DRONEY, J.: - - involved with illegitimacy - -

MS. KAPLAN: Yes.

DRONEY, J.: - - that's not an obvious characteristic - -

MS. KAPLAN: I agree with that and I also agree that the different factors come out differently as you compare them to different groups, which is natural when you think about it. I don't think for sure--we personally believe, our view is that for strict scrutiny, it should be based on whether the group has, if there is anything about being a member of

that group that has anything to do with that group's ability to perform or to contribute to society. So we think strict scrutiny is more appropriate for that reason, but again it makes no difference in the result and obviously, we would be very happy with intermediate scrutiny as well.

JACOBS, C.J.: On that subject, there is a submerged dispute in the briefs as to whether that consideration and say capability means, refers generally to one's capability of functioning in society and making a contribution to society or whether it has to do with the capability to enter, you know in this instance, to enter into marriage, to procreate and so on.

MS. KAPLAN: Yes.

JACOBS, C.J.: Where would we look to find out which of these two really inconsi-- incommensurable rules is the proper test?

MS. KAPLAN: Yes, I think that what you see in the brief from BLAG is an attempt to bootstrap the responsible procreation, the biological procreation argument to the rational basis inquiry and so the connection. I don't think there is any such connection in the case law whatsoever. I don't think you will find any Supreme Court case that has a connection between the rationale and whether a group gets heightened scrutiny, those are divorced inquiries.

And I think while there are no cases that talk about procreation being a factor for getting intermediate or heightened scrutiny. I think that's for a very good reason that there is no analysis of

that. And the reason is because obviously people, straight people as well as gay people who don't have a biological ability to procreate, certainly have the ability to succeed and perform and contribute to society in every way and that there is no difference whatsoever and they shouldn't be treated any differently based on that difference.

JACOBS, C.J.: In your federalism argument, I mean I understand what it is, but I mean, your adversaries really turn it around and they say that you know the states do decide who is married, but why is it not the role of Congress to say what federal statutes say and mean and why is that not a completely appropriate role for the federal government and if not even a necessary one. I mean all courts find it helpful to find a definition.

MS. KAPLAN: Yes, I think the federalism concerns come up two ways. First is the way I have already talked about, Judge, which has to do with because these issues are state issues, when you get to comparing the classification and the objective, and seeing whether, I think the word you used at one point was a fair, there has to be a fair connection. There is no fair connection for that reason.

On top of that, I think you have to look at a 200 year federalist tradition in which Congress had constantly, consistently, uniformly deferred to state definitions even for marriages that I think we all in this room today would find, or laws today that we find odious, like the anti-miscegenation laws prior to Loving. Even in those circumstances, Congress always deferred. So I think what Judge Boudin was saying is that there is the Romer sense, although I acknowledge this isn't in Romer, there is a sense of

queasiness or a sense of suspicion that should require the courts even if applying rational basis to look at the link, the way that Justice Kennedy described in Kennedy, the link between the classification and the objective.

STRAUB, J.: - - is it part of your position or your argument that those 30 odd states that you referred to that define marriage by statute or constitution as the traditional union of a man and a woman, that they too are unconstitutional to the extent that they prevent the participants from state benefits?

MS. KAPLAN: No, it is absolutely not our argument. I'm not--we are not arguing here. And this case would not--an affirmance to this case, would not result in an argument in any way.

STRAUB, J.: Explain to me why there is a difference in this instance is the federal benefits that are at least arguably sought to be protected by the definition of marriage? You argue that that is unconstitutional? There are some thirty states which may well be precisely the same circumstance and yet you say those are constitutionally--

MS. KAPLAN: No, no, I am not saying they are constitutional.

STRAUB, J.: - -

MS. KAPLAN: Please don't. Yes.

STRAUB, J.: But have the same principles that would apply in those instances, is that correct?

MS. KAPLAN: I think parenting again is the perfect example and I think if you look at what Judge Boudin--

STRAUB, J.: That are the same principles would apply to - - an analysis of those states?

MS. KAPLAN: The same principles apply, but the connection between the objective and the classification might be different in those states, because those are the states that determine, for example, who can marry and who can adopt. So if you were to look at the impact on behavior it could well be different.

I, of course, as a personal matter, I am not arguing that case, might disagree and I am sure there are arguments that are being raised. There is a case before the Supreme Court that makes those arguments right now. But this case is far narrower than that because as Judge Boudin said, the connection between what states do and what the federal government does is different and you don't have to go to deciding those issues that you might have to decide, for example, the science of parenting in those cases.

STRAUB, J.: So arguable at least, an affirmance here - - issued by the Supreme Court in your favor - - would probably bring in stuff that is - -

MS. KAPLAN: I am quite certain that other people would litigate that issue and continue to litigate that issue as to whether even those rationales wouldn't work for those states. I can't tell you how that would come out again, that's arguably an issue in the Perry case, that's not this case. But I

certainly--I think people will take this case, argue either side. I certainly don't think this case would control that issue.

STRAUB, J.: Am I correct that however we decide this case would have no bearing whatsoever on issues of adoption which would still be governed by state law and the best interest of the child?

MS. KAPLAN: Correct.

STRAUB, J.: And one final thing, Ms. Kaplan. I chatted with your friend here about this earlier decision back in 1885. Well, I am not quite sure I see - - in any event, which was rather definitive in its description of a traditional marriage. Do you know of a Supreme Court case that has stated issue with what Murphy said--

MS. KAPLAN: From a definitional perspective?

STRAUB, J.: Yes.

MS. KAPLAN: No, I am not aware of any. I was laughing because I was hoping I wouldn't get that question, Judge Straub, but having gotten it, I am not aware of any case that from a definitional perspective, as opposed to a rationale, would take issue with that definition. Obviously, in the 1880's it is almost impossible. In 1967, when my client got engaged, it was almost unforeseeable whether marriage would be permitted.

JACOBS, C.J.: Thank you.

MS. KAPLAN: Thank you.

JACOBS, C.J.: We will hear from the United States.

MR. DELERY: May it please the Court. Stuart Delery on behalf of the United States. This Circuit has not decided what level of scrutiny applies.

JACOBS, C.J.: Let's step back a second and ascertain--there is an undecided motion as to whether your notice of appeal should be stricken and whether you are an appellant or an appellee, and you know I am just a lawyer. In my day when you won, you didn't appeal.

MR. DELERY: Right. So here, Your Honor, although the United States agrees with the rationale and the ultimate decision of the District Court—

JACOBS, C.J.: Well, why did you file a notice of appeal?

MR. DELERY: So it is consistent with the pattern that was followed in the Chadha case, for example, because here, the judgment runs against the executive branch. The executive branch is ordered to pay $363,000. The determination has been made by the President and the Attorney General that the law will be enforced, Section 3 of DOMA will be enforced pending final judicial resolution of this matter.

JACOBS, C.J.: Well, that would certainly make the United States a defendant and I am not sure I know why it would make it an appellant, if it's satisfied with the adoption of its arguments in the court below it.

MR. DELERY: So, I think again here while that is true as to the rationale of the decision, the Chadha case and the Lovett case, for example both by the Supreme Court, indicated that where the executive branch agrees with an underlying judgment of unconstitutionality of a federal statute, but is nevertheless enforcing it, as was the case in Chadha, then it has both appropriate Article 3 standing for continuing to appeal and is the proper party to invoke the Appellate Court's further review of this matter. And so we think that that's the basis for being on the side of the appellant here in this case.

JACOBS, C.J.: Basically your role is to stimulate decision making in the appellate court. That's what you are saying?

MR. DELERY: In part, but it is also the case that the government actually is, the executive branch is the entity against whom the judgment is running and given the determination by the president and the attorney general to enforce Section 3 pending final resolution, you know as was the case in Chadha, you know, the government is not taking the action that it is ordered to by the District Court judgment and, therefore, that's the basis for appeal.

But moving to the standard of scrutiny, this is a question that this Court has not decided. We submit that the Court should consider the Supreme Court's established factors and hold the classifications based on sexual orientation are inherently suspect and warrant heightened scrutiny. Gay and lesbian people have been subject to a long and deep history of discrimination which continues to this day. Sexual orientation is a fundamental

aspect of a person's identity and it says nothing about an individual's ability to contribute productively to society.

So while other appellate courts have applied rational basis review they did so--

JACOBS, C.J.: I'm sorry, but when you refer to fundamental aspect of a person's identity, that doesn't seem to be part of any test other than in the asylum area as to whether somebody is being persecuted for something that they can't change or shouldn't be expected to alter.

MR. DELERY: Right, I think here--

JACOBS, C.J.: That's coming from another county.

MR. DELERY: I think here it bears on what has been called immutability or a distinguishing characteristic, that aspect of the Supreme Court's test. As the Supreme Court indicated in Lawrence, sexual orientation is deeply ingrained, whatever the debate about its precise origins and is a fundamental aspect of identity, its expression is an integral part of human freedom. So by rejecting for example the status/conduct distinction in Lawrence and the later Christian Legal Society case, the Court has acknowledged that even beyond the overwhelming consensus of the scientific community and the leading organizations on this question, however you parse the origins, it is a deeply engrained aspect of one's identity.

So the other--

DRONEY, J.: I have a question - -

MR. DELERY: Certainly.

DRONEY, J.: What is your position on - - what the level of enhanced scrutiny should be intermediate, strict, and how you make that distinction.

MR. DELERY: I think what we have said in our brief, I believe it is a footnote on page 36, is that we think that the heightened scrutiny factors suggest greater than rational basis review and given that it is not necessary to distinguish in this case for resolving it, we haven't taken a position on whether it is strict or intermediate. Intermediate would be sufficient here, and the factors point at least that far.

And I think if the Court looks at, which no federal Court of Appeals has done in approximately twenty years, the established heightened scrutiny factors, they all point in favor of recognizing sexual orientation as a classification that deserves heightened scrutiny. History of discrimination has been common ground from the courts that have looked at this question. As far as I know no court has concluded that there isn't a sufficient history of discrimination here. It starts with the proposition that sexual intimacy between same sex partners was criminalized until recently with far reaching consequences. As the Supreme Court in Lawrence indicated, that was an invitation to public and private discrimination in a whole range of ways.

As a result, gay and lesbian people were deemed unfit for federal employment, security clearances military service. There was employment

discrimination at state and local government levels and in the private sector, child custody and visitation rights over time have been denied and this history of discrimination continues to today. But it is also a consideration that has no bearing on an individual's ability to perform or contribute to society.

Gay and lesbian people contribute in all walks of life and even and did.

JACOBS, C.J.: Look, I mean, that's you know you are pressing on an open door, but do we look at that in terms of the ability for people to function productively generally in life or do we look at it in terms of whether people can in this instance procreate as a married couple?

MR. DELERY: I think what the Supreme Court has done is looked to whether a particular characteristic says anything about whether it is-- whether it is usually a sensible ground for differentiating among people in government action. So the court in Fontiero and Cleburne for example—

JACOBS, C.J.: Your argument is you weren't looking at the particular disability essentially that the government is trying to impose in a given case, you look at people's general capacity to make a contribution.

MR. DELERY: Right. On the suspect class or heightened scrutiny inquiry, the second would be potentially relevant when you are looking at the means and split of the particular statute, but in terms of deciding whether heightened scrutiny is appropriate, it is a more general inquiry as the Supreme Court has said because the purpose of

heightened scrutiny is, in effect, where there is some reason to be suspicious of government action that targets a historically disadvantaged group, for example. Heightened scrutiny has the effect of smoking out improper rationales and insuring that the reasons given for a particular government action are significant and proper purposes.

And so at the level of examining whether heightened scrutiny is appropriate it is a more general inquiry.

And then on political powerlessness, which was discussed earlier--

JACOBS, C.J.: Yes, it is hard--isn't it hard for you to argue political powerlessness when you know the administration declines to argue the other side of this, which is why you are here?

MR. DELERY: That is true, the President and the Attorney General have made a constitutional judgment as to heightened scrutiny.

JACOBS, C.J.: Well, there is substantial power; they put that power behind this point of view.

MR. DELERY: So a couple of points on this, Your Honor.

JACOBS, C.J.: So your presence here is like an argument against your argument.

MR. DELERY: Perhaps. But I think if you look to the gender context, for example, in the 1970's when the Supreme Court recognized gender as appropriate for intermediate scrutiny, women had

made substantial gains in a range of anti-discrimination efforts. So, for example, the 19th Amendment had provided the right to vote, Title VII had already banned discrimination at that point. So the court hasn't viewed this as an all or nothing factor, but if you look at where things currently stand, it is still the case that the rights of gay and lesbian people usually lose when they are put up for a vote. Efforts to combat discrimination against gay and lesbian people including very recently have often led to significant political backlash including in Tennessee just last year when efforts to include anti-discrimination protections in state law were repealed.

So it's sort of, it is a question of the baseline and where you start and certainly while progress has been made that was the case at the time of gender in the 1970's and the court did not view that as dispositive.

So for those reasons we think heightened scrutiny is appropriate, sexual orientation serves a-- should be viewed as a suspect classification and therefore a law like Section 3 of DOMA, which targets them must be substantially related to an important governmental objective.

And under heightened scrutiny the court looks not to a rationale that might be invented during the course of litigation, but to the actual reasons that the legislature gave for the action and also looks closely, as I indicated before, at the fit between the means chosen and the supposed ends to make sure that the law is based on reasoned analysis, significant and proper purpose and not disapproval of a particular group.

I think here Section 3 is not as BLAG would have it an ordinary exercise in line drawing for economic or tax legislation, one that just happens to disadvantage some people, and not others. On the contrary, if you look at the legislative history, I think it is crystal clear that it was motivated in significant part by disapproval of gay and lesbian people in their intimate and family relationships and so--

STRAUB, J.: Can you tell that to the Congress in 1996--

MR. DELERY: Did the government say that?

STRAUB, J.: - - tell that to the Congress in 1996, that which you just now told us?

MR. DELERY: No, Your Honor, the Department at the time said in a couple of different letters to members of Congress during the legislative process that at the time it predicted that the courts would uphold section 3 of DOMA.

STRAUB, J.: And you thereafter argued in favor of the constitutionality of the statute - - is that right?

MR. DELERY: That is true, over the years.

STRAUB, J.: As late as 2010, is that correct?

MR. DELERY: Yes. That's correct.

STRAUB, J.: What is it that changed your view of this?

MR. DELERY: What changed were two things. One was an evaluation of the appropriate

level of scrutiny that applies to claims based on sexual orientation. The defense of the law had been mounted under a rational basis standard and as indicated the government has concluded that the appropriate standard here is heightened scrutiny. And second, at a basic level this is now a decision that has been made by the Attorney General and by the President in the constitutional judgment and so the position in the cases are now dictated by the Chief Executive here.

STRAUB, J.: And now finally you concede that if rational basis was used, is utilized here, a reasonable argument can be made to uphold the constitutionality of the statute? Within that context, which are the interests advanced, are you referring to the other table, that would make its argument reasonable for constitutionality?

MR. DELERY: Okay, so just to clarify on that point, Your Honor, we have said as indicated in the Attorney General's letter to Congress that I do think a reasonable argument can be proffered under rational basis. That's not the same as saying that we think it should prevail. On that, the government has not taken a position.

STRAUB, J.: In the context of that statement, tell me which interests advanced the constitutionality would make the argument reasonable?

MR. DELERY: I think the answer to that, probably the best place to look is in the first superseded brief that the government filed in the First Circuit case. And so those briefly, I think, the arguments there were that maintaining the status

quo and a degree of uniformity for federal benefits, coupled with preserving room for state policy development on this question could provide a reasonable argument.

STRAUB, J.: Did you advance any other - -

MR. DELERY: Those were the--that's my summary of the arguments that were in the brief.

STRAUB, J.: Are there other issues advanced by the United States government?

MR. DELERY: Over time in cases, not in that case.

STRAUB, J.: That you just told me about.

MR. DELERY: No, not in that case. Thank you.

DRONEY, J.: Let me just ask about Baker versus Nelson. The attorney general in his letter to the speaker didn't say anything about Baker versus Nelson. What's your view on how Baker versus Nelson applies to the work of this Court?

MR. DELERY: So I think we don't think Baker controls the outcome of this case. I think the proper analysis is that summary dispositions like Baker should be narrowly construed. As the Court has indicated they are precedential, but they are binding only on the precise issues presented and necessarily decided. The reason being because you know a one sentence summary decision it is usually not apparent what the underlying rationales might or might not have been. So here the precise claim

that we have before the Court was not presented or necessarily decided. It is not the same equal protection claim because here we are dealing with a denial of federal benefits to couples who are already validly married under state law. There, it was whether states had to give a marriage license. And neither the jurisdictional statement presented to the Supreme Court or the State Supreme Court decision from which the party was appealing, presented the suspect class or heightened scrutiny issue for sexual orientation. There is no indication that the Supreme Court decided it, they didn't have to decide it and we'd submit it would over read Baker given later developments in the law to give it binding effect. In fact, it is not even clear what the classification was that the plaintiff was advocating in that case. In the jurisdictional statement, this is at page 702 of the appendix the statement is made that the discrimination in this case is one of gender. It was a different time, it was a different conception of the legal claim and like the First Circuit and like other courts that have considered this question, we don't think it is preclusive on this effect.

JACOBS, C.J.: Thank you.

MR. DELERY: Okay, thank you.

JACOBS, C.J.: We'll hear rebuttal.

MR. CLEMENT: Thank you, Your Honors, just a few points in rebuttal. First, just on what was just discussed about Baker, I would invite you to read the jurisdictional statement. I think it is clear that the appellant there was arguing both gender discrimination and sexual orientation. So I think that Baker would be binding on both. Also, as I read

the jurisdictional statement, I thought that they were arguing for heightened scrutiny, but as I said, you could read that for yourself and make your own judgment on that. Just a few other points, one Ms. Kaplan mentioned the issue of whether saving money alone is enough. Well, obviously we think we have more than saving money here standing alone. But I would emphasize that I do think actually saving money enough is a rational basis. I think you know one of the things that cite for the proposition that's not is a dissenting opinion in the recent Armour against Indianapolis case. Now the majority didn't say saving money alone is enough. As I understand the law here, saving money is a rational basis. You can't go about that rational basis in an utterly irrational way. So if you say you are going to save money by giving--you know not giving some benefits to people with blue eyes or something, that might be irrational government action, but it is not because saving money isn't a rational basis for government action. Of course, as I say, it is a little bit of an academic point because the saving money rationale is combined with other things, not just the other rationales we offer, but this is a situation where Congress is acting to do here is to preserve the scope of the benefit programs the way they had always been. They had always been that way based on the uniform state law as opposed to a federal definition, but the federal definition had the basis of not opening these programs up to new individuals.

And certainly, as I understand the law, a decision by the government not to expand a class of beneficiaries based on a rationale of saving money is the kind of decision Congress makes every day and is sufficiently rational to withstand rational basis

review. Obviously, one of the other bases that supports this as a rational bases that I think has been discussed the most so I will focus on it, is uniformity. Now a couple of things were said about uniformity. First there is this point about the couple moving to North Carolina and losing their tax status. Well, that's precisely the kind of thing that Congress can decide, well that doesn't make any sense. We want to treat people in New York and North Carolina exactly the same way. So we are going to have a uniform definition. Now the next response is, but Congress has never done this with respect to marital status before. Well, first that's not true. Congress does this with respect to it overrides marital decisions in specific context based on concerns about fraud. Back in the 19th century, it conditioned the admission of territories to statehood on overriding their decisions about what the definition of marriage was going to be. So if you want to go way back there are precedents as well, but most importantly, Congress never confronted a situation like it did in 1996, where they were going form a situation where they could have uniformity and deference to the states at once because every state had the same rule and they recognized that that was going to change. They had to choose between deferring to the state definition and maintaining a policy of uniformity, I think the decision to choose uniformity over deference is certainly within the realm of rational basis.

Thank you, Your Honors.

JACOBS, C.J.: Thank you. Thank you all. We will reserve decision.

[END RECORDING]

C E R T I F I C A T E

I, Ann Arundel, certify that the foregoing transcript is a true record of said proceedings, that I am not connected by blood or marriage with any of the parties herein nor interested directly or indirectly in the matter in controversy, nor am I in the employ of the counsel.

/s/ Ann Arundel

Date 10/2/12

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 10 Civ. 8435 (BSJ) (JCF)

EDITH SCHLAIN WINDSOR, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, *ET AL.*,
DEFENDANTS

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES' AMENDED RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR ADMISSION

Pursuant to the Court's order of July 28, 2011, in this case, and to Rules 26 and 36 of the Federal Rules of Civil Procedure, Interventor-Defendant The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("Defendant") makes the following supplemental response to Plaintiff's First Requests for Admission.

> **Request for Admission 1**. Admit that if, at the time of her, death, Thea Spyer had been married to a man instead of a woman, who was a U.S. citizen and who survived Thea Spyer's death, her estate would have qualified for the estate tax marital deduction, 26 U.S.C.

§ 2056(a), and would not have been liable for any federal estate tax.

Response: Defendant admits that Plaintiff has submitted documents that, if accurate, establish the eligibility of Spyer's estate for the estate tax marital deduction and that the estate would not have been liable for federal estate tax, if Spyer had been married to a surviving male U.S. citizen at the time of her death.

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Dated: August 1, 2011