No. 12-23

IN THE

Supreme Court of the United States

JANICE K. BREWER, in her official capacity as Governor of the State of Arizona, *et al.*
Petitioners,

v.

JOSEPH R. DIAZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, COLORADO, GEORGIA, IDAHO, KANSAS, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether a state that precludes same-sex marriage may confer exclusive benefits on married couples.

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INTEREST OF THE *AMICI* STATES[1]

The overwhelming majority of states—forty-two in all—define marriage as the union of one man and one woman, consistent with the historical definition of marriage. Thirty-five of those same states also confer significant rights and benefits exclusively on married couples. The decision below expressly rejects exclusive marriage benefits conferred by one of them and even implicitly rejects the underlying rationale for adhering to a traditional definition of marriage. The *amici* States have an interest in protecting their power to define marriage in the traditional manner and to afford exclusive benefits based on marital status.

SUMMARY OF THE ARGUMENT

There is an ongoing vibrant, nationwide discussion on the nature of marriage. For several years, this national debate has occurred amidst—and in many cases in direct response to—a handful of judicial decisions under state constitutions invalidating traditional marriage definitions, ordering marriage-equivalent status for same-sex couples, or requiring marriage-comparable benefits

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the amici states' intention to file this brief more than 10 days prior to the due date of this brief. Consent of the parties is not required for the States to file an amicus brief. Sup. Ct. R. 37.4.

for same-sex couples. Only recently, however, have courts begun to mandate legal recognition and governmental benefits for same-sex couples under the *federal* Constitution. The decision below, along with other recent decisions from the First and Ninth Circuits, falls within this new set of successful federal challenges to state laws protecting the traditional definition of marriage, and all warrant immediate review.

These three decisions present important, yet distinct, aspects of marriage policy. The Ninth Circuit's decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), addresses whether States may reserve marital status for opposite-sex couples, even while they afford at least some of the benefits of marriage to same-sex couples via "domestic partnerships." Meanwhile, the First Circuit's decision in *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012), bears on whether the federal government may decline to recognize state-licensed same-sex marriages when distributing benefits. Neither case, however, squarely addresses the related but distinct (and exceedingly important) issue presented here: May states confer exclusive benefits based on the traditional definition of marriage?

Timely resolution of the issues presented in all three cases is necessary to avoid uncertainty over the constitutional status of marriage itself, one of the most revered and enduring institutions of

American life. The decision below effectively invalidates the laws of five states within the Ninth Circuit—Alaska, Arizona, Idaho, Montana, and Nevada—that condition at least some rights and benefits on marital status or permit local governments to do so.[2] The decision also employs logic that undercuts similar laws in thirty other states. Indeed, the panel's reasoning implies the invalidity of traditional marriage, period. The decision's basic premise is that all distinctions between opposite-sex couples and same-sex couples are borne of animus toward homosexuals and that promoting traditional marriage is an illegitimate state purpose. The very presence in the Federal Reports of this radical rejection of traditional marriage as anathema to the Fourteenth Amendment should be enough to justify certiorari.

Furthermore, it is important to review this case precisely because it effectively requires all states within the Ninth Circuit immediately to provide marital benefits to same-sex couples—a remedy that may be exceedingly hard to undo later. The

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[2] Alaska (Alaska Const. art. 1, § 25; Alaska Stat. Ann. § 25.05.013); Arizona (Ariz. Const. art. 30, § 1); Idaho (Idaho Const. art. III, § 28); Montana (Mont. Const. art. XIII, § 7); Nevada (Nev. Rev Stat. §§ 122A.200–210). Although courts in Alaska and Montana have ordered limited benefits for same-sex partners of state employees, those states still condition many other benefits on marital status. *See Alaska Civil Liberties Union v. Alaska* 122 P.3d 781 (Alaska 2005); *Snetsinger v. Mon. Univ. Sys.,* 104 P.3d 445 (Mont. 2004).

political status quo of government benefits is notoriously hard to change, and the decision below may distort the politics of marriage benefits by enshrining an erroneous view of constitutional law as the political status quo for an extended period. Hence, even if this Court were to overturn that holding in another case down the road, states that have changed their policies in the meantime to comply with court orders would be handicapped in their ability to restore the traditional practice of distributing benefits based on (traditional) marital status alone.

Finally, review is justified because the decision below is so fundamentally wrong. As Congress and forty-two states recognize, the different procreative capacities of same-sex and opposite-sex couples support a constitutionally legitimate distinction between them for purposes of defining marriage and affording special benefits. These traditional policies further state interests in responsible procreation by encouraging biological parents to remain together, a rationale that cannot extend to same-sex couples. Congress and the states may conclude that discarding a distinction so deeply rooted in history and social experience could carry undesirable consequences, particularly where such change would utterly negate *any* apparent rationale for the government to afford special recognition and benefits to a limited set of relationships as "marriages."

ARGUMENT

I. The Constitutionality of Conferring Rights and Benefits Based On Traditional Marriage Is Nationally Important and Requires Timely Resolution

Few political or legal controversies command such national prominence as those surrounding same-sex marriage. The Supreme Court of Hawaii's 1993 decision to scrutinize that State's traditional marriage definition propelled marriage policy into the national spotlight. *See Massachusetts v. HHS*, 682 F.3d 1, 5-6 (1st Cir. 2012) (discussing the effects of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)); David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. Times, Mar. 6, 1996, at 13, *available at* 1996 WLNR 4401892. Many States answered with legislation or constitutional amendments expressly codifying the traditional definition of marriage. *Massachusetts*, 682 F.3d at 5-6 & n.2.

Congress responded with the Defense of Marriage Act (DOMA), signed by President Clinton on September 21, 1996. DOMA not only defines marriage for purposes of federal law but also authorizes states *not* to recognize same-sex marriages from other states as a matter of full-faith and credit. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

So, after two decades of political debate, Congress and forty-two states currently recognize the traditional definition of marriage. That is, the vast majority of jurisdictions continue to define marriage as being between one man and one woman, some as a matter of state constitutional law, some as a matter of statutory law, and some without a specific enactment. *See* App. at 1a-2a.

This intense, passionate national debate over marriage shows no signs of abating. This year alone, North Carolina adopted the traditional definition of marriage by constitutional amendment; Minnesota will consider a similar measure; and Maine, Maryland, and Washington will hold referenda on whether to retain or adopt laws permitting same-sex marriages. *See* Clarke Canfield, *Obama's Support for Same-Sex Marriage Adds Fuel to the Debate*, The Associated Press, May 18, 2012, *available at* http://bangordailynews.com/2012/05/18/politics/obamas-support-for-same-sex-marriage-adds-fuel-to-debate/.

Legal challenges to these laws have further shaped national and local marriage policy—all the while receiving national attention. A few well-known state supreme court decisions from California, Iowa, and Massachusetts have required those states to solemnize same-sex marriages as a matter of state constitutional law. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Varnum*

v. Brien, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

A few other state supreme courts have mandated—again on state constitutional grounds—that their states extend all marital rights and benefits to same-sex couples, even if they do not bestow the status of "marriage." *See Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

Still other state appellate courts have rejected such claims. *See, e.g., Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516 (Colo. App. 1994); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Ross v. Goldstein*, 203 S.W.3d 508 (Tex. App. 2006); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006).

As a matter of federal law, however, for forty years state and federal courts alike have consistently rejected challenges to marriage laws brought under the U.S. Constitution. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Baker v.*

Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *In re Estate of Cooper* 564 N.Y.S.2d 684 (N.Y. Sur. Ct. 1990), *aff'd sub nom. In re Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *see also Conaway,*, 932 A.2d 571 (employing federal equal protection analysis to interpret the state constitution); *Hernandez,*, 855 N.E.2d at 9 (same); *Anderson.*, 138 P.3d at 973 (same).

Such holdings follow from this Court's rejection of a challenge to Minnesota's traditional marriage law in *Baker v. Nelson*, 409 U.S. 810 (1972). *See Wilson*, 354 F. Supp. 2d at 1304 (concluding that *Baker* requires dismissal of a federal challenge to DOMA); *Morrison*, 821 N.E.2d at 20 (lead opinion) ("[*Baker*] is binding precedent . . . that state bans on same-sex marriage do not violate the United States Constitution.").

Recently, however, a few courts—including the Ninth Circuit in the decision below—have invoked the Fifth and Fourteenth Amendments to strike down laws involving important aspects of marriage, *Baker* notwithstanding. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), addresses whether, the issue of marriage *benefits* to one side, States may reserve the label "marriage" for opposite-sex couples as a traditional means of protecting and promoting such marriages. The majority held that withdrawing that label from otherwise equally situated same-sex

domestic partners is a prohibited display of animus toward homosexuals. *See Perry*, 671 F.3d at 1063-64. Although the *Perry* court asserted that its decision is based on the specific factual background leading to the passage of Proposition 8, its analysis and holding are likely to have broader significance for the use of the marriage label across the country. *See Dragovich v. U.S. Dep't of Treasury*, --- F. Supp. 2d ---, 2012 WL 1909603 (N.D. Cal. May 24, 2012) (relying on *Perry* when holding unconstitutional the federal government's definition of marriage as a union of one man and one woman).

Meanwhile, the First Circuit invalidated the traditional definition of marriage Congress adopted for purposes of carrying out federal programs and distributing approximately 1,138 federal rights, privileges, and benefits. *Massachusetts*, 682 F.3d 1. It rejected DOMA on the theory that "denying" federal benefits to same-sex couples bears no rational relationship to any legislative purpose. *Id.* at 15. This rationale would apparently apply to traditional state definitions of marriage too, though the court did assert that "federalism concerns" prompted it to employ "closer than usual [rational basis] review." *Id.* at 8; *see also Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012); *Golinski v. Office of Pers. Mgm't*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (district courts in both cases invalidating Section 3 of DOMA on the theory that Congress's definition of marriage is not rationally related to any legitimate governmental interest)

Rule 11 pet. for cert. filed, *Office of Pers. Mgm't v. Golinski*, No. 12-16 (S. Ct. July 3, 2012).

This case presents a third, and equally important, lower-court rejection of traditional marriage policy. Like the First Circuit in *Massachusetts*, the Ninth Circuit panel below concluded that the "withholding of benefits [from] same-sex couples" is an equal protection violation. Pet. App. 11a. This case thus directly presents the marriage benefits question without the federalism overlay that colored the First Circuit's equal protection analysis. And unlike *Perry*, the panel below did not cabin its holding to instances where states have *withdrawn* previously extended benefits. Rather, the panel below addressed the "*distribution* of employee health benefits." Pet. App. at 14a (emphasis added); *see also* Pet. App. at 11a ("[W]hen a state chooses to *provide* [employment] benefits, it may not do so in an arbitrary or discriminatory manner." (emphasis added)); Pet. App. at 13a-14a (stating that there was no rational basis for the "*denial*," not withholding, "of benefits to same-sex domestic partners" (emphasis added)).

The decision below thus "all but proclaim[ed] that limiting benefits only to married couples is unconstitutional." Pet. App. at 69a (O'Scannlain, J., dissenting in denial of en banc review). In fact, the only two courts to apply *Diaz* to marriage laws so far recognize this implication. When ruling on DOMA's constitutionality, the district court in

Dragovich rejected the government's argument that *Diaz* concerned only the *withdrawal* of benefits. It explained that *Diaz* stood for the proposition "that 'when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.'" *Dragovich*, 2012 WL 1909603, at *15 (internal citation omitted). So, too, another federal judge cited *Diaz* when assessing whether the federal government must *extend* employment benefits to same-sex couples. *See Golinski*, 824 F. Supp. 2d at 977, 1002.

Resolution of the state marriage-benefits question is of utmost importance. Few states promote marriage through labels alone; most join official recognition with access to particular rights, privileges, and benefits. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock.)"). The Supreme Judicial Court of Massachusetts, for instance, identified dozens of rights and benefits tied to marital status in areas ranging from property law to evidence rules to family law. *See Goodridge*, 798 N.E.2d at 955-56; *see also Perry*, 671 F.3d at 1077-78 (describing some incidents of marriage).

Of the forty-two states retaining a traditional definition of marriage, all but eight confer at least

some exclusive benefits on marital status. The others grant nearly identical rights, privileges, and benefits to same-sex couples and married couples.[3]

Delaying resolution of the state-benefits question would only harm the robust national debate over marriage policy. Waiting for another day to review the issue would make it difficult, if not impossible, for Arizona and other affected states to restore marriage benefits to the status quo ante in the event traditional marriage policy were eventually to prevail. Once states alter their laws in response to *Diaz* (or other decisions following its reasoning), reverting to the traditional benefits model would upset many citizens' settled expectations. Allowing the panel's erroneous reasoning to propagate may thus result in permanent *judicial* changes to the laws of thirty-five states, even if those judicial decisions themselves are later overruled.

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[3] California (Cal. Fam. Code § 297.5(k)(1)); Delaware (Del. Code Ann. tit. 13, § 212); Hawaii (Haw. Rev. Stat. § 572B-9); Illinois (750 Ill. Comp. Stat. 75/20); Nevada (Nev. Rev Stat. §§ 122A.200, 210); New Jersey (N.J. Stat. Ann. § 37:1-29; *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)); Oregon (Or. Rev. Stat. § 106.340); Rhode Island (R.I. Gen. Laws §§ 15-3.1-5 to -6).

II. The Decision Below Is Deeply Flawed and Casts a Pall Over *All* Marriage Laws By Holding That No Valid Rationale Supports Traditional Marriage

In addition to undermining state marriage-*benefits* laws, the decision below casts doubt on *all* state laws distinguishing between same-sex unions and traditional marriage, including those that *define* marriage. The decision's erroneous rational-basis analysis presumes there is no state interest in preserving traditional marriage; it reaches the "veiled but unmistakable" conclusion that "rules benefitting only traditional marriage serve no conceivable rational purpose." Pet. App. at 66a (O'Scannlain, J., dissenting in denial of en banc review).

This is a startling conclusion for a federal appeals court to reach, to say the least. Certiorari is warranted not only because the decision below conflicts with *Baker v. Nelson* (see Petition at 30-31), but also because the question itself is too important and fundamental to wait for another day.

A. The decision below conflicts with this Court's equal protection doctrine and undermines all laws predicated on a traditional definition of marriage.

In reviewing Arizona's legislative and executive decisions about state government employment

benefits, the panel below formulated a test for homosexual animus that cannot be reconciled with this Court's equal protection precedents and that necessarily casts doubt on *all* laws creating distinctions based on marital status.

The centerpiece of the panel's reasoning was *USDA v. Moreno*, 413 U.S. 528 (1973), which supplies the rule that when the "practical operation" of law prevents a disfavored group from altering their living arrangements to retain eligibility for governmental benefits, it evinces "a bare desire to harm a politically unpopular group." Pet App. at 12a-14a (internal citations omitted). Using *Moreno*, the panel discards the longstanding principle that disparate impact is typically irrelevant for rational-basis review, because "[m]ost laws classify, and many affect certain groups unevenly." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271-72 (1979) (upholding employment policies favoring veterans despite an adverse impact on women and non-veterans); *see also Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370-74 (1988) (upholding food stamp laws despite their burden on striking workers); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (upholding employment policies that disadvantaged certain narcotics users).

To be sure, the Court has been receptive to evidence of disparate impact on members of suspect or quasi-suspect classes, which receive heightened

protection, lest facial neutrality shield invidious discrimination from judicial review. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But even when considering disparate impacts on members of suspect or quasi-suspect classes, the Court has insisted that a law is not unconstitutional "*solely* because it has a . . . disproportionate impact." *Washington v. Davis,* 426 U.S. 229, 239 (1976); *see also City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 194 (2003); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977). Rather, disparate impact on members of protected classes becomes relevant only if there is direct evidence that a state decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r*, 442 U.S. at 279.

In *Moreno*, the Court indicated that state action designed *solely* to harm a politically unpopular group does not further any legitimate governmental interest, but it did not depart from traditional rational-basis principles. *See Lyng*, 485 U.S. at 370 n.8 (stating that *Moreno* "is merely an application of the *usual* rational-basis test" (emphasis added)). Consistent with other applications of rational basis review, the Court invalidated the challenged classification because it was "wholly without any rational basis." *Moreno*, 413 U.S. at 538. The Court did not hold the challenged law unconstitutional *merely* because it was intended to disadvantage a group, *see Lyng*,

485 U.S. at 370 n.8, much less did it establish that disparate impact alone is sufficient to show animus, *see* Pet. App. at 62a-63a (O'Scannlain, J., dissenting in denial of en banc review) (observing that even *Moreno* took "stock of legislative history 'indicat[ing] that th[e] amendment was *intended* to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program'" (quoting *Moreno*, 413 U.S. at 534) (emphasis added)).

Nor have subsequent decisions articulated different principles. In analyzing a decision by the City of Cleburne that disproportionately affected the mentally retarded, the Court applied the "general rule" that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The Court did not find a constitutional violation based on animus alone. *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001).

Likewise, the Court in *Romer v. Evans*, 517 U.S. 620 (1996), applied the standard test that a legislative classification is constitutional "so long as it bears a rational relation to some legitimate end." *Id.* at 631 (citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). The Court then invalidated the law at issue because it failed "even *this conventional inquiry*." *Id.* at 632 (emphasis added). The Court did not alter the principles of rational basis review

by relying on allegations of animus or disparate impact.[4]

The panel below, however, departed from these established principles by adopting an analysis that essentially requires a state to prove that a law designed to promote marriage encourages *both* same-sex *and* opposite-sex marriages. Without citing any evidence that *actual* animus motivated the Arizona legislature's decision to restrict employment benefits for both same-sex and opposite-sex domestic partners, the panel inferred from Arizona's adherence to a traditional definition of marriage that the choice to restrict benefits to married couples was borne of animus towards same-sex couples. Pet. App. at 62a-63a (O'Scannlain, J., dissenting in denial of en banc review). The adverse impact on same-sex couples created by Arizona's definition of marriage was enough, the court said.

But if an adverse effect on employment benefits for unmarried same-sex couples is sufficient to demonstrate animus, it follows that *all* conceptions of marriage as a union between a man and a woman are, "by the panel's judicial declaration,

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[4] Justice O'Connor suggested otherwise in *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), but her equal protection analysis was not adopted by the majority, which relied on Fourteenth Amendment's Due Process Clause. The panel below declined to address Justice O'Connor's argument. *See* Pet. App. at 7a.

begotten from bigotry." Pet. App. at 67a (O'Scannlain, J., dissenting in denial of en banc review). The panel, it is worth stressing, concluded that there is no rational relationship between *denying* same-sex couples benefits and *promoting* marriage *precisely because* same-sex couples "are ineligible to marry." Pet. App. at 13a-14a.

That conclusion is logical only if one presumes that same-sex couples and opposite-sex couples are indistinguishable for purposes of marriage itself. To state the obvious, if the state is not attempting to use benefits to convince same-sex domestic partners to enter same-sex marriages, it is *fitting*, not *irrational*, that same-sex couples cannot, in fact, marry. *See Johnson v. Robinson*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). Only if the state is attempting to promote marriage of *all* self-declared couples, *including* same-sex couples, does a refusal to recognize same-sex marriage produce a lack of fit.

On the other hand, if promoting *traditional* marriage is the state's goal, Arizona's benefits policy is unquestionably rational. Granting married couples benefits not available to unmarried couples undoubtedly creates an incentive for *eligible* couples to marry. *See, e.g.*, *Citizens for Equal Prot.*, 455 F.3d at 867-68

(recognizing as rational the practice of giving benefits to incentivize marriage); *Hernandez*, 855 N.E.2d at 21 (same); *Feliciano v. Rosemar Silver Co.,* 514 N.E.2d 1095, 1096 (Mass. 1987) (observing that extending a right to recover for loss of consortium to a cohabitating partner would "subvert[]" the purpose of promoting marriage).

Furthermore, it is axiomatic that if there is any legitimate reason for states to distinguish between same-sex couples and traditional marriages, states may enact laws that promote traditional marriage but not same-sex couples. *Citizens for Equal Prot.*, 455 F.3d at 867-68; *see also Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942) ("'[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.'" (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

So, faced with a challenge to exclusive traditional marriage benefits, courts must answer the question, "Why do states sanction marriage?" Tellingly, the panel below offers no answer to this question. Indeed, one of the fundamental failings of the decision below is that it identifies no rationale *for* same-sex marriage and instead relies only on an argument *against* civil marriage recognition generally.

B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

States that choose to preserve the traditional definition of marriage do so based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the only procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for.

In other words, civil recognition of marriage historically has not been based on a state interest in adult relationships in the abstract. Marriage instead is predicated on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. It is no exaggeration to say that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541.

In short, traditional marriage protects civil society by encouraging couples to remain together to rear the children they conceive. It creates the norm that potentially procreative sexual activity should occur in a long-term, cohabitative

relationship. It is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large. Through civil recognition of marriage, society channels sexual desires capable of producing children into stable unions that will raise those children in the circumstances that have proven optimal. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 781-82 (2002). "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

Marriage also perfectly joins the full biological mother-father-child relationship to the original mother-father *legal* responsibility for the child. In doing so, marriage "increas[es] the relational commitment, complementarity, and stability needed for the long term responsibilities that result from procreation." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 792 (2001).

This ideal does not disparage the suitability of alternative arrangements where non-biological parents have legal responsibility for children. But these relationships are exactly that—alternatives to the model. States may rationally conclude that, all things being equal, it is better for the biological

parents also to be the legal parents and that marriage promotes that outcome.

C. Appellate courts across the country have long recognized the responsible-procreation rationale for marriage, and the decision below cannot be reconciled with those precedents

From the very first legal challenges to traditional marriage, courts have refused to equate same-sex relationships with opposite-sex relationships based on the latter's procreative capacity. In *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974), the court held that both the state and federal constitutions allowed the state to regulate marriage. The court observed that limiting marriage to opposite-sex couples "is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." *Id.* Not every marriage produces children, but "[t]he fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." *Id.*

This analysis remains dominant in our legal culture, both with regard to federal equal protection doctrine[5] and state constitutional law.[6]

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[5] *See, e.g.*, *Citizens for Equal Prot.*, 455 F.3d at 867; *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358

The Eighth Circuit, for instance, held that Nebraska's laws "defining marriage as the union of one man and one woman and extending a variety of benefits to married couples" were rationally related to the state's interest in promoting responsible procreation. *Citizens for Equal Prot.,* 455 F.3d at 867-68.

As a matter of both federal and state constitutional law, the Supreme Court of Washington similarly concluded that "limiting marriage to opposite-sex couples furthers the State's interests in procreation and encouraging families with a mother and father and children biologically related to both." *Andersen,* 138 P.3d at 985. So too, relying on this Court's due process and equal protection decisions, the Maryland Court of Appeals held that laws enshrining the traditional definition of marriage were rationally related to the

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F.3d 804, 818-19 (11th Cir. 2004); *Wilson*, 354 F. Supp. 2d at 1309; *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *Kandu*, 315 B.R. at 147-48 ; *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (per curiam) (Ferren, J., concurring in part and dissenting in part).

[6] *See, e.g.*, *Standhardt*, 77 P.3d at 464-65; *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (lead opinion); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Hernandez*, 855 N.E.2d at 7; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Andersen,* 138 P.3d at 982-83.

goal of responsible procreation. *See Conaway*, 932 A.2d at 629-34.

State and federal courts have also rejected the theory that restricting marriage to opposite-sex couples evinces unconstitutional animus toward homosexuals as a group. *See Massachusetts*, 682 F.3d at 16 ("[W]e do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality."); *Kandu,* 315 B.R. at 147-48 (upholding the federal Defense of Marriage Act as explained by legitimate governmental interests and not homosexual animus); *Standhardt*, 77 P.3d at 465 ("Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else."); *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 680 (rejecting the argument that limiting marriage and divorce to opposite-sex couples is "explicable only by class-based animus").

A plurality of the New York Court of Appeals observed that "the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." *Hernandez*, 855 N.E.2d at 8. Those judges explained, "[t]he idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court

should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id.*

Despite an overwhelming consensus that the laws embodying the traditional definition of marriage promote legitimate state interests, the panel below concluded that Arizona's law did not. By resting its decision on the lowest possible standard of review, the panel below necessarily concluded that there was no "reasonably conceivable state of facts that could provide a rational basis for" Arizona's distinction between spouses and same-sex partners. *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Fundamentally, this conclusion is inconsistent with the views of federal courts of appeals and state high courts employing the same or more stringent forms of rational basis review.

Indeed, the *only* appellate opinions to say that refusal to recognize same-sex marriage constitutes *irrational* discrimination came in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003) (opinion of Marshall, C.J., joined by Ireland and Cowin, JJ.), and *Perry v. Brown*, 671 F.3d 1052, 1080-95 (9th Cir. 2012).[7] The *Goodridge*

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[7] The essential fourth vote to invalidate the Massachusetts law came from Justice Greaney, who wrote a concurring opinion applying strict scrutiny. *Id.* at 970-74. Meanwhile, the Supreme Courts of California, Connecticut, Iowa and Vermont invalidated their states' statutes limiting marriage to the

opinion rejected the responsible procreation theory as overbroad (for including the childless) and underinclusive (for excluding same-sex parents), considerations that misperceive the point and that are ordinarily irrelevant to rational-basis analysis in any event. *Goodridge*, 798 N.E.2d at 961-62.

Perry, in turn, purports to rely on the specific circumstances of California laws other than Proposition 8, laws that confer on same-sex civil unions the same benefits accorded to married couples. *See Perry*, 671 F.3d at 1076-80; *see also Perry v. Brown*, 681 F.3d 1065, 1067 (9th Cir. 2012) (opinion of Reinhardt and Hawkins, JJ., concurring in the denial of en banc rehearing) ("We held only that under the particular circumstances relating to California's Proposition 8, that measure was invalid.").

In contrast, while the First Circuit invalidated Section 3 of DOMA in *Massachusetts*, it did so only under a *sui generis* standard where the responsible

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traditional definition, but only after applying strict or heightened scrutiny. *In re Marriage Cases*, 183 P.3d 384, 441-46 (Cal. 2008); *Kerrigan v. State,* 957 A.2d 407, 476 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 895-96 (Iowa 2009); *Baker v. State*, 744 A.2d 864, 878-80 (Vt. 1999). The New Jersey Supreme Court held in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), that same-sex domestic partners were entitled to all the same benefits as married couples, but that court was never asked to consider the validity of the responsible procreation theory as a justification for traditional marriage.

procreation theory was legitimate and rational, yet insufficient. *Massachusetts,* 682 F.3d at 13-16. The court rejected the suggestion that preserving traditional marriage was irrational or nothing more than "mere moral disapproval." *Id.* at *16 (quoting *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring)).

What is more, like the decision below, neither *Goodridge* nor *Perry* (nor *Massachusetts*) identified an alternative coherent justification for marriages of *any* type. *Goodridge* equated same-sex and opposite-sex couples because "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge*, 798 N.E.2d at 961. *Perry* similarly located the significance of marriage in "stable and committed lifelong relationships." *Perry*, 671 F.3d at 1078. Having identified mutual dedication as one of the central *incidents* of marriage, however, neither opinion explained why the state should care about that commitment between sexual partners any more than it cares about other voluntary relationships of two, or even more, people. *See Morrison*, 821 N.E.2d at 29 (lead opinion).

A constitutional doctrine that requires the same benefits for same-sex and opposite-sex couples must supply a coherent rationale for government recognition of both, not simply attack traditional marriage as antiquated or somehow ill-considered. The failure of the decision below to do so—and

indeed of *any* of the courts invalidating traditional marriage and its benefits to do so—while abnegating one of the most fundamental and enduring civil institutions in American life, justifies this Court's intervention.

* * *

In October Term 2012, the Court will field petitions in at least four cases presenting distinct aspects of the same-sex marriage issue. The Petitions in *Massachusetts* and *Golinski* will ask the Court to review Section 3 of DOMA as applied to federal government benefits. *Perry* will present the issue whether reserving the label "marriage" to opposite-sex couples without also providing them with *exclusive* benefits vindicates legitimate state goals. And this case presents the mirror-image issue: whether reserving various *benefits* to married (and by definition opposite-sex) couples is legitimate. The Court should grant certiorari here so that it may review the merits of a near-perfect array of possible same-sex marriage claims all at once.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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CONSTITUTIONAL DEFINITION (30 STATES)	
Alabama	Ala. Const. art. I, § 36.03
Alaska	Alaska Const. art. 1, § 25
Arizona	Ariz. Const. art. 30, § 1
Arkansas	Ark. Const. amend. 83, § 1
California	Cal. Const. art. 1, § 7.5
Colorado	Colo. Const. art. 2, § 31
Florida	Fla. Const. art. 1, § 27
Georgia	Ga. Const. art. 1, § 4 ¶ I
Idaho	Idaho Const. art. III, § 28
Kansas	Kan. Const. art. 15, § 16
Kentucky	Ky. Const. § 233A
Louisiana	La. Const. art. XII, § 15
Michigan	Mich. Const. art. I, § 25
Mississippi	Miss. Const. art. 14, § 263A
Missouri	Mo. Const. art. I, § 33
Montana	Mont. Const. art. XIII, § 7
Nebraska	Neb. Const. art. I, § 29
Nevada	Nev. Const. art. I, § 21
North Carolina	N.C. Const. art. XIV, § 6
North Dakota	N.D. Const. art. XI, § 28
Ohio	Ohio Const. art. XV, § 11
Oklahoma	Okla. Const. art. 2, § 35
Oregon	Or. Const. art. XV, § 5a
South Carolina	S.C. Const. art. XVII, § 15
South Dakota	S.D. Const. art. XXI, § 9
Tennessee	Tenn. Const. art. XI, § 18
Texas	Tex. Const. art. 1, § 32
Utah	Utah Const. art. 1, § 29
Virginia	Va. Const. art. I, § 15-A
Wisconsin	Wisc. Const. art. XIII, § 13

STATUTORY DEFINITION (9 STATES)	
Delaware	Del. Code Ann. Tit. 13, § 101 (a) & (d)
Hawaii	Haw. Rev. Stat. § 572-1
Illinois	750 Ill. Comp. Stat. 5/201, 212, 213.1
Indiana	Ind. Code § 31-11-1-1
Maine	Me. Rev. Stat. Ann. tit. 19, §§ 650, 701
Minnesota	Minn. Stat. §§ 517.03; 518.01
Pennsylvania	17 Pa. Cons. Stat. § 1704
West Virginia	W. Va. Code § 48-2-603
Wyoming	Wyo. Stat. Ann. § 20-1-101

NO EXPRESS DEFINITION (3 STATES)	
New Jersey	*Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006)
New Mexico	N.M. Stat. §§ 40-1-1 to -7
Rhode Island	R.I. Gen. Laws §§ 15-1-1 to -5