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Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance

J. Robert Brown Jr.

Catherine E. Smith

Kyle C. Velte

Susannah William Pollvogt

Tanya Washington

No. 12-307

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,
in her capacity as executor of the
estate of THEA CLARA SPYER, et al.,

Respondents.

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

BRIEF FOR AMICI CURIAE SCHOLARS OF THE CONSTITUTIONAL RIGHTS OF CHILDREN IN SUPPORT OF RESPONDENT EDITH WINDSOR ADDRESSING THE MERITS AND SUPPORTING AFFIRMANCE

TANYA WASHINGTON
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW
140 Decatur St.
Atlanta, GA 30303

J. ROBERT BROWN
Counsel of Record
SUSANNAH W. POLLVOGT
CATHERINE E. SMITH
KYLE C. VELTE
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave.
Denver, CO 80208
303.871.6254
jbrown@law.du.edu

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici, scholars and professors primarily of family law and the law of equal protection, submit this brief to respond directly to arguments advanced by the Bipartisan Legal Advisory Group (BLAG) that the Defense of Marriage Act (DOMA) is justified because it advances child welfare. Specifically, BLAG asserts that DOMA advances child welfare by: (1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and a father.[2] Each of these purported justifications expresses and enforces a bare preference for the children of opposite-sex couples as the only children entitled to the type of permanency, stability and so-called "ideal" parenting arrangements that DOMA allegedly confers. These articulated justifications reveal that DOMA's real function is to draw invidious distinctions between families headed by opposite-sex parents and families

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. This amicus brief is filed pursuant to the blanket consent executed by the parties and with the consent of Windsor.

[2] Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the U.S. House of Representatives at 44-49, *United States v. Windsor*, No. 12-307 (U.S. Jan. 22, 2013) (hereinafter Brief for Respondent).

headed by same-sex parents, and, by implication, between the children in these families.

Amici's scholarship refutes the validity of BLAG's child welfare justifications by delineating the legal, economic and psychological injuries that DOMA inflicts on children with same-sex parents. Amici's scholarship further demonstrates that DOMA is categorically impermissible under this Court's equal protection jurisprudence because it punishes children for the conduct of their parents.

SUMMARY OF ARGUMENT

BLAG acknowledges that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike,"[3] and yet DOMA patently violates this most fundamental understanding of the equal protection guarantee. The children of same-sex married couples are *identically situated* to the children of opposite-sex married couples, in terms of their need for and entitlement to the types of family-supporting governmental rights and benefits regulated by DOMA. Yet DOMA imposes permanent class distinctions between these two groups of children by penalizing the children of same-sex couples merely because their parents are of the same sex.

[3] Brief for Respondent at 46-47 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

Further, this Court has made clear that the government may not punish children (by, for example, denying them government-conferred benefits[4]) based on moral disapproval of the parents' relationship, or in an effort to regulate the parents' conduct.[5] DOMA punishes children for conduct over which they have no control, which bespeaks invidious discrimination rather than an effort to attain legitimate governmental objectives.[6]

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[4] *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding state law that denied recovery to illegitimate child for the wrongful death of the child's mother violated equal protection).

[5] *Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)) (holding that arguments in support of withholding state benefits to illegal entrants do not apply to children of illegal entrants because they cannot affect their parents' conduct or their own status).

[6] *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that private biases and the possible injury they might inflict are not permissible considerations for removal of an infant child from the custody of his mother); *Weber v. Aetna Cas. & Surety*, 406 U.S. 164, 175 (1972) (striking down state law denying workers' compensation proceeds to non-marital children, explaining "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illegal and unjust."); *Plyler*, 457 U.S. at 219-20 (striking down Texas law that withheld state education funds from school districts that enrolled children of Mexican descent not legally admitted to the United States, in part, because "children can neither affect their parents' conduct nor their own status."); *Levy*, 391 U.S. at 72 ("We conclude that it is invidious to discriminate against [non-marital children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.").

Amici advance two main points. First, DOMA affirmatively harms children. Although advocates and commentators have thoroughly documented the ways in which DOMA disadvantages same-sex couples, less attention has been paid to the class of children adversely affected by DOMA's discriminatory framework.[7] As demonstrated below, a significant number of children in the United States are being raised by same-sex couples, as well as by single gay and lesbian parents. DOMA inflicts immediate, concrete injuries on a subset of these children, namely: those whose families would otherwise benefit from federal family-supporting programs, but whose parents' marriages, while recognized on the state level, are rejected at the federal level. Throughout this brief, this subset of children will be referenced as "the excluded class of

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[7] For discussions of same-sex marriage from the perspective of children, *see* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of the Child*, 102 W. VA. L. REV. 411, 412 (1999) ("[t]he preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship"); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 586 (2005); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C. L. L. REV. 81, 85-89 (2011); Ruth Butterfield Isaacson, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 131-51 (2010); Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 Wash. U. L. Rev. (*forthcoming* 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519.

children."[8] In addition to exacting an impermissible legal and economic toll on the excluded class of children, DOMA also stigmatizes and psychologically harms all children of same-sex couples by declaring their families inferior to those headed by opposite-sex couples.[9] Far from promoting the welfare of children, DOMA does nothing to help the children of opposite-sex couples, while actively harming the children of same-sex couples. Thus, this purported state interest cannot provide even a rational basis for the law, as it finds no "footing in the realities of the subject addressed by the legislation."[10]

Second, DOMA fails in its entirety because it serves an impermissible function: it punishes the excluded class of children based on nothing more than moral disapproval of their parents' conduct.[11] This Court has repeatedly struck down classifications that are based in the majority's bare moral disapproval of a disfavored social group as a violation of

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[8] Specifically, this class of children includes children of same-sex couples who are lawfully married in one of the nine marriage-equality states or the District of Columbia.

[9] *Cf. Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("The impact [of racial segregation on children] is greater when it has the sanction of law; for the policy of separating the races is usually seen as denoting the inferiority of the negro group.") (quoting the lower court).

[10] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[11] *Weber*, 406 U.S. at 171; *Palmore*, 466 U.S. at 433.

the Equal Protection Clause.[12] Further, laws are simply not permitted to permanently place a disfavored group of children into a disadvantaged class.[13]

ARGUMENT

I. DOMA AFFIRMATIVELY HARMS CHILDREN

The children of same-sex couples are an important and increasingly sizable segment of our society, in particular in those states that permit same-sex couples to marry, where one-third of same-sex married couples are raising children.[14]

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[12] *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). *See also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 921-24 (2012) (discussing *Lawrence* and moral disapproval).

[13] *See Plyler*, 457 U.S. at 208 (striking law that "permanently locked" a disfavored group of children "into the lowest socioeconomic class.").

[14] Sara Wildman, Children Speak for Same-Sex Marriage, N.Y. Times (Jan. 20, 2010), http:// www.nytimes.com/2010/01/21/fashion/21kids.html; Williams Institute, United States Census Snapshot: 2010, at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapsho-US-v2.pdf.

BLAG asserts that DOMA advances child welfare by: (1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and a father.[15] In fact, the real effect of DOMA is to place the excluded class of children in a legal, economic and social underclass[16] and to stigmatize all children with gay or lesbian parents.

A. The Children of Gay and Lesbian Parents Are an Important and Sizable Segment of Society

An October 2011 study, "All Children Matter," estimated that "roughly two million children are being raised by LGBT parents."[17] According to the United States Census, twenty-eight percent of cohabitating same-sex couples are raising at least one child under the age of eighteen.[18] Of these, it is estimated

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[15] Brief for Respondent at 44-49.

[16] *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 338 (D. Conn. 2012) (noting DOMA's effect of "limiting the resources, protections, and benefits available to children of same-sex parents.").

[17] *See* MOVEMENT ADVANCEMENT PROJECT ET AL., ALL CHILDREN MATTER: HOW LEGAL AND SOCIAL INEQUALITIES HURT LGBT FAMILIES ("ALL CHILDREN MATTER"), 1 (2011), *available at*: http://www.americanprogress.org/issues/2011/10/pdf/all_children_matter.pdf.

[18] GARY J. GATES AND JASON OST, THE GAY AND LESBIAN ATLAS 45 (2004).

that between 300,000 to one million children are being raised by same-sex couples; the remainder are children being raised by single gays and lesbians.[19] "Contrary to stereotypes, children being raised by same-sex couples are twice as likely to live in poverty as children being raised by married heterosexual households."[20] Further, same-sex couples of color are raising children at a much higher rate than white same-sex couples.[21]

As for the children of families excluded by Section 3 of DOMA, while there is no consensus as to exact numbers, it is estimated that one-third of same-sex couples in marriage states are raising children.[22] These numbers are likely to increase as more states extend the institution of marriage to include their gay and lesbian residents.

As discussed below, DOMA categorically excludes these children from enjoying the family-supporting rights, benefits and protections provided by the

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[19] Todd Brower, *It's Not Just Shopping, Urban Lofts and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 27 (2009).

[20] ALL CHILDREN MATTER at 1.

[21] *Id.*

[22] Sara Wildman, Children Speak for Same-Sex Marriage, N.Y. Times (Jan. 20, 2010), http://www.nytimes.com/2010/01/21/fashion/21kids.html; Williams Institute, United States Census Snapshot: 2010, at 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapsho-US-v2.pdf.

federal government to other families. Given the substantial and adverse impact of DOMA on the children of same-sex couples, BLAG's contention that excluding these families promotes the interests of children is patently irrational.

B. DOMA Deprives Children of Important Federal Benefits

BLAG concedes – as it must – that inclusion in the safety net of federal family-supporting rights and benefits is important to the stability of children.[23] Indeed, it largely defends DOMA on the basis of the benefits it creates for children – although BLAG fails to explain how excluding some families and not others advances this goal.[24]

BLAG's argument is premised on the notion that only *some* children are entitled to these benefits – children of opposite-sex couples. Yet children in the excluded class are deserving of these protections as well. These children face the entire range of experiences that define family life, including family medical crises, divorce, parental lay-offs, and parental death.[25]

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[23] Brief for Respondent at 3-4.

[24] *Id.* at 44-49 (listing as the reasons for supporting DOMA that it supports providing a stable structure in which to raise children).

[25] *See Weber*, 406 U.S. at 171 ("Both the statute in *Levy* and the statute in the present case involved state created compensation schemes, designed to provide close relatives and dependents

(Continued on following page)

Tragically, when these events take place, DOMA denies these children access to resources designed to serve as safety nets to protect children within family units – benefits that children with opposite-sex married parents obtain as a matter of course.[26]

The exclusion of same-sex married couples from over 1,100 federal marital rights and benefits has a direct and harmful economic impact on their children. For example, their families are denied the protections of the Family Medical Leave Act, which was enacted to help "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families."[27] The FMLA permits eligible employees to take up to twelve weeks of unpaid leave to care for a child, spouse, or parent with a serious health condition.[28] It is beyond argument that the children of married same-sex couples have the same interest in family security and stability as the children of married opposite-sex couples. Excluding same-sex married couples from the FMLA subjects the child and the entire household to

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of a deceased a means of recovery for his often abrupt and accidental death").

[26] For a list of privileges that benefit heterosexual couples and opposite-sex parents, *see* Angela Onwuachi-Willig, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 159-61 (Yale University Press 2013).

[27] 29 U.S.C. § 2601(b)(1) & (2).

[28] 29 U.S.C. § 2612(a)(1).

"greater stress in attempting to cope with the serious illness of a parent."[29]

The excluded children also are prevented from obtaining federal health insurance under the Federal Employees Health Benefits Program (FEHB), which offers coverage to federal civilian employees and their family members. DOMA prohibits same-sex married spouses from obtaining coverage, once again, exacting an economic toll on the same-sex married household, diverting economic resources from child-rearing, and creating a burden that opposite-sex married couples and their children do not carry.[30]

In addition, DOMA precludes same-sex married couples from filing joint tax returns. These couples pay more in taxes than their opposite-sex counterparts, "depleting the resources available to provide for their children."[31]

Finally, DOMA denies same-sex married couples Social Security payments if a spouse dies or becomes

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[29] *Pedersen*, 881 F. Supp. 2d at 339.

[30] *Id.* at 299-300 (Plaintiffs Damon Savoy and John Weiss, married under Connecticut law, were denied FEHB, diverting funds from their three adopted children to cover health insurance for Weiss, their full-time stay-at-home dad).

[31] *Id.* at 339. Plaintiffs Suzanne Artis and Geraldine Artis, raising three children together, were denied the marital benefit of filing their taxes jointly. *Id.* at 304.

disabled, reducing and/or diverting funds that would be used to raise and support the couples' children.[32]

These are merely a few examples of countless scenarios revealing DOMA's adverse effect on the children of same-sex married couples. As the district court in *Pedersen v. OPM* found:

> DOMA is inimical to its stated purpose of protecting children . . . DOMA does not alter or restrict the ability of same-sex couples to adopt children, a right conferred by state law, and therefore, DOMA's denial of federal marital benefits to same-sex married couples in fact leads to significant unintended and untoward consequences by limiting the resources, protections and benefits available to children of same-sex parents.[33]

Denial of these protections is not a one-time injury; rather, this denial over the course of a child's lifetime is cumulative and disrupts one of the primary

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[32] *See Id.* at 303 (surviving spouse of same-sex couple denied Social Security lump-sum death benefit); Brief for Respondent at 9 (quoting Senator Gramm as stating that without DOMA, state recognition of same-sex marriage will create new survivor benefits under Social Security).

[33] *Id.* at 338. Amici do not necessarily agree that DOMA's consequences for children of same-sex parents were "unintended," but, regardless of the original intent behind DOMA, BLAG's justifications for the law explicitly state a preference for the welfare of children of opposite-sex parents over the welfare of children of same-sex parents.

functions of family units – to provide stability (financial and otherwise) for future generations.

C. DOMA Inflicts Psychological Harm on All Children with Gay or Lesbian Parents

In addition to the direct legal and economic harm DOMA inflicts on children with same-sex married parents, DOMA also inflicts psychological harm by symbolically expressing the inferiority of families headed by same-sex parents and the children in those families.

BLAG's characterization of DOMA as a child-protective measure that promotes "responsible procreation and child-rearing" is at odds with the adverse impact of the legislation on all children with gay or lesbian parents. The effect and purpose of DOMA is to stigmatize the families of which these children are a part, and, by extension, to stigmatize these children.[34] As Dr. Gregory Herek (Professor of Psychology at U.C. Davis, who is known for his extensive empirical work investigating the impact of structural prejudice in the context of sexual orientation) has observed:

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[34] Aff. of Gregory M. Herek, Ph.D. at ¶ 29, *Mass. v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012) (No. 1:09-cv-11126-JLT), 2010 WL 604593 ("*Stigma* refers to an enduring condition, status, or attribute that is negatively valued by society . . . and that consequently disadvantages and disempowers those who have it.").

> Denying federal recognition to married same-sex couples devalues and delegitimizes their relationships. It conveys the government's judgment that committed intimate relationships between people of the same sex . . . are inferior to heterosexual relationships, and that the participants in a same-sex relationship are less deserving of society's recognition than heterosexual couples. . . . To the extent that laws differentiate majority and minority groups and accord them differing statuses, they highlight the perceived "differentness" of the minority and thereby promote and perpetuate stigma.[35]

DOMA communicates to the children of same-sex parents that their families, and the relationships within their families, are morally objectionable and functionally deficient.

This Court has previously considered state action that stigmatizes children relevant to assessing the constitutionality of such state action. Highlighting the adverse psychological effects of de jure segregation on black children, for example, a unanimous Court announced in *Brown v. Board of Education*:[36]

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their

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[35] Aff. of Gregory M. Herek, Ph.D. at ¶¶ 28, 30.

[36] 347 U.S. 483 (1954).

> status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[37]

Children of same-sex parents, like the victims of racial segregation, suffer the harmful psychological effects of the condemnation of their families, which, as the Court noted in *Brown*, is compounded by the law's sanction of this discrimination, and denotes the inferiority of their families.

Courts have acknowledged psychic harm to children as a constitutionally relevant consideration in other contexts. For example, in *Plyler v. Doe*,[38] the Court examined the constitutionality of a Texas statute authorizing local school districts to deny enrollment to undocumented immigrant children. The Court described the effect of the law as levying an "inestimable toll . . . on the social, economic, intellectual, and psychological wellbeing of the individual."[39] The Court went on to emphasize the relevance of the law's harmful impact on children to its constitutionality, stating:

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[37] *Id.* at 494 (quoting the lower court).

[38] 457 U.S. 202 (1982).

[39] *Id.* at 222

> Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. . . . In determining the rationality of § 21. 031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[40]

This Court need not find that discrimination against children of same-sex parents is identical to the discrimination against black children in *Brown* or immigrant children in *Plyler* in every respect. What is clear from these cases, however, is that the stigma a discriminatory law imposes – particularly on children – is a worthy consideration when analyzing the constitutionality of that law.

By categorically refusing to recognize the legally sanctioned relationships of same-sex couples, DOMA deprives children in these families of important, family-supporting benefits that they would otherwise enjoy. Further, by declaring that the children of same-sex couples are somehow less worthy than the children of opposite-sex couples, DOMA stigmatizes all children with gay or lesbian parents.

DOMA treats families headed by same-sex couples as second-class families, and thereby relegates children in these families to second-class status relative to their peers. The assertion that DOMA is

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[40] *Id.* at 223-24

justified by a legitimate or important governmental interest in protecting children is thoroughly undermined by the reality that DOMA stigmatizes same-sex families and inflicts psychological harm on the children of such families, while purporting to protect children generally.

II. DOMA FAILS UNDER ANY LEVEL OF SCRUTINY BECAUSE IT PUNISHES CHILDREN BASED ON THE CONDUCT OF THEIR PARENTS

The Court's equal protection jurisprudence has expressed a consistent, special concern for discrimination against children.[41] Why? Because discrimination against children always necessarily implicates two of the Equal Protection Clause's core values: promoting a society in which one's success or failure is the result of individual merit,[42] and discouraging the creation of permanent class or caste distinctions.[43]

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[41] *See Pickett v. Brown*, 462 U.S. 1, 7 (1983) (noting explicitly a "special concern" for illegitimate children); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) (stating that the Court has a "special interest" in education because it is the "principal instrument in awakening the child" to cultural values, preparing children for professional training, and helping children adjust to the environment. (quoting *Brown*, 347 U.S. at 493)).

[42] *See Plyler*, 457 U.S. at 222. *See also* Pollvogt at 926 (identifying meritocracy as core equal protection value).

[43] *See Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). *See also* Pollvogt at 926 (discussing goal of Equal Protection Clause to eliminate laws that tend to create social castes).

Where laws function to place children in a distinct, disadvantaged class based on the conduct of their parents, these principles are violated.[44]

DOMA directly controverts these important prohibitions. Through its own proffered justifications for the law (that is, the notion that DOMA promotes child welfare), BLAG makes clear that DOMA not only expresses and enforces a preference for opposite-sex couples over same-sex couples, but also expresses and enforces a preference for the *children* of opposite-sex couples over the *children* of same-sex couples. Thus, BLAG's justifications directly implicate this Court's lengthy history of protecting children against such unfair (and inherently invidious) discrimination.

A. The Court's Treatment of Discrimination Against Non-Marital Children

This Court has consistently expressed special concern with discrimination against children – in particular protecting their right to self-determination and to flourish fully in society, without being hampered by legal, economic and social barriers imposed by virtue of the circumstances of their birth.[45] This

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[44] *Plyler*, 452 U.S. at 219-20.

[45] *See Weber*, 406 U.S. at 175 (stating that condemning a child for the actions of his parents is "illogical and unjust."); *Levy*, 391 U.S. at 72 (holding that it is invidious to discriminate against illegitimate children for the actions by people over which they have no control).

concern is perhaps most strongly expressed in the Court's treatment of non-marital children.

The United States has a long history of discrimination against children born to unmarried parents.[46] Because of society's moral condemnation of their parents' conduct, they were denied legal and social benefits to which marital children were entitled. They could not inherit property; further, they were not entitled to financial parental support, wrongful death recovery, workers' compensation, social security, and other government benefits.[47]

In the early 1940s, criticism of the treatment of non-marital children began to take root and became a part of the political and legal debates of the civil rights movement.[48] In 1968, Professor Harry Krause and civil rights lawyer Norman Dorsen advanced child-centered arguments in *Levy v. Louisiana*, the

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[46] 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("rights [of a non-marital child] are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody."); Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969). *But see Levy*, 391 U.S. at 70 ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.).

[47] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Non-marital Children*, 63 FLA. L. REV. 345, 346-47 (2011).

[48] Martha Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 90 (2003)

first equal protection challenge on behalf of non-marital children.[49]

Louise Levy, an unmarried African American mother with five young children, died from the medical malpractice of a state hospital.[50] Thelma Levy, Louise's sister, sued Louisiana on behalf of the Levy children, who were prohibited from a "right to recover" because they were born outside of marriage.[51] The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim on the grounds that they were not "legitimate," insofar as "morals and general welfare . . . discourage[ ] bringing children into the world out of wedlock."[52]

In a groundbreaking legal victory for children, this Court reversed. The Court, citing *Brown,* explained its departure from its normal practice of deferring to legislative decisions: "we have been

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[49] Brief of Appellee, *Levy v. Louisiana*, 391 U.S. 68 (1968) No. 508, 1968 WL 112826; *see also*, Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. (*forthcoming* 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037519.

[50] John C. Gray and David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 2-3 (1969).

[51] *Id.* at 3.

[52] *Id.* (quoting *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law. *Levy v. Louisiana*, 250 La. 25 (1967).

extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[53] The Court determined Louisiana's actions were driven by invidious discrimination because the child's status as "illegitimate" was unrelated to the injury to the mother.[54]

Four years after Levy, in *Weber v. Aetna Casualty & Surety Co.*,[55] this Court struck another blow to government conduct that penalized children based on moral disdain for the parents' conduct. Henry Clyde Stokes had died of work-related injuries. At the time of his death, he lived with Willie Mae Weber.[56] Stokes and Weber were not married, but had five children.[57] One of the children was born to Stokes and Weber, while four others had been born to Stokes and his lawful wife, Adlay Jones, who had previously been committed to a mental hospital.[58] Weber and Stokes' second child was born shortly after Stokes' death.[59]

The four marital children filed a workers' compensation claim for their father's death, while Willie Mae Weber sought compensation benefits on behalf of

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[53] *Levy*, 391 U.S. at 71.

[54] *Id.* at 72; *see also* Plyler, 457 U.S. at 216.

[55] 406 U.S. 164 (1972).

[56] *Id.* at 165.

[57] *Id.*

[58] *Id.*

[59] *Id.*

the non-marital children.[60] Louisiana law awarded workers' compensation proceeds to a deceased worker's children born of his marriage, while the children born outside the marriage were denied those same proceeds.[61]

Once again, this Court reversed the Louisiana Supreme Court's decision, which had allowed laws to penalize non-marital children based on their parents' conduct. The Court articulated a principle that is now well-established: treating children born outside of marriage differently than those born inside it is impermissible discrimination.[62] The Court explained that marital and non-marital children were identically situated with respect to their interest in these benefits: "An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[63]

Weber, the most well-known and cited non-marital status case, reiterated that a state may not express its moral objection of parental conduct by withholding government benefits from the child. To do so places the child at an economic disadvantage for conduct over which the child has no control. In *Weber*, the Court conceded that the state's interest "in

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[60] *Id.* at 165-66.

[61] *Id.* at 175-76.

[62] *Id.* at 169.

[63] *Id.*

protecting 'legitimate family relationships'" was weighty.[64] The Court acknowledged that "the regulation and protection of the family unit have indeed been a venerable state concern."[65] Importantly, the Court did not "question the importance of that interest" but did question "how the challenged statute will promote it."[66] The Court ultimately concluded that "[t]he state interest in family relationships is not served by the statute"[67] explaining, "[t]he inferior classification of unacknowledged illegitimates bears, in this instance, no relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[68]

In other words, while promoting marriage and childbirth within marriage may be a valid state interest in the abstract, the Court rejected the contention that this interest is advanced by excluding a group of children who have an identical interest in the benefits at issue, simply because that group of children is disfavored.

Similarly, although it is unusual for the federal government to be in the business of regulating marriage at all, BLAG's purported concern for promoting

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[64] *Id.* at 173.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 175.

[68] *Id.*

childbirth in marriage may appear to be a superficially legitimate governmental interest. But it is unclear how excluding families headed by *married* same-sex couples advances this interest. Protecting the family unit is one matter; expressing a bare preference for one type of family is another.

In light of this history and legal precedent,[69] it is apparent that BLAG's argument that DOMA somehow protects children suffers from the same, fatally flawed reasoning that had been used to justify discrimination against non-marital children. BLAG seeks to permanently exclude an entire class of children from access to family-supporting federal benefits because it finds their parents' conduct to be objectionable. This is not a sufficient basis for such profound discrimination.

The rationales articulated in *Levy* and *Weber* formed early equal protection jurisprudence and spoke to the importance of the social and economic rights unique to children.[70] That the history of discrimination at issue in *Levy* and *Weber* turned on the

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[69] Between 1968 to 1986, this Court heard more than a dozen cases challenging laws that disadvantaged non-marital children, ultimately holding that this classification was of such concern that differential treatment of non-marital children warranted intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 465 (1988).

[70] *See* Laurence C. Nolan, "*Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 28 (1999).

distinction between marital and non–marital children (as compared to the distinction drawn by DOMA between children of same-sex married parents and children of opposite-sex married parents) does not insulate BLAG's justifications from a determination that DOMA violates the values that animate the Equal Protection Clause. The fact that DOMA purports to promote "legitimate family relationships" by preferring some children over others is an insufficient justification for the discrimination it enacts and the harms it inflicts.

B. The Court's Broader Concern with Discrimination Against Children

The Court has additionally expressed special concern about unfair discrimination against children in other contexts. Specifically, *Weber*'s moral and jurisprudential clarity about discrimination against children was echoed years later in *Plyler v. Doe*.[71] At issue in *Plyler* was a state law that sought to deny public education to the children of undocumented immigrants. In deciding the case, the Court relied heavily on the factual findings of the district court to the effect that (1) the law did nothing to improve the quality of education in the state and (2) it instead tended to "permanently lock[] the children of

[71] 457 U.S. 202 (1982).

undocumented immigrants into the lowest socio-economic class."[72]

The Court highlighted the foundational mission of the Equal Protection Clause: "to work nothing less than the abolition of all caste-based and invidious class-based legislation."[73] To be sure, not all laws that distinguish between groups fall under this prohibition. But laws that determine the legal, economic and social status of children, based on the circumstances of their birth, surely do. As the Court explained in Plyler, "[l]egislation imposing special disabilities upon groups disfavored *by virtue of circumstances beyond their control* suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[74]

The Court went on to emphasize that, even though it was arguably permissible to disapprove of the presence of undocumented immigrants in the United States, this concern did not justify "imposing disabilities on the minor *children* of illegal immigrants."[75] In support of its holding, the Court announced, "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport

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[72] *Id.* at 208.

[73] *Id.* at 213.

[74] *Id.* at 216 n.14 (emphasis added).

[75] *Id.* at 219-20.

with fundamental conceptions of justice."[76] Thus, discrimination against children is unjust in part because it contravenes "one of the goals of the Equal Protection Clause . . . [which is] the abolition of governmental barriers to advancement on the basis of individual merit."[77]

The Equal Protection Clause mandates that those who are similarly situated be treated alike.[78] The *Plyler* Court implemented this mandate by determining whether the children of undocumented immigrants were different *in a way that was relevant to children's interest* in receiving an education. Similarly, the relevant inquiry with respect to DOMA is whether the children of married same-sex couples are different *in a way that is relevant to their interest* in benefitting from the myriad family-supporting programs the government provides to promote stability and opportunity in our society. The answer is unequivocally "no."

C. Moral Disapproval of the Parents' Relationship is Not a Permissible Basis for Punishing Children

Finally, the Court has gone so far as to categorically reject moral disapproval of parental conduct and choices, even when enforcing such disapproval may,

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[76] *Id.*

[77] *Id.* at 222.

[78] *Cleburne*, 473 U.S. at 439 (citing *Plyler*, 457 U.S. at 202).

at the time, be viewed by government decision makers as serving the best interests of the child. In *Palmore v. Sidoti*,[79] the Court took the unusual step of reviewing a state family court's custody award. Following the divorce, the mother in the case was awarded custody of the couple's infant child. Both the father and the mother were white. Subsequent to the divorce, the mother entered into a relationship with and married a black man. The father sought custody of the child based on these "changed circumstances."

The family court explicitly found that there was no concern about either the mother's or the stepfather's parental fitness. Nonetheless, the court took to heart the recommendation of a counselor, who expressed concern about the "social consequences" for a child being raised in "an interracial marriage." Specifically, the counselor opined:

> "The wife [petitioner] has chosen for herself and for her a child, a life-style unacceptable to the father *and to society* . . . The child is, or at school age will be, subject to environmental pressures not of choice."[80]

On this basis, "the [family] court concluded that the best interest of the child would be served by awarding custody to the father."[81] While acknowledging that the father's disapproval of the relationship was not a

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[79] 466 U.S. 429 (1984).

[80] *Id.* at 431.

[81] *Id.*

sufficient basis for awarding him custody, the family court determined that because society did not yet fully accept interracial relationships, the child would inevitably "suffer from . . . social stigmatization."[82] On this basis, the family court awarded custody to the father.

This Court applied strict scrutiny to the family court's decision, and concluded that the stated interest in serving the best interests of the child was "a duty of the highest order."[83] However, the Court's chief concern was in regard to the actual *function* of the ruling, which was to give legal effect to private bias.[84] The Court held that the family court's decision, which determined the rights of the child based on societal disapproval of the parents, violated equal protection, famously stating: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[85]

Here, DOMA denies children benefits by giving effect to private bias in two different ways. First, as detailed above, it gives effect to private bias against same-sex couples. Second, as discussed below, it gives effect to private bias regarding impermissible gender-role stereotypes in parenting.

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[82] *Id.*

[83] *Id.* at 433.

[84] *See id.* at 433.

[85] *Id.*

BLAG baldly asserts that one of the justifications for DOMA is that DOMA serves to promote "childrearing by both a mother and a father,"[86] which it considers an optimal parenting situation. BLAG grounds the claim that opposite-sex parenting is superior in "common sense" and "the experience of countless parents."[87] This, according to BLAG, represents a legitimate state interest, because "it is rational for the federal government to encourage childrearing in situations in which children have a mother and a father," because there are "biological differentiation[s] in the roles of mothers and fathers" and "typical differences between men and women in parenting style, size and voice tone."[88]

The insistence that "opposite-sex parenting" necessarily leads to differentiation in parental roles is inescapably grounded in impermissible gender-role stereotyping. "The gender-based assumptions that women and men bring inherent differences to childrearing and parental responsibilities – differences which render same-sex couples incapable of successful child-rearing by comparison – rest on gender stereotyping, as scholars have explained."[89]

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[86] Brief for Respondent at 48.

[87] Brief for Respondent at 50.

[88] *See* Brief for Intervenor-Defendant-Appellant at 56, *Golinski v. U.S. Office of Pers. Mgmt.*, Nos. 12-15388, 12-15409 (9th Cir. June 4, 2012), 2012 WL 2132484.

[89] Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion*

(Continued on following page)

It is well established that laws may not rely on overbroad generalizations about different talents, capacities, or preferences of males and females.[90] Assumptions about expected parenting roles that men and women must or should perform based on gender alone falls squarely within the gender stereotyping that has been deemed impermissible in equal protection law, including in decisions about parents and parenting.

For example, in *Caban v. Mohammed*,[91] the Court struck down a New York law that permitted unwed mothers to block the adoption of their children by

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– *Legitimacy, Dual-Gender Parenting*, 28 LAW & INEQ. 307, 326 (2010). *See also* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2768 ("The normative notion[] that optimal child care depends on something unique about mothers as women conflates social expectations and roles imposed on parents according to their sex/gender with seemingly natural and intrinsic characteristics that distinguish women from men (and vice versa)."); Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 725-48 (2003); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 413 (2000).

[90] *See U.S. v. Virginia*, 518 U.S. 515, 533; *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" an insufficient justification under Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding invalid justification based on state's preference for allocation of family responsibilities under which wife plays a dependent role).

[91] 441 U.S. 380 (1979).

denying consent to potential adoptees. The law did not, however, extend this consent-based objection to unwed fathers. The father in the case challenged the gender-based distinction as an equal protection violation after his parental rights were terminated. The mother argued that the distinction between unmarried mothers and unmarried fathers was based on a fundamental difference between the sexes, because "a natural mother, absent special circumstances, bears a closer relationship with her child" than a father.[92] This Court disagreed, finding that "maternal and paternal roles are not invariably different in importance," and, even if unwed mothers were closer to their newborn children, "this generalization concerning parent-child relations would become less acceptable . . . as the age of the child increased."[93] The court "reject[ed] . . . the claim that the broad gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[94]

As the state did in *Caban*, BLAG here relies on impermissible, overbroad generalizations about different talents, capacities, or preferences of males and females.[95] This not only fails to provide a rational

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[92] *Id.* at 387-89.

[93] *Id.* at 389.

[94] *Id.*

[95] *See Virginia*, 518 U.S. at 533; *see also Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding invalid justification based on state's

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basis for a law; it embodies a form of categorically impermissible discrimination.

In conclusion, the parallels between the states' arguments in support of discriminatory legislation in *Levy*, *Weber, Plyler, Palmore,* and *Caban* and BLAG's argument in support of DOMA are impossible to ignore. The reasoning and holdings in these cases instruct that it is impermissible for laws to disadvantage children for matters outside of their control, in an effort to control the conduct of their parents, or as an expression of moral disapproval of their parents' relationships and conduct.

CONCLUSION

The child-welfare justifications advanced by BLAG in support of DOMA embody the very essence of invidious discrimination: BLAG contends, in essence, that families headed by married, opposite-sex couples are benefitted because families headed by married, same-sex couples are excluded from important rights and benefits – rights and benefits that serve the general social good of promoting family stability. Multiple courts have found that DOMA does

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preference for allocation of family responsibilities under which wife plays a dependent role); *and Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" an insufficient justification under Equal Protection Clause).

nothing to advance the interests that BLAG invokes to justify the law. But it is beyond argument that DOMA serves to harm – both concretely and symbolically – the families it excludes, including the children in those families.

As this Court has thoughtfully observed,

> [T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[96]

Although BLAG may morally disapprove of same-sex marriage, DOMA's harmful impact on generations of children of same-sex couples renders it ineffective, unjust, and patently impermissible.

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[96] *Lawrence*, 539 U.S. at 579.

The judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

TANYA WASHINGTON
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW
140 Decatur St.
Atlanta, GA 30303

J. ROBERT BROWN
Counsel of Record
SUSANNAH W. POLLVOGT
CATHERINE E. SMITH
KYLE C. VELTE
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave.
Denver, CO 80208
303.871.6254
jbrown@law.du.edu