No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

Brief *Amicus Curiae* on the Merits of Citizens United's National Committee for Family, Faith and Prayer, Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute, Public Advocate of the U.S., Declaration Alliance, Western Center for Journalism, Institute on the Constitution, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, English First, Protect Marriage Maryland PAC, Delegate Bob Marshall, and Senator Dick Black in Support of Resp. Bipartisan Legal Advisory Group

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United (including its National Committee for Family, Faith and Prayer), Public Advocate of the United States, Abraham Lincoln Foundation for Public Policy Research, Inc., and English First are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC").

Citizens United Foundation, U.S. Justice Foundation, Gun Owners Foundation,[2] The Lincoln Institute for Research and Education, Declaration Alliance, Western Center for Journalism, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

The Institute on the Constitution is an educational organization. Project Marriage Maryland PAC is a political committee.

Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and the author of the Virginia Marriage Constitutional Amendment.

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[1] It is hereby certified that counsel for petitioner and for respondent Bipartisan Legal Advisory Group filed blanket consents with the Court, and that counsel for respondent Windsor has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Gun Owners Foundation and English First join in Section II of this brief, opposing judicial usurpation of the legislative powers of Congress.

Senator Dick Black is a member of the Virginia State Senate.

Most of these *amici* have filed *amicus* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Most of the *amici curiae* herein filed an *amicus* brief in support of the petition for certiorari in a similar case regarding the constitutionality of DOMA. *See* Brief *Amicus Curiae* of Capitol Hill Prayer Alert Foundation, *et al.*, in Bipartisan Legal Advisory Group v. Gill, No. 12-13 (Aug. 2, 2012).[3]

SUMMARY OF ARGUMENT

The courts below mistakenly assume that DOMA Section 3 invades the exclusive authority of the States to regulate family relations, including marriage. Instead, DOMA's definition of marriage is a "rule of construction" defining the meaning of "marriage" and "spouse" as those words are used in the United States Code. As a rule of construction, DOMA Section 3 is an exercise of the power vested in Congress under the "Necessary and Proper" Clause to prescribe the means by which federal statutes and programs are carried out.

As an exercise of its "Necessary and Proper" powers, DOMA Section 3 is governed by the rule set down in McCulloch v. Maryland — that the degree of necessity of a means chosen by Congress is a matter

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[3] http://www.lawandfreedom.com/site/constitutional/DOMA_amicus.pdf.

within its legislative discretion, and therefore outside the authority of the judiciary. Instead of honoring this well-established boundary separating judicial from legislative power, the courts below misused the Fifth Amendment to impose their judicial will, by substituting their view as to whether DOMA's definitions of "marriage" and "spouse" were necessary enough to carry out the constitutionally legitimate purposes of enforcing the federal tax code, providing for federal programs, and administering Congress's exclusive power over naturalization.

Additionally, the court of appeals erroneously concluded that homosexuals as a class are "quasi-suspect," on the theory that they have been discriminated against, and that they constitute a discrete and insular minority which is politically powerless to represent their interests in Congress, requiring special judicial protection. As evidenced by the President of the United States and his Department of Justice having taken their side in this litigation, as well as other signal events such as Congressional enactment of the Don't Ask, Don't Tell Repeal Act of 2010 (Pub. L. 111-321), the lobby for gay and lesbian rights is hardly politically powerless at the national level. Moreover, historically, homosexuals have not been singled out for discriminatory treatment in the ways that the court of appeals assumed below.

More significantly, the court of appeals has completely missed the fact that, as Circuit Court Judge Chester John Straub pointed out dissenting in part, unless Congress defines "marriage" and "spouse" for the "purposes of federal law," state law will. And

as Chief Justice John Marshall pointed out in McCulloch with respect to the Maryland tax on the Bank of the United States, a burden would be imposed upon the people of the United States without their consent, the people of all of the States but one (Maryland) having been completely excluded from the political process that generated the tax. Likewise, if the Court of Appeals prevails in this case, then the government of New York would be empowered to establish for its own citizens which federal taxes they would pay and which federal benefits they would receive, regardless of the impact that New York's marriage policy would have on the people of the other 49 States.

Finally, the decisions of the courts below are grounded in a judicial fiction which should be recognized, admitted, and repudiated. By its own rules of construction of the Constitution, there is no legitimate basis for this Court to add an "equal protection component" to the Due Process Clause of the Fifth Amendment. Stripped of that mythical component, the due process guarantee imposes no equal protection limit upon Congress's authority to enact DOMA Section 3. It is past time for this Court to bring to an end the line of atextual cases begun with Bolling v. Sharpe in 1954, and to place itself back under the authority of the Constitution as it is written.

ARGUMENT

I. THE CONSTITUTIONALITY OF DOMA SECTION 3 IS GOVERNED BY THE NECESSARY AND PROPER AND SUPREMACY CLAUSES, NOT BY THE TENTH AMENDMENT.

A. Both Courts Below Have Mistakenly Based Their Decisions on the Ground that DOMA Section 3 Is a Plenary Regulation of Marriage.

The two courts below agreed that DOMA Section 3 is unconstitutional for what appear to be quite different reasons. In fact, however, both decisions are erroneously based upon the false assumption that DOMA Section 3 is an illegitimate exercise of the legislative power of Congress to regulate marriage for federal taxing and spending purposes.

In what appears to be a headlong pursuit[4] to develop support for its conclusion "that DOMA's

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[4] The district court below evaded the question whether the Supreme Court's holding in Baker v. Nelson, 409 U.S. 810 (1972) — which "summarily affirmed a challenge to a Minnesota state law that denied a marriage license to a same-sex couple" — "require[d] it to dismiss Windsor's case." Windsor I at 399. Then, after rehearsing the differing standards of review applied to "equal protection" challenges, the court refused to be bound by any existing review standard. Instead, "mindful" of what the district court euphemistically called "the Supreme Court's jurisprudential cues" (*id.* at 402), the court fashioned a standard to achieve its desired outcome. *See id.* at 400-06.

section 3 does not pass constitutional muster," the district court below found that section to be unconstitutional because it "operates to reexamine the states' decisions concerning same-sex marriage...."

> [DOMA Section 3] sanctions some of those [state] decisions and rejects others. But such a sweeping federal view in this arena does not square with our federalist system of government, which places matters at the "core" of the domestic relations law **exclusively** within the province of the **state**. [Windsor v. United States, 833 F. Supp. 2d 394, 402, 405 (S.D.N.Y. 2012) (hereinafter "Windsor I") (emphasis added).]

In short, the district court struck down DOMA Section 3 because enactment of that section exceeded Congress's enumerated powers and unconstitutionally "intrud[ed] upon the states' business of regulating domestic relations." *Id.* at 405. Thus, the district court concluded Congress had no legitimate interest in defining marriage for any purpose, failing even rational basis review. *See id.* at 405-06.

Although the court of appeals below commended the district court for its "thorough opinion," it could not embrace the district court's remarkable view that DOMA Section 3 had "no rational basis to support it." Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012) (hereinafter "Windsor II"). Instead, the court of appeals "conclud[ed] that review of Section 3 of DOMA requires heightened [judicial] scrutiny" (*id.* at 181) — that DOMA's definition of marriage "must be

'substantially related to an important government interest.'" *Id.* at 185. The court of appeals purported to rest its decision to apply a heightened standard of review on the ground that homosexuals were a "quasi-suspect" class. *Id.* In fact, however, prior to articulating that justification, the court of appeals had already unilaterally determined that the higher standard of review was dictated by considerations of federalism. "[W]hen it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government," the court intoned, because "[r]egulation of marriage is 'an area that has long been regarded as a virtually exclusive province of the States'" (*id* at 179):

> Therefore, our **heightened scrutiny** analysis of DOMA's marital classification under federal law is **distinct from** the analysis necessary to determine whether the marital classification of a **state** would survive such scrutiny. [*Id.* (emphasis added).]

Not surprisingly, then, when the court of appeals began its analysis to determine whether DOMA Section 3 "with[stood] intermediate scrutiny," it led with the argument that Section 3 was not "substantially related to an important [federal] government interest," because "'the states, at the time of the adoption of the Constitution, possessed *full power* over the subject of marriage and divorce[, t]he Constitution [having] delegated *no authority* to the Government of the United States on the subject of marriage and divorce.'" *Id.* at 186.

The district court's and the court of appeals' federalism rationale is mistaken. DOMA Section 3 is not an unconstitutional federal regulation of marriage binding upon the people of the several States. Rather, Section 3 is a constitutional exercise of the power of Congress to enact "necessary and proper" laws as a means for carrying on its enumerated powers vested by the Constitution including, but not limited to, "the power to lay and collect taxes ... to provide for the general welfare of the United States."

B. DOMA Section 3 Is a Constitutional Exercise of the Powers Vested in Congress by the Necessary and Proper Clause of Article I, Section 8, as Confirmed by Court Precedent.

DOMA Section 3 reads as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife. [Pub. L. 104-199 (1996).]

As an amendment to Chapter 1 of Title 1, United States Code, Section 3 is, as it purports to be, a "rule of construction" defining the words "marriage" and "spouse" as those words appear in statutes in the United States Code. *See* 1 U.S.C. Chapter 1 – Rules of

Construction. It is **not**, as the courts below assumed it to be, a regulation of domestic relations — a subject that rightfully belongs to the States. As dissenting Circuit Judge Chester John Straub observed:

> The subject of domestic relations, including marriage, has been the province of the states..... But DOMA does not change this, and does nothing to strip the status that states confer on couples they marry. [Windsor II, 699 F.3d at 202 (Straub, J., concurring and dissenting).]

Rather, as Judge Straub continued, DOMA Section 3 "limits the *federal* benefits, rights, privileges, and responsibilities of marriage to a subset of those deemed married under state law." *Id.* (italics original).

To be sure, DOMA Section 3 changes the previous federal policy that federal benefits, rights, privileges, and responsibilities were governed solely by "those deemed married under state law." *See id.* But there is nothing in the Constitution obligating Congress to defer to state domestic relations law in the exercise of its taxing power to provide for the general welfare, even though it impacts on regulations of matters that are the exclusive province of the States. After all, it is for Congress to determine whether a federal expenditure "provides for the general welfare," not the States. *See* Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Further, unlike a federal statute enacted by Congress pursuant to the powers vested in it by the Constitution, statutes enacted by state legislators pursuant to powers not delegated to the United States,

as provided by the Tenth Amendment, do not qualify as "the Supreme Law of the Land." And rightfully so. The legislature of any one State is not empowered by the Tenth Amendment to enact laws having the extraterritorial effect of binding the people of the United States. "Otherwise," as Judge Straub pointed out, "'marriage' and 'spouse' for the purposes of federal law would depend on the outcome of th[e] [same sex marriage] debate in each state, with the meanings of those terms under federal law changing with any change in a given state." Windsor II, 699 F.3d at 204 (Straub, J., concurring and dissenting).

DOMA Section 3, then, was designed to "limit the national impact of state-level policy development" (*id.*) over the definition of marriage, not to resolve that policy debate by imposing a national definition of marriage upon the domestic relations codes of the several States. Instead, DOMA Section 3 is a rule of construction governing **only** the meaning of "marriage" and "spouse" in **federal statutes**, pursuant to the power vested in Congress "to make all Laws which shall be necessary and proper for carrying into Execution the ... Powers vested by this Constitution in the Government of the United States," as a means "to maintain consistency and uniformity in distributing federal benefits and administering federal programs." Windsor II, 699 F.3d at 204-05 (Straub, J., concurring and dissenting). As Judge Straub so ably demonstrated, the definitions of "marriage" and "spouse" are instrumental to the federal government's administration of a wide variety of federal statutes enacted pursuant to the powers vested in Congress by Article I, Section 8, including the levying of taxes,

providing for the general welfare, and even establishing rules governing naturalization. *See id.* at 202-03.

It has been well established for nearly 200 years that the constitutionality of such statutes is governed by the standard laid down in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." By erroneously positing that the purpose of DOMA Section 3 was to establish a national marriage policy as an end in itself, the courts below poisoned the constitutional well, placing upon DOMA's defenders a burden that they could not discharge no matter what level of scrutiny was applied. Had the courts below followed the McCulloch rule, they would have been required to defer to Congress's choice of means — so long as that means is clearly designed to meet a constitutional end and, so long as the means adopted is not clearly prohibited by the Constitution.

C. As Applied to the Federal Estate Tax, DOMA Section 3 Meets the McCulloch Test.

The threshold legal issue in this case, then, is whether DOMA's rule of construction of the meaning of "spouse" as it appears in 26 U.S.C. section 2056(a) is within the powers of Congress to tax or to make any law that is a necessary and proper means to exercise

its taxing power. It has long been settled that Congress has the power to levy an estate tax. *See* New York Trust Co. v. Eisner, 256 U.S. 345 (1921). In Eisner, the executor of the estate contended that the levying of the estate tax was unconstitutional, in part, on the ground of "interference with the rights of the States to regulate descent and distribution" (*id.* at 348) and of "inequalities in the amounts that beneficiaries might receive in case of estates of different values." *Id.* at 349. Both contentions were rejected by this Court.

Limiting the marital deduction to only those surviving "spouses," as defined by DOMA Section 3, is no greater an interference with the powers of the States to regulate descent and distribution of estates than is generally the case in the calculation of the taxable estate for federal purposes. And denial of the marital deduction to a person who is not a spouse within DOMA's Section 3 definition does not single out partners of same-sex marriages for unique treatment. Various categories of relatives of the testator (*e.g.*, brothers, sisters, mothers, fathers) are not entitled to the marital deduction. According to the reasoning in Eisner, then, DOMA Section 3 meets the threshold standard of constitutionality.

Additionally, this Court has consistently ruled that Congress's power to tax is not limited to the purpose of raising revenue. Thus, this Court found that it is permissible for Congress to adopt a taxing policy for the purpose of deterring certain activities by the levying of a tax on them, as well as for the purpose of collecting revenue. *See, e.g.,* United States v. Doremus, 249 U.S. 86 (1919). Therefore, according to

precedent, it is a constitutionally permissible exercise of Congress to adopt a tax policy for the purpose of nurturing traditional marriage as the ideal family structure for raising children, just as this Court has recently observed, that it is perfectly permissible for Congress to impose a tax "to encourage people to quit smoking" or "to shape decisions about whether to buy health insurance." *See* National Federation of Independent Business v. Sebelius, 567 U.S. __, 132 S.Ct. 2566 (2012). Indeed, as Justice Robert Jackson observed, "[o]ne cannot formulate a revenue-raising plan that would not have economic and social consequences." United States v. Kahriger, 345 U.S. 22, 35 (1953) (Jackson, J., concurring). It is not for the courts to second-guess whether Congress should promote a traditional family policy in the exercise of its taxing powers. *See* McCray v. United States, 195 U.S. 27 (1904). The only question that remains, therefore, is whether promoting a Congressional policy is "prohibited" by another provision of the Constitution.

II. DOMA SECTION 3 IS NOT PROHIBITED BY THE FIFTH AMENDMENT.

Both courts below ruled that DOMA Section 3 was prohibited by the so-called "equal protection component" of the Fifth Amendment. Declining to decide the question whether homosexuals were a quasi-suspect class,[5] the district court ruled that the application of DOMA Section 3 to deny Windsor the

[5] Windsor I, 833 F. Supp. 2d at 401-02.

benefit of the surviving spouse exemption in the computation of her share of her partner's estate had no legitimate or rational basis. *Id.*, 833 F. Supp. 2d at 402-06. After finding that homosexuals are a "quasi-suspect class,"[6] the court of appeals decided that DOMA Section 3 was not "'substantially related to an important government interest.'" *Id.*, Windsor II, 699 F.3d at 186-88. Both judicial rulings are inconsistent with this Court's established McCulloch test and, therefore, constitute a constitutionally illegitimate usurpation of Congress's legislative power.

Additionally both rulings are based on a judicial fiction, completely without textual support in the Constitution. On its face, there is no language in the Fifth Amendment's Due Process Clause that suggests or even hints that it contains an "equal protection component." The Fourteenth Amendment, which contains a Due Process Clause identical to the one in the Fifth Amendment, also contains an Equal Protection Clause. If the Fifth Amendment due process guarantee and the Fourteenth Amendment Equal Protection Clause contain identical "indistinguishable ... equal protection obligations," as this Court has ruled,[7] then the Equal Protection Clause is mere surplusage, unnecessary because the Fourteenth Amendment has its own Due Process Clause. Such disregard of the constitutional text undermines the legitimacy of judicial review, which is

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[6] Windsor II, 699 F.3d at 181-85.

[7] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

premised upon the proposition that the courts, too, are governed by the written text, not the other way around. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government.").

Clothed and emboldened by this Court's procrustean precedents that substitute judicially devised tests for the plain language of the Due Process Clause, both courts below have, as Circuit Court Judge Staub observed,[8] "expand[ed] a constitutionally guaranteed right [by] substitut[ing] for the crucial ... words of [the due process] guarantee []other ... words, more ... flexible and ... less restricted in meaning."[9] By failing to honor the constitutional text, both courts issued opinions masquerading as the exercise of judicial power, whereas in reality they were exercising legislative power vested by the Constitution in Congress alone.

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[8] Windsor II, 699 F.3d at 207 (Staub, J., concurring and dissenting).

[9] *See* Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

A. The Necessary and Proper Clause Empowers Congress, Not the Courts, to Determine the Degree of Necessity of the Means Chosen to Carry Out Its Enumerated Powers.

DOMA Section 3 is one of eight "rules of construction," each of which is designed by Congress to define words that appear throughout the federal code. Each definition serves as a means of administering a wide variety of federal statutes and programs. The definitions of "marriage" and "spouse" are among the words defined, and as Circuit Judge Straub recognized, those definitions are tailored to carry out a "broad range of federal laws to which marital status is relevant." *See* Windsor II, 699 F.3d at 191 (Straub, J., concurring and dissenting).

Because DOMA Section 3 is designed as a means of carrying out other federal laws and purposes, its constitutionality is determined under the Necessary and Proper Clause. *See* McCulloch, 17 U.S. at 406-12. And, according to the rule of McCulloch, the constitutionality of DOMA Section 3 is initially subject to examination to determine whether it is a valid exercise of a power vested in Congress, before addressing the question whether it is constitutionally prohibited. *See id.* at 421. In McCulloch, the question before the Court was whether Congress had authority to authorize the incorporation of a bank of the United States. Because the Court found nothing in the enumerated powers vested in Congress to create a bank, the Court turned its attention to the "necessary and proper" clause, which prescribes the constitutional

rule governing the power of Congress to authorize the incorporation of a bank as a means to the exercise of one or more enumerated powers.

Counsel for Maryland, which sought to tax the bank, argued that the word "necessary" limited Congress's "power to pass all laws ... for carrying into execution" those enumerated powers vested in the general government, contending that only those means "as are indispensable, and without which the power would be nugatory" are constitutionally permissible. *Id.*, 17 U.S. at 413. In response, Chief Justice Marshall observed that the word "necessary" embraced a wide range of meanings, including, "convenient, or useful, or essential." The word, the Chief Justice wrote, "has not a fixed character peculiar to itself[,] admit[ting] of all degrees of comparison, which increase or diminish the impression the mind receives of the urgency it imports":

> A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. [*Id.* at 414.]

Because the word "necessary" has no fixed meaning, Chief Justice Marshall rejected Maryland's argument, asserting that "the choice of means" was vested in Congress which "was free to adopt [any means] which might be appropriate, and which were conducive to the end." *Id.*, 17 U.S. at 415. Thus, the Chief Justice concluded:

> [W]e think the sound construction of the

> constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. [*Id.*, 17 U.S. at 421.]

After stating the oft-repeated McCulloch rule,[10] the Chief Justice summed up the matter:

> [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the **degree of** its **necessity,** would be to **pass the line** which circumscribes the judicial department, and to **tread on legislative** ground. This court disclaims all pretensions to such a power. [*Id.*, 17 U.S. at 423 (emphasis added).]

While both courts below purported to find in the "equal protection component" of the Due Process Clause a prohibition against DOMA Section 3, the reasoning of both courts demonstrate that, by ignoring McCulloch, they have substituted their views for those of Congress as to what means are needful for the enforcement of a wide variety of federal laws, and in

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[10] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional." *Id.*, 17 U.S. at 421-22.

doing so, both courts have crossed the boundary line dividing the exercise of judicial power vested in the courts from the exercise of legislative power vested in Congress.

B. The Constitutional Inquiries Engaged in by Both Lower Courts Related to the Degree of Necessity of DOMA Section 3, Not to Any Principled Prohibition in the Due Process Clause.

By employing "intermediate scrutiny" to measure DOMA Section 3's constitutionality, the court of appeals requires that DOMA's definition of marriage "be '**substantially related** to an important government interest.'" Windsor II, 699 F.3d at 185 (emphasis added). Indeed, the court of appeals required the connection between DOMA Section 3 and the congressional policies to be "'**exceedingly** persuasive.'" *Id.* (emphasis added). According to this line of reasoning, it is not enough for DOMA Section 3 to be a "conducive" or an "useful" means to further constitutionally permissible federal interests; indeed, it is not even enough for the connection to be "very necessary"; rather it must be "exceedingly necessary" — which is as close to "absolutely necessary" as possible.

By opening the door to judicial examination of the degree of necessity, the use of a heightened standard of scrutiny enabled the court of appeals (i) to cast "suspicion" on the real purpose of DOMA Section 3 (*id.* at 185), and (ii) to raise doubts on the effectiveness of the means chosen (*id.*), and then (iii) to conclude:

> [b]ecause DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires as federal rule to achieve uniformity, the rationale premised on uniformity is **not** an **exceedingly persuasive** justification for DOMA. [*Id.* at 186 (emphasis added).]

In like manner, the court of appeals dismissed DOMA's connection to protecting the federal "fisc" (*i.e.*, treasury), finding it "so broad, touching more than a thousand federal laws, that it is not **substantially related** to fiscal matters." *Id.* at 187 (emphasis added). Under the "heightened scrutiny" standard, it is not enough that DOMA might be useful, conducive, or even somewhat necessary means to carry out numerous federal programs, none of which the court of appeals found to be outside the enumerated powers of Congress.

The court of appeals also found that preserving traditional marriage was neither an "important" nor a sufficiently "substantial" goal to satisfy its heightened scrutiny test. *Id.* at 187. While the court of appeals conceded that "promotion of procreation **can be** an important government objective," it just did "not see how DOMA is **substantially** related to it." *Id.* at 188 (emphasis added). In other words, two members of the majority of the court of appeals panel announced (in 2012), that if they had been members of Congress (in 1996), they would have voted "nay" on DOMA because they were not convinced that Section 3 was necessary enough.

Had the district court judge been serving in the 104th Congress, she too would have joined her appellate judicial colleagues by voting "no." While it is difficult to discern just what standard of review the district court applied to DOMA Section 3, the district court ruminated that "rational basis analysis can vary by context," requiring "intensified scrutiny of purported justifications," or even "special clarity." Windsor I, 833 F. Supp. 2d at 402. After taking an inventory of Congress's justifications for DOMA, the district court, like the court of appeals, assumed that it was a judicial task to determine if there was sufficient nexus between DOMA Section 3 and the federal purposes that Congress believed would be served. *See id.* at 402-06. For example, the district court found that the means chosen by Congress to promote traditional marriage was not very effectual. *Id.* at 403-04. As for Congress's interest in promoting child rearing, the district court found that "DOMA has no **direct** impact on heterosexual couples at all" and thus "its ability to deter those couples from having children outside marriage or incentivize couples that are pregnant to get married, is **remote**, at best." *Id.* at 404 (emphasis added). As for the goal of conserving the nation's financial resources, the district court found the means chosen to be "arbitrary," unworthy of even serious consideration. *Id.* at 406.

To sum up, both the court of appeals and the district court purportedly found that the mythical "equal protection component" of the Fifth Amendment's Due Process Clause entrusted the courts with ample discretion to second-guess and override the means chosen by Congress in the exercise of its powers

under the Necessary and Proper Clause. By so ruling, the two courts unconstitutionally crossed the line, usurping legislative power in disregard of the rule in McCulloch that the **degree of necessity** of the means, chosen by Congress to reach a legitimate goal, belongs exclusively to Congress.

C. The Due Process Guarantee Does Not Justify Any Departure from the McCulloch Rule of Deference to Congress's Choice of the Efficacy of Means.

Although the district court toyed with the idea that it might be required to give a reason for second-guessing Congress's choice of means, it declared that it "need not decide ... whether homosexuals are a suspect class." Windsor I, 833 F. Supp. 2d at 402. The court of appeals disagreed, stating that, in order for it to apply "heightened scrutiny," it was required that it first establish homosexuals to be a "quasi-suspect class." Cobbling together four factors from this Court's precedents, the court of appeals concluded that, because homosexuals have been (i) historically discriminated against (ii) for no good societal reason, then because of (iii) the immutability of their sexual orientation and (iv) their political powerlessness, review of DOMA Section 3 "requires heightened scrutiny" under the equal protection component buried in the Fifth Amendment. Windsor II, 699 F.3d at 181-85.

Of these four factors, the court of appeals determined that factors (iii) and (iv) — "[i]mmutability

and lack of political power are not strictly necessary factors to identify a suspect class." *Id.* at 181. Yet, it was precisely those two factors that historically have given rise to the notion that, in exceptional cases, courts could intrude upon matters that were otherwise within the discretion of legislatures:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. [United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).]

In support of this proposition, Justice Harlan Fiske Stone cited two cases — McCulloch,[11] in which the Court struck down a state tax on a federally-created instrumentality; and South Carolina v. Barnwell Bros.[12] in which the Court observed that state regulations affecting interstate commerce are constitutionally more vulnerable when the regulatory burden falls principally upon those without the state — such legislation not likely to have been subject to the political restraints exerted on legislation that adversely affects in-state interests.

In this case, it is not the lesbian plaintiff and her fellow New York homosexuals who are "politically

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[11] *Id.*, 17 U.S. at 428.

[12] 303 U.S. 177, 184 n.2 (1938).

powerless," as that term was originally coined and applied in Carolene Products. Rather, here it is the people of the other 49 States who are not citizens of New York and, therefore, who have no say in the decision of the New York judiciary to "recognize[] foreign same-sex marriages before the state passed its marriage statute in 2011." *See* Windsor II, 699 F.3d at 177. Just as the people of the other States had no political standing in Maryland to influence Maryland's decision to tax the Bank of the United States, the people of the other States are excluded from participating in the political decision in New York to redefine marriage, so as to open the door to a whole range of federal benefits that theretofore were available only to persons in a traditional marriage relationship. As Chief Justice Marshall observed in McCulloch:

> The **people of a state** ... give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the **people of all the states**. They are

> given by all, for the benefit of all — and upon theory, should be subjected to that government only which belongs to all. [*Id.*, 17 U.S. at 428-29 (emphasis added).]

Applying this principle, dissenting Circuit Judge Straub recognized that Congress was endowed with the political authority to enact DOMA Section 3 "to maintain the status quo":

> Otherwise, "marriage" and "spouse" for the purposes of federal law would depend on the outcome of [the] debate [over "same-sex marriage] in each state, with the meanings of those terms under federal law changing with any change in any given state. [Windsor II, 699 F.3d at 204 (Straub, J., concurring and dissenting).]

When viewed in this light, DOMA Section 3 protects the politically powerless — not the other way around. By "fr[eezing] federal benefits policy as it existed in 1996 with respect to same-sex marriage,"[13] DOMA Section 3 ensured that Congress, not a legislature or court or plebiscite of a single State, would decide how, if any, recognition of "same-sex marriage" would impact on federal programs that would affect all of the people of the United States.

As a class, homosexuals and their supporters are hardly disenfranchised. As citizens of the United

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[13] Windsor II, 699 F.3d at 204.

States, they are well represented in Congress, the legislative body that enacted DOMA Section 3, and that has the power to modify or repeal it.[14]

D. Homosexuals Are neither Politically Powerless nor Singled Out by Law for Discriminatory Treatment.

As Respondent Bipartisan Legal Advisory Group has well-documented, homosexuals "are far from politically powerless." *See* Brief on the Merits for Respondent BLAG of the U.S. House of Representatives, pp. 51-54. They are not only has the Obama Administration embraced their side in this and similar litigation, President Obama highlighted "gay rights" in his January 21, 2013 inaugural address, declaiming that "[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well."[15]

Although the court of appeals acknowledged that "homosexuals have [clearly] achieved political successes over the years,"[16] it still questioned whether homosexuals "have the strength to politically protect

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[14] *See, e.g.*, Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321.

[15] Inaugural Address by President Barack Obama, http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[16] Windsor II, 699 F.3d at 184.

themselves from wrongful discrimination." *Id.* In order to answer this question impartially, one must first ask what is meant by "wrongful discrimination." As a class, homosexuals have not been discriminated against in the way that the court of appeals has so "easily"[17] assumed. The appellate panel below concluded that "the most telling proof of animus and discrimination is that, for many years and in many states, homosexual conduct was criminal." *Id.* Yet historically, even the crime of sodomy was not so targeted. Rather, it was defined as "carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast." *See* W. Clark, Handbook of Criminal Law § 125, p. 420 (3d ed. West: 1915). Thus, the crime of sodomy was "known in the common law by the convertible and equivalent name[] of 'crime against nature.'" *Id.* at 421. As a "crime against nature," the offense not only extended to opposite sex unnatural couplings, but was one of several sexual offenses that fit under a broad category of "offenses against the public health, safety, comfort, and morals." *Id.* at Chapter XII, p. 398. Among these sexual offenses were bigamy, adultery, fornication, lewdness and illicit cohabitation, incest, miscegenation, and seduction, all of which could be committed by persons of the opposite sex. *See id.* §§ 116-124, pp. 406-28. Rather than a narrow negative purpose, these laws reflected a perceived concern for the public health, safety, comfort, and morals of certain sexual behaviors.

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[17] *Id.* at 182.

Not only did the court of appeals ignore the broader picture that homosexual behavior was only one of a number of sexual acts prohibited by the criminal law, but it completely overlooked the criminal law revolution beginning in the 1960's with the Model Penal Code which led a nationwide effort to decriminalize private sexual conduct between consenting adults. As one astute observer noted with respect to the new 1971 Oregon Criminal Code[18]:

> Prior to the new Code, Oregon's laws dealing with sexual offenses proscribed a vast array of activities commonly practiced between willing partners. Those prohibitions included adultery, lewd cohabitation, fornication, and sodomy, in addition to others. Chapter 167 of the Oregon Revised Statutes was entitled "Crimes Against Morality and Decency," and the title gave an accurate description of the interests sought to be protected. The former Oregon law, in common with laws in most jurisdictions, was "designed to provide an enormous chastity belt encompassing the whole population and proscribing everything but solitary and joyless masturbation and 'normal coitus' inside wedlock." [G. Fields, "Privacy 'Rights' and the New Oregon Criminal Code," 51 *Or. L. Rev.* 494, 501 (1972).]

Since the 1960's and 1970's the political power of

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[18] Or. Law 1971, ch. 743.

homosexuals and their libertarian and privacy allies has grown, not shrunk.

Equally missing from the court of appeals' "easy ... conclu[sion] that homosexuals have suffered a history of discrimination" is its failure to recognize that the statutes defining marriage have not just excluded persons of the same sex from being recognized as married couples, but certain opposite sex unions as well, including incest (such as father/daughter and brother/sister), nonage, venereal disease, impotence, mental incapacity, limited purpose (*e.g.*, immigration), and, of course, bigamy. *See* H. Clark, The Law of Domestic Relations in the United States, pp. 21-124 (West, 2d ed.: 1988). Indeed, "[a]t common law, the second marriage was always void ... and from the earliest history of England polygamy has been treated as an offense against society." Reynolds v. United States, 98 U.S. 145, 164 (1879).

The prohibition against polygamy is especially noteworthy because the court of appeals finding that "[t]he only class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other"[19] is demonstrably false. A polygamous marriage, if recognized by a State, would not meet the DOMA Section 3's standard that a marriage is a union between one man and one woman.

The court of appeals simply eschews engaging in any serious discussion of whether homosexuals as a

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[19] Windsor II, 699 F.3d at 184.

class deserve special judicial attention on account of political powerlessness or discrimination, preferring instead to impose its views by judicial fiat based on nothing more than personal preference:

> It is **difficult to say** whether homosexuals are 'under-represented' in positions of power and authority without knowing their number relative to the heterosexual population. But **it is safe to say** that the seemingly small number of acknowledged homosexuals so situated is attributable either to **hostility** that excludes them or to a **hostility** that keeps their sexual preference private.... [Windsor II, 699 F.3d at 184-85 (emphasis added).]

So quick to condemn DOMA Section 3 on grounds of "hostility," the court of appeals' concluding apologia — that it reached its decision by "straightforward legal analysis"[20] — is impossible to accept. Remarkably, the court itself admits that its opinion "sidesteps the fair point that same-sex marriage is unknown to history and tradition,"[21] by artificially separating the civil aspect of marriage from its unquestionable religious foundation. *See* H. Clark's Law of Domestic Relations at 21-25. By so secularizing marriage, the court of appeals has disregarded the historical

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[20] *Id.* at 188.

[21] *Id.*

interrelationship between Biblical Christianity[22] and the American constitutional republic. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 465-70 (1892). As Justice Joseph Story remarked, upon his inauguration as Dane Professor of Law at Harvard University, remarked that "[t]here never has been a period in which the Common Law did not recognise Christianity as lying at its foundations," and that "[t]he perfect lawyer ... should examine well the precepts of religion, as the only solid basis of civil society...." J. Story, "Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th 1829," reprinted in The Legal Mind in America, pp. 178, 185-86 (P. Miller, ed., Cornell Univ. Press: 1962).

E. Stripped of the Judicially Invented Equal Protection Component, DOMA Section 3 Is Not Prohibited by the Due Process Clause.

But for this Court's atextual precedents

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[22] Indeed, the courts below give no regard whatsoever to the originator and definer of marriage who created us male and female (*see* Genesis 1:26-28) and enabled male and female couples to procreate offspring in his image (*see* Genesis 5:1-3).

> God's mandate and benediction that the **man and the woman** procreate his image is to be exercised within the confines of monogamy. God institutes marriage by giving Adam his bride, defining them as **husband and wife**, and ordains the man to leave his parents and cling to his wife, forming a new home. By instituting marriage in the Garden of Eden ... God represents marriage as an ideal and holy state, an act of worship. (Heb. 13:4). [B. Waltke, An Old Testament Theology (Zondervan 2007), p. 237 (emphasis added).]

interjecting an "equal protection component" into the Fifth Amendment Due Process Clause, neither the court of appeals nor the district court opinion would have been possible. Accordingly, it would be a mistake for this Court (i) to limit its review solely to whether the court of appeals contravened this Court's equal protection precedents, or (ii) if it finds the court of appeals opinion does conform with those precedents, to limit itself to formulate its own explanation of those precedents. Rather, in utmost respect for Congress's judgment and good faith, this Court should examine Section 3 of DOMA to determine if it conforms to the United States Constitution, not whether it conforms to its own precedents. After all, Article VI of the Constitution states that "the laws of the United States which shall be made in pursuance" of the Constitution — not in pursuance of this Court's judicial opinions — is "the supreme Law of the Land." Indeed, in establishing the practice of judicial review of the constitutionality of a statute duly enacted by the Congress of the United States, this Court has acknowledged that it is because "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). But the Constitution was not written for Congress alone. As the Marbury Court also stated, "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."[23]

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[23] *See id.* at 179-180.

Both opinions of the courts below are based upon the assumption that the "equal protection component" of the Fifth Amendment is identical to the Equal Protection Clause of the Fourteenth Amendment. There is ample support for this claim in this Court's precedents. *See, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995). This position would be unremarkable if supported by the constitutional text, but it is not. Rather, this Court's equal protection doctrine, insofar as it rests upon the Fifth Amendment Due Process Clause, has been developed in flagrant disregard of a well-established rule of construction dating back to at least 1840: "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). If the Due Process Clause of the Fifth Amendment contains the same equal protection standard as the Equal Protection Clause of the Fourteenth Amendment, then the latter guarantee was "needlessly added" to an amendment that, like the Fifth Amendment, already contained a provision that no person may be "deprive[d] ... of life, liberty or property without due process of law." In short, this Court's equal protection doctrine renders the Fourteenth Amendment's equal protection guarantee "superfluous or unmeaning,"[24] the due process guarantee being sufficient by itself to have imposed the "equal protection" guarantee upon the States. *See, e.g.,* L.

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[24] *Id.* at 571.

Seidman, Constitutional Law: Equal Protection of the Laws, at 32-33 (Foundation Press, New York: 2003).

Additionally, this Court's current equal protection doctrine utterly disrespects the "high talent, the caution, and the foresight of the illustrious men who framed" the Constitution, in which "[e]very word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." Holmes, 39 U.S. at 571. In the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), decided just five years after the ratification of the Fourteenth Amendment, this Court treated the due process and equal protection guarantees as distinct and independent limits upon the States, each of which embodied entirely different principles dealing with issues arising from entirely different historical periods. *Id.* at 80-81. The Due Process Clause was traced back to the late 18th century, having made its appearance not only in one of the first 10 amendments to the United States Constitution, but "in the constitutions of nearly all the States, as a restraint upon the power of the States." *Id.* at 80. On the other hand, the Equal Protection Clause grew out of the nation's post civil war period, and was designed to remedy the evil of the "existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class...." *Id.* at 81.[25]

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[25] Even the dissenting justices in the Slaughter House Cases did not find an "equal protection component" in the due process guarantee. Rather, they relied primarily upon the "privileges and immunities" guarantee as having secured to everyone access to

Until May 17, 1954, the day upon which this Court struck down "racially segregated public schools" in the States under the equal protection guarantee of the Fourteenth Amendment,[26] it was generally understood that the due process guarantee of the Fifth Amendment did not have an equal protection component. As this Court observed in Adarand, "[t]hrough the 1940's, this Court had routinely taken the view ... that, 'unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.'" *Id.* at 213. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), this Court shoehorned equal protection into the due process text by sheer will, declaring "it would be **unthinkable** that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500 (emphasis added). *See also* Adarand, 515 U.S. at 215-16.

To the contrary, it was and is eminently "thinkable" that the Reconstruction Congress, led by abolitionist Republicans, would propose an amendment to the Constitution that would increase the powers of the federal government at the expense of the States. Indeed, on February 13 and 26, 1866, Congressman Bingham of Ohio introduced the first version of what would become the Fourteenth Amendment. It read that "'**The Congress shall have**

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the "ordinary avocations of life" without "discrimination" in favor of state-granted monopolies. *See, e.g., id.* at 96-111 (Field, J., dissenting) and at 111-122 (Bradley, J., dissenting).

[26] *See* Brown v. Board of Education, 347 U.S. 483 (1954).

the power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of the citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.'" *See* G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, Constitutional Law, p. 482 (2nd ed., Little, Brown: 1991) (emphasis added). Later, on April 30, 1866, the Joint Committee on Reconstruction substituted a new proposal, which read:

> **No state shall** make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws. [*See id.* at 482-83 (emphasis added).]

Additionally, the Committee "coupled" these prohibitions against the States with a grant of power to Congress to enforce them by "appropriate legislation." *Id.* at 483. Had Congress intended that the equal protection guarantee apply to the federal government as well as the states, it would have so written it, just as it did in the Thirteenth Amendment, outlawing slavery and involuntary servitude in the United States, and in the Fifteenth Amendment, protecting the right to vote in both state and federal elections free from racial discrimination.

In sum, this Court's Fifth Amendment equal protection doctrine "disregard[s] a deliberate choice of

words and their natural meaning," and is, therefore, unquestionably "a departure from the first principle of constitutional interpretation" that "'every word must have its due force, and appropriate meaning....'" *See* Wright v. United States, 302 U.S. 583, 588 (1938).

The question remains whether the due process guarantee, standing alone, prohibits DOMA Section 3. Originally, due process of law was limited to determine whether a claimed life, liberty, or property interest could be denied without judicial process. *See, e.g.,* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856). *See also* Sources of Our Liberties, p. 132 (R. Perry & J. Cooper, eds., Rev. Ed, ABA Found: 1978). Any claim based upon the proposition that the Due Process Clause protected a certain substantive life, liberty, or property interest was subject to summary dismissal. *See, e.g.,* The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873).

From 1905 through the mid-1930's, however, the courts rejected this understanding, extending due process protection to certain common law economic rights, regardless of whether those rights were afforded judicial process before being denied. *See, e.g.,* Lochner v. New York, 198 U.S. 45 (1905) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). While the end of substantive protection of economic rights did not herald a wholesale return to the original textual meaning of procedural due process,[27] this Court

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[27] Carolene Products, 304 U.S. at 154. As the district court observed, with respect "'commercial, tax and like regulation,'"

did rule in at least three cases that the Due Process Clause did not subject economic measures even to a "rational basis" test. *See* Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); and Ferguson v. Skrupa, 372 U.S. 726 (1963). Rather, as Justice Black stated in Ferguson:

> Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation....'" [*Id.*, 372 U.S. at 731.]

While there may be arguments Ms. Windsor and the Obama Administration might want to raise to support their view that limiting certain tax benefits to only persons within a traditional marriage relationship has no social utility, such arguments are properly addressed to Congress, not the Courts. The Fifth Amendment's Due Process Clause neither contains an "equal protection component" nor, by the plain meaning of the words of its text, does it elevate this Court over Congress in determining the degree of need of any particular means to carry out constitutionally permissible federal purposes.

"courts must accept as constitutional those legislative classifications that bear a rational relationship to a legitimate government interest." [Windsor I, 833 F. Supp. 2d at 400.]

CONCLUSION

For the reasons stated, the decision of the court of appeals below should be reversed.

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