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REPORT ON THE DEFENSE OF MARRIAGE ACT

COMMITTEE ON CIVIL RIGHTS
COMMITTEE ON LESBIAN GAY BISEXUAL AND TRANSGENDER RIGHTS
COMMITTEE ON SEX AND LAW

The guarantee and protection of individual rights is a hallmark of the United States Constitution. When governmental policies, practices, or laws violate those rights, judicial or legislative action is necessary to protect individuals from the harms that flow from such violations. Such action is warranted now, given the real, numerous, and varied harms experienced by lawfully married same-sex couples in the United States due to the federal Defense of Marriage Act ("DOMA"), which unlawfully discriminates against married same-sex couples.

DOMA was first proposed by the United States Congress in response to a historic ruling by the Supreme Court of the State of Hawaii, in which that court found that denial of marriage rights to same-sex couples constituted sex discrimination and was therefore subject to strict scrutiny review under the equal protection clause of the Hawaii Constitution.[1] DOMA has two main provisions: (1) to exempt same-sex marriages from the Constitutional command that all states give effect -- or "full faith and credit" -- to all other states' acts; and (2) to create a definition of marriage for purposes of interpreting federal law that excludes same-sex marriages.[2]

At the time that DOMA was being debated in Congress, the Association of the Bar of the City of New York (the "Association") issued a report stating its opinion that the act violated the U.S. Constitution.[3] The Association continues to hold that opinion. DOMA violates the Due Process and Equal Protection provisions of the Fifth and Fourteenth Amendments to the U.S.

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[1] *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[2] Section 2(a) of DOMA states: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (2012). Section 3(a) of DOMA states: "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 a wife." 1 U.S.C. § 7 (2012).

[3] *See* Report by the Association of the Bar of the City of New York, June 12, 1996.

Constitution because it denies fundamental rights to certain individuals based on sexual orientation. It should either be repealed through passage of the Respect for Marriage Act[4] or be overturned by judicial decision.

I. COURTS ARE PROPERLY FINDING THAT DOMA VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION BECAUSE IT DENIES FUNDAMENTAL RIGHTS BASED ON SEXUAL ORIENTATION.

DOMA implicates key due process and equal protection issues by its creation of two separate classes of married couples: on the one hand, opposite sex married couples who receive the federal rights, benefits, and protections of marriage and, on the other hand, same-sex married couples who are denied the federal rights, benefits, and protections of marriage. In the years immediately following the Association's first report on DOMA, initial legal challenges to DOMA were unsuccessful.[5] More recently, however, a number of courts have found DOMA unconstitutional under the Equal Protection Clause applying even the least strict, rational basis, standard of review. Additionally, as a group, gays and lesbians (and by extension, same-sex couples) should qualify as at least a quasi-suspect class, such that any laws seeking to deprive them of rights granted to similarly situated heterosexuals (for example, opposite-sex couples) should be reviewed using heightened scrutiny.

A. DOMA Is Unconstitutional Even Under the Least Stringent "Rational Basis" Review

Under DOMA, same-sex couples who are legally and validly married under state law are denied federal marriage-related benefits, protections, and responsibilities, such as Social Security spousal benefits, joint income tax filings and deductions, employment benefits for federal employees, and the ability to sponsor a nonimmigrant spouse for purposes of residency and citizenship.[6] When the government categorizes people into discrete classes (such as people married to a spouse of the same sex and people married to a spouse of the opposite sex) and then passes a law that treats these classes differently, the law must at the very least be "rationally related to a legitimate government purpose."[7]

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[4] S.598 / H.R.1116, 112th Congress. The Respect for Marriage Act had not been reintroduced as of the issuance of this report.

[5] Some of these challenges to DOMA failed not because a court had determined that DOMA was constitutional but because plaintiffs lacked standing to challenge DOMA because they were not legally married to a spouse of the same sex. *See Smelt v. Cnty. of Orange*, 447 F.3d 673, 683-84 (9th Cir. 2006) (petitioners did not have standing to challenge Section 3 of DOMA because they did not have a legally-recognized marriage in any state within the U.S.); *Mueller v. C.I.R.*, 39 Fed. Appx. 437, 438 (7th Cir. 2002) (petitioner, who attempted to file tax return jointly with his same-sex partner, lacked standing to challenged DOMA's effect on his tax-filing status because he was not legally married to his partner).

[6] A full list of the 1,138 statutory provisions in which marital status is a factor in determining or receiving benefits, rights and privileges is available at http://www.gao.gov/new.items/d04353r.pdf (last visited March 7, 2013).

[7] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

In 2009, Ninth Circuit Judge Stephen Reinhardt held that the equal protection clause was violated by Section 3 of DOMA[8] as applied to a deputy federal public defender whose request to add his same-sex spouse as a family-member beneficiary of his health insurance had been denied.[9] Judge Reinhardt, applying the rational basis standard of review set out in City of Cleburne, Tex. and Romer v. Evans,[10] concluded that the government cannot deny federal benefits to same-sex spouses "simply by a distaste for or disapproval of same-sex marriage or a desire to deprive same-sex spouses of benefits available to other spouses in order to discourage them from exercising a legal right afforded them by a state."[11]

A bankruptcy court similarly held that DOMA violated the equal protection guarantee in the due process clause of the Fifth Amendment because it did not serve or advance an important governmental interest and therefore could not be upheld under either heightened scrutiny or rational basis review.[12] Accordingly, it refused to grant the U.S. Trustee's motion to dismiss a joint Chapter 13 bankruptcy petition based on DOMA. Noting that the petition was filed by a legally married same-sex couple, the court held: "[i]n [our] judgment, no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple."[13]
In yet another challenge to Section 3 of DOMA, seven same-sex couples legally married in Massachusetts and three surviving spouses who had wed a same-sex spouse argued various claims that, when taken together, challenged the prohibitions imposed by DOMA on their eligibility for federal employee health benefits, Social Security benefits and the right to file

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[8] Section 3 of DOMA established a "federal" definition of marriage that limits the availability of any benefits or protections afforded to married individuals under federal law, regulation or otherwise only to opposite-sex couples, regardless of whether a same-sex couple is validly married under state law.

[9] *See In re Levenson*, 560 F.3d 1145, 1151 (9th Cir. 2009).Judge Reinhardt issued his decision in *Levenson* in his capacity as Chair of the Ninth Circuit's Standing Committee on Federal Public Defenders pursuant to the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff. As the opinion was not issued by a three-judge panel, it is technically considered an administrative ruling.

[10] In our 1996 Report, we argued that the bill raised serious questions under the Fifth Amendment's guarantee of critical fundamental rights. At the time, the U.S. Supreme Court had just decided *Romer v. Evans*, 517 U.S. 620 (1996), and ruled that a state constitutional amendment that took away from lesbians and gay men, but no other people, legal rights previously recognized under various ordinances violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. The Court explained that the amendment in question, which repealed existing statutes, regulations and ordinances barring discrimination based on sexual orientation, "has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and…invalid form of legislation." *Romer*, 517 U.S. at 632. The Court invalidated the state constitutional amendment at issue under the rational basis standard and declared that "[i]t is not within our constitutional tradition to enact laws of this sort[,]" which raise the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

[11] *Levenson*, 560 F.3d at 1149-1150.

[12] *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011).

[13] *Balas*, 449 B.R. at 569.

federal income taxes jointly with their spouses violated their due process rights under the Fifth Amendment.[14] The district court agreed with the plaintiffs and ruled that the interests articulated by Congress in 1996 were either improper or not related to DOMA's purpose.[15] In the absence of any legitimate state interest advanced by the Government, the court ruled that DOMA lacked a rational basis to support it.[16]

The First Circuit reviewed the district court's decision in Gill along with the companion case, Commonwealth of Massachusetts v. U.S. Department of Health & Human Services ("Commonwealth of Massachusetts")[17], and "conclude[d] that the extreme deference accorded to ordinary economic legislation . . . would not be extended to DOMA by the Supreme Court; and without insisting on 'compelling' or 'important' justifications or 'narrow tailoring,' the Court would scrutinize with care the purported bases for the legislation."[18] It further noted that "DOMA intrudes broadly into an area of traditional state regulation,"[19] and therefore warranted "a closer than usual review based in part on its discrepant impact upon married couples and in part on the importance of state interests in regulating marriage."[20]

The court then reviewed the government interests that were supposedly advanced by Section 3 of DOMA, including: (1) preserving scarce government resources; (2) supporting child-rearing in the context of stable marriage; (3) moral disapproval of homosexuality; and (4) Congress' desire to maintain a federal marriage status quo to allow for reflection in a time of evolving state marriage laws.[21] Each of the interests failed to pass constitutional muster because, as stated by the First Circuit, "[s]everal of the reasons given do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point."[22] Accordingly, the court affirmed the district courts' judgments that Section 3 of DOMA is unconstitutional.

In June 2012, the Southern District of New York, borrowing the First Circuit's analysis in *Gill* and *Commonwealth of Massachusetts*, also held DOMA unconstitutional under rational

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[14] *See Gill v. O.P.M.*, 699 F. Supp.2d 374, 376-77 (D. Mass 2010).

[15] *Id.* at 390.

[16] *Id.* at 396.

[17] *Massachusetts v. U.S. Dep't of H.H.S.*, 698 F. Supp.2d 234 (D. Mass 2010).

[18] *Massachusetts v. U.S. Dep't of H.H.S.*, 682 F.3d 1, 11 (1st Cir. 2012).

[19] *Id.* at 13.

[20] *Id.* at 8.

[21] *Id.* at 14-15.

[22] *Id.* at 15.

basis review.[23] In Windsor, the plaintiff challenged Section 3 of DOMA, asserting that it denied her equal protection of the laws, as guaranteed by the Fifth Amendment, because it operated to require her to pay federal estate tax on her deceased same-sex spouse's estate, a tax from which similarly situated heterosexual couples are exempt. The court explained that the rational basis review to be applied to DOMA is distinct from the rational basis review typically applied to "laws such as economic or tax legislation...which normally pass constitutional muster."[24] The court found that under U.S. Supreme Court precedent "a more searching form of rational basis review" was required for laws like DOMA "that exhibit a desire to harm a politically unpopular group."[25] Under this "more searching form of rational basis review," the Windsor court considered and rejected all of the purported justifications for DOMA, which included: "defending and nurturing the traditional institution of marriage; promoting heterosexuality; encouraging responsible procreation and childrearing; preserving scare government resources; and defending traditional notions of morality."[26] The district court's ruling in *Windsor v. United States* was later upheld by the Second Circuit under a stricter standard of review, *infra*, Section I.B.

As *Windsor* made its way from the Southern District of New York to the Second Circuit, Section 3 of DOMA received rational basis review in another district court in the same appellate region. In July 2012, Section 3 of DOMA was again held unconstitutional, this time by the District of Connecticut in *Pedersen v. Office of Personnel Management*.[27] In Pedersen, plaintiffs were denied federal benefits because they were legally married to a spouse of the same sex. Like the First Circuit, the *Pedersen* court recognized that "even under rational basis review the constitutional scrutiny is not minimalist, rather the Court must consider the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered."[28] After assessing the purported rational bases, the court concluded that "no conceivable rational basis exists" to deny plaintiffs the benefits in question.[29] Consequently, and

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[23] *See Windsor v. United States*, 833 F. Supp.2d 394, 402 (S.D.N.Y. 2011). The Windsor court relied on the First Circuit's opinion in Gill and Commonwealth of Massachusetts to support its finding that a particular form of rational basis review was warranted. *Id.* ("As the First Circuit explains, 'Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.'").

[24] *Id.*

[25] *Id.* (internal quotations omitted). The *Windsor* court relied on *Lawrence v. Texas*, 539 U.S. 558, 579–80, (2003) (O'Connor, J., concurring), *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

[26] *Id.*

[27] *See Pedersen v. O.P.M.*, 881 F. Supp.2d 294, 347 (D. Conn. 2012).

[28] *Id.* at 310 (internal quotations omitted).

[29] *Id*. at 347.

in accordance with its sister courts, the *Pederson* court held that Section 3 of DOMA violates the Fifth Amendment's equal protection principles.

B. **Categorizations Based on Sexual Orientation Deserve Heightened Scrutiny, and DOMA Cannot Survive Such Scrutiny**

The criteria for applying heightened scrutiny are: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society."[30] If heightened scrutiny applies, then the government must establish that the challenged law is "substantially related to an important government objective."[31]

In February 2012, in *Golinski v. O.P.M*, a judge in the Northern District of California accepted the argument, made by the plaintiff in the context of a DOMA Section 3 challenge, that heightened scrutiny should apply to classifications based on sexual orientation under the equal protection clause.[32] The court agreed that sexual orientation is a quasi-suspect classification entitled to heightened scrutiny, noting the long history of discrimination suffered by gays and lesbians, the evolution of social science on the defining characteristics of being gay or lesbian, and the lack of political power that gays and lesbians have.[33] In addressing prior precedent that sexual orientation is not a suspect classification, the court pointed out that the leading Ninth Circuit case that addressed the question – High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) – was based on Bowers v. Hardwick, 478 U.S. 186 (1986), which was later overturned by the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003).[34] The court went on to find Section 3 of DOMA unconstitutional under the equal protection clause.[35]

In October 2012, the Second Circuit subjected Section 3 of DOMA to intermediate scrutiny under the equal protection clause when it considered the appeal in *Windsor v. United States*. The underlying district court decision, *supra*, Section I.A, had invalidated the law under rational basis review. A divided panel of the Second Circuit departed from the district court's

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[30] Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, February 24, 2011. *See Bowen v, Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

[31] *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[32] *See Golinski v. O.P.M.*, 824 F. Supp.2d 968 (N.D. Ca. 2012).

[33] *Id.* at 985-90.

[34] *Id.* at 983-85.

[35] *Id.* at 995; *but see Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp.2d 944, 959 (N.D. Cal. 2012) (finding DOMA Section 3 unconstitutional using rational basis review).

rational basis review and concluded that homosexuals are a quasi-suspect class under equal protection analysis and that Section 3 of DOMA was accordingly subject to intermediate scrutiny under the equal protection clause.[36] The *Windsor* majority then found that none of the reasons offered as justification for enacting DOMA's enactment – "maintaining a uniform definition of marriage," "protecting the fisc," "preserving a traditional understanding of marriage," and "encouraging responsible procreation" – were "substantially related to an important government interest," and that the law was therefore unenforceable.[37] In response to DOMA advocates' protest that "same-sex marriage is unknown to history and tradition, the *Windsor* court stressed that "law (federal *or* state) is not concerned with holy matrimony," but only a "civil status."[38]

In the *Windsor* appeal before the Second Circuit, the constitutionality of DOMA was defended by the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG"), a collection of Republican leaders of the House of Representatives, after the Justice Department declined to continue defending DOMA.[39] On February 24, 2011, the Justice Department wrote a letter to Congress stating that the Administration had determined that: classifications based on sexual orientation should be subject to heightened scrutiny; under this standard, Section 3 of DOMA is unconstitutional; and, accordingly, the DOJ would cease defending DOMA.[40]

The Justice Department's decision was based on then-pending litigation challenging DOMA Section 3 (i.e., *Windsor* and *Pederson*) that "caused the President and the Department [of Justice] to conduct a new examination of the defense of [that] provision."[41] It was against this backdrop that BLAG intervened in Windsor, Gill, and Commonwealth of Massachusetts to defend the constitutionality of DOMA.

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[36] *Id.* at 185.

[37] *Id.* at 185-88.

[38] *Id.* at 188.

[39] *See Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012).

[40] *See* Letter from the Attorney General to the Clerk of the United States Court of Appeals for the First Circuit on Litigation Involving Section 3 of the Defense of Marriage Act, February 23, 2011, available at http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf (last accessed on March 7, 2013). The Justice Department filed a letter to the First Circuit the same day that DOJ issued a letter to Congress explaining that it would cease defending the DOMA challenges pending in *Windsor* and the *Pedersen v. O.P.M.* case in the District of Connecticut. *See supra* n.29.

[41] *Id*. at 1. The Justice Department explained: "Previously, the Administration has defended Section 3 in jurisdictions where the circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that applied in those cases. These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue." *Id*. at 1-2.

The Supreme Court granted certiorari in *Windsor v. United States* on December 7, 2012,[42] and oral arguments took place on March 27, 2013. Whatever standard of review the Supreme Court rules applies on the DOMA challenge, the overwhelming trend in the recent case law makes it clear that Section 3 of DOMA cannot stand.

II. DOMA VIOLATES THE FULL FAITH AND CREDIT CLAUSE AND THE TENTH AMENDMENT

In addition to violating the Due Process and Equal Protection provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution, DOMA also violates the Full Faith and Credit Clause and the Tenth Amendment.

DOMA violates the Full Faith and Credit Clause because it diminishes, rather than implements, the commands of that clause. The Full Faith and Credit Clause of the U.S. Constitution requires states to recognize the acts, records, and judicial proceedings of other states and confers upon Congress only the limited authority to "prescribe the manner in which such acts, records and proceedings may be proved, and the effect thereof." U.S. CONST. Art. IV, § 1. Section 2 of DOMA, however, enacted a congressionally created exemption from the Constitutional full faith and credit requirement when a same-sex marriage is at issue.[43] Through DOMA, Congress has abrogated states' responsibilities to each other by altering the plain meaning of a provision of the Constitution -- something the Supreme Court has already made clear is impermissible.[44] As such, it exceeds Congress's limited authority to prescribe the manner in which full faith and credit shall be given. We are not aware of any other instance in which Congress has legislated under the Full Faith and Credit Clause to make the command for "faith and credit" anything less or other than "full."[45] Indeed, each prior exercise of the limited congressional power under this clause has gone in the opposite direction.[46] The passage of

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[42] *See Windsor v. United States*, 133 S. Ct. 786 (2012).

[43] Section 2(a) of DOMA states: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (2012).

[44] In *City of Boerne v. Flores*, in the context of discussing the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA"), the Court stated that "[i]f Congress could define its own powers by altering the [meaning of a provision of the Constitution], no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it.'" 521 U.S. 507, 529 (1997).

[45] *See*, *e.g.*, Gabe Vick, *The Defense of Marriage Act: The Crossroad of Love and Legislation*, 22 J. AM. ACAD. MATRIM. LAW. 105, 115 (2009) ("Congress has, for the first time, limited the scope of the [Full Faith and Credit Clause] and given states the option to not give full faith and credit to a sister state.").

[46] *See* 28 U.S.C. §§ 1738, 1739 (all properly authenticated acts, records and judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."); 28 U.S.C. § 1738A (each state must enforce child custody

Section 2 of DOMA clearly exceeded Congress's constitutional authority under the Full Faith and Credit Clause because the effect of DOMA is to diminish the mandates of that clause.[47]

DOMA also violates the Tenth Amendment because it defines marriage without regard to State law and thereby unconstitutionally encroaches upon the powers granted to the States. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."[48] Related to the principle that certain powers are reserved to the states is the "fundamental principle underlying our federalist system of government that 'every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.'"[49] Prior to the enactment of DOMA, there had never been a federal definition of marriage.[50] Rather, "the federal government consistently relied on state determinations with regard to marriage when they were relevant to federal law."[51] States can and have established their position on this issue. To date, eight states – New York, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Maryland and Washington – and the District of Columbia define marriage to include the union of same-sex partners.[52] Thirty-eight states, through constitutional provisions or state laws, restrict marriage to the union of opposite sex partners.[53] Although its

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determinations of home state); 28 U.S.C. § 1738B (each state must enforce child support orders made by home state); 18 U.S.C. § 2265 (each state must enforce protective orders in domestic violence matters).

[47] To the extent that the Full Faith and Credit Clause has been read to include a policy exception (for example, as set forth in the Second Restatement of Conflicts of Laws, § 283), any such exception would need to be a legitimate exercise of the state's power. We do not assert that no policy exceptions to the Full Faith and Credit Clause exist, but only that in the case of same-sex marriage, there is no rational basis upon which to allow a state to refuse to recognize another state's validly performed marriage. *See supra* Section I; *see generally* Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. Feb. 7, 2012) ("Although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently.").

[48] U.S. CONST. amend. X. The Tenth Amendment "leaves to the several States a residuary and inviolable sovereignty." New York v. United States, 505 U.S. 144, 188 (1992) (quoting The Federalist No. 39, at 245 (C. Rossiter ed. 1961)).

[49] *Commonwealth of Massachusetts v. U.S. Dep't of H.H.S.*, 698 F. Supp.2d 234, 246 (D. Mass. 2010) (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)).

[50] *Id.* at 239.

[51] *Id.* at 250 ("State control over marital status determinations is a convention rooted in the early history of the United States, predating even the American Revolution.").

[52] N.Y. DOM. REL. LAW § 10-A (2011); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); VT. STAT. ANN. TIT. 15, § 8 (2012); N.H. REV. STAT. § 457:1-A (2011); B18-482, 2009 to 2010 Council, 18th Period (D.C. 2009); MD. CODE ANN., FAM. LAW §§ 2-201 2021; WASH. REV. CODE §§ 26.04.010-26.04.020 (2012).

[53] National Conference of State Legislators, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, available at http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last visited May 2, 2013).

reasoning was subsequently rejected by the First Circuit,[54] the District of Massachusetts concluded that DOMA violates the Tenth Amendment because "[t]he federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and in doing so, offends the Tenth Amendment."[55] Congress has exceeded its authority in passing the legislation and has stripped the states of their vested constitutional rights guaranteed by the Tenth Amendment.

III. CONCLUSION

For the foregoing reasons, the New York City Bar Association reiterates its long-held position that Sections 2 and 3 of DOMA are unconstitutional. It is our hope that the Supreme Court follows the recent trend among the Circuits and overturns Section 3 of DOMA in the *Windsor* case, whether under a heightened scrutiny analysis or the less rigorous rational basis test. We also support passage of the Respect for Marriage Act to repeal Section 2 of DOMA if the Court finds Section 3 of DOMA unconstitutional, and for complete repeal in the event the Court upholds Section 3 of DOMA.

May 2013

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[54] *Commonwealth of Massachusetts v. U.S. Dep't of H.H.S.*, 682 F.3d 1, 11 (1st Cir. 2012).

[55] The court also held that because "DOMA imposed an unconstitutional condition on the receipt of federal funding . . . the statute contravenes a well-established restriction on the exercise of Congress' spending power." *Commonwealth of Massachusetts*, 698 F. Supp. 2d at 248-49. Therefore, the court held that Congress exceeded the scope of its authority in enacting DOMA. *Id.* at 249.