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 OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR ON THE MERITS QUESTION

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of Respondent Edith Schlain Windsor. The ABA urges that Section 3 of the Defense of Marriage Act ("Section 3") imposes an unprecedented and discriminatory burden on a discrete minority of couples legally married under state law in contravention of the constitutional guarantee of equal protection.

The ABA is the largest voluntary professional membership organization and the leading association of legal professionals in the United States. Its membership comprises nearly 400,000 attorneys in all 50 states, the District of Columbia, and the U.S. Territories and includes attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges,[2] legislators, law professors, law students, and non-lawyer associates in related fields.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not

Since its founding in 1878, the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution, including the elimination of bias and discrimination. Over the past 40 years, the ABA has repeatedly advocated for the elimination of discrimination against gay and lesbian people. In 1973, the ABA adopted a policy urging the repeal of laws that criminalized private sexual relations between consenting gay and lesbian adults.[3] Since that time, the ABA has adopted numerous policies that recognize and support the rights of gays and lesbians: in 1987, in response to bias-motivated crimes; in 1989, advocating the elimination of discrimination against gays and lesbians in employment, housing, and public accommodations; in 1991, against bias in the judicial system; and in 1992, against discrimination on university campuses.

In addition, the ABA has adopted positions supporting equal treatment of gay and lesbian families, including a 1995 policy advocating equal treatment in child-custody matters and visitation rights and a 1999 policy calling for the repeal of laws

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circulated to any member of the Judicial Division Council prior to filing.

[3] Only recommendations that are adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD is comprised of more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html. The ABA policies discussed in this brief are reprinted in the Appendix.

that banned adoption by gay and lesbian parents. Similarly, the ABA adopted a 2002 policy urging that surviving partners of victims of terrorism and other crimes be eligible for governmental compensation and assistance funds available to eligible spouses.

The ABA also has worked to eliminate discrimination against gay and lesbian people who are, or wish to become, lawyers. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association an affiliated organization with a vote in the House of Delegates ("HOD"). In 1994, the ABA incorporated into its Standards of Approval of Law Schools a requirement that accredited law schools not discriminate on the basis of sexual orientation. In 1996, the ABA adopted a policy urging state and local bar associations to study bias against gay and lesbian persons within the legal profession and the criminal justice system. And in 2002, the ABA amended its constitution to prohibit state and local bar associations that discriminate on the basis of sexual orientation from having representation in the HOD.

In furtherance of these policies, the ABA participated as *amicus curiae* before this Court by filing briefs in *Romer v. Evans,* 517 U.S. 620 (1996), *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Lawrence v. Texas,* 539 U.S. 558 (2003).

Finally, and of special relevance to the merits question before the Court, the ABA adopted policies in 2004, opposing efforts to amend the United States Constitution to ban same-sex marriages; in 2009, urging the repeal of Section 3; and in 2010, urging States, territories, and tribal governments to offer

marriage rights to their gay and lesbian citizens. The report accompanying the ABA's 2009 policy noted that Section 3 "constitutes a radical departure from the federal government's tradition of deference to state and tribal determinations of marital status."[4] It explained that the ABA policy sought, consistent with the traditional recognition that domestic relations are a matter of state concern, "to ensure that state decisions to recognize [same-sex] marriages are respected."[5]

ABA members who represent gay and lesbian clients, including married couples, as well as ABA members who are gay or lesbian, understand that Section 3 presents serious obstacles to married gay and lesbian couples in ordering their affairs and providing security and stability for themselves and their children. ABA members observe firsthand the difficulties that Section 3 presents to married gay and lesbian couples in an array of contexts, including estate planning, navigating the tax laws, ensuring financial protection for their health and old age, addressing immigration issues, and other important yet quotidian legal and practical issues.

The ABA accordingly has a strong interest in seeing that the question presented to this Court is resolved in a manner that recognizes the dignity of gay and lesbian persons, upholds fundamental fairness, and respects the States' traditional primacy

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[4] Report at 4, a*vailable at* http://www.americanbar.org/content/dam/aba/directories/policy/2009_am_112.authcheckdam.pdf.

[5] *Id.* at 3.

in matters of domestic relations. The ABA likewise has a strong interest in ensuring that married gay and lesbian couples do not suffer discrimination as they build their families and their lives together. For all of these reasons, the ABA urges this Court to affirm the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Section 3's unprecedented discrimination against gays and lesbians legally married under state law bars them from legal protections and civic responsibilities that accrue under federal law to every other lawfully married couple. As attorneys, ABA members observe firsthand Section 3's damaging effects on fundamental aspects of their gay and lesbian clients' lives.

I. Among its consequences, Section 3 denies married gay and lesbian couples protections under the Family Medical Leave Act; for some, it deprives them of access to affordable health insurance and healthcare; it impairs the ability of married gay and lesbian couples to plan for their futures and save for retirement; it may compel them to pay higher taxes; it withholds benefits that our country bestows on married members of the U.S. Armed Forces; and it excludes gay and lesbian spouses who are non-U.S. citizens from some of the protections of our immigration laws.

II. Section 3 is an unprecedented intrusion by Congress into domestic relations law, which has historically been the exclusive province of the States. Section 3 is the first time that Congress has attempted to define marriage for purposes of all

federal laws and regulations and the only time that Congress has sought to exclude a class of marriages valid under state law from all federal protections and benefits of marriage. "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to" constitutional principles. *Romer*, 517 U.S. at 633. Moreover, laws, like Section 3, that upset the traditional federal-state balance should be carefully scrutinized to ensure that they comply with the Constitution's demands.

Even under the rational-basis review applied in *Romer*, none of the governmental interests advanced in support of Section 3 justifies its sweeping exclusion of lawfully married gay and lesbian couples from the rights and responsibilities of marriage. Section 3 does not enable the federal government to define marriage for itself, nor does it create a uniform definition of marriage. Federal law, by and large, still defers to the States' varied definitions of marriage, except in the case of gay and lesbian couples. Still less does Section 3 encourage the States to experiment with recognizing same-sex marriage; to the contrary, it prevents States from granting their married gay and lesbian citizens true equality with their heterosexual counterparts. And even if Section 3 saves the federal government money, that cannot by itself be a sufficient justification for excluding a specific group from government benefits. Finally, Section 3's exclusion of gay and lesbian married couples does nothing whatever to encourage heterosexual marriage and child-rearing. Section 3 discriminates against legally

married gay and lesbian couples and rationally furthers no governmental interest except an illegitimate one of "mak[ing] them unequal to everyone else." *Romer*, 517 U.S. at 635.

ARGUMENT

Though only 65 words long, Section 3 is sweeping in its breadth and devastating in its effect. Section 3 provides that, for purposes of every federal statute, regulation, and administrative ruling, the word "marriage" "means only a legal union between one man and one woman," and the word "spouse" means "only [ ] a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. For the first time, Section 3 creates a federal definition of "marriage" that applies to the entire United States Code, as well as every agency rule, and that excludes a specific group of persons legally married under state law.

Section 3's purpose and effect are to bar legally married gay and lesbian couples from the federal protections and civic responsibilities that accrue to every other married couple. In so doing, the statute seriously undermines gay and lesbian couples' ability to protect and provide for each other and for their children, and it likewise undermines lawyers' ability to help their gay and lesbian clients achieve those objectives. Section 3's unprecedented discrimination against a discrete minority of couples legally married under the laws of their States is not justified by the rationales that have been advanced for it. The statute therefore cannot survive appropriate scrutiny under the equal protection guarantee of the Fifth Amendment.

I. SECTION 3 SINGLES OUT MARRIED GAY AND LESBIAN COUPLES BY EXCLUDING THEM FROM THE FEDERAL BENEFITS THAT SUPPORT AND PROTECT ALL OTHER LEGALLY MARRIED COUPLES

By its terms, Section 3's restrictive definitions of "marriage" and "spouse" are incorporated into more than one thousand federal laws. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012) ("DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws."); Memorandum from Dayna K. Shah, Assoc. Gen. Counsel, Gen. Accounting Office, to Sen. Bill Frist (Jan. 23, 2004) (identifying, as of December 31, 2003, "a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges").[6] In virtually every instance, Section 3 works to the detriment of married gay and lesbian couples by withholding rights, benefits, and responsibilities that Congress has granted married heterosexual couples. The federal rights that accompany marriage are imparted to protect "the most important relation in life," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), yet on account of Section 3 gay and lesbian married couples are excluded from them.

When ABA members represent gay and lesbian clients in ordering their affairs and

[6] *Available at* http://www.gao.gov/new.items/d04353r.pdf.

protecting the interests of their spouses and families, they observe firsthand Section 3's negative and sometimes dramatic effect on their clients' lives and marriages. They witness the ways in which Section 3 can prevent their married gay and lesbian clients from obtaining the security and stability for themselves and their children that federal law makes available automatically to heterosexual couples.

These ABA members are also acutely aware that, because of Section 3, validly married gay and lesbian couples often must negotiate the legal complexities that result when state law regards them as married but federal law does not. Such "uncertainties [in marital status] are not merely technical, nor are they trivial; they affect fundamental rights and relations." *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting). Gay and lesbian couples are thus doubly disadvantaged by Section 3.

Moreover, attorneys often cannot adequately assist their married gay and lesbian clients in overcoming the obstacles erected by Section 3. While "creative" lawyering can sometimes be effective,[7] many married gay and lesbian couples may not even be aware of all of the ways in which they are excluded from the legal protections that most married couples take for granted. Section 3, in

[7] *See, e.g.*, *In re Adoption of Patricia S.*, 976 A.2d 966, 967-68 (Me. 2009) (one partner adopts the other to form legally cognizable relationship for purposes of creating beneficiary status under a family trust where marriage is unavailable).

short, requires married gay and lesbian couples to exercise a degree of legal sophistication that most people do not possess and is not expected of most couples.

Even when aware of the need for legal counsel, married gay and lesbian couples may encounter difficulty finding an attorney with the expertise necessary to address problems that often do not have clear-cut answers. *Cf., e.g.*, U.S. Taxpayer Advocate Serv., 2012 Annual Report to Congress, Vol. 1, at 455 (2012) ("In an evolving legal landscape, the IRS has issued answers about domestic partners and same-sex spouses, but more questions have arisen. Despite requests, the IRS has yet to publish comprehensive, authoritative guidance.").[8] Moreover, the costs of legal services are often substantial and are prohibitive for many couples, especially those couples with low incomes. *See* Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community* at iii (2009) (concluding that after controlling for other factors, "gay and lesbian couples are significantly more likely to be poor than their married heterosexual counterparts");[9] *see generally* Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income*

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[8] *Available at* http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Status-Updates-Federal-Tax-Questions-Continue-to-Trouble-Domestic-Partners-and-Same-Sex-Spouses.pdf.

[9] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

Americans 1 (2009) (finding that, among other things, fewer than one in five civil legal problems faced by low-income Americans is addressed with the assistance of a lawyer).[10]

Section 3 therefore not only withholds a wide array of federal rights and protections from married gay and lesbian couples, but it usually leaves them and their lawyers with few or no sound legal options for approximating those rights. The difficulties presented by Section 3 arise in a range of settings, from procuring affordable health care to achieving financial security and, for binational couples, to navigating the immigration system.

A. Health Care

Ensuring that a spouse is physically cared for "in sickness and in health" is one of the best-recognized responsibilities of marriage. Federal law offers an array of benefits that assist married couples in caring for one another's health and well-being. For example, under the federal Family and Medical Leave Act ("FMLA"), qualified employees of covered companies are entitled to 12 weeks unpaid leave during a 12-month period, *inter alia*, to care for a seriously ill spouse. *See* 5 U.S.C. § 6382(a)(1)(C); 29 U.S.C. § 2612(a)(1)(C). At its core, the FMLA recognizes that no one should have to choose between a job and caring for a sick husband or wife. *See* 139 Cong. Rec. S1261 (daily ed. Feb. 4, 1993) (statement of Sen. Levin) ("[E]mployees should not be punished

[10] *Available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

because they need time to take care of their families."); *id.* at S1260 (statement of Sen. Kerry) ("[T]he [FMLA] is an example of what we ought to mean when we talk about helping families help themselves.").

Because of Section 3, however, married gay and lesbian employees are ineligible for FMLA leave to care for their sick spouses. *See, e.g., Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *20 (D. Conn. 2012) (describing how lesbian postal employee was denied request for FMLA leave to care for spouse during treatments for debilitating neck injury); *cf.* Lauren Eichmann, *Carle Receives Guilty Verdict*, Daily Illini (Dec. 1, 2004) (explaining that lesbian nurse was fired for taking time off to care for her dying partner of 18 years).[11] Without the protection of the FMLA, unless they are eligible for state-mandated or employer-provided protections, these couples are left with little recourse.

Married gays and lesbians who are among the country's more than 4.4 million federal employees face additional obstacles. Section 3 precludes them from adding their spouses to their federal health insurance and vision plans. *See Pedersen*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *18 (explaining that Section 3 precluded a Naval employee from adding her wife to her federal health insurance plan); *Golinski v. U.S. Office of Pers.*

[11] *Available at* http://www.dailyillini.com/news/article_b1aae23c-fce6-5290-ae66-d05641ec9645.html.

Mgmt., 824 F. Supp. 2d 968, 974 (N.D. Cal. 2010) (describing how veteran staff attorney at the U.S. Court of Appeals for the Ninth Circuit was denied health insurance coverage for her wife because of Section 3).

As a result of Section 3, married gay and lesbian couples in which the sole breadwinner is a federal employee therefore have no options other than purchasing an individual policy for the nonworking spouse—typically more expensive than employer-provided insurance—or leaving the nonworking spouse uninsured. *See, e.g.*, Mark W. Stanton, Agency for Healthcare Research & Quality, *Employer-Sponsored Health Insurance: Trends in Cost and Access,* Research in Action, at 2 (Sept. 2004) ("[E]mployment-based health insurance is likely to be less expensive than individually purchased coverage (for the same set of benefits) and typically provides a broader scope of benefits than is available in individually purchased coverage.").[12]

Section 3 also adversely affects married gay and lesbian employees who work for private employers that extend health care coverage to same-sex spouses. To encourage private employers to offer health insurance to the spouses of their employees, the tax code typically exempts employer and employee contributions to a spousal health plan. *See, e.g.*, 26 U.S.C. § 106(a); *see also* Treas. Reg. § 1.106-1 (excluding from gross income employer contributions to spousal health plan). Section 3,

[12] *Available at* www.ahrq.gov/research/empspria/empspria.pdf.

however, ensures that the value of a gay or lesbian spouse's insurance coverage is treated as taxable compensation by the federal government. A gay or lesbian employee's contribution to a spouse's insurance premium also cannot be made on a pre-tax basis. These two extra taxes cost the average married or partnered gay or lesbian employee $1,069 per year. *See* M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits* 7 (2007).[13]

Moreover, when a married gay or lesbian employee is laid off from a job, his or her spouse immediately will lose any employer-sponsored health insurance. Typically, the Consolidated Omnibus Budget Reconciliation Act ("COBRA") protects an employee's family by guaranteeing up to 18 months of continued health coverage after employment terminates, and up to 36 months of coverage after the employee dies. *See* 29 U.S.C. §§ 1161-1163. Although COBRA protection extends to the employee's "spouse," *id.* § 1167(3)(A)(i), Section 3 disqualifies husbands and wives of gay and lesbian employees.

B. Retirement Planning

Section 3 presents a tremendous obstacle to a married gay or lesbian couple's ability to plan for a financially secure future. Most married couples rely on Social Security, private savings plans, and, when

[13] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf.

available, pensions to ensure that both spouses are provided for in retirement. Section 3, however, sharply limits the utility of all three retirement planning tools for married gay and lesbian couples, and there is little that lawyers can do to mitigate these harms.

This is particularly true for married couples who intend to live on one spouse's pension during retirement. Because of Section 3's interplay with the Employee Retirement Income Security Act ("ERISA"), married gays and lesbians are denied automatic survivorship rights to their spouses' pensions. *See* 26 U.S.C. § 401(a)(11) (limiting statutory survivorship rights to federally recognized "spouse"); 29 U.S.C. § 1055(d)-(e) (same). Gay and lesbian retirees who rely on a pension are therefore helpless to protect their non-pensioned spouses. *See, e.g.*, *Pedersen*, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, at *19 (describing how surviving spouse was not permitted payments from deceased husband's pension due to Section 3).

Similarly, gay and lesbian widows and widowers have no survivorship rights to their spouses' Social Security benefits. Typically, a decedent's qualified surviving spouse automatically receives a lump-sum payment and the amount of the decedent's monthly Social Security benefits (if it is greater than the surviving spouse's monthly benefits). *See* 42 U.S.C. § 402(e)-(f), (i). These policies are designed to avoid the impoverishment of elderly widows and widowers. But when a gay or lesbian person dies, the Social Security system provides no protection to his or her surviving spouse

because of Section 3. *See, e.g.*, *Massachusetts*, 682 F.3d at 12 ("[DOMA] . . . prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits.").[14] The denial of Social Security survivorship benefits can cause serious hardship to gay and lesbian widows and widowers. In fact, 53% of married elderly couples receiving Social Security payments rely on those payments for more than half of their income, and for 23% of such couples, Social Security represents at least 90% of their income. *See* Soc. Sec. Admin., Fact Sheet (2012).[15] In December 2012, 6.3 million widows and widowers received Social Security survivorship benefits. *See id.*[16]

Section 3 also complicates a married gay or lesbian couple's ability to invest in Individual Retirement Accounts ("IRAs"). Typically, the annual maximum allowable contribution to an IRA is based on a person's income. But federal tax law permits a

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[14] The Social Security Act contains gender-specific definitions of terms such as "husband" and "wife" that arguably could provide the Social Security Administration with an alternative basis to deny gay and lesbian widows and widowers Social Security survivorship benefits. *See, e.g.*, 42 U.S.C. § 402(b). Section 3 nevertheless stands as an absolute bar to such benefits.

[15] *Available at* http://www.ssa.gov/pressoffice/factsheets/basic fact-alt.pdf.

[16] Section 3 disfavors gay and lesbian married couples in the Social Security context even while both spouses are alive. While certain low-earning heterosexual spouses are entitled to special spousal benefits when their husbands or wives reach retirement age, the same benefits are not offered to low-earning gay or lesbian spouses. *See* 42 U.S.C. § 402(b)-(c).

spouse filing a joint income tax return to determine his or her IRA contribution limit by reference to the total compensation earned by the couple. *See* 26 U.S.C. § 219(c). As a result, many married couples can significantly boost retirement savings by having a working spouse contribute to an IRA opened in the name of a nonworking spouse. Pursuant to Section 3, however, married gay and lesbian couples are not entitled to this benefit.

C. Immigration

The United States has long recognized the importance of the marital bond in its immigration policy. For more than 50 years, the federal government has offered foreign spouses of U.S. citizens an expedited pathway to citizenship. *See* Immigration and Nationality Act, Pub. L. No. 82-414, ch. 2, § 319, 66 Stat. 163, 244-45 (1952) (codified as amended at 8 U.S.C. § 1430(a)). An American citizen who marries a foreign national is also immediately eligible to petition for an immigrant visa on his or her spouse's behalf, and the foreign spouse can simultaneously apply for permanent resident status. *See id.*, ch. 1, § 205(b), 66 Stat. at 180 (codified as amended at 8 U.S.C. § 1151(b)(2)(A)(i)).[17]

These provisions are central to our Nation's immigration policy. Yet Section 3 denies marital recognition to binational gay and lesbian couples. As

[17] As early as 1924, the United States began providing immigration visas to the wives (though not the husbands) of U.S. citizens. *See* Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, §§ 4(a), 8, 43 Stat. 153, 155, 157.

a result, binational gay and lesbian couples can be forcibly separated by the United States government notwithstanding their legally valid marriages.[18] *See, e.g.*, Michael Martinez, *Gay Married Immigrant Fights Deportation in California*, CNN.com (Mar. 23, 2012).[19]

Because our immigration system is based on federal rules and regulations, Section 3 poses enormous obstacles to lawyers who wish to aid their gay and lesbian clients in this area. This is no small problem: According to a recent study, an estimated 40,000 gay and lesbian couples living in the United States include at least one partner who is not a citizen. *See* Craig J. Konnoth & Gary J. Gates,

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[18] The Obama administration recently declared that it would consider the existence of a same-sex relationship when exercising prosecutorial discretion in commencing, closing, or staying removal proceedings. *See* Letter from Janet Napolitano, Sec'y of Dep't of Homeland Sec., to Rep. Nancy Pelosi (Sept. 27, 2012), *available at* http://www.metroweekly.com/poliglot/12-3384%20Pelosi%20S1%20signed%20response%2009.27.12.pdf. The new policy, however, does not carry the force of law and therefore can be reversed by this or any future administration. Moreover, the policy does not provide the pathway to legal status that heterosexual foreign nationals who marry American citizens are granted. A gay or lesbian foreign national therefore must have an independent basis to live or work legally in the United States alongside a citizen spouse.

[19] *Available at* http://www.cnn.com/2012/03/22/us/california-gay-deportation/index.html.

Same-sex Couples and Immigration in the United States 1 (2011).[20]

Section 3 also undermines the marital bonds of gay and lesbian couples in which both spouses are foreign.[21] For example, the heterosexual spouse of a foreign national granted asylum is automatically entitled to asylum so that the couple can live together in the United States (even if the spouse would not have been entitled to asylum independently). *See* 8 U.S.C. § 1158(b)(3)(A). For married gay and lesbian couples, however, each spouse must prove entitlement to asylum.

D. Military Benefits

From our founding, American society has expressed its "high regard for the special place that military heroes hold in our tradition." *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion). Our federal laws embody that commitment and offer an array of benefits to veterans and current members of the armed services. *See, e.g.*, U.S. Dep't of Veterans Affairs, Federal Benefits for Veterans, Dependents and Survivors (2012).[22] Many of these

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[20] *Available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf.

[21] Same-sex civil marriages are validly performed in 11 countries as well as parts of Mexico. *See* BBC News, *Gay Marriage: Party Leaders Hail Vote* (Feb. 5, 2013), http://www.bbc.co.uk/news/world-21321731.

[22] A*vailable at* http://www.va.gov/opa/publications/benefits_book/2012_Federal_benefits_ebook_final.pdf.

benefits extend to military spouses and children. Among other things, military spouses are entitled to military health insurance, survivorship payments, and burial alongside a spouse at a VA national cemetery. *Id.* at 70, 98-109. These benefits recognize not only the sacrifices made by service members' families but also that service members perform their duties better if they know that their loved ones are being cared for. *See* S. Rep. No. 93-235 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1579, 1585.

Section 3 denies many of these benefits from the husbands and wives of gay and lesbian service members.[23] Although the Department of Defense recently extended a handful of benefits to gay and lesbian military spouses, more than 100 other benefits available to opposite-sex military spouses remain inaccessible because of Section 3. *See* Ernesto Londoño, *Pentagon to Extend Certain Benefits to Same-Sex Spouses*, Washington Post.com (Feb. 5, 2013).[24]

One such benefit is health insurance. Lawyers cannot mitigate the harm Section 3 causes to gay and lesbian military spouses when they cannot afford or otherwise obtain health insurance. *See, e.g.*, Complaint, *McLaughlin v. Panetta*, No. 11-cv-

[23] The eligibility of gay and lesbian military spouses for military benefits may also be limited by 38 U.S.C. § 101(3), (31) (limiting definition of "spouse" in context of veterans' benefits to married persons of opposite sex).

[24] A*vailable at* http://articles.washingtonpost.com/2013-02-05/world/36758629_1_openly-gay-troops-couples-gay-service-members.

11905, at ¶¶ 42-45, 50-53 (D. Mass. Oct. 27, 2011) (describing how one uninsured military spouse travels to Mexico for affordable medical procedures and another has put off necessary surgery).

Gay and lesbian spouses also may be ineligible for certain financial protections when a service member spouse dies. Typically, upon the death of a service member or veteran, the military provides a surviving spouse with a monthly survivorship stipend. *See* 38 U.S.C. § 1311. Low-income surviving spouses of war veterans additionally receive the Survivors' Pension.[25] None of these financial protections are offered to the spouses of gay and lesbian service members or veterans, however.[26]

E. Taxes

As demonstrated by this very case, when gay and lesbian couples' marriages are not recognized by the federal government, they may bear substantial tax burdens that married heterosexual couples do not face. For example, federal law typically exempts from estate taxes all property that passes to a surviving spouse who is an American citizen. *See* 26 U.S.C. § 2056(a). This exemption recognizes that a married couple is a unit, and taxation on marital

[25] *See* http://benefits.va.gov/pensionandfiduciary/pension/spousepen.asp.

[26] Similarly, the spouses of gay and lesbian public safety officers who die in the line of duty are not eligible for the death benefits that are paid to the spouses of all other safety officers. *See* 42 U.S.C. § 3796(a)(1).

property is therefore deferred until both spouses have died or the property is otherwise relinquished. *See Estate of Turner*, 138 T.C. 14, 20 (T.C. 2012). But because Section 3 prevents the I.R.S. from recognizing her marriage, Edith Windsor was forced to pay more than $300,000 in federal estate taxes on her own marital property.

The gift tax is a related example. Federal law recognizes that spouses transfer money and items of value to each other all the time. *See* S. Rep. No. 97-144, at 127 (1981). The tax code therefore provides heterosexual married couples with an unlimited exemption from the federal gift tax. *See* 26 U.S.C. § 2523. Almost any transfer of value[27] from one gay or lesbian spouse to the other, however, is viewed as a "gift" by the federal government, and a spouse who transfers more than $14,000 in value in any given year must report that "gift" to the I.R.S. *See* Rev. Proc. 2012-41(3.19).[28] Once a couple exceeds a lifetime exclusion amount, every transfer of wealth within the marital relationship in excess of the annual exemption—everything from Christmas presents to half the value of a jointly owned home to the value of a deceased spouse's estate—may be taxed by the federal government at a marginal rate as high as 40%. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112- 240, § 101(c)(1), (3)(A), 126 Stat. 2313 (2013).

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[27] Certain medical and educational payments are exempt from the gift tax rules. *See* 26 U.S.C. § 2503(e).

[28] This threshold is easily surpassed. Indeed, it can happen if one spouse purchases a new car for the other or even pays the mortgage for the couple's home.

Married gay and lesbian couples also face significant burdens related to their income taxes. In seven of the jurisdictions where same-sex marriage is recognized,[29] married gay and lesbian couples must file their state and local income taxes as married but their federal income taxes as single. Filing with different statuses in different jurisdictions is complicated and often requires assistance from tax lawyers and accountants. Moreover, according to one recent analysis, the inability to file federal income taxes as "married" costs the average gay or lesbian couple several thousand dollars each year.[30] *See* Blake Ellis, *Same-Sex Spouses Lose Big on Taxes*, CNN Money.com (Dec. 31, 2011);[31] *see also* M.V. Lee Badgett, *The Same-Sex Marriage Divide: The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1089 (2010) (concluding that 66% of married gay couples in Massachusetts would save on average

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[29] The seven jurisdictions are Connecticut, Iowa, Maine, Massachusetts, New York, Vermont, and the District of Columbia. New Hampshire and Washington also issue marriage licenses to gay and lesbian couples but have no state income tax. In Maryland, the tenth jurisdiction that recognizes same-sex marriage, married gay and lesbian couples presently must file as single.

[30] Although the average gay or lesbian couple pays higher income taxes, some married gay and lesbian couples may pay lower income taxes when they are required to file separately, as explained by *amicus* Citizens for Responsibility and Ethics in Washington. (Br. at 12-20.)

[31] A*vailable at* http://money.cnn.com/2011/12/26/pf/taxes/gay_marriage_taxes/index.htm?hpt=hp_t2.

$2,325 on their federal income taxes if they could file as married).[32]

F. Ethical Responsibilities

Beyond withholding critical rights from married gay and lesbian couples, Section 3 also exempts them from certain legal obligations. Federal anti-nepotism laws provide a case in point. Federal officials with hiring or supervisory authority are barred by statute from appointing, employing, promoting, or advancing their spouses to positions within governmental agencies. *See* 5 U.S.C. § 3110(a)(3). By virtue of Section 3, however, married gay or lesbian federal officials are not bound by this law as to their spouses. By the same token, federal decision-makers are typically precluded from participating in any decision in which they or their spouses have a financial stake. *See* 18 U.S.C. § 208(a). But because Section 3 bars federal recognition of same-sex marriages, gay and lesbian employees can decide an issue that directly affects their spouses. *See also* 2 U.S.C. § 31-2 (Senate restrictions on accepting gifts extends to recognized "spouse").

Attorneys who advise on government ethics issues are left in a difficult position when counseling clients because Section 3 authorizes conduct that most observers would argue, but for Section 3, would

[32] As discussed above, *see supra* at 13-14, Section 3 also causes gay and lesbian couples to suffer negative tax ramifications if one spouse is added to the other's employer-based health insurance plan.

be illegal. In enacting Section 3, however, Congress seems not to have considered this practical effect of the law. *See Massachusetts*, 682 F.3d at 13 (noting that "only one day of hearings was held on DOMA" and "none of the testimony concerned DOMA's effects on the numerous federal programs at issue"). Now that nearly one-fifth of the States have exercised their prerogative to allow gay and lesbian couples to marry, the sweeping, harsh, and, in this instance, unintended impact of Section 3 has become clear.

II. SECTION 3'S UNPRECEDENTED EXCLUSION OF A DISCRETE GROUP OF LEGALLY MARRIED COUPLES FROM FEDERAL BENEFITS AND RESPONSIBILITIES CONTRAVENES EQUAL-PROTECTION PRINCIPLES

The governmental interests advanced in support of Section 3 cannot justify the unprecedented exclusion of one group, legally married gay and lesbian couples, from all of the federal benefits and responsibilities of marriage. Whether Section 3 is subjected to the heightened scrutiny accorded suspect classifications, *see, e.g., Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (plurality opinion) (illegitimacy); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality opinion) (gender), or the type of rational-basis review this Court has employed for similar non-economic regulations targeting a particular minority group, *see Romer*, 517 U.S. at 631-35 (gays and lesbians); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (the mentally disabled); *U.S. Dep't of Agric. v. Moreno*, 413 U.S.

528, 534-38 (1973) (households with unrelated members), it fails to pass constitutional muster.

The ABA will not repeat the parties' arguments on this issue but will focus on one specific point: Section 3 is without precedent in federal law. Never before has the federal government adopted a definition of marriage that applies across the board to every federal statute and regulation and that excludes a class of people who are legally married under the laws of their States. Indeed, the regulation of domestic relations in general, and marriage in particular, is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

The novelty of Section 3's intrusion into an area traditionally reserved to the States strongly supports two conclusions. *First*, Section 3 warrants careful review. As this Court noted in *Romer*, "[t]he absence of precedent for [a law] is itself instructive; 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to [equal protection].'" 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). *Second*, the "unique federal interests" proffered by the Bipartisan Legal Advisory Group ("BLAG") (Br. at 21) in support of Section 3—which essentially amount to assertions that Section 3 preserves each sovereign's ability to define marriage and that there is a need for a uniform federal definition of marriage—cannot support Section 3's singular withdrawal of the benefits of marriage from gay and lesbian couples.

Section 3 accordingly cannot survive appropriate scrutiny under equal-protection principles.

A. Section 3's Unprecedented Intrusion into an Area Traditionally Reserved to the States Signals the Need for Careful Review

This Court stated long ago that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593 (1890)). Subject to constitutional constraints, the States have always had "the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Sosna*, 419 U.S. at 404 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)); *see also, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (recognizing traditional exception to statutory federal diversity jurisdiction for domestic relations matters); *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law."); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern."). Indeed, Congress acknowledged when it enacted Section 3 that "[t]he determination of who may

marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664, at 3 (1996).

Before Section 3, then, there was no general federal definition of "marriage." Almost without exception, federal law simply deferred to state law, treating as married any couple legally married under the laws of their State. *See, e.g., Lembcke v. United States*, 181 F.2d 703, 706 (2d Cir. 1950) (concluding that the validity of a marriage for purposes of qualifying for military spousal survivorship benefits depended on whether the marriage was recognized by state law); *Brown v. United States*, 164 F.2d 490, 490 (3d Cir. 1947) (deferring to state law to determine whether claimant on deceased soldier's federal life insurance policy was his wife).[33]

By barring a specific class of couples legally married under state law from the federal rights and responsibilities that accompany marriage, Section 3 broke with two centuries of tradition reserving the realm of domestic relations to the States. "[S]ometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (quotation marks and alterations omitted). Section 3's unprecedented incursion into the

[33] When Congress has defined terms relating to marriage in the past, it has done so in the context of specific statutes and in furtherance of a specific governmental interest other than the exclusion of an entire class of married persons from all of the federal benefits accompanying marriage. *See Massachusetts*, 682 F.3d at 12 (citing as example 8 U.S.C. § 1186a(b)(1)(A)(i), which guards against immigration fraud).

traditional province of the States, at a minimum, calls for careful examination.

Moreover, it is a commonplace that federal statutes are presumed not to alter the traditional federal-state balance. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). A statute that *does* alter that balance—and does so as dramatically as Section 3—should be examined carefully to ensure that its classifications, in light of the justifications advanced for them, satisfy the Constitution's demands. *See, e.g.*, *Massachusetts*, 682 F.3d at 6 ("Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection . . . is uniquely reinforced by federalism concerns.").

B. Section 3 Cannot Survive Appropriate Scrutiny under Equal-Protection Principles

By "deem[ing] a class of [married] persons a stranger to [federal] laws," *Romer*, 517 U.S. at 635, notwithstanding recognition by a couple's State of their marriage, Section 3 denies that class of persons—here, legally married gay and lesbian couples—equal protection. Even under the rational-basis review applied in *Romer*, none of the governmental interests proffered in support of Section 3 can justify its sweeping exclusion of

lawfully married gay and lesbian couples from the federal rights and responsibilities of marriage.

BLAG offers four "unique federal interests" that purportedly justify Section 3: (1) it "preserves each sovereign's ability to define marriage for itself" (Br. at 30-33) (capitalization omitted); (2) it fills the need for a "uniform federal definition" of marriage (Br. at 33-37); (3) it permits States to "act as laboratories of democracy" while the federal government reserves judgment on same-sex marriage (Br. at 41-43); and (4) it protects the public fisc (Br. at 37-41). BLAG also contends that Section 3 promotes traditional marriage and child-rearing (Br. at 43-49). Section 3 rationally furthers none of these asserted interests.

BLAG's first three justifications for Section 3 founder in light of the States' long-standing primacy in defining marriage. *First,* Section 3 does not "preserve each sovereign's ability to define marriage for itself." The federal government, as one of those sovereigns, has never defined marriage for itself, and even under Section 3's regime it still does not. As *amici curiae* Family Law Professors explained in detail in the court below, the regulation of marriage has always varied from State to State in numerous ways. *See* Family Law Prof. Br. at 7-9. For instance, the minimum age to marry, the permitted and proscribed degree of consanguinity, and recognition of common-law marriage differ in different States. *See id.* Section 3 does not change this and thus does not enable the federal government to define marriage for itself. Federal law continues, by and large, to treat as married anyone who is validly married

under state law, notwithstanding differences among the States—except that it repudiates, across the board, one particular class of marriages that certain States have chosen to permit.

Second, if the goal were to create a "uniform federal definition" of marriage or to ensure national uniformity in eligibility for federal benefits, Section 3 again fails. BLAG asserts (Br. at 36) that "when state definitions of marriage vary only in the details, it is understandable and commendable for federal law to borrow those definitions," but "when a state is on the verge of making a fundamental change to the definition, that creates a need for Congress to choose between uniformity and borrowing (a need that simply did not exist before)." But if the goal is uniformity, it should not matter what the differences are; a common-law marriage valid in some States but not others does not fit within a uniform definition of marriage or ensure national uniformity in eligibility for federal benefits. The need for Congress to choose between uniformity and borrowing has always existed, and Congress has historically chosen to borrow, and continues to borrow, except in the case of valid same-sex marriages.

Third, the notion that Section 3 permits the States to "act as laboratories of democracy" simply ignores what Section 3 actually says and does. BLAG invokes Justice Brandeis's famous statement that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory" for "novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J.,

dissenting). But far from promoting such efforts by the States, Section 3 hinders them. While Section 3 does not, by its terms, prevent a State from recognizing same-sex marriage or preempt its decision to do so, it nonetheless "burden[s] the choice of [S]tates . . . to regulate the rules and incidents of marriage." *Massachusetts*, 682 F.3d at 12. For example, a State that permits married gay and lesbian couples to combine their income for Medicaid purposes—as married heterosexual couples may do—could have its federal funding rescinded for noncompliance with Section 3. *Id.* at 7.

More fundamentally, Section 3 thwarts the democratic process by preventing States from allowing their gay and lesbian citizens a truly equal share in the benefits and responsibilities of civil marriage. If Congress wanted to encourage the States to choose freely which marriages they would permit, it would have continued to recognize all marriages valid under state law. As it is, Section 3 undermines States' ability to treat their gay and lesbian citizens equally by ensuring that no matter what a State does, married gay and lesbian couples will not enjoy the same rights and responsibilities as married heterosexual couples in that same State.

Likewise, protecting the public fisc is not a sufficient reason for excluding a discrete minority group from benefits otherwise offered to all. *See Romer*, 517 U.S. at 635 (rejecting interest in "conserving resources" as a rational basis for law excluding gays and lesbians from civil-rights protections); *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources

standing alone can hardly justify the classification used in allocating those resources."); *see also* U.S. Br. at 46-47; Windsor Br. at 53-54.

Finally, Section 3 does nothing to promote traditional marriage and child-rearing; it merely penalizes gay and lesbian married couples without affecting heterosexual couples. *See* U.S. Br. at 41-44; Windsor Br. at 39-47. As a purely logical matter, excluding gay and lesbian couples from federal benefits cannot create an incentive for heterosexual couples to marry or raise children responsibly. "This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Massachusetts*, 682 F.3d at 15 (citations omitted).

Ultimately, none of these purported governmental interests can justify Section 3's disparate treatment of legally married persons similarly situated in all respects except for the gender of their spouses. Whatever Congress's reasons may have been in enacting it, Section 3 contravenes the equal protection of the laws.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

OFFICIAL POLICIES AND CONSTITUTIONAL AMENDMENTS OF THE AMERICAN BAR ASSOCIATION

1. Policy adopted by the House of Delegates, August 1973

   Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

2. Policy adopted by the House of Delegates, August 1987

   BE IT RESOLVED, That the ABA condemns crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation, or minority status, and urges vigorous efforts by federal, state, and local officials to prosecute the perpetrators and to focus public attention on this growing national problem.

3. Policy adopted by the House of Delegates, August 1989

   BE IT RESOLVED, That the American Bar Association urges the Federal government, the states and local governments to enact legislation,

subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations. "Sexual orientation" means heterosexuality, bisexuality and homosexuality.

4. Policy adopted by the House of Delegates, August 1991

BE IT RESOLVED, That the American Bar Association supports the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch.

BE IT FURTHER RESOLVED, That the American Bar Association urges that such studies include the development of remedial steps to address and eliminate any bias found to exist.

5. Policy adopted by the House of Delegates, February 1992

BE IT RESOLVED, That the American Bar Association opposes any efforts by government to withhold funds from, or otherwise penalize, educational

institutions for denying access to campus placement facilities to government employers who contravene university policies by discriminating on the basis of sexual orientation.

6. Amendment adopted by the House of Delegates, August 1992

PROPOSAL: Amend the Constitution to provide that the National Lesbian and Gay Law Association (hereinafter "NLGLA") is an affiliated organization.

Amend Section 6.8(a)(1) to read as follows:

(1) The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Conference of Chief Justices, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Women Judges, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Lesbian and Gay Law Association and the National Organization of Bar Counsel.

7. Policy adopted by the House of Delegates, August 1995

> *RESOLVED*, That the American Bar Association supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

8. Policy adopted by the House of Delegates, August 1996

> *RESOLVED*, That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

9. Policy adopted by the House of Delegates, February 1999

> *RESOLVED*, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

10. Policy adopted by the House of Delegates, August 2002

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses.

FURTHER RESOLVED, That eligibility for such funds should be determined without reference to intestate succession laws and should not affect the operation of such laws.

11. Amendment adopted by the House of Delegates, August 2002

Amend §6.4(e) of the Constitution to read as follows:

§6.4(e) A state or local bar association may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, persons with disabilities and/or sexual orientation.

ADOPTED BY THE HOUSE OF DELEGATES
February 9, 2004

RESOLVED, That to preserve the authority of the states and territories to regulate marriage under our federal system, the American Bar Association opposes any federal enactment that would restrict the ability of a state to:

(a) prescribe the qualifications for civil marriage between two persons within its jurisdiction; and

(b) determine when effect should be given to a civil marriage validly contracted between two persons under the laws of another jurisdiction.

RECOMMENDATION (2009)

RESOLVED, That the American Bar Association urges Congress to repeal 1 U.S.C. § 7, which denies federal marital benefits and protections to lawfully married same-sex spouses.

RECOMMENDATION (2010)

RESOLVED, That the American Bar Association urges state, territorial, and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry.

STANDARD 211 FOR APPROVAL OF LAW SCHOOLS. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual

orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.