No. 12-13

IN THE

Supreme Court of the United States

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *Petitioner*,

v.

NANCY GILL, *ET AL.*, *Respondents.*

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

Brief *Amicus Curiae* of
Capitol Hill Prayer Alert Foundation, U.S. Justice Foundation, Citizens United, Citizens United Foundation, Young America's Foundation, Public Advocate of the U.S., Institute on the Constitution, The Lincoln Institute for Research and Education, Gun Owners Foundation, Conservative Legal Defense and Education Fund, Virginia Delegate Bob Marshall, Virginia Senator Dick Black, Abraham Lincoln Foundation for Public Policy Research, Inc., Protect Marriage Maryland PAC, and Declaration Alliance in Support of Petitioner

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

The Capitol Hill Prayer Alert Foundation, U.S. Justice Foundation, Citizens United Foundation, Young America's Foundation, The Lincoln Institute for Research and Education, Gun Owners Foundation,[2] Conservative Legal Defense and Education Fund, and Declaration Alliance are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Citizens United, Public Advocate of the United States, and Abraham Lincoln Foundation for Public Policy Research, Inc., are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). The Institute on the Constitution is an educational organization. Protect Marriage Maryland PAC is a political action committee. Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and the author of the Virginia Marriage Constitutional Amendment. Senator Dick Black is a member of the Virginia State Senate. Most of these *amici* have filed *amicus* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes.

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[1] It is hereby certified that counsel for federal Respondents filed blanket consent with the Court, and that counsel for other respondents, and counsel for petitioner all have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Gun Owners Foundation takes no position on Section I of this brief but joins in Section II's critique of the use of judicially devised standards of review.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be granted, but not limited to the two questions presented by Petitioner, both of which rest upon the assumption that the Fifth Amendment's Due Process Clause imposes an "equal protection" limit on the exercise of Congress's Taxing and Spending Powers. While the petition contains adequate grounds for review by this Court whether the decision of the court below comports with Supreme Court precedents, *amici* urge this Court to add to the questions to be addressed whether section 3 of the Defense of Marriage Act ("DOMA") violates the Fifth Amendment Due Process guarantee as it is written, not as it has been construed by this Court.

Additionally, if not persuaded by their textual argument, *amici* urge this Court to grant the petition to review whether its various balancing tests, including strict scrutiny, intermediate scrutiny, and rational basis, are wholly unsuitable to the task of objective judicial review, as demonstrated by an illustrative review of this Court's decisions and the decision of the court below. Unmoored from the constitutional text, this Court's tests have been, and if not abandoned will continue to be, used inconsistently by unelected judges in the unchecked exercise of raw legislative power.

ARGUMENT

I. THERE IS NO "EQUAL PROTECTION COMPONENT" IN THE FIFTH AMENDMENT DUE PROCESS GUARANTEE.

A. The Question to Be Decided Is whether Section 3 of DOMA Conforms to the Constitution, Not this Court's Precedents.

As the petitioning Bipartisan Legal Advisory Group of the House of Representatives ("House Advisory Group") has demonstrated, the court below "creat[ed] an entirely novel form of equal protection review that deviates from this Court's precedents and the law in virtually every other circuit." *See* House Advisory Group Petition for a Writ of Certiorari at 24. After the court below found that section 3 of DOMA failed its unprecedented equal protection test, it commiserated with the petitioning House members, observing that "[i]nvalidating a federal statute is an **unwelcome responsibility** for federal judges" in light of the fact that "Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect." Massachusetts v. Department of Health and Human Services, 682 F.3d 1, 16 (1st Cir. 2012) (emphasis added). Offering its condolences, the court below assured the petitioners that it had "follow[ed] its best understanding of governing precedent," and that petitioners should be comforted to know that "in large matters the Supreme Court will correct [any] mis-readings (and even if it approves the result will formulate its own explanation)." *Id.* at 16-17.

It would be a mistake, however, for this Court (i) to limit its review solely to whether the court of appeals contravened this Court's "equal protection" precedents, or (ii) if it finds the court of appeals opinion does conform with those precedents, to limit itself to "formulate its own explanation" of those precedents. Rather, in "utmost respect" for Congress' "judgment and good faith," this Court should examine section 3 of DOMA to determine if it conforms to the United States Constitution, not just whether it conforms to its own precedents. After all, Article VI of the Constitution states that "the laws of the United States which shall be made in pursuance" of the Constitution — not in pursuance of this Court's judicial opinions — is "the supreme Law of the Land." Indeed, in establishing the practice of judicial review of the constitutionality of a statute duly enacted by the Congress of the United States, this Court has acknowledged that it is because "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

But the Constitution was not written for Congress alone. As the Marbury Court also stated, "the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature"[3]:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United

[3] *Id*. at 179-180 (italics original).

> States, if that constitution forms no rule for his government? [*Id.* at 180.]

Indeed, if this Court is governed only by its own precedents, or by its "own explanations," then the oath of office is truly a "solemn mockery" (*id.*), the justices having sworn to decide cases according to their own opinions.

B. Before Addressing the Questions Presented by the Parties, the Court Should First Reconsider whether the Fifth Amendment Contains an "Equal Protection Component."

In its petition for a writ of certiorari, the House Advisory Group states, as its first question presented:

> (1) Whether Section 3 of the Defense of Marriage Act violates the **equal protection component** of the Due Process Clause of the Fifth Amendment. [*See id.* (emphasis added).]

In two related certiorari petitions in cases involving the Defense of Marriage Act, the Solicitor General has stated the question to be:

> Whether Section 3 of DOMA violates **the Fifth Amendment's guarantee of equal protection of the laws**.... [*See* Office of Personnel Management Petition for a Writ of Certiorari Before Judgment (No. 12-16) and Department of Health and Human Services Petition for a Writ of Certiorari (No. 12-15)

(emphasis added).]

Both petitions presuppose that the Fifth Amendment Due Process Clause prohibits Congress from enacting any statute that "den[ies] to any person within its jurisdiction the equal protection of the laws." In essence, both petitions are based upon the unstated assumption that the "equal protection component" of the Fifth Amendment is identical to the equal protection guarantee of the Fourteenth Amendment.

To be sure, there is ample support for this claim in this Court's precedents. Indeed, the House Advisory Group petition cites Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995), for the proposition that the Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *See* House Advisory Group Petition at 24, n.7. Thus, the House Advisory Group observes that "this Court has gone to great lengths to underscore that there is only one constitutional standard of equal protection, and it applies equally to federal and state actions." *Id.* at 32.

This position would be unremarkable if supported by the constitutional text. But it is not. Rather, this Court's equal protection doctrine, insofar as it rests upon the Fifth Amendment due process clause, has been developed in flagrant disregard of a well-established rule of construction dating back to at least 1840: "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole

instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. (14 Peters) 579, 570-71 (1840). If the Due Process Clause of the Fifth Amendment contains the same equal protection standard as the Equal Protection Clause of the Fourteenth Amendment, then the latter guarantee was "needlessly added" to an amendment that, like the Fifth Amendment, already contained a provision that no person may be "deprive[d] ... of life, liberty or property without due process of law." In short, this Court's equal protection doctrine renders the Fourteenth Amendment's "equal protection" guarantee "superfluous or unmeaning,"[4] the due process guarantee being sufficient by itself to have imposed the "equal protection" guarantee upon the States. *See, e.g.,* L. Seidman, Constitutional Law: Equal Protection of the Laws, at 32-33 (Foundation Press, NY, NY: 2003).

Additionally, this Court's current equal protection doctrine disrespects the "high talent, the caution, and the foresight of the illustrious men who framed" the Constitution, in which "[e]very word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." *Id.* In the Slaughter House Cases, 83 U.S. (16 Wall.) 36, decided in 1873, just five years after the ratification of the Fourteenth Amendment, this Court treated the due process and equal protection guarantees as distinct and independent limits upon the States, each of which embodied entirely different principles dealing

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[4] *Id*. at 571.

with issues arising from entirely different historical periods. *Id.* at 80-81. The due process guarantee was traced back to the late 18th century, having made its appearance not only in one of the first 10 amendments to the United States Constitution, but "in the constitutions of nearly all the States, as a restraint upon the power of the States." *Id.* at 80. On the other hand, the equal protection guarantee grew out of the nation's post civil war period, and was designed to remedy the evil of the "existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class...." *Id.* at 81.[5]

Until May 17, 1954, the day upon which this Court struck down "racially segregated public schools" in the States under the equal protection guarantee of the Fourteenth Amendment,[6] it was generally assumed that the due process guarantee of the Fifth Amendment did not have an "equal protection component." As this Court observed in Adarand, "[t]hrough the 1940's, this Court had routinely taken

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[5] Even the dissenting justices did not find an "equal protection" component in the due process guarantee. Rather, they relied primarily upon the "privileges and immunities" guarantee as having secured to everyone access to the "ordinary avocations of life" without "discrimination" in favor of state-granted monopolies. *See, e.g., id.* at 96-111 (Field, J., dissenting) and at 111-122 (Bradley, J., dissenting). Secondarily, Justice Bradley contended that state-granted monopolies also violated the due process and equal protection guarantees, but not on the same principle of equality. *See id.* at 122 (Bradley, J., dissenting).

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

the view ... that, 'unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.'" *Id.* at 213. However, in Bolling v. Sharpe, 347 U.S. 497 (1954), this Court shoehorned equal protection into the due process text by shear will, declaring "it would be **unthinkable** that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500 (emphasis added). *See also* Adarand, 515 U.S. at 215-16.

To the contrary, it is eminently "thinkable" that the Reconstruction Congress, led by abolitionist Republicans, would propose an amendment to the Constitution that would increase the powers of the federal government at the expense of the States. Indeed, on February 13 and 26, 1866, Congressman Bingham of Ohio introduced the first version of what would become the Fourteenth Amendment. It read that "'**Congress shall have the power** to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of the citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.'" *See* G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, Constitutional Law, p. 482 (2nd ed., Little, Brown: 1991) (emphasis added). Later, on April 30, 1866, the Joint Committee on Reconstruction substituted a new proposal which read:

> **No state shall** make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws. [*See id.* at 482-83 (emphasis added).]

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

In sum, this Court's Fifth Amendment equal protection doctrine "disregard[s] a deliberate choice of words and their natural meaning," and is, therefore, unquestionably "a departure from the first principle of constitutional interpretation" that "'every word must have its due force and appropriate meaning....'" *See* Wright v. United States, 302 U.S. 583, 588 (1938).

II. THIS COURT'S SEARCH TO APPLY EQUAL PROTECTION PRINCIPLES SHOULD BE GROUNDED IN THE CONSTITUTIONAL TEXT, NOT JUDICIALLY DEVISED STANDARDS OF REVIEW.

A. DOMA Must Be Evaluated against the Text of the Constitution.

Should this Court choose to grant certiorari but not to re-examine its having found an equal protection component in the Due Process Clause of the Fifth Amendment as urged in Section I, *supra*, it would then be required to ascertain the meaning and application of that "component" to the case in some reasoned way. The first problem would be, what interpretative aids to use to determine the meaning of an atextual constitutional provision. As the equal protection component is said to emanate from the Due Process Clause, there is no text to analyze, and neither framers' debates nor ratification conventions from which to draw guidance. Until 1954, even this Court did not recognize an equal protection component in the Due Process Clause.

This Court may assume that the text and scope of the equal protection component is identical to the Equal Protection Clause. That is precisely what this Court did in Adarand Constructors, stating that, at least since 1964, the court "continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable ... on the assumption that fourteenth amendment precedents are controlling." *Id.* 515 U.S. at 32

(emphasis added).

This observation was not entirely accurate when made, as this Court has concluded that in certain areas, the federal government has greater leeway to define classifications than the several states. *See* Mathews v. Diaz, 426 U.S. 67 (1976), a case not referred to in Adarand, unanimously upholding a federal statute denying certain benefits to aliens. ("The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." *Id*., pp 84-85.) In the instant case as well, where Congress' definition of "marriage," invokes the taxing power (*e.g.,* defining who could file joint returns for federal income tax purposes) and the spending power (*e.g.,* deciding who would receive family benefits for work performed by federal employees) (Art. I, Sec. 8, Cl. 1), there are good and sufficient reasons for Congress to have greater authority in drawing distinctions and making classifications that would be unavailable to the states.

However, if the Court were to assume that the equal protection component is invested with the identical text and trappings of the Equal Protection Clause, standard techniques of constitutional construction should be employed. The object of these techniques would be a search for authorial intent, as explained by retired University of Virginia Professor E.D. Hirsch, Jr. in his Validity in Interpretation, YALE UNIV. PRESS (1967). Rejecting the notion that "the meaning of a law is what present judges say the

meaning is" (*id*., p. viii), Hirsch asserts the earlier consensus view that "a text means what its author meant." *Id*., p. 1. Hirsch explains that "if the meaning of a text is not the author's, then no interpretation can possibly correspond to *the* meaning of the text..." and the reader is cut adrift from any objective truth as to its "determinate" meaning. *Id.*, p. 5 (italics original). Hirsch rejects "the idea that textual meaning changes in the course of time" because then "there could be no objective knowledge about texts. Any statement about textual meaning could be valid only for the moment, and even this temporary validity could not be tested, since there would be no permanent norms...." *Id*., pp. 212-13.

Hirsch's interpretive view is fully consistent with the writing of J.G. Sutherland, who 70 years before wrote that "[i]t is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just or expedient...." J.G. Sutherland, Statutes and Statutory Construction, Callaghan and Company (1891), p. 311. Additionally, this view reflects that of Professor Francis Lieber, writing earlier in the 19th century, who defined interpretation as "the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey...." Legal and Political Hermeneutics, p. 11 (1839) (cited in Sutherland, Statutes, p. 311). Of course, a careful search for authorial intent limits the power of a court. It recognizes the sovereignty of the people who participated in ratifying that document, and treats the Constitution with respect and deference as "the great charter by which the sovereign people establish and maintain government, define, distribute

and limit its powers. It is the organic and paramount law." Sutherland, Statutes, p. 1. *See* Marbury, 5 U.S. at 176-77.

Modern day equal protection "case law," however, is produced by something other than a hunt for authorial intent. The law of equal protection is based almost exclusively on the application of judicially manufactured tests. Professor Philip Hamburger views the notion traced to United States v. Carolene Products, 304 U.S. 144 (1938), that "judges can vary their enforcement of constitutional law [by] adopting[ing] different degrees of 'judicial scrutiny' as implying a power of 'judicial discretion,'" something quite different from a hunt for authorial intent. P. Hamburger, Law and Judicial Duty, HARV. UNIV. PRESS, (2008) p. 12. Employing various levels of scrutiny in tests developed over the years, the Court has already proceeded well beyond any type of analysis which could be considered faithful to the text of the Equal Protection Clause. Indeed, this Court has never tied the language of its various tests to a constitutional definition of legal equality, the core principle of the clause.

B. A Review of this Court's Cases Demonstrates No Textual Basis and Few Consistent Principles.

A brief survey of this Court's application of its self-defined "standards of review" is necessary to more fully understand the decision below. In United States v. Carolene Products, 304 U.S. 144 (1938), this Court indicated via footnote that there might be some

legislation that it would subject to "more exacting judicial scrutiny," or "more searching judicial inquiry," rather than merely the "existence of a rational basis...." *Id*. at 153 n.4. In Skinner v. Oklahoma, 316 U.S. 535 (1942), that concept had morphed for the first time into the term "strict scrutiny," and was used there to invalidate a state law requiring forced sterilization of certain repeat offenders, since purported "fundamental rights" were at issue.

A similar test was then applied in Korematsu v. United States, 323 U.S. 214, 215 (1944), with the effect of upholding the exclusion of American citizens from certain sensitive areas of the country for no reason other than their race and national origin. But claiming to subject the exclusion orders to "the most rigid scrutiny," the Court determined only that "[w]e **cannot say** that [the government] **did not** have **ground** for believing" that "exclusion of those of Japanese origin was **deemed necessary**...."[7] In applying this rational-basis-esque form of strict scrutiny, the Court claimed it was "not unmindful of the hardships imposed," but then brushed them off, stating that "hardships are part of war."[8]

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[7] Korematsu remains as one of the few instances where the government has actually met this "fatal in fact" standard. *See* Gerald Gunther, "The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 HARV. L. REV. 1, 8 (1972).

[8] Korematsu appears to have marked the development of the "suspect class" doctrine, the Court stating that laws which "curtail the rights of a single racial group are immediately suspect." *Id.*, 323 U.S. at 215.

Then, in 1957 and 1959, this Court reached opposite results in two cases with nearly identical facts, even though purporting to employ the same "standard of review." In Sweezy v. New Hampshire, 354 U.S. 234 (1957), a professor had been found in contempt for failing to answer questions from the New Hampshire Attorney General about the content of his lectures, pursuant to an investigation about subversive activities. Four Justices, reversing the finding of contempt, expressed reluctance towards employing any "standard of review," stating that they could "not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." *Id*. at 251. Writing in concurrence, Justices Frankfurter and Harlan agreed with the result, but believed that the government could violate a person's fundamental rights if "the subordinating interest of the State [was] compelling." *Id.* at 265.

Then, just two years later in Uphaus v. Wyman, 360 U.S. 72 (1959), Justices Frankfurter and Harlan were not as eager to protect associational privacy as they had been to protect academic privacy. Even though the case involved the same New Hampshire Attorney General, and the same investigation into subversive activities, Justices Frankfurter and Harlan changed sides, forming a new majority with the Sweezy minority, this one based on balancing tests, and finding in favor of the government. The Court decided that the "academic and political freedoms discussed in *Sweezy* ... are not present here in the same degree," and thus that "the interest of self-preservation, 'the ultimate value of any society,'" clearly was compelling enough to outweigh the

individuals' interest in merely "keep[ing] private ... the association [previously] made public." *Id.* at 80-81 (italics original).

Although the Court has been quick to criticize state legislatures for failing to clearly articulate justifications for statutory distinctions, this Court is often guilty of the same offense in its opinions. From Sweezy to Uphaus, the personal preferences of one or two justices appeared to have dictated entirely different results, employing a decision-making process divorced from the constitutional text. It is far more dangerous to permit the federal judiciary to exercise legislative, "public policy" power, judges rarely being held accountable to anyone, and not needing to assemble majorities of 218 or 51, but rather of five in this Court, and of two or even just one in the lower federal courts.

In 1976, not satisfied with the options of rational basis and strict scrutiny, the Court, "without citation to any source,"[9] created yet another standard of review dubbed "intermediate scrutiny," which it admitted had not existed before. Craig v. Boren, 429 U.S. 190, 210, 217 (1976) (Powell, J., concurring) ("There are valid reasons for dissatisfaction with the 'two-tier' approach ... our decision today will be viewed by some as a 'middle tier' approach."). This new level of scrutiny was applied to "quasi-suspect classes" such as gender.[10]

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[9] Craig v. Boren, 429 U.S. 190, 217 (Rhenquist, J., dissenting).

[10] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-724, 731 (1982) ("exceedingly persuasive justification").

Then in Plyler v. Doe, 457 U.S. 202 (1982), the Court extended the protection of intermediate scrutiny to the children of illegal aliens. The Court was unable to say that illegal alien minors constituted a suspect class or even a quasi-suspect class, nor could the Court find that education was a fundamental right. *Id.* at 219-223. Nevertheless, the Court applied intermediate scrutiny to strike down the law prohibiting children of illegal aliens from receiving public school education. Without so saying, the Court overturned the state law seemingly for no other reason than because it seemed cruel to the sensibilities of the individual justices.[11] By its decision in Plyler, the Court announced that it refused to be bound even by its own rules. Rather, the Court was viewed as saying and doing whatever it wanted, whenever it wanted, to justify the decision that it wanted. In sum, Supreme Court Equal Protection doctrine no longer limits the Court "to say[ing] what the law is,"[12] but rather enables the Court to make law. It is not entirely surprising that the lower court came to its conclusions based on "a prediction of what this Court would do were DOMA before it." Pet., p. 16.

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[11] The Court stated that "the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'" *Id*. at 220. Thus, "legislation directing the onus of a parent's misconduct against his children does not comport with **fundamental conceptions of justice**." *Id*. (emphasis added).

[12] Marbury v. Madison, 5 U.S. at 177 (1803).

C. Petitioner Correctly Faults the Court of Appeals' Balancing Test, but Ignores the Larger Issue of this Court's Evolving Standards of Review.

Petitioner faults the balancing test used by the court below. Petitioner criticizes that court for having "invented a new standard of equal protection review that it described as involving 'intensified scrutiny' and 'closer than usual review.'" Pet., p. 14. Petitioner claims that this form of scrutiny is "outcome determinative" (Pet., p. 15), that is, the test chosen almost always determines the outcome of the case. These *amici* agree. Indeed, taking full advantage of the fluidity provided by this Court's three-tiered tests (Pet., pp. 22-23), the court below added its own interpretative guidelines to reach its preferred conclusion.[13] Significantly, none of these guidelines is derived from any constitutional text, but rather are fact-specific, having the effect, if not the design, of maximizing the court's discretion.

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[13] *See*, *e.g.*,

"These three decisions did not adopt some new category of suspect classifications or employ rational basis review in its minimalist form; instead, the Court rested on the **case-specific** nature of the discrepant treatment...." [Massachusetts v. HHS at 10 (emphasis added).]

"[E]qual protection assessments are sensitive to the **circumstances** of the case and not dependent entirely on abstract categorizations." [*Id.* at 10-11 (emphasis added).]

"[C]ategories are often approximations and are themselves constructed by **weighing** of underlying elements." *Id.* at 11 (emphasis added).]

Petitioner claims that this "entirely novel form of scrutiny ... cannot be reconciled with the approach of this Court." Pet., p. 16. While the specific tests are novel, the lower court's decision embodies the same basic approach of this Court: fashioning new tests without specific reference to the text of the Constitution.

Petitioner argues that the standards of scrutiny are "well-established three tiers of equal protection review." Pet., p. 30. But over decades of cases, the standards of review have become more of a "sliding scale of review." In some cases the Court does not specify which standard of review it is using. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003). At other times the Court's terminology is imprecise, making it unclear which standard is being used. For example, it is impossible to know whether "heightened scrutiny" or "exacting scrutiny" are the same as "intermediate scrutiny," or if they fall somewhere else in between rational basis and strict scrutiny.

Further, at times the Court claims to be using one standard, but is clearly using some alternative test. For example, "[f]our times during the 1985 term the Supreme Court ... invalidate[d] state and local regulations, despite the absence of a suspect classification or fundamental right requiring heightened or strict scrutiny ... [u]nder the guise of rational basis."[14] G.L. Pettinga, "Rational Basis With

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[14] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); and

Bite: Intermediate Scrutiny by Any Other Name," 62 IND. L.J. 779 (1987). Some have characterized these decisions as nothing more than "an effort to 'reach perceived injustices that otherwise lie beyond constitutional reach,'" such as what the Court did in Plyler v. Doe, *supra*. *Id*. at 780.

When the Court changes its own rules *ad hoc*, and applies them retroactively, it "creates an endless opportunity for the Court to closely scrutinize legislation whenever it sees fit" and "[t]his unbridled freedom fosters confusion in lower courts as to what ... test to apply in any given case." *Id*. at 802.

Not only are the standards of review themselves outcome-determinative, but also the terminology a court chooses to characterize the government's interests seems to reflect the judges' individual sensibilities and foreshadow the decision reached. For example, if a state's interest in passing certain legislation is made to sound petty and intolerant, such as an interest in "irrational prejudice,"[15] or "a bare congressional desire to harm a politically unpopular group,"[16] such interest will never be deemed "compelling." However, if the state's interest is made to sound lofty, such as "the interest of

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Williams v. Vermont, 472 U.S. 14 (1985).

[15] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

[16] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)

self-preservation, 'the ultimate value of any society,'"[17] then there can be no action the state cannot justify.

The decision of the court below fits this general pattern. Instead of treating together all of the governmental interests that Congress declared to be advanced by section 3, the court below treated them in isolation, one at a time, subjecting each to the most careful scrutiny.[18] From this review, the court below concluded that "without resort to suspect classifications ... the rationales offered do not provide **adequate support** for section 3 of DOMA," without providing any reference point by which to determine what would be constitutionally adequate. Pet., p. 38

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[17] Uphaus v. Wyman, 360 U.S. 72, 80 (1959)

[18] *See*, *e.g.*,

"[I]t is said that DOMA will save money for the federal government.... This may well be true.... But, where the distinction is drawn against a historically disadvantaged group and **has no other basis**, this is a reason for undermining rather than bolstering the distinction." [Massachusetts v. HHS at 14 (emphasis added).]

"DOMA does not increase benefits to opposite sex couples ... or explain how denying benefits to same-sex couples will reinforce heterosexual marriage.... This is not merely a matter of **poor fit of remedy** to a perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples at its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." [*Id*. at 14-15 (emphasis added).]

"For generations, moral disapproval has been taken as an adequate basis for legislation.... But speaking directly of same-sex preferences, Lawrence ruled that **moral disapproval alone** cannot justify legislation discriminating on this basis." [*Id*. at 15 (emphasis added).]

(emphasis added).

D. The Time Has Come for this Court to Abandon Its "Standards of Review" and Return to the Constitutional Text.

After more than 60 years of observing this Court's "standards of review," criticism of these tests has increased, including some from members of this very Court. Dissenting in United States v. Virginia, 518 U.S. 515 (1996), Justice Scalia discussed the Court's "current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: 'rational basis' scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." *Id*. at 567.[19] Even more recently, at oral argument in District of Columbia v. Heller, 554 U.S. 570 (2008), Chief Justice Roberts noted that, of the various tests being proposed for evaluating the constitutionality of firearms laws under the Second Amendment, "none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right.... [T]hese

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[19] Justice Scalia went on to say that "I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny," but that such tests must be designed to "*preserve* our society's values" rather than "inscrib[e] one after another of the current preferences of society ... into our Basic Law." *Id*. at 567-68 (italics original).

standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard...." Heller Oral Argument, p. 44, ll. 5-23. These *amici* agree — it is time to re-examine the issue, discard the baggage, and start afresh.

CONCLUSION

While the Court is understandably reluctant to re-examine long-standing doctrine and decisions, stare decisis has less application to constitutional cases. Justice Stanley Reed summarized some of those reasons:

> In the constitutional field the rule should be most liberally applied, because the court must test its conclusions by the organic document, rather than precedent; because constitutional doubts must be personal and present doubts, not those of others; because legislation is often powerless to overcome questionable constitutional decisions; and finally because of the extreme difficulty in rectifying judicial error by amendment.[20]

The understandable desire to achieve "consistency"

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[20] S. Reed, Stare Decisis and Constitutional Law, PA. BAR ASSOC. Q., Apr. 1938 at 134 quoted in J. Noland, "Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years," 4 VALPARAISO UNIV. L. REV. 1, 108 (Fall 1969).

in decisions requires identification of the reference point for such consistency. Consistency with prior decisions runs the risk of being no more than what Ralph Waldo Emerson famously termed "a foolish consistency." However, consistency with the Constitutional text cannot be faulted. The late Dr. J. Vernon McGee described consistency with Scripture requires us:

> to contradict ourselves today, when we find what we said yesterday was wrong, if we discover today that it is wrong. We'll contradict ourselves. What is it to be consistent then? Consistent means simply this: to be mastered by, and guided by great principles. [Dr. J. Vernon McGee, "The Church Will Lead Us in Prayer."[21]]

It is impossible to imagine prioritizing consistency with one's prior statements over consistency with revealed truth. So should it be with the Constitution. Much as the Church views Scripture, the Court should view the Constitution as the Great Principle by which it is guided. These *amici* invite the Court to use this case as a vehicle to re-examine its decisions establishing and applying an equal protection component of the Fifth Amendment, and abandon judicially devised standards of review in favor of a faithful interpretation and application of the constitutional text.

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[21] http://www.oneplace.com/ministries/thru-the-bible-sunday-sermon/listen/the-church-will-lead-us-in-prayer-287662.html (at 33:37 – 34:48).

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