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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Section 3 of the Defense of Marriage Act provides that for purposes of federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. §7.

The court of appeals held that Section 3 violates equal protection. It recognized that Section 3 is not subject to either "heightened" or "intermediate" scrutiny and that Section 3 passes "conventional" rational basis review. But it struck down Section 3 nonetheless based on a new form of review (which it viewed as outcome determinative) said to entail "intensified scrutiny," "closer than usual review," and "diminish[ed]" deference to Congress. The court based its new standard of review on a fusion of "equal protection and federalism concerns."

The questions presented are:

1. Whether Section 3 of the Defense of Marriage Act violates the equal protection component of the Due Process Clause of the Fifth Amendment; and
2. Whether the court below erred by inventing and applying to Section 3 of the Defense of Marriage Act a previously unknown standard of equal protection review.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri.

[1] *Amicus* files this brief with consent by all parties, with more than 10 days' prior written notice; the federal respondents lodged a blanket letter of consent with the Clerk, and *amicus* has lodged the other parties' written letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

Since its founding, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. Eagle Forum participated as *amicus curiae* in the First Circuit in this litigation, as well as in other related appellate proceedings on same-sex marriage. Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement against the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that the plaintiffs here attempt to import into the Fourteenth Amendment. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court. Eagle Forum files this *amicus* brief with the consent of all parties.

STATEMENT OF THE CASE

The petition asks this Court to decide whether the federal Constitution requires state and federal governments to treat same-sex relationships the same as traditional husband-wife marriage. The Court's answer will resolve several important questions beyond the fate of §3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, that the Commonwealth of Massachusetts and several of its residents (collectively, "Plaintiffs") have challenged here. This Court's decision also will determine the fate of §2 of DOMA, 28 U.S.C. §1738C, which implements congressional authority under the Full-Faith-and-Credit Clause to address the full faith and credit that the states owe to same-sex marriages from other states. U.S. CONST. art. IV, §1 ("Congress may by general laws prescribe the manner in which

[State acts] shall be proved, and the effect thereof"). Finally, this Court's decision will determine the fate of state laws in more than forty states that recognize and privilege sex-based relationships, such as those between husband and wife, mother and child, or father and child.

In 1996, Congress saw this juncture approaching, initially from a state-law challenge in Hawaii. Congress premised DOMA on four governmental interests: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources. H.R.Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. With regard to the first interest, Congress tied the interest in husband-wife marriage to procreation and childrearing:

> At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a *deep and abiding interest in encouraging responsible procreation and child-rearing.* Simply put, government has an interest in marriage because it has an interest in children.

Id. at 13, *reprinted at* 1996 U.S.C.C.A.N. at 2917 (emphasis added). With respect to the third interest (*i.e.,* state sovereignty and democratic self-governance), Congress sought both to avert judges' "re-defin[ing] the scope of federal legislation, as well as legislation throughout the other forty-nine states" by declaring a state-law right to marry and "to take

steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage." *Id.* at 17-18, *reprinted at* 1996 U.S.C.C.A.N. at 2921-22. Congress enacted DOMA with broad bipartisan support in the House and the Senate, and President Clinton signed it. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

Forty years ago, *Baker v. Nelson,* 409 U.S. 810 (1972), presented this Court with essentially the same question presented here – namely, whether the federal Constitution provides a right to same-sex marriage – which the Court answered in the negative by dismissing "for want of a substantial federal question" a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from the Minnesota Supreme Court's decision in *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971). In the intervening years, similar claims were routinely dismissed by federal courts on the authority of *Baker*.[2]

Thirty years ago, this Nation finally rejected the ERA, which would have added language to the Constitution that *might* have provided a basis for the claims here. Moreover, the American people rejected the ERA in large part because of a well-founded fear

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[2] *See, e.g., Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870-71 (8th Cir. 2006); *Wilson v. Ake,* 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005); *Adams v. Howerton,* 486 F.Supp. 1119, 1122 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982).

that ERA would lead to the very result demanded by Plaintiffs here. *Amicus* Eagle Forum respectfully submits that the fate of the ERA – the only constitutional text that *might* have supported the plaintiffs' claim – is instructive here.

There matters stood until two federal district courts upheld claims similar to those rejected in *Baker,* giving remarkably short shrift to this Court's definitive ruling.[3] This year, the respective Courts of Appeals upheld both decisions, laboring mightily to decide them on other grounds in order to evade their obvious conflict with *Baker*.[4] Perhaps sensing a shift in political – if not legal – momentum, four other federal district courts recently upheld similar claims, and others have been docketed.[5]

Against this backdrop, *amicus* Eagle Forum respectfully asks this Court to heed the American People's rejection of the ERA and to reaffirm the rule of law that was necessarily decided in *Baker,* a rule

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[3] *Perry v. Schwarzenegger,* 702 F.Supp.2d 1132 (N.D. Cal. 2010); *Gill v. OPM,* 699 F.Supp.2d 374 (D. Mass. 2010).

[4] *Perry v. Brown,* 671 F.3d 1052, 1082 (9th Cir. 2012); *Massachusetts v. U.S. Dept. of Health & Human Serv.,* 682 F.3d 1, 8 (2012).

[5] *Windsor v. U.S.,* 833 F.Supp.2d 394, 399 (S.D.N.Y. 2012); *Dragovich v. U.S. Dept. of Treasury,* 2012 WL 1909603, *6 (N.D. Cal. 2012); *Golinski v. U.S. Office of Personnel Management,* 824 F.Supp.2d 968, 983 (N.D. Cal. 2012); *Pedersen v. Office of Personnel Management,* No. 3:10-cv-01750-VLB (D. Conn. July 31, 2012).

that requires reversal of the First Circuit's decision below and dismissal of similar claims pending in other lower courts.

STATEMENT OF FACTS

The facts related to the parties' circumstances are not in dispute. Under the laws of Massachusetts, the individual plaintiffs have entered into same-sex marriages. If federal law recognized those marriages, the individual plaintiffs would receive benefits that federal law makes available to married couples.

SUMMARY OF ARGUMENT

As signaled above, the record overwhelmingly demonstrates that Congress's *main* purpose in enacting §3 was the *same* as its purpose in enacting §2 – namely to protect each state's marriage laws by isolating any redefinition of marriage to only the particular state or states that voluntarily chose it, thereby preventing one state's redefinition of marriage from being exported to other states against their will. As such, this case involves not just DOMA §3, but also DOMA §2; not just federal law, but also state law; not just specific benefits programs for a few federal employees in a few states, but all of the legal incidents, rights, privileges, duties, obligations, and immunities of all married people in every state.

The following three sections elaborate on three significant reasons for the Court to grant the petition for a writ of *certiorari:*

I. The First Circuit's decision is inconsistent with the rulings of this Court on the application of the rational-basis test and its reasoning would require overturning the laws of more than forty states adopting the husband-wife definition of

marriage. Even if these state laws did not fall directly under the First Circuit's constitutional analysis, they would fall as a practical matter in a post-DOMA regime from federally recognized same-sex marriages' spreading through the Nation.

II. The First Circuit's decision is inconsistent with *Baker,* which the First Circuit had the obligation to follow because only this Court has the power to overturn this Court's precedents. *Agostini v. Felton,* 521 U.S. 203, 237 (1997). By their own terms, nothing in either *Romer v. Evans,* 517 U.S. 620 (1996), or *Lawrence v. Texas,* 539 U.S. 558 (2003), altered *Baker* with respect to same-sex marriages.

III. The history of the Nation's consideration, debate, and rejection of the Equal Rights Amendment in the 1970s and 1980s makes clear that the ratification of the Fifth and Fourteenth Amendments did not and do not include a federal right to same-sex marriage.

Amicus Eagle Forum respectfully submits that each of the foregoing reasons independently justifies a grant of the petition by this Court.

I. THE FATE OF DOMA AND THE FATE OF CIVIL MARRIAGE IN ALL FIFTY STATES ARE JOINED IN THIS LITIGATION

This litigation presents the exceedingly important issues not only of overturning an Act of Congress, but also of overturning the laws of more than forty states that have adopted husband-wife definitions of marriage. First, as a legal matter, any rule of federal constitutional law that compels

overturning DOMA §3's federal marriage definition necessarily also compels overturning DOMA §2 and any husband-wife definitions of marriage under state law. Second, even if that result did not flow as a matter of constitutional law, the mere *fact* of federal recognition of same-sex marriage would quickly make it impossible for any state to enforce its own marriage laws.

A. The Legal Reasoning Advanced by Plaintiffs against DOMA §3 Applies Equally to DOMA §2 and the Marriage Laws of Forty-Four States

If accepted by this Court with respect to DOMA §3 and federal recognition of same-sex marriages, the reasoning pressed by the Plaintiffs and relied on by the First Circuit also will undermine DOMA §2 and any state laws that limit marriage to husband-wife marriage. This case is *not,* therefore, limited to federal recognition of valid state-law marriages.

A successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988). It is enough, for example, that Congress "rationally may have been considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992). Because "a legislative choice" like DOMA "is not subject to courtroom fact-finding and may be based on rational speculation

unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993), Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Unfortunately for Plaintiffs, the data simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce.

The fact that other potential legal arrangements exist under Massachusetts law does not undermine the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004). Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face an *impossible* burden. We are at least a generation away from the longitudinal studies that could

purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Plaintiffs *never* will be able to negative the value of traditional husband-wife families for childrearing, Plaintiffs cannot prevail when the data *required by their theory of the case* do not yet exist.

By contrast, if this Court were to hold that DOMA §3 has no rational basis, that same holding would apply to every other husband-wife definition of marriage because those definitions all rely on the same core principle that legislatures may rationally view husband-wife marriage to support responsible procreation and childrearing. *See, e.g., Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011) (rational basis lacking for Arizona's denying state benefits to same-sex unmarried couples); *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012) (rational basis lacking for California's husband-wife definition of marriage). The fate of husband-wife marriage definitions in not only DOMA §3 but also the laws of more than forty states hinge on recognizing that legislatures – here, the federal Congress – rationally may encourage husband-wife marriage.[6]

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[6] The Fifth Amendment Due Process Clause's equal-protection component is equivalent to the Fourteenth Amendment's Equal Protection Clause. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). As such, any decision under the Fifth Amendment applies equally to the states under the Fourteenth Amendment.

The First Circuit appropriately recognized that strict scrutiny does not apply to same-sex marriage. Although *husband-wife marriage* unquestionably is a fundamental right under the federal Constitution, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has never recognized the unrestricted right to marry *anyone.*

Instead, the fundamental right recognized by the Supreme Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race. Indeed, as discussed in Section II, *infra,* this Court already has held that same-sex couples have no right to marry, much less a fundamental right do so. *Baker,* 409 U.S. at 810. Moreover, since the *Loving* decision was extant in 1972 when this Court decided *Baker, Loving* obviously does not relate to this litigation. Nothing has changed materially since 1972.

After recognizing that the rational-basis test applies here, the First Circuit then went on to adopt a heightened form of rational-basis review under the perceived authority of *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528 (1973), and *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985). To the extent that these cases establish a heightened rational-basis form of review, that review has no application here.

Both *Moreno* and *Cleburne Living Center* involved as-applied challenges by plaintiffs who were "collateral damage" to laws that could validly apply to their intended targets.

In *Moreno,* the Court reviewed amended criteria for food-stamp eligibility that excluded households of unrelated people – something Congress enacted to avoid supporting "hippie communes" – but which the Court found to deny equal protection to the poor. 413 U.S. at 537-38. The *Moreno* holding says nothing against denying benefits to the law's actual targets: namely, educated young adults, with access to family money, who had simply "tuned out" for a lark, and – even worse – who could remain eligible for food stamps by altering their living arrangements. *Id.*

In *Cleburne Living Center,* the Court recognized four then-current, IQ-based classifications of mental retardation and upheld an as-applied challenge to a zoning ordinance by a group home consisting of residents in only the upper two classifications, who had none of the potential dangers associated with patients in the lower classifications. 473 U.S. at 442 n.9, 449. Again, the *Cleburne Living Center* holding says nothing against requiring zoning approval for the ordinance's appropriate targets: namely, institutions that would serve special-needs patients.

To the extent that *Moreno* and *Cleburne Living Center* establish a heightened level of review, that review is available only to those collaterally impacted by a valid form of government regulation, not to those who represent the precise distinction that the regulation appropriately sought to advance. Here, the challenge is not based on collateral impact,

but on the constitutionally valid objective of DOMA itself.

B. Forcing Massachusetts' Same-Sex Marriages on the Federal Government Will Force Same-Sex Marriage on All States Nationwide

Although Plaintiffs and their allies often seek to minimize the issues at stake in Plaintiffs' challenge to DOMA §3, the impact of the First Circuit's decision – and of any decision by this Court to affirm that decision – simply is not limited to a relatively few federal beneficiaries from Massachusetts and a few other states. Similarly, although Plaintiffs and their allies often rely on principals of federalism to argue that the Federal Government should recognize state-law same-sex marriages, nothing in the Constitution requires the Federal Government to accept such state-law arrangements as federal law.

Even without the direct force of law, federal employees with federally recognized, same-sex marriages from states like Massachusetts will spread across the Nation when they are re-posted, transferred, or simply move. They will take with them not only their federal recognition, but also various property rights such as pensions. When they move to states that do not recognize same-sex marriages, they will raise countless substantive and procedural legal issues, as well as the sheer weight of practical problems that the differing legal regimes will present. For example, in *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), *abrogated by* U.S. CONST. amend XIII, XIV, the Supreme Court held that a property right, created only by Missouri law,

was nevertheless entitled to federal constitutional recognition and protection in every state.[7] As a result, no state or territory could enforce its own laws prohibiting slavery. That same principle, together with the principles of the Fourteenth Amendment now applicable to the states, would ensure that overturning DOMA §3 would quickly spread same-sex marriage to all fifty states.

DOMA's opponents cite principles of federalism to argue that the Federal Government has no role to assert in family law, but the Federal Government is not trying to set family law in the states that have adopted same-sex marriage. To the contrary, DOMA's opponents are trying to compel the Federal Government to comply with *state* law.

Congress heretofore has *generally* relied on state-law definitions of marriage for federal-law purposes. "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 727-28 (1979). Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691-92 (2006) (internal quotation omitted). This Court should place no value on the relative inaction of prior Congresses now that

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[7] As this Court recognized in *Washington v. Glucksberg,* 521 U.S. 702, 758-59 (1997), *Dred Scott* invalidated the Missouri Compromise based on a Fifth Amendment argument on property rights.

Congress has reached its "different accommodation" in DOMA.[8]

While it is true that – before DOMA – the Federal Government *generally* looked to state law to determine the validity of a marriage, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 988-89 (9th Cir. 1987) (interior quotations omitted). Moreover, because equitable estoppel principles do not apply to the Federal Government, *Office of Personnel Management v. Richmond,* 496 U.S. 414, 420-24 (1990), Plaintiffs certainly cannot estop the Federal Government to continue its prior degree of relative inaction vis-à-vis

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[8] It would be wrong to suggest that the Federal Government *always* has deferred to state or territorial family law. The First Congress adopted and President Washington signed the Northwest Ordinance, 1 Stat. 51 (1789), which adopted English common law (including a husband-wife definition of marriage) for the Northwest Territories. Under President Lincoln, the Federal Government criminalized bigamy, which this Court upheld in *Reynolds v. U.S.,* 98 U.S. 145 (1879). More recently, numerous federal benefit programs such as Social Security and the Employee Retirement Income Security Act retain rights in divorced spouses after state law has terminated the marriage and *preempt* inconsistent state rules in the interest of national uniformity. *See, e.g., Egelhoff v. Egelhoff,* 532 U.S. 141, 147-48 (2001).

a federal definition of marriage. Now that Congress has acted with a federal law for a federal program, this Court cannot credibly order the *Federal* Government to follow *state* law.

II. *BAKER* REMAINS BINDING PRECEDENT, AND THIS COURT SHOULD SUMMARILY REVERSE ON THAT BASIS

In *Baker,* this Court considered and rejected the concept that the federal Constitution included a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights, duties, and benefits that Minnesota conveyed to husband-wife marriages, and this Court dismissed the case for want of a substantial federal question. *Baker,* 409 U.S. at 810.

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, this Court – and any lower courts confronted with a same-sex marriage claim – must review the jurisdictional statement filed in the Supreme Court and any other relevant aid to construction in order to ascertain what issues *Baker* "presented and necessarily decided." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("lower courts are bound by summary decision by this Court 'until such time as the Court informs [them] that [they] are not'") (*quoting Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)). The *Baker* jurisdictional statement plainly presented, and *Baker* thus plainly decided, the question whether denying same-sex marriage violates the Constitution's equal-protection guarantees that

Plaintiffs here assert, as well as the due-process and privacy claims that the *Baker* plaintiffs asserted.

To support their claim, the *Baker* plaintiffs appealed to the same constitutional principles – namely, equal protection, due process, and also privacy – that Plaintiffs here assert. *Baker* therefore necessarily decided that there is no basis under federal equal protection or due process analysis to support any claim that a same-sex relationship deserves the same recognition, rights or benefits as husband-wife marriage. Moreover, as indicated in Section I.A, supra, these broad constitutional principles are the same in *Baker* (application for a state marriage license) as here (recognition of state-law marriages).

Given that *Baker* is controlling and on point for same-sex marriage issues, the lower federal courts have an obligation to follow that authority:

> "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989), alteration in *Agostini*).

Although no Supreme Court decision undermines *Baker* sufficiently for the lower courts to reject its holding, Plaintiffs claim that *Lawrence* and *Romer* render *Baker* non-controlling. *Lawrence* expressly disavows that result:

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini.* Moreover, there is an obvious difference between criminalizing consensual and private adult behavior and requiring public and societal recognition, including monetary benefits from the federal fisc. Similarly, the *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. Guaranteeing political rights to everyone under *Romer* in no way even correlates with how the Constitution lacks a constitutional right to same-sex marriage as established by *Baker.* As such, *Baker* remains good law that this Court can and should summarily affirm.

III. THE HISTORY OF THE EQUAL RIGHTS AMENDMENT DEMONSTRATES THAT THE PEOPLE REJECTED THE RELIEF THAT PLAINTIFFS SEEK

Amicus Eagle Forum respectfully submits that the history of the ERA also is relevant to the meaning of the Equal Protection provisions in the Fifth and Fourteenth Amendments. That history further counsels against recognizing a federal right to same-sex marriage.

By way of background, it is significant that eight of the thirteen states that originally ratified the Fifth Amendment[9] – and all but three of the thirty-seven states that subsequently joined the Union[10] – have defined marriage as a union between husband and

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[9] GA. CONST. art. I, §IV, ¶I; S.C. CONST. art. XVII, §15; VA. CONST. art. I, §15-A; DEL. CODE ANN. tit. 13, §101; N.C. CONST. art. XIV, §6; PA. CONS. STAT. §1704; R.I. GEN. LAWS §§15-1-1 to -5; *Chambers v. Ormiston,* 935 A.2d 956, 962 (R.I. 2007); *cf. Quarto v. Adams,* 395 N.J. Super. 502, 511, 929 A.2d 1111, 1116 (N.J. Super.A.D. 2007). Maryland voters will consider same-sex marriage in November 2012.

[10] *See* ALA. CONST. art. I, §36.03; ALASKA CONST. art. 1, §25; ARIZ. CONST. art. XXX, §1; ARK. CONST. amend. 83, §§1-3; CAL. CONST. art. I, §7.5; COLO. CONST. art. II, §31; FLA. CONST. art. I §27; IDAHO CONST. art. III, §28; KAN. CONST. art. XV, §16; KY. CONST. §233a; LA. CONST. art. XII, §15; MICH. CONST. art. I, §25; MISS. CONST. art. XIV, §263a; MO. CONST. art. I, §33; MONT. CONST. art. XIII, §7; NEB. CONST. art. I, §29; NEV. CONST. art. I, §21; N.D. CONST. art. XI, §28; OHIO CONST. art. XV, §11; OKLA. CONST. art. II, §35; OR. CONST. art. XV, §5a; S.D. CONST. art. XXI, §9; TENN. CONST. art. XI, §18; TEX. CONST. art. I, §32; UTAH CONST. art. I, §29; WIS. CONST. art. XIII, §13; HAW. REV. STAT. §572-1, -3; 750 ILL. COMP. STAT. 5/212; IND. CODE §31-11-1-1; 19-A ME. REV. STAT. §701.5; MINN. STAT. §517.01; W. VA. CODE §48-2-603; WYO. STAT. ANN. §20-1-101; N.M. Stat. §§40-1-1 to -7. Washington State voters will consider same-sex marriage in November 2012.

wife. While "not conclusive in a decision as to whether that practice accords with due process," the "fact that a practice is followed by a large number of states is … plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971). In ratifying thirty constitutional marriage amendments, States acted with the same solemnity with which they ratified the Fifth and Fourteenth Amendments. Whatever the founding colonies had in mind *in 1787,* the idea of same-sex marriage that this Court easily rejected in 1972 is not "deeply rooted" *today*.

When this Court decided *Baker,* the Nation had recently begun a ten-year political drama to consider, debate, and ultimately reject a proposal to amend the Constitution to guarantee "equality of rights ... on account of sex" under the ERA. Among the ERA's many debatable ramifications was the issue of whether its ratification would have created a federal constitutional right to same-sex marriage, thereby abrogating *Baker*. The founder of *amicus* Eagle Forum was deeply involved in that consideration, debate, and rejection, and Eagle Forum respectfully submits that the will and wisdom expressed by the People are relevant here.

Scholarly opinion and the legislative history both were divided on the ERA's impact on same-sex marriage. One camp assumed that the definition of marriage would remain unchanged because laws defining marriage as an opposite-sex union applied

equally to both sexes.[11] 118 Cong. Rec. 4389 (daily ed. March 21, 1972) (Sen. Bayh). This camp included Yale Law School professor Thomas I. Emerson, co-author of an influential law review article on the proposed ERA. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871 (1971). As the article purported to cover all the amendment's possible consequences – including its effect on marriage – without mentioning the possibility of homosexual marriage, ERA proponents deemed the omission significant and used it to argue against any suggestion that the ERA would allow same-sex marriage.[12]

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[11] *Loving* properly rejected Virginia's claim that its miscegenation statute neutrally treated whites and blacks equally. *Loving,* 388 U.S. at 8-9. There, the statute *did not* apply equally to whites and non-whites, had a race-based purpose, and was "designed to maintain White Supremacy." *Loving,* 388 U.S. at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence,* 539 U.S. at 600 (Scalia, J., dissenting).

[12] Professor Emerson successfully argued *Griswold v. Connecticut,* 381 U.S. 479 (1965). Speaking in Birmingham, Alabama in 1976, "Emerson said fears by anti-ERA supporters concerning women being drafted into combat, legalized homosexual marriages and rearrangement of family structures are 'fears not based on fact. I don't blame them (for being against ERA),' he said. 'If all that were true I'd be against it too.'" Melanie Jones, *Anti-ERA Forces' Fears Are Not*

The other camp – which included both ERA supporters and ERA opponents – focused the inquiry on the individual's choice of a mate, stressing that the traditional definition of marriage undeniably restricts one's choice of a mate "on account of sex." This camp included the authors of *The Legality of Homosexual Marriage,* 82 YALE L.J. 573 (1973), who argued passionately that the ERA would provide a firm constitutional basis for homosexual marriage:

> [T]he new Amendment represents an unqualified prohibition – an absolute guarantee [of equality that would be] much less flexible than that of the Fourteenth Amendment.

Legality of Homosexual Marriage, 82 YALE L.J. at 585.

In addition, ERA *opponents* also argued that the ERA would support same-sex marriage, which ERA proponents regarded as a scare tactic: "The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the *old canards about homosexual marriages*…." Judy Mann, *Obstruction,* WASHINGTON POST, B1, Feb. 19, 1982 (emphasis added). This so-called canard came not only from ERA opponents in the public and political spheres,[13] but also from academia and the Congress:

Based on Fact, Proponent Says, BIRMINGHAM NEWS, Feb. 2, 1976.

[13] Prof. Eugene Volokh's web log contains excerpts from additional contemporaneous articles under the headings *Phyllis Schlafly said it would be like this:*

> Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

118 Cong. Rec. 4373 (daily ed. March 21, 1972) (Sen. Ervin) (*quoting* the testimony of Harvard Professor Paul A. Freund in *Hearings on H.J. Res. 35, 208 Before Subcomm. no. 4 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971)).

Although the ERA was not ratified at the federal level, several states adopted its language into their state constitutions, and the history of same-sex marriage under these "State ERAs" underscores the ERA's ambiguity. In some cases, the same-sex marriage view prevailed, but in others the husband-wife view prevailed. *Compare, e.g., Andersen v. King County,* 158 Wash. 2d 1, 138 P.3d 963 (Wash. 2006) *with Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (Haw. 1993). The upshot of these split decisions is that the People of the relevant states opted into the ERA's indeterminacy as a matter of state law, and their courts have struggled accordingly.

By contrast, the People of the United States rejected even the *possibility* of this outcome by

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http://www.volokh.com/2003_11_16_volokh_archive.html#106917664607446885 (Nov. 18, 2003); http://www.volokh.com/archives/archive_2005_03_13-2005_03_19.shtml#1110843997 (Mar. 14, 2005).

rejecting the ERA. *See Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (dismissing ERA-related ratification question as moot following the expiration of the extended ratification period on June 30, 1982). As such, we can never know whether this Court might have construed the ERA according to the "absolutist" reading of *Legality of Homosexual Marriage* and Professor Freund or the more contextual one of Senator Bayh and Professor Emerson. The good news is that the ERA's failure *ensures* that this Court will never have to answer that question.

Amicus Eagle Forum respectfully submits that "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted), and that such post-enactment history – *i.e.,* post-ratification of the Fifth and Fourteenth Amendments – is "entitled to great weight in statutory construction" of the original Amendments. *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81 (1969). This Court should not ignore the will of the People in rejecting the ERA, which was widely understood to provide the only possible textual basis for a constitutional right to equal recognition of same-sex relationships. Given the ERA's failure to win ratification, *Baker* remains good law that this Court can summarily affirm here.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* and summarily reverse the First Circuit.

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Respectfully submitted,

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