Section 7: Gay Rights

Institute of Bill of Rights Law at The College of William & Mary School of Law
VII. Gay Rights

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Section 3 of the Defense of Marriage Act (DOMA) defines the term “marriage” for all purposes under federal law as “only a legal union between one man and one woman as husband and wife.” It also defines “spouse” as “a person of the opposite sex who is a husband or a wife.” In Gill v. Office of Personnel Management, seven homosexual couples and three surviving spouses married in Massachusetts sued to enjoin agencies and officials from enforcing DOMA and denying them federal benefits that were otherwise available to heterosexual couples. In Massachusetts v. United States Department of Health and Human Services, Massachusetts brought a companion case out of concern for losing federal funding for programs such as Medicaid and veterans’ cemeteries. With opinions released on the same day, District Court Judge Tauro held that Section 3 of DOMA was unconstitutional under the Fifth Amendment, and it violated the Spending Clause and Tenth Amendment. These cases were joined on appeal to the Court of Appeals for the First Circuit, which affirmed the district court’s decision that DOMA was unconstitutional on equal protection grounds while rejecting the Spending Clause and Tenth Amendment rationales.

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.
Marriage Act ("DOMA"), 1 U.S.C. § 7, which denies federal economic and other benefits to same-sex couples lawfully married in Massachusetts and to surviving spouses from couples thus married. Rather than challenging the right of states to define marriage as they see fit, the appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom.

In 1993, the Hawaii Supreme Court held that it might violate the Hawaii constitution to deny marriage licenses to same-sex couples. *Baehr v. Lewin*, 74 Haw. 530 (1993). Although Hawaii then empowered its legislature to block such a ruling, Haw. Const. art. I, § 23—which it did, Act of June 22, 1994, 1994 Haw. Sess. Laws 526 (H.B. 2312) (codified at Haw.Rev.Stat. § 572-1)—the Hawaii decision was followed by legalization of same-sex marriage in a small minority of states, some by statute and a few by judicial decision; many more states responded by banning same-sex marriage by statute or constitutional amendment.

Congress reacted with the same alarm as many state legislatures. Within three years after the Hawaii decision, DOMA was enacted with strong majorities in both Houses and signed into law by President Clinton. The entire statute, reprinted in an addendum to this decision, must—having only two operative paragraphs—be one of the shortest major enactments in recent history. Section 3 of DOMA, 1 U.S.C. § 7, defines "marriage" for purposes of federal law:

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

Section 2, which is not at issue here, absolves states from recognizing same-sex marriages solemnized in other states.

DOMA does not formally invalidate same-sex marriages in states that permit them, but its adverse consequences for such a choice are considerable. Notably, it prevents same-sex married couples from filing joint federal tax returns, which can lessen tax burdens, see 26 U.S.C. § 1(a)-(c), and prevents the surviving spouse of a same-sex marriage from collecting Social Security survivor benefits, e.g., 42 U.S.C. § 402(f), (i). DOMA also leaves federal employees unable to share their health insurance and certain other medical benefits with same-sex spouses.

DOMA affects a thousand or more generic cross-references to marriage in myriad federal laws. In most cases, the changes operate to the disadvantage of same-sex married couples in the half dozen or so states that permit same-sex marriage. The number of couples thus affected is estimated at more than 100,000. Further, DOMA has potentially serious adverse consequences, hereafter described, for states that choose to legalize same-sex marriage.

In *Gill v. OPM*, No. 10–2207, seven same-sex couples married in Massachusetts and three surviving spouses of such marriages brought suit in federal district court to enjoin pertinent federal agencies and officials from enforcing DOMA to deprive the couples of federal benefits available to opposite-sex married couples in Massachusetts. The Commonwealth brought a companion case, *Massachusetts v. DHHS*, No. 10–2204,
concerned that DOMA will revoke federal funding for programs tied to DOMA’s opposite-sex marriage definition—such as Massachusetts’ state Medicaid program and veterans’ cemeteries.

By combining the income of individuals in same-sex marriages, Massachusetts’ Medicaid program is noncompliant with DOMA, and the Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, has discretion to rescind Medicaid funding to noncomplying states. Burying a veteran with his or her same-sex spouse removes federal “veterans’ cemetery” status and gives the Department of Veterans’ Affairs discretion to recapture all federal funding for the cemetery.


The district court’s judgment declared section 3 unconstitutional and enjoined the federal officials and agencies from enforcing section 3, but the court stayed injunctive relief pending appeals. The judgment included specific remedies ordered for the named plaintiffs in relation to tax, social security and like claims. With one qualification—discussed separately below—the federal defendants have throughout focused solely upon the district court’s premise that DOMA is unconstitutional.

The Justice Department filed a brief in this court defending DOMA against all constitutional claims. Thereafter, altering its position, the Justice Department filed a revised brief arguing that the equal protection claim should be assessed under a “heightened scrutiny” standard and that DOMA failed under that standard. It opposed the separate Spending Clause and Tenth Amendment claims pressed by the Commonwealth. The *Gill* plaintiffs defend the district court judgment on all three grounds.

A delay in proceedings followed the Justice Department’s about face while defense of the statute passed to a group of Republican leaders of the House of Representatives—the Bipartisan Legal Advisory Group (“the Legal Group”)—who retained counsel and intervened in the appeal to support section 3. A large number of amicus briefs have been filed on both sides of the dispute, some on both sides proving very helpful to the court.

On appeal from a grant of summary judgment, our review is de novo, *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir.2011), and the issues presented are themselves legal in character, even though informed by background information as to legislative purpose and “legislative facts” bearing upon the rationality or adequacy of distinctions drawn by statutes. E.g., *FCC v. Beach Comms’n, Inc.*, 508 U.S. 307, 314–20 (1993). Such information is normally noticed by courts with the assistance of briefs, records and common knowledge. *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir.1999).

This case is difficult because it couples issues of equal protection and federalism with the need to assess the rationale for a
congressional statute passed with minimal hearings and lacking in formal findings. In addition, Supreme Court precedent offers some help to each side, but the rationale in several cases is open to interpretation. We have done our best to discern the direction of these precedents, but only the Supreme Court can finally decide this unique case.

Although our decision discusses equal protection and federalism concerns separately, it concludes that governing precedents under both heads combine—not to create some new category of "heightened scrutiny" for DOMA under a prescribed algorithm, but rather to require a closer than usual review based in part on discrepant impact among married couples and in part on the importance of state interests in regulating marriage. Our decision then tests the rationales offered for DOMA, taking account of Supreme Court precedent limiting which rationales can be counted and of the force of certain rationales.

Equal Protection. The Legal Group says that any equal protection challenge to DOMA is foreclosed at the outset by Baker v. Nelson, 409 U.S. 810 (1972). There, a central claim made was that a state's refusal to recognize same-sex marriage violated federal equal protection principles. Minnesota had, like DOMA, defined marriage as a union of persons of the opposite sex, and the state supreme court had upheld the statute. On appeal, the Supreme Court dismissed summarily for want of a substantial federal question. Id.

Baker is precedent binding on us unless repudiated by subsequent Supreme Court precedent. Hicks v. Miranda, 422 U.S. 332, 344 (1975). Following Baker, "gay rights" claims prevailed in several well known decisions, Lawrence v. Texas, 539 U.S. 558 (2003), and Romer v. Evans, 517 U.S. 620 (1996), but neither mandates that the Constitution requires states to permit same-sex marriages. A Supreme Court summary dismissal "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). Baker does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage.

Central to this appeal is Supreme Court case law governing equal protection analysis. The Gill plaintiffs say that DOMA fails under the so-called rational basis test, traditionally used in cases not involving "suspect" classifications. The federal defendants said that DOMA would survive such rational basis scrutiny but now urge, instead, that DOMA fails under so-called intermediate scrutiny. In our view, these competing formulas are inadequate fully to describe governing precedent.

Certain suspect classifications—race, alienage and national origin—require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective. Both are far more demanding than rational basis review as conventionally applied in routine matters of commercial, tax and like regulation.

Equal protection claims tested by this rational basis standard, famously called by Justice Holmes the "last resort of constitutional argument," Buck v. Bell, 274 U.S. 200, 208 (1927), rarely succeed. Courts accept as adequate any plausible factual

Under such a rational basis standard, the *Gill* plaintiffs cannot prevail. Consider only one of the several justifications for DOMA offered by Congress itself, namely, that broadening the definition of marriage will reduce tax revenues and increase social security payments. This is the converse of the very advantages that the *Gill* plaintiffs are seeking, and Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government.

The federal defendants conceded that rational basis review leaves DOMA intact but now urge this court to employ the so-called intermediate scrutiny test used by Supreme Court for gender discrimination. Some similarity exists between the two situations along with some differences, *compare Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (plurality opinion). But extending intermediate scrutiny to sexual preference classifications is not a step open to us.

First, this court in *Cook v. Gates*, 528 F.3d 42 (1st Cir.2008), *cert. denied*, — U.S. —, 174 L.Ed.2d 284 (2009), has already declined to create a major new category of “suspect classification” for statutes distinguishing based on sexual preference. *Cook* rejected an equal protection challenge to the now-superceded “Don’t Ask, Don’t Tell” policy adopted by Congress for the military, pointing out that *Romer* itself avoided the suspect classification label. *Cook*, 528 F.3d at 61–62. This binds the panel. *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir.2010).

Second, to create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of *Baker*, which we are neither empowered to do nor willing to predict. Nothing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche. That such a classification could overturn marriage laws in a huge majority of individual states underscores the implications.

However, that is not the end of the matter. Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications. And (as we later explain), in areas where state regulation has traditionally governed, the Court may require that the federal government interest in intervention be shown with special clarity.

In a set of equal protection decisions, the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. It is these decisions—not classic rational basis review—that the *Gill* plaintiffs and the Justice Department most usefully invoke in their briefs (while seeking to absorb them
into different and more rigid categorical rubrics).

The oldest of the decisions, U.S. Dept. of Agric. v. Moreno, 413 U.S. 528 (1973), invalidated Congress’ decision to exclude from the food stamp program households containing unrelated individuals. Disregarding purported justifications that such households were more likely to under-report income and to evade detection, the Court closely scrutinized the legislation’s fit—finding both that the rule disqualified many otherwise-eligible and particularly needy households, and a “bare congressional desire to harm a politically unpopular group.” Id. at 534, 537–38.

The second, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), overturned a local ordinance as applied to the denial of a special permit for operating a group home for the mentally disabled. The Court found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density. All that remained were “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.” Id. at 448.

Finally, in Romer v. Evans, 517 U.S. 620 (1996), the Court struck down a provision in Colorado’s constitution prohibiting regulation to protect homosexuals from discrimination. The Court, calling “unprecedented” the “disqualification of a class of persons from the right to seek specific protection from the law,” deemed the provision a “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.” Id. at 632–33, 635.

These three decisions did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered. Several Justices have remarked on this—both favorably, City of Cleburne, 473 U.S. at 451–55 (1985) (Stevens, J., concurring), and unfavorably, United States v. Virginia (VMJ), 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

Circuit courts, citing these same cases, have similarly concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations. As one distinguished judge observed:

Judges and commentators have noted that the usually deferential “rational basis” test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination.

United States v. Then, 56 F.3d 464, 468 (2d Cir.1995) (Calabresi, J., concurring) (citing City of Cleburne as an example). There is nothing remarkable about this: categories are often approximations and are themselves constructed by weighing of underlying elements.

All three of the cited cases—Moreno, City of Cleburne and Romer—stressed the historic patterns of disadvantage suffered by the group adversely affected by the statute. As with the women, the poor and the mentally
impaired, gays and lesbians have long been the subject of discrimination. *Lawrence*, 539 U.S. at 571. The Court has in these cases undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.

As for burden, the combined effect of DOMA’s restrictions on federal benefits will not prevent same-sex marriage where permitted under state law; but it will penalize those couples by limiting tax and social security benefits to opposite-sex couples in their own and all other states. For those married same-sex couples of which one partner is in federal service, the other cannot take advantage of medical care and other benefits available to opposite-sex partners in Massachusetts and everywhere else in the country.

These burdens are comparable to those the Court found substantial in *Moreno, City of Cleburne*, and *Romer*. *Moreno*, like this case, involved meaningful economic benefits; *City of Cleburne* involved the opportunity to secure housing; *Romer*, the chance to secure equal protection of the laws on the same terms as other groups. Loss of survivor’s social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans.

Accordingly, we conclude that the extreme deference accorded to ordinary economic legislation in cases like *Lee Optical* would not be extended to DOMA by the Supreme Court; and without insisting on “compelling” or “important” justifications or “narrow tailoring,” the Court would scrutinize with care the purported bases for the legislation. Before providing such scrutiny, a separate element absent in *Moreno, City of Cleburne*, and *Romer*—federalism—must be considered.

**Federalism.** In assailing DOMA, the plaintiffs and especially the Commonwealth rely directly on limitations attributed to the Spending Clause of the Constitution and the Tenth Amendment; the Justice Department, along with the Legal Group, rejects those claims. In our view, neither the Tenth Amendment nor the Spending Clause invalidates DOMA; but Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA’s justifications and diminish somewhat the deference ordinarily accorded.

It is true that DOMA intrudes extensively into a realm that has from the start of the nation been primarily confided to state regulation—domestic relations and the definition and incidents of lawful marriage—which is a leading instance of the states’ exercise of their broad police-power authority over morality and culture. As the Supreme Court observed long ago,

> [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.


Consonantly, Congress has never purported to lay down a general code defining marriage or purporting to bind the states to such a regime. Rather, in individual situations—such as the anti-fraud criteria in immigration law, 8 U.S.C. § 1186a(b)(1)(A)(i)—Congress has provided
its own definitions limited to the particular program or personnel involved. But no precedent exists for DOMA’s sweeping general “federal” definition of marriage for all federal statutes and programs.

Nevertheless, Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so.

Supreme Court interpretations of the Tenth Amendment have varied over the years but those in force today have struck down statutes only where Congress sought to commandeer state governments or otherwise directly dictate the internal operations of state government. Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144 (1992). Whatever its spin-off effects, section 3 governs only federal programs and funding, and does not share these two vices of commandeering or direct command.

Neither does DOMA run afoul of the “germaneness” requirement that conditions on federal funds must be related to federal purposes. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987). The requirement is not implicated where, as here, Congress merely defines the terms of the federal benefit. In Dole, the Supreme Court upheld a condition by which federal funds for highway construction depended on a state’s adoption of a minimum drinking age for all driving on state roadways. 483 U.S. at 205. DOMA merely limits the use of federal funds to prescribed purposes.

However, the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts to regulate the rules and incidents of marriage; notably, the Commonwealth stands both to assume new administrative burdens and to lose funding for Medicaid or veterans’ cemeteries solely on account of its same-sex marriage laws. These consequences do not violate the Tenth Amendment or Spending Clause, but Congress’ effort to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws does bear on how the justifications are assessed.

In United States v. Morrison, 529 U.S. 598 (2000), and United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court scrutinized with special care federal statutes intruding on matters customarily within state control. The lack of adequate and persuasive findings led the Court in both cases to invalidate the statutes under the Commerce Clause even though nothing more than rational basis review is normally afforded in such cases.


True, these federalism cases examined the
reach of federal power under the Commerce Clause and other sources of constitutional authority not invoked here; but a statute that violates equal protection is likewise beyond the power of Congress. See Moreno, 413 U.S. at 541, (Douglas, J., concurring). 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 (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.

DOMA’s Rationales. Despite its ramifying application throughout the U.S. Code, only one day of hearings was held on DOMA, Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. (1996) (“Hearing”), and none of the testimony concerned DOMA’s effects on the numerous federal programs at issue. Some of the odder consequences of DOMA testify to the speed with which it was adopted.

The statute, only a few paragraphs in length, is devoid of the express prefatory findings commonly made in major federal laws. E.g., 15 U.S.C. § 80a–1; 16 U.S.C. § 1531; 20 U.S.C. § 1400; 21 U.S.C. § 801; 29 U.S.C. § 151; id. § 1001; 42 U.S.C. § 7401. Accordingly, in discerning and assessing Congress’ basis for DOMA our main resort is the House Committee report and, in lesser measure, to variations of its themes advanced in the briefs before us. The committee report stated:

The Committee briefly discusses four of the governmental interests advanced by this legislation: (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.


The penultimate reason listed above was not directed to section 3—indeed, is antithetical to it—but was concerned solely with section 2, which reserved a state’s power not to recognize same-sex marriages performed in other states. Thus, we begin with the others, reserving for separate consideration the claim strongly pressed by the Gill plaintiffs that DOMA should be condemned because its unacknowledged but alleged central motive was hostility to homosexuality.

First, starting with the most concrete of the cited reasons—“preserving scarce government resources”—it is said that DOMA will save money for the federal government by limiting tax savings and avoiding social security and other payments to spouses. This may well be true, or at least might have been thought true; more detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.

But, where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction. Plyler v. Doe, 457 U.S. 202, 227 (1982); Romer, 517 U.S. at 635. The reason, derived from equal protection analysis, is that such a group has historically been less able to protect itself through the political process. Plyler, 457 U.S. at 218 n. 14; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938).
A second rationale of a pragmatic character, advanced by the Legal Group’s brief and several others, is to support child-rearing in the context of stable marriage. The evidence as to child rearing by same-sex couples is the subject of controversy, but we need not enter the debate. Whether or not children raised by opposite-sex marriages are on average better served, DOMA cannot preclude same-sex couples in Massachusetts from adopting children or prevent a woman partner from giving birth to a child to be raised by both partners.

Although the House Report is filled with encomia to heterosexual marriage, DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage. Certainly, the denial will not affect the gender choices of those seeking marriage. This is not merely a matter of poor fit of remedy to perceived problem, Lee Optical, 348 U.S. at 487–88; City of Cleburne, 473 U.S. at 446–50, 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.

A third reason, moral disapproval of homosexuality, is one of DOMA’s stated justifications:

Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality. H.R. Rep. No. 104–664, at 15–16 (emphasis added); see also, e.g., 142 Cong. Rec. 16,972 (1996) (statement of Rep. Coburn) (homosexuality “morally wrong”).

For generations, moral disapproval has been taken as an adequate basis for legislation, although usually in choices made by state legislators to whom general police power is entrusted. But, speaking directly of same-sex preferences, Lawrence ruled that moral disapproval alone cannot justify legislation discriminating on this basis. 539 U.S. at 577–78. Moral judgments can hardly be avoided in legislation, but Lawrence and Romer have undercut this basis. Cf. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

Finally, it has been suggested by the Legal Group’s brief that, faced with a prospective change in state marriage laws, Congress was entitled to “freeze” the situation and reflect. But the statute was not framed as a temporary time-out; and it has no expiration date, such as one that Congress included in the Voting Rights Act. See Nw. Austin, 129 S.Ct. at 2510 (describing original expiration date and later extensions); City of Boerne, 521 U.S. at 533. The House Report’s own arguments—moral, prudential and fiscal—make clear that DOMA was not framed as a temporary measure.

Congress did emphasize a related concern, based on the Hawai’i Supreme Court’s decision in Baehr, that state judges would impose same-sex marriage on unwilling states. H.R. Rep. No. 104–664, at 5–6, 12, 16–17. But almost all states have readily amended constitutions, as well as elected judges, and can protect themselves against what their citizens may regard as overreaching. The fear that Hawai’i could impose same-sex marriage on sister states through the Full Faith and Credit Clause, id.
at 7–9, relates solely to section 2 of DOMA, which is not before us.

We conclude, without resort to suspect classifications or any impairment of Baker, that the rationales offered do not provide adequate support for section 3 of DOMA. Several of the reasons given do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point. If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress’ will, this statute fails that test.

Invalidating a federal statute is an unwelcome responsibility for federal judges; the elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect. Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion). But a lower federal court such as ours must follow its best understanding of governing precedent, knowing that in large matters the Supreme Court will correct misreadings (and even if it approves the result will formulate its own explanation).

In reaching our judgment, we do not rely upon the charge that DOMA’s hidden but dominant purpose was hostility to homosexuality. The many legislators who supported DOMA acted from a variety of motives, one central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of Western civilization. See H.R.Rep. No. 104–664, at 12, 16. Preserving this institution is not the same as “mere moral disapproval of an excluded group,” Lawrence, 539 U.S. at 585 (O’Connor, J., concurring), and that is singularly so in this case given the range of bipartisan support for the statute.

The opponents of section 3 point to selected comments from a few individual legislators; but the motives of a small group cannot taint a statute supported by large majorities in both Houses and signed by President Clinton. Traditions are the glue that holds society together, and many of our own traditions rest largely on belief and familiarity—not on benefits firmly provable in court. The desire to retain them is strong and can be honestly held.

For 150 years, this desire to maintain tradition would alone have been justification enough for almost any statute. This judicial deference has a distinguished lineage, including such figures as Justice Holmes, the second Justice Harlan, and Judges Learned Hand and Henry Friendly. But Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern.

To conclude, many Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress’ denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.

Hara’s Health Benefits Claim. A distinct, if much narrower, issue is raised by Dean Hara, one of the Gill plaintiffs. Although the district court ordered the relief Hara sought for Social Security lump-sum death benefits, the district court found that relief on his

Hara was married under Massachusetts law to a now-deceased Congressman, and Hara has sought to be enrolled as a surviving spouse for health benefits under the Congressman’s Federal Employees’ Health Benefit Plan (“FEHBP”). For this, (1) Hara would have to be an eligible “annuitant” under the annuity statute, and (2) the Congressman had to have enrolled in the health benefit plan for “self and family,” which he had not done. 5 U.S.C. § 8341; 5 C.F.R. §§ 890.303(c), 890.302(a)(1).

Acting on an application by Hara for a survivor annuity benefit, the Office of Personnel Management (“OPM”) had previously ruled that Hara was ineligible to receive an annuity both because he was not a spouse under DOMA and because the Congressman had not elected such coverage. Such determinations as to annuities are reviewed exclusively by the Merit Systems Protection Board (“MSPB” or “Board”) and then exclusively by the Federal Circuit. 5 U.S.C. §§ 8347, 8341, 7703(b)(1); 28 U.S.C. 1295(a)(9).

On review, the Board upheld the denial of coverage solely because of DOMA, finding the failure to elect coverage not to bar annuitant status. Hara sought further review in the Federal Circuit, and that case has been stayed pending resolution of the DOMA issue in this circuit. *Hara*, No. 2009–3134 (Oct. 15, 2010 order staying proceedings). Thus, now—as at the time the district court issued its judgment—a Board determination is in force that Hara lacks annuitant status.

OPM has separately denied Hara’s claim for FEHBP health enrollment because of the Congressman’s failure to elect “self and family” coverage. Although the district court found DOMA unconstitutional, it refused to resolve Hara’s health coverage claim now because it still depends on Hara establishing eligibility for annuitant status, which is at issue in his pending Federal Circuit appeal. Whether or not Hara lacked standing, the district court showed prudence in deferring on this issue to the Federal Circuit.

Hara says in substance that the Federal Circuit has to recognize his annuitant status because the Board has waived or forfeited any objection based on the failure to elect spousal survivor coverage; but the Department of Justice does not concede the point, which the Federal Circuit presumably will resolve. If Hara prevails there, district court injunctive relief to secure his health coverage is likely to be unnecessary, but our affirmance is without prejudice to such a future request by Hara.

The judgment of the district court is *affirmed* for the reasons and to the extent stated above. Anticipating that certiorari will be sought and that Supreme Court review of DOMA is highly likely, the mandate is *stayed*, maintaining the district court’s stay of its injunctive judgment, pending further order of this court. The parties will bear their own costs on these appeals.

*It is so ordered.*
"Suit Cites States' Rights on Behalf of Gay Rights"

The New York Times
July 9, 2012
Adam Liptak

The day after the Supreme Court announced its decision upholding President Obama’s health care law, the next constitutional blockbuster arrived at the court.

It is a rematch between the main lawyers in the health care case, and it replays some of the same themes. But now the issue is same-sex marriage.

The question, again, is whether a federal law—this time the Defense of Marriage Act, or DOMA—passes constitutional muster. The law says the federal government must deny benefits to gay couples who are married in states that allow such unions. The law excludes same-sex spouses from benefits like Social Security payments, health insurance and burial services.

“Until DOMA is repealed or invalidated,” explained Walter Dellinger, who was acting United States solicitor general in the Clinton administration, “no gay couple is fully married.”

(It is worth pausing to point out what the new case is not about. It does not concern the law’s other main part, the one that says states need not recognize same-sex marriages from other states. It is also not about the more ambitious arguments made in a suit filed in California by Theodore B. Olson and David Boies, which seeks to establish a constitutional right to same-sex marriage.)

The federal appeals court in Boston on May 31 struck down the part of the marriage law that concerns federal benefits, saying there was no good reason to treat some married couples differently from others.

On June 29, Paul D. Clement, who had learned the day before that he had largely lost the health care case, was back at the Supreme Court. He asked the justices to hear an appeal from the Boston decision and uphold the marriage law.

Four days later, Solicitor General Donald B. Verrilli Jr., who had successfully defended the health care law, agreed that the new case warranted review. But he said the justices should strike down the marriage law.

The appeals court ruling in Boston was largely based on equal protection principles. But there was a dash of federalism in it, too, one reminiscent of arguments in the health care case.

Marriages have traditionally been governed by state law, Judge Michael Boudin wrote for a unanimous three-judge panel of the appeals court, raising federalism concerns that warranted a close look at whether the marriage law was justified.

The trial judge, Joseph L. Tauro, had gone further, saying the marriage law overstepped Congress’s power to attach conditions to federal grants to states. For instance, Judge Tauro wrote, the Department of Veterans Affairs had threatened to take back some $19 million from Massachusetts if it allowed the burial of a veteran’s same-sex spouse in a cemetery that had been built and maintained with federal money.
Most people did not take that part of Judge Tauro’s opinion very seriously, and the appeals court rejected it. But that was a month before the Supreme Court limited the health care law’s Medicaid expansion along similar lines.

The important point about federalism, said Mr. Dellinger, the former Clinton administration lawyer, is that two interests that are sometimes at odds in cases about same-sex marriage line up here. “Gay rights and states’ rights are on the same side of the case,” he said.

Mr. Verrilli, for his part, finds himself in an awkward position. It is ordinarily the job of the executive branch to defend laws enacted by Congress, and the Justice Department did defend the marriage law early in the Obama administration. Last year, though, Attorney General Eric H. Holder Jr. announced an about-face, saying he and President Obama had concluded that the law was unconstitutional.

The administration would continue to enforce the law, Mr. Holder said, but would no longer defend it in court.

After the administration’s move, House Republicans intervened in the case to defend the law. They turned to Mr. Clement, who sometimes seems to be handling every important case on the Supreme Court docket.

In his Supreme Court petition, Mr. Clement wrote that the justices should hear the case because legislators were not equipped to litigate. “The House has been forced into the position of defending numerous lawsuits challenging DOMA across the nation,” he said. “That is a role for which the Justice Department—not the House—is institutionally designed.”

The seven same-sex couples and three surviving spouses actually challenging the law have yet to be heard from, and they will presumably urge the Supreme Court to deny review. But there is every reason to think the court will agree to hear the case, or a similar one from California, shortly after the justices return from their summer break, with arguments around January and a decision by June.

Both sides will be looking for support in the principles that animated the health care decision. In his petition, Mr. Clement quoted an observation from Justice Oliver Wendell Holmes Jr., one of Chief Justice John G. Roberts Jr.’s touchstones, that “judging the constitutionality of an act of Congress is the gravest and most delicate duty that this court is called on to perform.”

Mr. Verrilli went his adversary one better, actually citing the five-day-old health care decision, National Federation of Independent Business v. Sebelius, in what was probably its first appearance in a Supreme Court brief. In the health care case, Mr. Verrilli reminded the justices, they appointed lawyers to argue positions that neither party had embraced. In the marriage case, where both the plaintiffs and the Justice Department now agree that the law is unconstitutional, Mr. Verrilli said, it would similarly be sensible to allow Mr. Clement to have his say.
Seeking a clear-cut Supreme Court ruling against Congress’s power to ban federal benefits for legally married same-sex couples, the Obama Administration on Tuesday afternoon filed two cases, and urged the Justices to allow the House GOP leaders to defend the law that the government now believes is unconstitutional. One petition . . . involves a First Circuit Court ruling against the ban included in the Defense of Marriage Act. The second . . . asked the Court to pull up a case now pending in the Ninth Circuit Court—a case in which a federal District judge in California nullified the ban.

Although the Administration believes, after changing its position last year, that DOMA’s Section 3 is invalid, and thus agrees with the lower court rulings, it contended that it still has the authority to be the one to appeal in order “to ensure that the judiciary is the final arbiter” of the issue. The House’s Republican leaders, who have taken over the defense of DOMA, have already filed their own petition (now docketed as 12-13), but the government lawyers argued that the legislators do not have a legal right to appeal but should be allowed to take part in the case anyway. If the lawmakers are allowed to do so, the new filing said, the Court need not rule on whether they were legally entitled to bring their own appeal.

DOMA is a 1996 law signed by President Bill Clinton and passed with huge majorities in the House and Senate. It has two main provisions, but only one of those is at stake in the new cases. That is the provision that says that, whenever marriage is mentioned in a federal program or gets favored treatment as in the tax code, that means only a legally married man and woman. The other provision attempts to give the states a legal right to refuse to recognize same-sex marriages that are performed in other states. Gay rights advocates also oppose that provision, but it is not being put before the Court.

The constitutional challenge to its marriage definition is not an attempt to establish a federal constitutional right for gays and lesbians to marry. In fact, the couples challenging DOMA are already legally married under their own states’ laws, and are contending that excluding them from equal legal treatment is a form of unconstitutional discrimination. That was the basis for the First Circuit Court’s ruling against Section 3 at the end of May, and by U.S. District Judge Jeffrey White in San Francisco in February.

Judge White’s decision is now under review, on an expedited schedule in the Ninth Circuit, but by filing its petition in the Supreme Court at this stage, the Obama Administration sought to bypass that judicial rung in order to have a fuller review done by the Supreme Court. The filing will have the effect of putting the Ninth Circuit’s review on hold in the meantime.

In urging that the Court put the Ninth Circuit case on a fast track to the Supreme Court, the new petition said that “authoritative resolution of the question is of great importance to the United States,” to the individual federal court employee in the
case, and to "tens of thousands of others who are being denied the equal enjoyment of the benefits that federal law makes available to persons who are legally married under state law."

Because both cases involve decisions that struck down a federal law, the chances are very strong that the Supreme Court will accept at least one of them for review in the next Term, opening October 1. The Court will not consider them during its summer recess, but they could be ready for action by the Justices at their first private Conference, now set for September 24.

One of the key issues that will be before the Court is the constitutional test the Justices would apply to the federal ban. Although the Court has decided a number of major gay rights cases, it has never declared a specific standard—that is, it has not said whether a law need only have a "rational basis," whether it should have to meet some level of "heightened scrutiny," or whether it should have to satisfy the toughest test of all: "strict scrutiny." It has applied a variation of rational basis, without saying that should control in other cases.

In the First Circuit, a somewhat mixed standard was applied, but Judge White applied "heightened scrutiny," as both of those courts nullified the federal ban. The Justice Department has now embraced the "heightened scrutiny" test and concluded that the ban cannot meet that hurdle. It has said, though, that it will continue to enforce the ban until its constitutionality is finally settled.

The new cases have not yet been assigned docket numbers. Another same-sex marriage case is on its way to the Court, involving the constitutionality of California’s voter-approved "Proposition 8," banning all same-sex marriages in that state. That case thus raises a different constitutional issue than DOMA, involving whether a state is free to ban such marriages altogether. That case, as it went through the Ninth Circuit, became considerably narrower than it had been in District Court, but the Circuit Court did nullify the state constitutional amendment approved as a ballot measure.

UPDATED July 4: The government petitions on DOMA have been docketed as 12-15 (First Circuit case) and 12-16 (District Court-Northern California case). The House GOP leaders’ petition filed earlier is docketed as 12-13 (First Circuit case). The responses to all three are due August 2, unless extended.)
Advocates of same-sex marriage won a major legal victory—and greatly increased the odds of a U.S. Supreme Court showdown on the subject—as an appeals court ruled that the government could not deny tax, Social Security and other federal benefits to gay couples who were legally married in their home states.

The ruling struck down a major part of the Defense of Marriage Act, or DOMA, the law adopted in 1996 that denied federal benefits to same-sex couples. The Obama administration had urged the court to overturn the law, saying it violated the constitutional rights of gay couples.

The 3-0 decision by the federal appeals court in Boston sends the gay marriage issue toward the Supreme Court on two tracks.

One track directly involves whether gays and lesbians have a constitutional right to marry. In that case, a federal appeals court in San Francisco struck down California’s Proposition 8, which had reversed the state Supreme Court’s decision. The other track—the current case—involves whether gay couples, once legally married, have a right to equal treatment.

Both cases are likely to be appealed to the Supreme Court this year. The judges in Boston made it clear they had that in mind, and seemed to be tailoring their opinion for Justice Anthony M. Kennedy. The U.S. 9th Circuit Court of Appeals also tailored its Proposition 8 opinion for Kennedy, who is likely to be the swing vote.

The Boston-based judges of the U.S. 1st Circuit Court of Appeals, two of whom are Republican appointees, sounded a states’ rights theme in Thursday’s opinion. Marriage is a matter of state law, they said. And as such, they saw no valid justification for the federal government to “penalize” legally married same-sex couples by denying them the same benefits available to all other married couples. These include filing a joint tax return, obtaining family healthcare coverage for the spouse of a federal employee or receiving a survivor’s benefit from Social Security.

The Obama administration had reached the same conclusion last year and refused to defend this part of the law. House Republicans, led by Speaker John A. Boehner of Ohio, vowed to carry on the defense. They hired Washington lawyer Paul Clement to argue in favor of limiting federal recognition of marriage to “a legal union between one man and one woman.”

White House Press Secretary Jay Carney said President Obama agreed with the court’s decision. The administration sent a lawyer to Boston to argue for striking down part of DOMA as a violation of equal protection.

“There’s no question that this [decision] is in concert with the president’s views,” Carney said.
Congress passed DOMA to prevent a gay marriage in one state from being accorded legal recognition in other states. This provision was not at issue in Thursday’s decision. Instead, the ruling arose from a challenge to the federal benefits provision filed by seven same-sex couples who were married in Massachusetts and sought equal benefits as married couples.

The judges steered clear of strong wording or sweeping conclusions about the legal status of gays. They did, however, cite Kennedy’s 1996 opinion that struck down an anti-gay voter initiative in Colorado.

The judges in Boston conceded their ruling was only a stepping stone.

“Only the Supreme Court can finally decide this unique case,” Judge Michael Boudin wrote. They put their decision on hold until the law’s defenders could appeal.

Clement pledged to do just that. “We have always been clear we expect this matter ultimately to be decided by the Supreme Court, and that has not changed,” he said.

Nonetheless, gay rights advocates hailed the ruling as another step toward full legal equality for gays and lesbians.

DOMA created “a classic double standard, whereby gay people were singled out for discrimination,” said Mary Bonauto, a lawyer for Gay & Lesbian Advocates & Defenders, the Boston-based group that sued on behalf of the seven same-sex couples. The lead plaintiff, Nancy Gill, is a postal worker who sought health benefits for her spouse. Massachusetts filed a similar suit against the government, stressing the states’ rights issue.

Suzanne Goldberg, a Columbia University law professor, said the court’s opinion “helps to sound the death knell for DOMA. The 1st Circuit explained, clearly and simply, that denying same-sex couples the benefits of marriage will not support heterosexuals’ marriages.”

The National Organization for Marriage sharply criticized the ruling. “It’s obvious that the federal courts on both coasts are intent on imposing their liberal, elitist views of marriage on the American people,” said Brian Brown, the group’s president. “They dismiss the centuries-old understanding of marriage as a critical social institution that exists for the benefit of couples and their children.”

The Massachusetts state high court was the nation’s first, in 2003, to declare gays and lesbians had a right to marry. Since then, more than 100,000 same-sex couples have wed legally there and in other states where gay marriage was legal, according to the court’s opinion. That includes Iowa, Connecticut, New Hampshire, New York, Vermont and, before Proposition 8, California. Two other states, Washington and Maryland, have passed gay marriage laws that could face voter initiatives in November. The District of Columbia also permits same-sex marriage.

The opinion by Boudin, an appointee of President George H.W. Bush, was joined by Chief Judge Sandra Lynch, a Bill Clinton appointee, and Judge Juan Torruella, a Ronald Reagan appointee.

The broader right-to-marry issue is likely to reach the high court in the California case, now awaiting a possible review by the full U.S. 9th Circuit Court of Appeals.
A federal judge in San Francisco and a three-judge panel of the 9th Circuit struck down Proposition 8, the voter initiative that limited marriage to a man and a woman. Both decisions relied on the Constitution’s guarantee of equal protection of the laws.

Defenders of Proposition 8 asked the full 9th Circuit to review the panel’s decision. If that fails, they can appeal to the U.S. Supreme Court.
A federal appeals court panel heard arguments Wednesday on whether to uphold a lower court's finding that a section of the 1996 law banning federal recognition of same-sex marriage is unconstitutional.

The case is the first challenge to the so-called Defense of Marriage Act, or DOMA, to reach a federal appeals court. In July 2010, Judge Joseph L. Tauro of the United States District Court in Boston sided with the plaintiffs in two separate cases brought by the state attorney general and a gay rights group.

One issue under consideration is whether the law wrongly denies federal benefits, like Social Security survivors' payments and the right to file taxes jointly, to married same-sex couples, thus violating their equal protection rights.

In the case brought by Martha Coakley, the Massachusetts attorney general, Judge Tauro found in 2010 that DOMA compels Massachusetts to discriminate against gay couples who are legally married under state law in order for the commonwealth to receive federal money for certain programs.

The other case, brought by Gay and Lesbian Advocates and Defenders, focused more narrowly on equal protection as applied to federal benefits. In that case, Judge Tauro agreed in 2010 that the law violated the equal protection clause of the Constitution by denying benefits to one class of married couples—gay men and lesbians—but not others.

The Obama administration initially appealed the lower court’s ruling. But last year, the Justice Department announced that it would stop defending DOMA, leaving Congress to appeal Judge Tauro’s ruling to the First Circuit. The House of Representatives’ Bipartisan Legal Advisory Group stepped in, hiring Paul D. Clement, a former United States solicitor general, to argue the appeal.

Massachusetts became the first state in the country to allow same-sex marriage in 2004. Other states have followed, and gay rights supporters are hoping that a series of legal challenges to DOMA around the country will ultimately lead to a Supreme Court ruling on the law. Judge Tauro struck down the section of the law that defines marriage as the union of a man and a woman for all federal purposes.

At the federal courthouse here on Wednesday, the arguments focused on what the appropriate constitutional test for DOMA should be: the relatively easy standard known as “rational basis,” or a tougher review that requires heightened scrutiny.

Mr. Clement—who last week argued before the Supreme Court on behalf of states challenging President Obama’s health care law—told the appeals panel that Congress had a rational basis for defining marriage as between a man and a woman. He said that in 1996, as Hawaii appeared to be the first state moving toward recognizing same-sex marriage, Congress passed the law out of concern that it should have its own definition of marriage.
“Congress could rationally choose to have a uniform definition rather than have it rely upon state law,” Mr. Clement said.

But Mary Bonauto, who argued on behalf of Gay and Lesbian Advocates and Defenders, said that “the central question is what federal interest is served in singling out only same-sex marriages” as invalid.

“We believe the Defense of Marriage Act is an irrational, arbitrary classification of gay people for its own sake and not for any other purpose,” she said.

In the Coakley case, Judge Tauro had held that that federal restrictions on financing for states that recognize same-sex marriage violates the 10th Amendment—the part of the Constitution that declares that rights not explicitly granted to the federal government, or denied to the states, belong to the states.

Maura Healey, the assistant attorney general who argued on behalf of Ms. Coakley, told the panel that DOMA requires Massachusetts “to live with two distinct and unequal forms of marriage.” She added, “This is a burden that Congress has imposed on Massachusetts simply because it doesn’t like the fact that gay people are getting married.”

Stuart F. Delery, the Justice Department’s acting assistant attorney general for the civil division, also argued before the panel, saying that the court should hold DOMA to heightened scrutiny because it targets “a group with a long and deep history of discrimination.”

The three judges on the panel directed most of their questions at Mr. Clement and Mr. Delery. But the questions were measured and did not shed much light on how the court might rule. The judges—Juan Torruella, Michael Boudin and Sandra Lynch, the First Circuit’s chief judge—were appointed by Presidents Ronald Reagan, the elder George Bush and Bill Clinton, respectively.

Afterward, Ms. Coakley said she could not make predictions based on the judges’ questions but added: “When you look at, to me, the thinness of the legal argument on the other side and really the emotional and real fact-based arguments made by the plaintiffs, I’m confident that Judge Tauro will be upheld.”
“Court Puts Review of DOMA Ruling on Hold”

The San Francisco Chronicle
July 27, 2012
Bob Egelko

A U.S. appeals court put a San Francisco woman’s suit seeking federal benefits for same-sex married couples on hold Friday until the Supreme Court decides whether to review the 1996 law that prohibited those benefits.

The Ninth U.S. Circuit Court of Appeals in San Francisco canceled the hearing it had scheduled Sept. 10 in the case of Karen Golinski, a lesbian attorney with the appeals court who had challenged the government’s denial of family insurance coverage for her wife.

The court said it would wait to see whether the nation’s high court takes the case out of its hands by granting the Obama administration’s request for immediate review.

The administration, joined by Golinski, has asked the Supreme Court to bypass the appeals court and use the case to consider the constitutionality of the Defense of Marriage Act.

The law, known as DOMA, bars federal family insurance coverage, joint tax filing, immigration sponsorship and more than 1,000 other federal marital benefits for same-sex couples who are legally married under state law.

House Republican leaders have also asked the Supreme Court to review DOMA in an appeal of a federal Circuit Court ruling in Boston that found the law unconstitutional. Republicans hired attorneys to defend DOMA after President Obama withdrew his administration’s support of the law in February 2011.

In Golinski’s case, U.S. District Judge Jeffrey White of San Francisco ruled in February that DOMA was a discriminatory law, rooted in antigay bias, and served no legitimate government purpose. The government has complied with the ruling by extending insurance coverage to Amy Cunningham, whom Golinski wed in 2008 before Californians banned same-sex marriage by passing Proposition 8.

House Republicans have appealed White’s ruling, arguing that withholding federal benefits from same-sex couples was a rational way to save federal funds, encourage responsible child-rearing and leave the volatile marriage issue to the states.
An ailing 83-year-old lesbian asked the Supreme Court on Monday to hear her legal challenge against a federal law that defines marriage as a union between a man and woman, attempting to place her case on a fast-track to the top court.

The suit, filed by Edith Schlain Windsor in 2010, targets the Defense of Marriage Act, a law passed by the U.S. Congress in 1996 that denies federal benefits to lawfully married same-sex couples.

Windsor’s petition attempts to bypass the U.S. Court of Appeals, which is slated to hear the case in September.

With Windsor’s filing, there are three petitions pending before the Supreme Court over the constitutionality of the Defense of Marriage Act, an issue the high court could take up in oral arguments as early as next spring, said Windsor’s lawyer Roberta Kaplan, of Paul, Weiss, Rifkind, Wharton & Garrison LLP.

“This case presents a question of exceptional national importance: the constitutionality of a statute, the Defense of Marriage Act (‘DOMA’), that daily affects the lives of thousands of Americans,” the petition said.

In June, a New York district court ruled in Windsor’s favor, finding that a central provision of the law discriminates against married same-sex couples. The case is now on expedited appeal before the 2nd U.S. Circuit Court of Appeals.

But Windsor’s lawyers argue that premature review of her case by the Supreme Court is warranted since the issue is already before the court. Also, Windsor suffers from a heart condition that could end her life before the case is resolved.

The American Civil Liberties Union originally filed the suit in New York on behalf of Windsor, a former computer programmer who married Thea Clara Spyer in Toronto, Canada, in 2007. The two were engaged in 1967.

Spyer died in 2009 after a long battle with multiple sclerosis, leaving her property to Windsor. Because the marriage was not recognized under federal law, Windsor had to pay more than $363,000 in federal estate taxes, according to the suit.

Six states have legalized same-sex marriage since DOMA went into effect, including New York in 2011. But federal law and programs do not recognize those marriages because of DOMA.

Windsor’s attorneys argue that the federal law violates the 14th Amendment of the U.S. Constitution which prohibits states from denying people equal protection under the laws.

Federal courts in New York, California and Massachusetts all found the law unconstitutional for different reasons, applying varying standards of legal analysis.
The Republican-controlled House of Representatives, through its Bipartisan Legal Advisory Group (BLAG), is defending the law, which the Obama administration has largely abandoned. President Barack Obama in 2011 instructed the Justice Department to stop defending the law in courts, finding it unconstitutional.

Paul Clement, a lawyer for BLAG, did not immediately respond to a request for comment on Windsor’s petition.
The Obama administration will no longer defend a law that bans federal recognition of same-sex marriage — a major legal reversal that reinvigorates a national debate over gay rights.

The decision, outlined Wednesday by Attorney General Eric Holder, represents the administration’s strongest legal advocacy for the rights of gay men and lesbians, who have strongly opposed the Defense of Marriage Act (DOMA). The law defines marriage as only between a man and a woman.

“Much of the legal landscape has changed in the 15 years since Congress passed DOMA,” Holder said. “The Supreme Court has ruled that laws criminalizing homosexual conduct are unconstitutional. Congress has repealed the military’s ‘don’t ask, don’t tell’ policy. . . . But while both the wisdom and the legality of DOMA will continue to be the subject of extensive litigation and public debate, this administration will no longer assert its constitutionality in court.”

Holder said he was following President Obama’s lead and laid out reasons why government action that treats gay people differently than straight people is subject to court scrutiny. He noted his action departed from a practice of defending federal laws, but said the legislative record that led to DOMA’s passage had “numerous expressions reflecting moral disapproval of gays and lesbians and their intimate family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection clause is designed to guard against.”

“This is huge,” said Northwestern University law professor Andrew Koppelman, an expert on gays’ legal rights. “For the first time, the president of the United States has taken the position that laws that discriminate against gays are unconstitutional.”

White House spokesman Jay Carney said Obama is “still grappling” with his personal views on gay marriage, but regards the law as “unfair.”

The action, prompted by a court-ordered filing deadline in two pending legal challenges to the law in New York and Connecticut, triggered a divided response. “While Americans want Washington to focus on creating jobs and cutting spending, the president will have to explain why he thinks now is the appropriate time to stir up a controversial issue,” said Brendan Buck, a spokesman for Republican House Speaker John Boehner.

Gay-rights advocates lauded the move as a landmark for gays’ legal rights. Edith Windsor, who is one of the challengers to the federal law, said the administration had “done the right thing.”

Windsor, who in 2007 married Thea Spyer in Canada, sued the government for refusing to recognize her relationship and imposing a $350,000 tax on Spyer’s estate when she
died in 2009. Had Spyer been a man, Windsor argues, she would not have had to pay the tax because spouses are exempt. “I knew that the government would never be able to justify that I had to pay a $350,000 estate tax simply because I was married to a woman,” she said.

Five states and D.C. allow gay people to marry. On Wednesday, Hawaii Gov. Neil Abercrombie, a Democrat, signed same-sex civil unions into law.
A federal appeals court panel on Tuesday threw out a voter-approved ban on same-sex marriage passed in 2008, upholding a lower court’s ruling that the ban, known as Proposition 8, violated the constitutional rights of gay men and lesbians in California.

The three-judge panel issued its ruling in San Francisco, upholding a 2010 decision by Judge Vaughn R. Walker, who had been the chief judge of the Federal District Court of the Northern District of California but has since retired. The panel found that Proposition 8—passed by a vote of 52 percent to 48 percent—violated the equal protection rights of two same-sex couples who brought the suit. The proposition placed a specific prohibition in the State Constitution against marriage between two people of the same sex.

But Tuesday’s 2-to-1 decision was much more narrowly framed than the sweeping ruling of Judge Walker, who asserted that barring same-sex couples from marrying was a violation of the equal protection and due process clauses of the Constitution.

The two judges on Tuesday stated explicitly that they were not deciding whether there was a constitutional right for same-sex couples to marry, instead ruling that the disparate treatment of married couples and domestic partners since the passage of Proposition 8 violated the Constitution’s Equal Protection Clause.

“Although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently,” Judge Stephen R. Reinhardt wrote in the decision. “There was no such reason that Proposition 8 could have been enacted.”

“All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation ‘marriage,’” the judge wrote, adding, “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gay men and lesbians in California.”

In his dissenting opinion, Judge N. Randy Smith wrote that the court was overreaching in nullifying a voter initiative.

Unlike the 2008 State Supreme Court decision here overturning an earlier ban on same-sex marriage, this decision is not about to set off a race to the chapel by same-sex couples. A stay imposed on Judge Walker’s original decision will remain in place, at least for two weeks. Theodore B. Olson, one of the lawyers who challenged the ban, said he would seek to get the stay lifted; backers of Proposition 8 said they would oppose that.

Both sides in the case made clear that they intended to take the case before the Supreme Court in hopes of prompting it to settle once and for all an issue that has been fought out in courts, legislatures and ballot boxes since at least a 1971 case in Minnesota. That said,
there is no guarantee the court will take it. The narrow parameters of the ruling’s reasoning—and the fact that it was written to apply only to California—may prompt the court to wait for a clearer dispute before weighing in.

Whatever the legal nuances of the decision—and lawyers were battling about how far-reaching it would prove to be—the decision reverberated throughout political circles, from the presidential campaign to state legislatures.

Mitt Romney denounced the decision as an attack by “unelected judges” on “traditional marriage” and predicted that the Supreme Court would decide the issue. “That prospect underscores the vital importance of this election and the movement to preserve our values,” he said.

Still, the decision by the United States Court of Appeals for the Ninth Circuit, coming at a time when Washington State seems poised to become the seventh state to legalize same-sex marriages, seems likely to add to what members of both parties said was a sense of momentum. Chad Griffin, the president of the American Foundation for Equal Rights, which challenged Proposition 8, noted that polls in the past year had shown public support for same-sex marriage steadily increasing, a significant change from just a decade ago.

In New Jersey, State Senator Stephen M. Sweeney, a Democrat and president of the Senate, who abstained in a vote on a same-sex marriage bill two years ago, is now championing one that is to come up for a vote next Tuesday. “Today’s court ruling simply reaffirmed what we already knew: Marriage equality is right, and its time is now,” he said.

Proponents of Proposition 8 expressed disappointment, but said they were not surprised, given the nature of the Ninth Circuit, which they view as liberal, and predicted the ruling would fail before the Supreme Court. Several said the decision was narrow enough that it was more unlikely now that the Supreme Court, if it accepted the case, would use it to establish a constitutional right to same-sex marriage.

“Since the beginning of this case, we’ve known that the battle to preserve traditional marriage will ultimately be won or lost not here, but rather in the U.S. Supreme Court,” said Andrew P. Pugno, general counsel for the ProtectMarriage.com coalition, which was behind Proposition 8. “We will immediately appeal this misguided decision that disregards the will of more than seven million Californians who voted to restore marriage as the unique union of only a man and woman.”

Mr. Pugno said he had not decided whether he would appeal to the Supreme Court or ask a larger panel of the Ninth Circuit Court to review this decision.

Douglas NeJaime, an associate professor at Loyola Law School in Los Angeles, said the narrowness of the decision could influence the Supreme Court to take a road it often favored: issuing narrow and incremental decisions, not sweeping ones. “It’s striking that the court—or at least the two judges—went out of their way to define the judgment as narrowly as they could,” he said.

Mr. Olson hailed the decision, saying it was a “huge day,” and noted that the judges had, in the course of their 89-page majority decision, systematically rebutted most of the arguments that had been made against gay marriage.
“I’m not at all surprised that the court didn’t go further than it needed to go,” he said. “If it had, it might have been criticized for reaching more than it should.”

The emotional repercussions were on display as Spencer Perry, 17, the son of one of the couples who initiated the case, turned out to praise it. “With this ruling, in the eyes of the government, my family is finally normal,” he said as his mother looked on.

John Schwartz contributed reporting from New York, and Ian Lovett from Los Angeles.
The Supreme Court has nine justices, but if the constitutional fight over same-sex marriage reaches them this year, the decision will probably come down to just one: a California Republican and Reagan-era conservative who has nonetheless written the court’s two leading gay rights opinions.

Justice Anthony M. Kennedy, 75, often holds the court’s deciding vote on the major issues that divide its liberals and conservatives. More often than not, that vote has swung the court to the right. But on gay rights, Kennedy has been anything but a “culture wars” conservative.

One of his opinions lauded the intimacy between same-sex couples and demanded “respect for their private lives,” provoking Justice Antonin Scalia to accuse him of having “signed on to the so-called homosexual agenda.”

“He is a California establishment Republican with moderately libertarian instincts,” Stanford University law professor Pamela Karlan said of Kennedy. “He travels in circles where he has met and likes lots of gay people.”

Based on Kennedy’s past opinions, Karlan is confident that if the Supreme Court takes up the issue of California’s same-sex marriage ban, “it meansProp. 8 is going down to defeat,” she said. “There is no way he will take it to reinstate” the ban.

Not all court observers share her prediction, but the uncertainty about how Kennedy might vote may, by itself, be enough to deter the high court from hearing an appeal of the decision by the U.S. 9th Circuit Court of Appeals. Four justices must vote for the court to consider a case, but a majority is needed to issue a ruling.

When an appeal reaches the high court, the four most conservative justices will face a tough choice: Vote to have the court hear the case and run the risk that Kennedy would side with the more liberal justices to go beyond the 9th Circuit decision and establish a nationwide right to same-sex marriage. Or turn the case aside, leaving same-sex marriage intact in California but setting no national precedent.

The man at the center of the speculation grew up in a Catholic family in Sacramento, where his father was a lawyer and lobbyist in the Legislature. Family friends included then-Gov. Earl Warren. As a Harvard law student, the young Kennedy visited the Supreme Court to meet with Warren, who was then chief justice.

As a justice since 1988, Kennedy has reflected at times both styles of Republicanism: the conservatism and respect for states’ rights of Reagan, who appointed him, as well as Warren’s devotion to civil rights and fair treatment.

Two years ago he wrote the much-disputed 5-4 opinion in the Citizens United case that said corporations and unions had a free-speech right to spend freely on election
campaigns. But also that year Kennedy wrote a 5-4 opinion that struck down as cruel and unusual punishment the laws in Florida and elsewhere under which juvenile offenders were sent to prison for life for crimes that did not involve a murder. Sounding a bit like Warren, Kennedy said it was unfair to close the prison doors forever on youths who had gone wrong.

Eight years ago he wrote the decision that declared unconstitutional laws in Texas and elsewhere that made gays subject to arrest for “deviate” sexual conduct. “The state cannot demean” same-sex couples by making their intimate, private conduct into a crime, Kennedy said.

In 1996, he wrote an opinion in a Colorado case called *Romer vs. Evans* that formed the basis for Tuesday’s 9th Circuit decision striking down Proposition 8.

Colorado voters had approved an initiative that stripped gays and lesbians of civil rights protections under state and local ordinances. Kennedy said the law could not stand because it was “born of animosity” toward homosexuals and took away their hard-won legal rights.

In Tuesday’s decision, Judge Stephen Reinhardt of Los Angeles did not say gays had a right to marry as a matter of equal treatment. Instead, he focused on same-sex marriage in California and repeated Kennedy’s view that voters could not take away the rights gays had briefly won. “Prop. 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry,” Reinhardt wrote, citing *Romer vs. Evans*.

Kennedy sits in the middle of two ideological blocs likely to split evenly on the question of same-sex marriage. The four conservatives—Chief Justice John G. Roberts Jr. and Justices Scalia, Clarence Thomas and Samuel A. Alito Jr.—are likely to oppose the 9th Circuit’s decision on the grounds that judges should not force such a change in state law. The four liberals—Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan—are likely to support the 9th Circuit’s decision as a matter of equal treatment.

“Both sides will be nervous,” said Michael Dorf, a Cornell University law professor who has clerked for Reinhardt and Kennedy. The California-only approach taken by Reinhardt would allow the high court to pass up the case, but he and others predict the justices will hear it. “This legalizes same-sex marriage in the biggest state. That’s a big deal in itself,” Dorf said.

Chapman University law professor John Eastman said conservatives had not given up on Kennedy.

“I know some people say Justice Kennedy will ask: Should we stop the progress now? I think Justice Kennedy will ask: Do we want to put a stake in the heart of an institution, marriage, that has done so much for society?” he said.

Professor Erwin Chemerinsky, dean of UC Irvine Law School, believes Kennedy will play the crucial role and write a broader opinion that undercuts other state laws banning same-sex marriage. “This is a court that wants to have the last word on major legal issues,” he said.
The Ninth Circuit Court refused on Tuesday to reconsider the decision in February striking down California's Proposition 8, the voter-approved ban on same-sex marriages in the state. The Court, however, put the case on hold for at least 90 days to allow the proponents of the ballot measure to seek to appeal to the Supreme Court. The denial came over the dissents of three judges, who called this a "momentous case" and argued that the divided decision of a three-judge panel had resulted from a "gross misapplication" of a key Supreme Court ruling on gay rights. One other judge dissented, but did not join the three in their objection...

The ruling will set the stage for a major test in the Supreme Court, although the panel ruling is a narrow one that explicitly avoided deciding whether gays and lesbians have a constitutional right to get married. The two judges who were in the majority in ruling against Proposition 8 briefly defended the narrowness of their decision in a concurring opinion Tuesday.

After the panel decision, the supporters of the measure had asked the full Circuit Court to reconsider the case en banc. At the request of an unidentified judge, a vote was taken among the 25 judges eligible to vote on the question, and a majority of 13 would have been required to grant such review. The final vote thus appeared to be 21-4, because the dissenting member of the panel favored en banc review, but did not join the dissenting opinion by three other judges.

Because the Circuit Court's decision is now on hold, not only for 90 days, but also—if the Justices grant review—for all of the time that the Supreme Court takes to decide it, that could make it unnecessary for the backers of Proposition 8 to file a quick plea for help from the Supreme Court. The case almost certainly could not be heard, in any event, until the new Term, starting October 1, since the Justices are likely to go into summer recess later this month. If review were granted, the case probably would not even be heard until weeks after the November elections this year.

The Ninth Circuit panel, and a three-judge panel of the First Circuit, have now issued gay marriage decisions that avoid the issue of whether the Constitution assures gays and lesbians of any right to civil marriage. In both of the panel decisions, the two Circuit Courts relied upon findings that excluding homosexuals from equal access to marriage or to the benefits of marriage was based upon discrimination against them because of their sexual identities. That approach is key to a series of modern Supreme Court rulings that have held that hostility to homosexuality, or moral objection to it, is not a valid basis for singling out gays and lesbians for less favorable treatment in public policy. The Supreme Court has never recognized a right to same-sex marriage.

The First Circuit Court, unlike the Ninth Circuit, did not strike down a state law, but rather ruled unconstitutional a part of a 1996 federal law, the Defense of Marriage Act, that provided federal benefits for marriage only for opposite-sex couples.
Tuesday's developments in the Ninth Circuit Court illustrated just how contentious the issue of same-sex marriage remains in American society. The three dissenting judges who joined in a separate opinion accused the majority of the court of having “silenced any . . . respectful conversations” about the issue; they noted that President Obama, in a recent statement saying he supports same-sex marriage, had also urged the nation to talk about the issue in a “respectful manner.”

Circuit Judge Diarmuid O’Scannlain wrote the dissenting opinion, joined by Circuit Judges Jay S. Bybee and Carlos Bea. Their opinion said that the majority has now “declared that animus must have been the only conceivable motivation for a sovereign state to have remained committed to a definition of marriage that has existed for millennia. . . . Even worse, we have overruled the will of seven million California Proposition 8 voters based on a reading of Romer [v. Evans] that would be unrecognizable to the Justices who joined it, to those who dissented from it, and to the judges from sister circuits who have since interpreted it. We should not have so roundly trumped California’s democratic process without at least discussing this unparalleled decision as an en banc court.”

Circuit Judge N. Randy Smith, who had dissented from the panel ruling, said Tuesday he would have granted en banc review, but he wrote no opinion.

Circuit Judge Stephen Reinhardt, the author of the panel decision, wrote a short concurring opinion joined by his colleague on the panel, Circuit Judge Michael Daly Hawkins. They said they were puzzled by Judge O’Scannlain’s “unusual reliance” on comments by President Obama, because, they said, the President had made no mention of “the narrow issue that we decided.”

They added: “We held only that under the particular circumstances relating to California’s Proposition 8, that measure was invalid. In line with the rules governing judicial resolution of constitutional issues, we did not resolve the fundamental question that both sides asked us to: whether the Constitution prohibits the states from banning same-sex marriage. That question may be decided in the near future, but if so, it should be in some other case, at some other time.”

Because the stay order was issued, no new same-sex marriages may be performed in California under the panel decision. Some 18,000 couples were married in California, during the period between the time the state Supreme Court had ruled that such a right existed under the state constitution and the vote by California voters in November 2008 to take away that right for gays and lesbians.
Opponents of same-sex marriage asked the U.S. Supreme Court Tuesday to hear their case for reinstating California’s Proposition 8, a voter initiative limiting marriage to heterosexuals that was ruled unconstitutional by lower courts.

The petition is the second major marriage case to reach the justices’ door this year, after parties on both sides asked the high court to settle the constitutionality of the Defense of Marriage Act, a 1996 federal law denying benefits to same-sex spouses that lower courts also found invalid.

The court is widely expected to hear one or both of the cases, with arguments likely by early next year and a ruling before July.

Although both cases involve gay marriage, each presents distinct legal issues, meaning the justices need not recognize a broad right to same-sex marriage even if they rule Proposition 8 and the Defense of Marriage Act unconstitutional.

In May 2008, the California Supreme Court held that the state constitution, which guarantees individuals liberty, privacy and equal protection of the laws, required recognition of same-sex marriage. Opponents quickly qualified a ballot initiative to amend the state constitution to limit marriage to heterosexual couples and the measure, Proposition 8, passed in November 2008.

Same-sex marriage advocates, led by the bipartisan legal team of Ted Olson and David Boies, challenged Proposition 8 in federal court. Conservative activists behind the initiative stepped in to defend Proposition 8 after state officials, including Republican Gov. Arnold Schwarzenegger and his Democratic successor, Edmund G. (Jerry) Brown Jr., declined to do so.

The Ninth U.S. Circuit Court of Appeals, based in San Francisco, affirmed a district court that found Proposition 8 unconstitutional. But the Ninth Circuit didn’t find a general right to same-sex marriage. Instead, its opinion focused on the fact that the voter initiative withdrew from a minority group a right previously recognized by the state constitution. More than 18,000 marriage licenses were issued to same-sex couples before voters rescinded their marriage rights.

The court based its ruling on a 1996 Supreme Court precedent by Justice Anthony Kennedy, which said Colorado couldn’t withdraw protections for gays and lesbians once they were granted.

In their Supreme Court filing, Proposition 8 backers said the Ninth Circuit got it wrong. Unlike the “exceptionally harsh and unprecedented character” of the Colorado measure, California law remained friendly to gays and lesbians, they said, recognizing domestic partnerships nearly equivalent to heterosexual marriage.

California voters made a rational choice in deciding that the label marriage should apply only to heterosexual partnerships, the petition says, because the concept evolved to channel “the unique procreative potential of
sexual relationships between men and women” into family units whose stability is reinforced by law.

For support, the Proposition 8 team invoked President Barack Obama, who, in an interview announcing his personal support for same-sex marriage, said those on the other side weren’t “mean-spirited.”

The petition also cites an expert, David Blankenhorn, who testified at the Proposition 8 trial in 2010 that permitting gays and lesbians to marry would be harmful to children.

In June, however, Mr. Blankenhorn, founder of the Institute for American Values, said he had come to accept gay marriage as more beneficial than harmful to society. He wrote in a New York Times op-ed that “to my deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus.”
With the Supreme Court’s next Term already shaping up as a historic one on the rights of gays and lesbians, Arizona officials have raised a significant new question for the Justices: if a state bans gay marriage, can it then take away unwed same-sex couples’ access to state benefits that go only to those who can marry? The Ninth Circuit Court said no, but dissenting judges argued that the ruling amounted to a ban on states acting to protect a traditional view of marriage. That complaint may add to the Supreme Court’s willingness to hear the state’s new appeal (Brewer v. Diaz, filed last week).

The case illustrates a trend that is beginning to develop in lower courts dealing with issues of gay marriage: they are establishing new rights to legal equality for such couples, without taking the constitutional step of creating an explicit new right for gays and lesbians to marry. That was what lower courts did in two cases that have already reached the Court, involving the constitutionality of the federal Defense of Marriage Act, and in a case due to reach the Court soon on California’s “Proposition 8” ban on such marriages. It happened again in the Arizona case newly arrived at the Court, involving the constitutionality of the federal Defense of Marriage Act, and in a case due to reach the Court soon on California’s “Proposition 8” ban on such marriages. It happened again in the Arizona case newly arrived at the Court, although the dissenters said that the decision there implicates states’ power to limit marriage rights.

Arizona is one of 39 states that ban same-sex marriage. In November 2008, its voters approved “Proposition 120,” declaring that “only a union of one man and one woman shall be valid or recognized as a marriage in this state.”

That vote came only seven months after the state government changed policy, and began offering health care benefits to “domestic partners” of state employees—a new opportunity given equally to unmarried couples, whether or not they were gay. Up to that time, those benefits were available only to married spouses and their children. The 2008 change made a “domestic partner” an eligible dependent of a state worker, and defined domestic partner generally as a person living in the same home with a state employee who had been living there for at least a year, was not married, and was at least 18 years old.

Ten months after “Proposition 120” had passed, the Arizona legislature passed a law that was to go into effect on January 1 of last year, wiping out coverage for all domestic partners, gay or not. Titled “Section 0,” it said simply that “dependent” in state benefit law meant only a spouse or an eligible child (one under age 19 or, if a full-time student, under age 23). The state legislature adopted Section 0, concluding that coverage of domestic partners was costing the state upwards of $4 million a year, and the state was faced with a serious budget crisis, with a rising deficit. Section 0 was one of 40 provisions that were adopted as cuts to the state budget.

Section 0, however, has never gone into effect, because a group of gay and lesbian state workers sued to challenge it and, in the meantime, got a court order blocking its enforcement.
Their lawsuit, based on the equal legal protection guarantee of the Fourteenth Amendment, argued that the loss of health care for their domestic partners, and for the children of their domestic partners, was discriminatory. Since state workers who were not gay could keep their benefits if they got married, while gay workers were barred from marrying, the effect was to single out gays for the denial of benefits that they formerly had enjoyed. The loss, they argued, would be a significant financial and emotional hardship. One example that federal courts cited was of a University of Arizona professor who had been in a committed relationship for 22 years with her partner, who could not work because of a need to care for the partner’s 89-year-old mother. The partner had signed up for family health coverage provided by the state, needing it for herself because she has asthma and could not get private health insurance. She would lose that coverage under Section O.

A federal judge ruled that the challengers were likely to succeed when their case was tried, and blocked Section O. The judge found that, while that provision did not end coverage only for domestic partners of gays, but the partners of all state employees, it would have a “discriminatory effect” on gays because of the state’s marriage ban. A three-judge panel of the Ninth Circuit agreed. The state had argued that the provision was justified by the need to save state funds, a need to reduce the cost of running the domestic partner benefit program, and a desire to promote marriage in its traditional form. The Circuit Court panel rejected all of those reasons, concluding that none of them could survive constitutional challenge, even with the court only applying the least-demanding standard: rational basis review. State employees and their families have no constitutional right to benefits, the panel conceded, but it added: “When a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.”

When the full 28-judge Circuit Court refused to reconsider the case en banc, the two dissenting judges argued that there was no evidence that the Arizona legislature had passed Section O in order to discriminate against state employees who are gay or lesbian, and such an intent would be necessary to make the cut-off of benefits unconstitutional. “It rests only on budgetary considerations,” the dissenters contended. Further, the dissenters argued, the panel decision was based upon the “veiled but unmistakable” conclusion that “rules benefitting only traditional marriage serve no conceivable rational purpose.” The decision thus set a precedent for striking down efforts by states “to promote traditional marriage,” the dissenting opinion asserted.

Arizona’s petition to the Supreme Court raises three questions: whether Section O is unconstitutional though it was written in a neutral way and there is no evidence of discrimination based on sexual orientation, whether the state had justified it adequately as eliminating the added expense and administrative burden of covering all domestic partners, and whether the fact that Arizona bars same-sex marriage is a valid basis for finding Section O to be biased.

The Ninth Circuit ruling, state officials argued, was flawed on the merits, conflicts with rulings of the Supreme Court on how to judge discrimination under the Fourteenth Amendment, conflicts with rulings of other state courts on similar issues, and ignores the state’s valid reasons for Section O—“conserving state resources and funds and
promoting traditional marriage.” Indirectly, the petition added, picking up on the dissenting Circuit Court judges, the panel decision has struck down Arizona’s state laws and constitutional provision limiting marriage to opposite-sex couples.

Noting that the Ninth Circuit had also struck down California’s “Proposition 8” ban on same-sex marriage in that state, the Arizona petition said the Ninth Circuit decision in the domestic partners case was “in some ways even more breathtaking” because the “Proposition 8” ruling did not reach the question of the constitutionality of same-sex marriage, while this decision does, at least indirectly.

The Arizona state employees who filed the challenge have 30 days to respond to the new petition, unless that time is extended. The Supreme Court is not expected to act upon the case during its summer recess.
A state can’t selectively withdraw benefits from same-sex couples, a federal appeals court ruled Tuesday in blocking Arizona’s attempt to deny health coverage to the domestic partners of gay and lesbian state employees.

When a state provides health care to its employees, “it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular,” said the Ninth U.S. Circuit Court of Appeals in San Francisco.

The 3-0 ruling upheld a federal judge’s injunction against a law that was signed by Arizona Gov. Jan Brewer in 2009 and was scheduled to take effect this year. Brewer’s predecessor, Janet Napolitano, had authorized health benefits for state employees’ domestic partners in April 2008 before leaving to become President Obama’s Homeland Security secretary.

Tara Borelli of Lambda Legal, a lawyer for nine lesbian and gay state employees in Arizona, said the ruling is the first by a federal appeals court “to recognize that equal pay for equal work means that lesbian and gay state employees should get the same family health coverage as their heterosexual co-workers.”

Matthew Benson, a spokesman for Brewer, said the governor is considering a further appeal. He said Brewer and Arizona lawmakers had “eliminated domestic partner benefits across the board for both gay and straight couples in response to the state budget crisis.”

The court said, however, that the cutoff had a discriminatory impact because only opposite-sex couples could restore their benefits by getting married. The ruling provides health coverage only to the domestic partners of gay and lesbian couples—the sole plaintiffs in the suit—an impact that Benson said promotes inequality.

The court also said the plaintiffs presented a study showing a cutoff of benefits to same-sex partners would achieve only minimal savings—no more than $1.8 million a year for fewer than 300 partners in a state with a $7.8 billion budget, according to court documents—and the state had offered no rebuttal.