# United States Senate

COMMITTEE ON THE JUDICIARY

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Response of David Austin R. Nimocks to

Written Questions from Senator Chuck Grassley,

Ranking Member of the Senate Judiciary Committee,

Regarding the July 20, 2011 Committee Hearing Entitled "S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families"

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David Austin R. Nimocks
Senior Legal Counsel
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, D.C. 20001
Tel: (202) 393-8690
Fax: (480) 444-0028

Dear Chairman Leahy, Ranking Member Grassley, and Committee Members,

On July 27, 2011, as a follow up to the July 20, 2011 hearing on repealing the Defense of Marriage Act ("DOMA"), Ranking Member Grassley asked me to answer the following question:

> **One of the witnesses believes that DOMA degrades same-sex couples, their loved ones, and their marriages, rendering them second class citizens.**
>
> **Do you believe that this is the effect of DOMA, and are there legitimate, non-discriminatory reasons why the government can prefer to give official recognition only to traditional marriages?**

Arguments about "second class citizens" are grounded in legal principles of equal protection and relate, in part, to our country's civil rights history. *See*, *e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). However, equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

DOMA acknowledges the fundamental truth that opposite-sex couples are inimitably different from same-sex couples, which flows from the fact that men and women are uniquely different. Such an affirmation is neither offensive nor unconstitutional. Rather, it recognizes the real and crucial differences between same-sex unions and marriage between a man and a woman. And it is these legitimate, undeniable differences which show that not only *can* the federal

government give official recognition to marriage, it *should*. Particularly, numerous courts have relied on the unique procreative capacity of opposite-sex relationships in concluding that "the many laws defining marriage as the union of one man and one woman … are [constitutional because they are] rationally related to the government interest in 'steering procreation into marriage.'" *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).[1] This is true not only of *every* appellate court—federal and state—to consider this issue under the U.S. Constitution, but the majority of state courts interpreting their own constitutions as well,[2] including the Minnesota Supreme Court in its famous 1971 decision, *Baker v. Nelson*.[3] And when the U.S. Supreme Court was asked by the losing plaintiffs to overrule *Baker*, it unanimously rejected the appeal as failing to present a substantial question of federal law— dismissing exactly the type of arguments referenced by the witness.[4]

It is, however, "degrad[ing]" to humanity to suggest that men and women are the same. Indeed, the lynchpin of most common anti-marriage arguments is

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[1] *See also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308-09 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145-47 (Bankr. W.D. Wash. 2004); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 680 (Tex. App. 2010); *Standhardt v. Superior Court of Arizona*, 77 P.3d 451, 461-64 (Ariz. Ct. App. 2003); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

[2] *See Conaway v. Deane*, 401 Md. 219, 317-23, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982-85 (Wash. 2006) (plurality); *Morrison v. Sadler*, 821 N.E.2d 15, 23-31 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 461-64; *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973).

[3] *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) ("The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry.").

[4] *See Baker v. Nelson*, 409 U.S. 810 (1972).

that there are no important or demonstrable differences between men and women and that any two people, irrespective of sex, can fulfill the important public purposes of the institution of marriage. But as stated by the Supreme Court, "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."[5] "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ."[6]

These celebrated "inherent differences" are the foundation for society's interest in marriage: "encouraging responsible procreation and child-rearing."[7] Only a man and a woman can create a sexual union that can, in turn, generate a child. And, as supported by millennia of accumulated common sense[8] and shown by the unusually strong consensus of social science,[9] children are best raised in a low-conflict home led by their biological father and mother. Both parents matter

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[5] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 133-34 (1994) (quoting *Ballard v. U.S.*, 329 U.S. 187, 193-194 (1946)).

[6] *United States v. Virginia*, 518 U.S. 515, 533 (1996).

[7] H.R. Rep. No. 104-664, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, at 2917.

[8] *See Hernandez,* 7 N.Y.3d at 359 ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004) ("Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model."); *accord In re Op. of the Justices*, 129 N.H. 290 (1987) *and In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. Ct. App. 2010).

[9] *See*, *e.g.*, footnotes 10 and 11 to *Statement of Austin R. Nimocks*, submitted for the July 20, 2011 hearing on S.598 (identifying the relevant studies).

because they "play crucial and qualitatively different roles in the socialization of the child."[10] And this parental diversity is crucial for children because "[t]he two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being."[11] Thus, pretending that our society is not composed of two wonderfully different and complementary halves of humanity both denies reality and ignores the government and society's primary and public reason for being in the marriage business: children.

Americans fully understand this fundamental truth about marriage. The people do not need the assistance of their elected representatives to define the institution of marriage. Unlike the debt ceiling, complicated administrative questions, or matters where the expertise of the legislature is preferred, the people are the experts on marriage since it is not the product or creation of Congress. DOMA did not invent marriage or create anything new. Rather, it merely recognized and guarded what the people know and believe.

And lest there be any question about what Americans believe about marriage, one need only to look at the record. What is likely the largest and most definitive poll of Americans' opinions on this issue, completed in May 2011, found that 62% of Americans believe marriage should be defined as "only a union

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[10] Michael Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 Hum. Dev. 245, 246 (1975).

[11] David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood & Marriage are Indispensable for the Good of Children & Society* 197 (1996).

between one man and one woman."[12] Unsurprisingly, that percentage reflects the success rate for the votes in 31 states that, like DOMA, recognized and protected marriage as being only between a man and a woman.[13] By contrast, every U.S. jurisdiction that has redefined marriage has done so without the popular consent of the people.

Finally, as outlined in my original testimony and my supplemental written testimony, there are many firm bases for the government to recognize what has always been true from the beginning of time. Because only opposite-sex couples can fulfill the public purposes of marriage, DOMA is a sound, compelling, and constitutional policy.

Respectfully submitted this 10th day of August 2011.

David Austin R. Nimocks

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[12] *See* http://www.adfmedia.org/News/PRDetail/?CID=27539 (last visited August 3, 2011).

[13] *See* http://oldsite.alliancedefensefund.org/userdocs/MarriageAmendmentVotePercentages.pdf (last visited August 3, 2011) (showing that, for instance, an average of 62.5% of voters have voted to approve their state marriage amendments). However, many consider the number of U.S. jurisdictions that have voted on marriage to be 32. As referenced by Hon. Steve King at the July 20, 2011 hearing on S.598, Iowans removed from their supreme court on November 2, 2010 all three justices who were up for retention votes. In the words of Rep. King, Iowans "sent a message to the Supreme Court of Iowa," and made clear both their displeasure with the court's decision in *Varnum v. Brien*, and their unwavering belief in marriage as the union of one man and one woman.