*Chapter 1*

**The Legal and Constitutional Environment of Business**

***Case 1.1***

C.A.7 (Ind.),2013.

Doe v. Prosecutor, Marion County, Indiana

--- F.3d ----, 2013 WL 238735 (C.A.7 (Ind.))

Only the Westlaw citation is currently available.

United States Court of Appeals,

Seventh Circuit.

**John DOE, Plaintiff–Appellant,**

**v.**

**PROSECUTOR, MARION COUNTY, INDIANA, Defendant–Appellee.**

No. 12–2512.

Argued Nov. 27, 2012.

Decided Jan. 23, 2013.

[FLAUM](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0233857101&FindType=h), Circuit Judge.

A recent Indiana statute prohibits most registered sex offenders from using social networking websites, instant messaging services, and chat programs. John Doe, on behalf of a class of similarly situated sex offenders, challenges this law on First Amendment grounds. We reverse the district court and hold that the law as drafted is unconstitutional. Though content neutral, we conclude that the Indiana law is not narrowly tailored to serve the state's interest. It broadly prohibits substantial protected speech rather than specifically targeting the evil of improper communications to minors.

**I. Background**

**A. Legislative Background**

[Indiana Code § 35–42–4–12](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L) prohibits certain sex offenders from “knowingly or intentionally us[ing]: a social networking web site” [FN1](#Document1zzB00212029708330) or “an instant messaging or chat room program” [FN2](#Document1zzB00322029708330) that “the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program.” [§ 35–42–4–12(e)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7fdd00001ca15) (violation constitutes a Class A misdemeanor but subsequent violations constitute Class D felonies). The law applies broadly to all individuals required to register as sex offenders under Indiana Code § 11–8–8, et seq., who have committed an enumerated offense. [§ 35–42–4–12(b)(1)–(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_3fed000053a85). The law does not differentiate based on the age of victim, the manner in which the crime was committed, or the time since the predicate offense. Subsection (f) provides an express defense if the individual did not know the website allowed minors or upon discovering it does, immediately ceased further use. [§ 35–42–4–12(f)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_ae0d0000c5150). Subsection (a) exempts persons convicted of so-called Romeo and Juliet relationships where the victim and perpetrator are close in age and had a consensual relationship. [§ 35–42–4–12(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4).

**B. Procedural Background**

**1. John Doe's Suit**

In 2000, Doe was arrested in Marion County and convicted of two counts of child exploitation. Although he was released from prison in 2003 and is not on any form of supervised release, he must register as a sex offender on Indiana's registry. And because child exploitation is an enumerated offense, [section 35–42–4–12](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L) prohibits Doe from using the covered websites and programs. Doe filed suit against the Marion County Prosecutor alleging the law violates his First Amendment rights (as incorporated under the Fourteenth Amendment). [FN3](#Document1zzB00432029708330) The district court granted his request to proceed anonymously and later granted his motion to certify a class pursuant to [Federal Rule of Civil Procedure 23(b)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR23&FindType=L). It defined the class as:

all Marion County residents required to register as sex or violent offenders pursuant to Indiana law who are not subject to any form of supervised release and who have been found to be a sexually violent predator under Indiana law or who have been convicted of one or more of the offenses noted in [Indiana Code § 35–42–4–12(b)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_c0ae00006c482) and who are not within the statutory exceptions noted in [Indiana Code § 35–42–4–12(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4).

Doe filed a motion for preliminary injunction, but the parties agreed it should be treated as a motion for a permanent injunction and decided after a full bench trial. The district court ordered as much. *See* [Fed.R.Civ.P. 65(a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR65&FindType=L). The parties further agreed no additional discovery was required and there would be no live evidence at trial. Accordingly, the bench trial consisted of the introduction of four affidavits—two from Doe and two from social media experts—as well as arguments from counsel.

**2. Lower Court Decision**

After the bench trial, the district court upheld the law and entered judgment for the defendant. It found the law implicates Doe's First Amendment rights but held the regulation is narrowly tailored to serve a significant state interest and leaves open ample alternative channels of communication.

Although the court noted that the statute “captures considerable conduct that has nothing to do” with the state's legitimate interest in protecting children from predators, it asserted “Doe never furnishes the Court with workable measures that achieve the same goal (deterrence and prevention of online sexual exploitation of minors) while not violating his First Amendment rights.” The district court reasoned that the law is narrowly tailored because it “only preclude[s] ... using web sites where online predators have easy access” to children, but “the vast majority of the internet is still at Mr. Doe's fingertips.” The district court concluded that the law is not “substantially broader than necessary” because social networking sites without minors, e-mail, and message boards present alternative methods to communicate as Doe wished.

Doe offered another Indiana law that already prohibits online solicitation of children as evidence that the law is not narrowly tailored. The district court rejected this argument stating that “the statutes serve different purposes”: “[o]ne set of statutes aims to *punish* those who have *already committed* the crime of solicitation,” while the “challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors.” (emphases in original). The district court concluded by noting the statute furthers the state's “strong interest in ensuring that sex offenders do not place themselves in these potentially dangerous situations.”

On the issue of alternative channels of communication, the district court listed several social network alternatives, namely: “the ability to congregate with others, attend civic meetings, call in to radio shows, write letters to newspapers and magazines, post on message boards, comment on online stories that do not require a Facebook [account], email friends, family, associates, politicians and other adults, publish a blog, and use social networking sites that do not allow minors.”

Doe timely appeals this decision.

**II. Discussion**

[[1]](#Document1zzF12029708330)[[2]](#Document1zzF22029708330) We review a denial of a permanent injunction for abuse of decision, accepting all factual determinations unless they are clearly erroneous. [*3M v. Pribyl,* 259 F.3d 587, 597 (7th Cir.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001631248&ReferencePosition=597). However, this case presents a single legal question, which we review de novo.[FN4](#Document1zzB00542029708330) The statute clearly implicates Doe's First Amendment rights as incorporated through the Fourteenth Amendment. It not only precludes expression through the medium of social media, *see* [*Cohen v. California,* 403 U.S. 15, 24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1971127088) (“the usual rule [is] that governmental bodies may not prescribe the form or content of individual expression”), it also limits his “right to receive information and ideas,” [*Stanley v. Georgia,* 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1969132965); *see* [*Procunier v. Martinez,* 416 U.S. 396, 408–09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1974127174) (“[T]he addressee as well as the sender of direct personal correspondence derive[ ] from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.”). The Indiana law, however, is content neutral because it restricts speech without reference to the expression's content. [*Turner Broadcasting Sys. v. FCC,* 512 U.S. 622, 641–42, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1994136435). As such, it may impose reasonable “time, place, or manner restrictions.” [*Clark v. Comm. for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984131499). To do so, the law must satisfy a variant of intermediate scrutiny—it must be “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.” [*Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295). Because we conclude the law is not narrowly tailored, we need not reach the alternative channel inquiry.

The state initially asserts an interest in “protecting public safety, and specifically in protecting minors from harmful online communications.” Indiana is certainly justified in shielding its children from improper sexual communication. Doe agrees, but argues the state burdens substantially more speech than necessary to serve the intended interest. Indiana naturally counters that the law's breadth is necessary to achieve its goal. On this point, the Supreme Court's cases on narrow tailoring are instructive.

[[3]](#Document1zzF32029708330) “A complete ban [such as the social media ban at issue] can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.” *See* [*Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577). In [*Frisby,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) the Court upheld an ordinance that prohibited picketing focused on a particular residence. [*Id.* at 477, 108 S.Ct. 2495.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) The regulation sought to stop a recent pattern of abortion protesters that surrounded abortion doctors' homes. The Court found that the state had a significant interest in protecting “residential privacy,” and a “complete prohibition” was the only way to further this interest. [*Id.* at 484–86, 108 S.Ct. 2495.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) The Court reasoned that “the evil of targeted residential picketing ... is created by the medium of expression itself.”   [*Id.* at 487–88, 108 S.Ct. 2495](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) (internal quotations omitted). A ban on all picketing would have gone too far because only the focused residential protests threatened the state interest. [*Id.* at 486, 108 S.Ct. 2495.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) Similarly, in [*City of Los Angeles v. Taxpayers for Vincent,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1984123438) a city ordinance prohibited posting signs on public property. [466 U.S. 789, 792, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984123438). The Court concluded these signs constituted “visual blight” and the regulation furthered the city's legitimate interest in esthetic values. [*Id.* at 805, 104 S.Ct. 2118.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984123438) The Court upheld the complete ban reasoning the “substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.”   [*Id.* at 810, 104 S.Ct. 2118.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984123438)

In contrast to [*Frisby*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) and [*Vincent,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1984123438) the Supreme Court has invalidated bans on expressive activity that are not the substantive evil if the state had alternative means of combating the evil. In [*Schneider v. Town of Irvington,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1939126946) the Court struck down various blanket prohibitions against distributing handbills. [308 U.S. 147, 162–64, 60 S.Ct. 146, 84 L.Ed. 155 (1939)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1939126946). The laws in that case furthered a legitimate interest in preventing litter. But unlike the ordinances in [*Frisby*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) and [*Vincent,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1984123438) the expressive activity—handing paper to people in public—did not produce the evil. The recipients' incidental decision to drop the paper did. As such, the Court required the cities to prevent littering by enforcing littering laws; they could not prohibit activity that might incidentally result in littering. [*Id.* at 162–63, 60 S.Ct. 146.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1939126946) Similarly, in [*Martin v. City of Struthers,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1943120620) the Court invalidated an ordinance that prohibited all door-to-door distributions or solicitations because “[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors.” [319 U.S. 141, 147, 63 S.Ct. 862, 87 L.Ed. 1313 (1943)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1943120620). For example, those who did not want to receive a stranger could post no trespassing signs, and states could permissibly punish those who disobeyed the warnings. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1943120620)

Turning to the Indiana statute, the state agrees there is nothing dangerous about Doe's use of social media as long as he does not improperly communicate with minors. Further, there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress. Even the district court agreed with this sentiment, stating the law “captures considerable conduct that has nothing to do” with minors. Indiana prevents Doe from using social networking sites for fear that he might, subsequent to logging on to the website or program, engage in activity that Indiana is entitled to prevent. But like the states in [*Schneider*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1939126946) and [*Martin,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1943120620) Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders. For instance, it is a felony in Indiana for persons over twenty-one to “solicit” children under sixteen “to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling intended to arouse or satisfy the sexual desires of either the child or the older person.” [Ind.Code § 35–42–4–6](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-6&FindType=L) (it is also a felony for person between the ages of eighteen to twenty-one to solicit children under fourteen). A separate statute goes further. It punishes mere “inappropriate communication with a child” and communication “with the intent to gratify the sexual desires of the person or the individual,” [Ind.Code § 35–42–4–13](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-13&FindType=L) (applies to persons over twenty-one communicating with children fourteen or younger). Significantly, both statutes have enhanced penalties for using a computer network and better advance Indiana's interest in preventing harmful interaction with children (by going beyond social networks). They also accomplish that end more narrowly (by refusing to burden benign Internet activity). That is, they are neither over- nor under-inclusive like the statute at issue here.[FN5](#Document1zzB00652029708330)

In conducting this analysis, however, we must be most careful not to impose too high a standard on Indiana. The Supreme Court has continually reminded us that the state's regulation “need not be the least restrictive or least intrusive means of” combating the state's legitimate interests, [*Ward,* 491 U.S. at 798, 109 S.Ct. 2746,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295) and post-hoc analyses, like the one we are engaging in, are particularly susceptible to running afoul of this principle. At first glance, this standard seems in tension with language in [*Frisby*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) noting a law must “target[ ] and eliminate[ ] no more than the exact source of the ‘evil’ it seeks to remedy,” [*Frisby,* 487 U.S. at 485, 108 S.Ct. 2495,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) and indeed, that is what the dissenters in [*Ward*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989093295) alleged, *see* [*Ward,* 491 U.S. at 804–07, 109 S.Ct. 2746](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295) (Marshall, J., dissenting). However, [*Ward*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989093295) scales back [*Frisby*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) in a limited number of situations. On the one hand, [*Ward*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989093295) adds a quantitative component to the [*Frisby*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1988082577) language by noting the law must not be “*substantially* broader than necessary.” [*Id.* at 800, 109 S.Ct. 2746](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295) (emphasis added). On the other hand, [*Ward*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989093295) also embodies an administrability exception in stating “the requirement of narrow tailoring is satisfied ‘so long as the [state interest] would be achieved less effectively absent the regulation.’ ” [*Ward,* 491 U.S. at 799, 109 S.Ct. 2746](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295) (original quotations and alterations omitted). In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil.

[*Hill v. Colorado*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000388777) is illustrative. [530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000388777). There, the state, concerned about abortion protests, passed a statute that prohibited approaching individuals within a 100–foot radius of a healthcare facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with [an]other person” on public property. [*Id.* at 707, 120 S.Ct. 2480.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000388777) The Court acknowledged that in furthering the state's interest in providing unimpeded access to healthcare facilities and shielding patients from potentially traumatic encounters, the state's blanket prohibition on approaching individuals would “sometimes inhibit a demonstrator whose approach in fact would have proved harmless.” [*Id.* at 729, 120 S.Ct. 2480.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000388777) But this over-inclusiveness was “justified by the great difficulty” in creating a law that “targets and eliminates no more than the exact source of the ‘evil.’ ” *See* [*id.*;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000388777)[*Frisby,* 487 U.S. at 485, 108 S.Ct. 2495.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082577) The Court hypothesized that the ideal statute would prove convoluted, potentially protecting “a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8–foot boundary.” [*Hill,* 530 U.S. at 729, 120 S.Ct. 2480.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000388777) Thus, the statute at issue in [*Hill*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000388777) was constitutional because (1) the prohibited expression that did not further the state interest was minimal, and (2) its inclusion stemmed from the difficulty in carving a rule that covered precisely the evil contemplated by the legislature.

The Indiana statute's over-inclusiveness, however, cannot be justified by the administrability concerns described in [*Hill.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000388777) With little difficulty, the state could more precisely target illicit communication, as the statutes above demonstrate. *See* [Ind.Code §§ 35–42–4–6](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-6&FindType=L); 35–42–4–13. To be sure, other sex-offender or social media statutes might present different administrability questions. For instance, a hypothetical law banning all communication between minors and sex offenders through social media burdens less speech but nevertheless creates problems. Such a law frees most expression from regulation but still prohibits substantial harmless speech—e.g., at a very basic level, it would prohibit conversations between a parent and child if the parent is a sex offender. But as additional exceptions make a law more precise, the over-inclusiveness concerns decrease until the [*Hill*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2000388777) administrability concerns dominate. Where that point lies, however, is for another case.

The district court also suggested the law was narrowly tailored to serve purposes different from the existing solicitation and communication laws. It stated the existing laws “aim[ ] to *punish* those who have *already committed* the crime of solicitation,” while the “challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors” (emphases in original). The state continues this argument on appeal. The immediate problem with this suggestion is that all criminal laws generally “punish” those who have “already committed” a crime. The punishment is what “prevent[s] and deter[s]” undesirable behavior. Thus, characterizing the new statute as preventative and the existing statutes as reactive is questionable. The legislature attached criminal penalties to solicitations in order to prevent conduct in the same way decade-long sentences are promulgated to deter repeat drug offenses. Perhaps the state suggests that prohibiting social networking deprives would-be solicitors the opportunity to send the solicitation in the first place. But if they are willing to break the existing anti-solicitation law, why would the social networking law provide any more deterrence? By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation—indeed, those laws already have enhanced penalties if the defendant uses a computer network. *See* [Ind.Code §§ 35–42–4–6(b)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-6&FindType=L&ReferencePositionType=T&ReferencePosition=SP_d801000002763); 35–42–4–13(c).

The state also makes the conclusory assertion that “the State need not wait until a child is solicited by a sex offender on Facebook.” Of course this statement is correct, but the goal of deterrence does not license the state to restrict far more speech than necessary to target the prospective harm. Moreover, the state never explains how the social network law allows them to avoid “waiting.” “That the [state's] asserted interests are important in the abstract does not mean ... that [its regulation] will in fact advance those interests.” *See* [*Turner,* 512 U.S. at 664, 114 S.Ct. 2445.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1994136435) The state “must do more than simply posit the existence of the disease sought to be cured,” and “the regulation [must] in fact alleviate these harms in a direct and material way.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1994136435) (internal quotations omitted). The state bears this burden, and it does not explain how the law furthers this interest.

Despite the infirmity of the statute in this case, we do not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest in ways distinct from the existing justifications. For example, perpetrators may take time to seek out minors they will later solicit. This initial step requires time spent on social networking websites before the solicitation occurs. In the future, the state may argue that prohibiting the use of social networking allows law enforcement to swoop in and arrest perpetrators before they have the opportunity to send an actual solicitation. This argument remains speculative. And it is uncertain whether such a law could advance this interest without burdening a “substantially broader” than necessary group of sex offenders who will not use the Internet in illicit ways. [FN6](#Document1zzB00762029708330) *See* [*Ward,* 491 U.S. at 800, 109 S.Ct. 2746.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1989093295) But perhaps such a law could apply to certain persons that present an acute risk—those individuals whose presence on social media impels them to solicit children. Currently, the state presents no evidence that covered individuals present this sort of risk. We speculate only to make clear that this decision should not be read to limit the legislature's ability to craft constitutional solutions to this modern-day challenge.

The district court also cited [*Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1997131733), for the proposition that the state may “ensur[e] that sex offenders do not place themselves in these potentially dangerous situations.” [FN7](#Document1zzB00872029708330) However, [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733) is inapposite. It rejected a substantive due process challenge to a Kansas statute permitting the state to commit persons that are “likely to engage in sexually violent behavior.” [*Id.* at 351, 117 S.Ct. 2072](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1997131733) (quoting [Kan. Stat. Ann. § 59–29a01](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1001553&DocName=KSSTS59-29A01&FindType=L) (1994)). The case did not present a First Amendment challenge. Notwithstanding, the [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733) statute proceeds cautiously and is far more targeted than the Indiana statute here. The [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733) law provided respondents a number of procedural safeguards before a trial in which the state had to prove beyond a reasonable doubt that petitioners had a “mental abnormality” that made them “likely to engage in the predatory acts of sexual violence.” [*Id.* at 352, 117 S.Ct. 2072.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1997131733) They were also entitled to regular review after their confinement to ensure they still met the act's criteria. [*Id.* at 353, 117 S.Ct. 2072.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1997131733) We do not suggest that these procedures are a prerequisite to a First Amendment deprivation; [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733)-style civil commitment presents a far greater deprivation of liberty than banning social networking. But [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733) nevertheless illuminates the imprecision of the Indiana statute. Unlike the individualized assessment that ensured each respondent was “likely” to commit the redressable evil, the Indiana legislature imprecisely used the sex offender registry as a universal proxy for those likely to solicit minors. There may well be an appropriate proxy, but the state has to provide some evidence, beyond conclusory assertions, to justify the regulation.

This case also differs from our decision in [*Doe v. City of Lafayette,* 377 F.3d 757 (2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2004789831) (en banc). That case involved an individual with an extensive history of sex offenses against children, who admitted he was going to the city parks “cruising” and “looking” for children. [*Id.* at 759–60.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004789831) The city issued a unilateral order banning the plaintiff from the city parks without a hearing. [*Id.* at 760.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004789831) Unlike this case, the regulation did not implicate the First Amendment so we upheld it under the deferential rational basis review. [*Id.* at 764, 773.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004789831) Other laws restricting sex offenders' proximity to schools or parks have been similarly upheld under rational basis review because courts have found they do not implicate the First Amendment or involve a fundamental right. *See, e.g.,* [*Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003192404) (holding that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause); [*Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003192441) (holding that the public disclosure provision of Connecticut's sex offender registration law did not violate the Due Process Clause); [*Doe v. Miller,* 405 F.3d 700 (8th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2006535631) (holding residency restriction within two thousand feet of school or child care facility constitutional under rational basis review).[FN8](#Document1zzB00982029708330)

Finally, this opinion should not be read to affect district courts' latitude in fashioning terms of supervised release, [18 U.S.C. § 3583(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS3583&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) (“The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]”), or states from implementing similar solutions. Our penal system necessarily implicates various constitutional rights, and we review sentences under distinct doctrines. Terms of supervised release, for instance, must be “reasonably related to the [sentencing] factors” and “involve[ ] no greater deprivation of liberty than is reasonably necessary.” [§ 3583(d)(1)-(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS3583&FindType=L&ReferencePositionType=T&ReferencePosition=SP_e07e0000a9f57). Thus, in assessing the need for incapacitation, *see* § 3553(a)(2)(C), a court could conceivably limit a defendant's Internet access if full access posed too high a risk of recidivism. [*United States v. Scott,* 316 F.3d 733, 736–37 (7th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003092154&ReferencePosition=736). The alternative to limited Internet access may be additional time in prison, which is surely more restrictive of speech than a limitation on electronics. This option is not without limits, *see* [*United States v. Holm,* 326 F.3d 872, 878–79 (7th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003276794&ReferencePosition=878) (holding total Internet ban was too broad and compiling similar cases from other circuits), but terms of supervised release or parole may offer viable constitutional alternatives to the blanket ban—imposed outside the penal system—in this case.

We conclude by noting that Indiana continues to possess existing tools to combat sexual predators. The penal system offers speech-restrictive alternatives to imprisonment. Regulations that do not implicate the First Amendment are reviewed only for a rational basis. The Constitution even permits civil commitment under certain conditions. But laws that implicate the First Amendment require narrow tailoring. Subsequent Indiana statutes may well meet this requirement, but the blanket ban on social media in this case regrettably does not.

**III. Conclusion**

For the foregoing reasons, we REVERSE the district court's decision, and REMAND with instructions to enter judgment in favor of Doe and issue the injunction.

[FN\*](#Document1zzF0012029708330) The Honorable John J. Tharp Jr., United States District Court for the Northern District of Illinois, sitting by designation.

[FN1.](#Document1zzF00212029708330) A “ ‘social networking web site’ means an Internet web site that: (1) facilitates the social introduction between two or more persons; (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; (3) allows a member to create a web page or a personal profile; and (4) provides a member with the opportunity to communicate with another person. The term does not include an electronic mail program or message board program.” [§ 35–42–4–12(d)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_5ba1000067d06).

[FN2.](#Document1zzF00322029708330) An “ ‘instant messaging or chat room program’ means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program.” [§ 35–42–4–12(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS35-42-4-12&FindType=L&ReferencePositionType=T&ReferencePosition=SP_4b24000003ba5).

[FN3.](#Document1zzF00432029708330) He sued the City of Indianapolis as well, but it was dismissed by stipulation.

[FN4.](#Document1zzF00542029708330) The state argues that the district court's citation to a report (that was not in the record) deserves deference on appeal. However, only adjudicative facts are entitled to the clearly erroneous standard of review. Adjudicative facts concern the parties' conduct and are the facts that normally go to a jury. They constitute the facts that appellate courts do not disturb on appeal. The report, on the other hand, contains legislative facts. They are facts in the literal sense, but they come from outside the case and bear on the prudence or meaning of a legal rule. *See* [Fed.R.Evid. 201(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRER201&FindType=L); [Fed.R.Evid. 201](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRER201&FindType=L) Advisory Committee Note to Subdivision (a) of 1972 Proposed Rules.

[FN5.](#Document1zzF00652029708330) To be sure, the ages in the existing statutes are different. But Indiana could adjust that aspect of the laws as it sees fit.

[FN6.](#Document1zzF00762029708330) This example brings the law's overbreadth concerns to the surface. Today, we facially invalidate the Indiana law because it is not narrowly tailored to serve the state's interest and any plaintiff could show as much. *See* [*Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 967 n. 13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984130891) (“[L]egislation repeatedly has been struck down ‘on its face’ because it was apparent that any application of the legislation would create an unacceptable risk of the suppression of ideas.” (second quotation omitted)); *e.g.,* [*United States v. Playboy Entm't Grp.,* 529 U.S. 803, 806–07, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000358279). But assuming arguendo that Doe's (or a different plaintiff's) speech is unprotected or the law could constitutionally be applied to them, it still inexplicably applies to sex offenders whose crimes did not involve the Internet or children. As such, a plaintiff could still bring a successful facial challenge because the law “applie[s] unconstitutionally to others, in other situations not before the court” [*Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1973126457); *e.g.,* [*United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2021786171).

[FN7.](#Document1zzF00872029708330) The district court actually cited [*United States v. Comstock,* ––– U.S. ––––, 130 S.Ct. 1949, 1954, 176 L.Ed.2d 878 (2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2022052219&ReferencePosition=1954), but [*Comstock*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2022052219) was merely an extension of [*Hendricks*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1997131733) and its progeny to the federal government.

[FN8.](#Document1zzF00982029708330) The only court (as far as we know) to analyze a sex offender statute under the First Amendment was the Tenth Circuit in [*Doe v. City of Albuquerque,* 667 F.3d 1111 (10th Cir.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2026899490). The court struck down a local library rule banning registered sex offenders after concluding the library was a limited public forum and the ban implicated the First Amendment. The case is unique, however, in that the city offered no evidence supporting its ban. Instead, it erroneously argued that it had “no burden” under [*Ward.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989093295) *See* [*id.* at 1131–32.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2026899490) Thus, the court left open the possibility that other restrictions could survive First Amendment scrutiny.

***Case 1.2***

134 F.3d 87

(Cite as: 134 F.3d 87)

**BAD FROG BREWERY, INC., Plaintiff-Appellant,**

**v.**

**NEW YORK STATE LIQUOR AUTHORITY, Anthony J. Casale, Lawrence J. Gedda, Edward F. Kelly, individually and as members of the New York State Liquor Authority, Defendants-Appellees.**

No. 1080, Docket 97-7949.

United States Court of Appeals,Second Circuit.

Argued Oct. 22, 1997.

Decided Jan. 15, 1998.

JON O. NEWMAN, Circuit Judge:

A picture of a frog with the second of its four unwebbed "fingers" extended in a manner evocative of a well known human gesture of insult has presented this Court with significant issues concerning First Amendment protections for commercial speech. The frog appears on labels that Bad Frog Brewery, Inc. ("Bad Frog") sought permission to use on bottles of its beer products. The New York State Liquor Authority ("NYSLA" or "the Authority") denied Bad Frog's application.

Bad Frog appeals from the July 29, 1997, judgment of the District Court for the Northern District of New York (Frederic J. Scullin, Jr., Judge) granting summary judgment in favor of NYSLA and its three Commissioners and rejecting Bad Frog's commercial free speech challenge to NYSLA's decision. We conclude that the State's prohibition of the labels from use in all circumstances does not materially advance its asserted interests in insulating children from vulgarity or promoting temperance, and is not narrowly tailored to the interest concerning children. We therefore reverse the judgment insofar as it denied Bad Frog's federal claims for injunctive relief with respect to the disapproval of its labels. We affirm, on the ground of immunity, the dismissal of Bad Frog's federal damage claims against the commissioner defendants, and affirm the dismissal of Bad Frog's state law damage claims on the ground that novel and uncertain issues of state law render this an inappropriate case for the exercise of supplemental jurisdiction.

Background

Bad Frog is a Michigan corporation that manufactures and markets several different types of alcoholic beverages under its "Bad Frog" trademark. This action concerns labels used by the company in the marketing of Bad Frog Beer, Bad Frog Lemon Lager, and Bad Frog Malt Liquor. Each label prominently features an artist's rendering of \*91 a frog holding up its four-"fingered" right "hand," with the back of the "hand" shown, the second "finger" extended, and the other three "fingers" slightly curled. The membranous webbing that connects the digits of a real frog's foot is absent from the drawing, enhancing the prominence of the extended "finger." Bad Frog does not dispute that the frog depicted in the label artwork is making the gesture generally known as "giving the finger" and that the gesture is widely regarded as an offensive insult, conveying a message that the company has characterized as "traditionally ... negative and nasty." [FN1] Versions of the label feature slogans such as "He just don't care," "An amphibian with an attitude," "Turning bad into good," and "The beer so good ... it's bad." Another slogan, originally used but now abandoned, was "He's mean, green and obscene."

FN1. The gesture, also sometimes referred to as "flipping the bird," see New Dictionary of American Slang 133, 141 (1986), is acknowledged by Bad Frog to convey, among other things, the message "fuck you." The District Court found that the gesture "connotes a patently offensive suggestion," presumably a suggestion to having intercourse with one's self.

Hand gestures signifying an insult have been in use throughout the world for many centuries. The gesture of the extended middle finger is said to have been used by Diogenes to insult Demosthenes. See Betty J. Bauml & Franz H. Bauml, Dictionary of Worldwide Gestures 159 (2d ed.1997). Other hand gestures regarded as insults in some countries include an extended right thumb, an extended little finger, and raised index and middle fingers, not to mention those effected with two hands. See id.

Bad Frog's labels have been approved for use by the Federal Bureau of Alcohol, Tobacco, and Firearms, and by authorities in at least 15 states and the District of Columbia, but have been rejected by authorities in New Jersey, Ohio, and Pennsylvania. In May 1996, Bad Frog's authorized New York distributor, Renaissance Beer Co., made an initial application to NYSLA for brand label approval and registration pursuant to section 107-a(4)(a) of New York's Alcoholic Beverage Control Law. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a) (McKinney 1987 & Supp.1997). NYSLA denied that application in July. Bad Frog filed a new application in August, resubmitting the prior labels and slogans, but omitting the label with the slogan "He's mean, green and obscene," a slogan the Authority had previously found rendered the entire label obscene. That slogan was replaced with a new slogan, "Turning bad into good." The second application, like the first, included promotional material making the extravagant claim that the frog's gesture, whatever its past meaning in other contexts, now means "I want a Bad Frog beer," and that the company's goal was to claim the gesture as its own and as a symbol of peace, solidarity, and good will. In September 1996, NYSLA denied Bad Frog's second application, finding Bad Frog's contention as to the meaning of the frog's gesture "ludicrous and disingenuous." NYSLA letter to Renaissance Beer Co. at 2 (Sept. 18, 1996) ("NYSLA Decision"). Explaining its rationale for the rejection, the Authority found that the label "encourages combative behavior" and that the gesture and the slogan, "He just don't care," placed close to and in larger type than a warning concerning potential health problems,

foster a defiance to the health warning on the label, entice underage drinkers, and invite the public not to heed conventional wisdom and to disobey standards of decorum.

Id. at 3. In addition, the Authority said that it considered that approval of this label means that the label could appear in grocery and convenience stores, with obvious exposure on the shelf to children of tender age id., and that it is sensitive to and has concern as to [the label's] adverse effects on such a youthful audience.

Id. Finally, the Authority said that it has considered that within the state of New York, the gesture of "giving the finger" to someone, has the insulting meaning of "Fuck You," or "Up Yours," ... a confrontational, obscene gesture, known to lead to fights, shootings and homicides ... [,] concludes that the encouraged use of this gesture in licensed premises is akin to \*92 yelling "fire" in a crowded theatre, ... [and] finds that to approve this admittedly obscene, provocative confrontational gesture, would not be conducive to proper regulation and control and would tend to adversely affect the health, safety and welfare of the People of the State of New York.

Id.

Bad Frog filed the present action in October 1996 and sought a preliminary injunction barring NYSLA from taking any steps to prohibit the sale of beer by Bad Frog under the controversial labels. The District Court denied the motion on the ground that Bad Frog had not established a likelihood of success on the merits. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, No. 96-CV-1668, 1996 WL 705786 (N.D.N.Y. Dec. 5, 1996). The Court determined that NYSLA's decision appeared to be a permissible restriction on commercial speech under Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment.

The parties then filed cross motions for summary judgment, and the District Court granted NYSLA's motion. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, 973 F.Supp. 280 (N.D.N.Y.1997). The Court reiterated the views expressed in denying a preliminary injunction that the labels were commercial speech within the meaning of Central Hudson and that the first prong of Central Hudson was satisfied because the labels concerned a lawful activity and were not misleading. Id. at 282. Turning to the second prong of Central Hudson, the Court considered two interests, advanced by the State as substantial: (a) "promoting temperance and respect for the law" and (b) "protecting minors from profane advertising." Id. at 283.

Assessing these interests under the third prong of Central Hudson, the Court ruled that the State had failed to show that the rejection of Bad Frog's labels "directly and materially advances the substantial governmental interest in temperance and respect for the law." Id. at 286. In reaching this conclusion the Court appears to have accepted Bad Frog's contention that marketing gimmicks for beer such as the "Budweiser Frogs," "Spuds Mackenzie," the "Bud-Ice Penguins," and the "Red Dog" of Red Dog Beer ... virtually indistinguishable from the Plaintiff's frog ... promote intemperate behavior in the same way that the Defendants have alleged Plaintiff's label would ... [and therefore the] regulation of the Plaintiff's label will have no tangible effect on underage drinking or intemperate behavior in general.

Id.

However, the Court accepted the State's contention that the label rejection would advance the governmental interest in protecting children from advertising that was "profane," in the sense of "vulgar." Id. at 285 (citing Webster's II New Riverside Dictionary 559 (1984)). The Court acknowledged the State's failure to present evidence to show that the label rejection would advance this interest, but ruled that such evidence was required in cases "where the interest advanced by the Government was only incidental or tangential to the government's regulation of speech," id. at 285 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, ---- - ----, 116 S.Ct. 1495, 1508-09, 134 L.Ed.2d 711 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 487-88, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983)), but not in cases "where the link between the regulation and the government interest advanced is self evident," 973 F.Supp. at 285 (citing Florida Bar v. Went for It, Inc., 515 U.S. 618, 625- 27, 115 S.Ct. 2371, 2376-78, 132 L.Ed.2d 541 (1995); Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328, 341-42, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986)). The Court concluded that common sense requires this Court to conclude that the prohibition of the use of the profane image on the label in question will necessarily limit the exposure of minors in \*93 New York to that specific profane image. Thus, to that extent, the asserted government interest in protecting children from exposure to profane advertising is directly and materially advanced.

973 F.Supp. at 286.

Finally, the Court ruled that the fourth prong of Central Hudson--narrow tailoring--was met because other restrictions, such as point-of-sale location limitations would only limit exposure of youth to the labels, whereas rejection of the labels would "completely foreclose the possibility" of their being seen by youth. Id. at 287. The Court reasoned that a somewhat relaxed test of narrow tailoring was appropriate because Bad Frog's labels conveyed only a "superficial aspect of commercial advertising of no value to the consumer in making an informed purchase," id., unlike the more exacting tailoring required in cases like 44 Liquormart and Rubin, where the material at issue conveyed significant consumer information.

The Court also rejected Bad Frog's void-for-vagueness challenge, id. at 287-88, which is not renewed on appeal, and then declined to exercise supplemental jurisdiction over Bad Frog's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994), id. at 288.

Discussion

I. New York's Label Approval Regime and Pullman Abstention

Under New York's Alcoholic Beverage Control Law, labels affixed to liquor, wine, and beer products sold in the State must be registered with and approved by NYSLA in advance of use. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a). The statute also empowers NYSLA to promulgate regulations "governing the labeling and offering" of alcoholic beverages, id. § 107-a(1), and directs that regulations "shall be calculated to prohibit deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field in so far as possible," id. § 107-a(2).

Purporting to implement section 107-a, NYSLA promulgated regulations governing both advertising and labeling of alcoholic beverages. Signs displayed in the interior of premises licensed to sell alcoholic beverages shall not contain "any statement, design, device, matter or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste" or "any illustration which is not dignified, modest and in good taste." N.Y. Comp.Codes R. & Regs. tit. ix § 83.3 (1996). Labels on containers of alcoholic beverages "shall not contain any statement or representation, irrespective of truth or falsity, which, in the judgment of [NYSLA], would tend to deceive the consumer." Id. § 84.1(e).

NYSLA's actions raise at least three uncertain issues of state law. First, there is some doubt as to whether section 83.3 of the regulations, concerning designs that are not "in good taste," is authorized by a statute requiring that regulations shall be calculated to prohibit deception of consumers, increase the flow of truthful information, and/or promote national uniformity. It is questionable whether a restriction on offensive labels serves any of these statutory goals. Second, there is some doubt as to whether it was appropriate for NYSLA to apply section 83.3, a regulation governing interior signage, to a product label, especially since the regulations appear to establish separate sets of rules for interior signage and labels. Third, there is some doubt as to whether section 84.1(e) of the regulations, applicable explicitly to labels, authorizes NYSLA to prohibit labels for any reason other than their tendency to deceive consumers.

[1][2] It is well settled that federal courts may not grant declaratory or injunctive relief against a state agency based on violations of state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). "The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts." Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir.1996) (citing Pennhurst ). Moreover, where a federal constitutional claim turns on an uncertain issue of state law and the controlling state statute is susceptible to an interpretation that would avoid or modify the federal constitutional \*94 question presented, abstention may be appropriate pursuant to the doctrine articulated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477, 97 S.Ct. 1898, 1902-03, 52 L.Ed.2d 513 (1977); Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir.1995). Were a state court to decide that NYSLA was not authorized to promulgate decency regulations, or that NYSLA erred in applying a regulation purporting to govern interior signs to bottle labels, or that the label regulation applies only to misleading labels, it might become unnecessary for this Court to decide whether NYSLA's actions violate Bad Frog's First Amendment rights.

[3][4][5][6] However, we have observed that abstention is reserved for "very unusual or exceptional circumstances," Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir.1995). In the context of First Amendment claims, Pullman abstention has generally been disfavored where state statutes have been subjected to facial challenges, see Dombrowski v. Pfister, 380 U.S. 479, 489-90, 85 S.Ct. 1116, 1122-23, 14 L.Ed.2d 22 (1965); see also City of Houston v. Hill, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512-13, 96 L.Ed.2d 398 (1987). Even where such abstention has been required, despite a claim of facial invalidity, see Babbitt v. United Farm Workers National Union, 442 U.S. 289, 307-12, 99 S.Ct. 2301, 2313-16, 60 L.Ed.2d 895 (1979), the plaintiffs, unlike Bad Frog, were not challenging the application of state law to prohibit a specific example of allegedly protected expression. If abstention is normally unwarranted where an allegedly overbroad state statute, challenged facially, will inhibit allegedly protected speech, it is even less appropriate here, where such speech has been specifically prohibited. Abstention would risk substantial delay while Bad Frog litigated its state law issues in the state courts. See Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397-98, 19 L.Ed.2d 444 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964).

II. Commercial or Noncommercial Speech?

[7] Bad Frog contends directly and NYSLA contends obliquely that Bad Frog's labels do not constitute commercial speech, but their common contentions lead them to entirely different conclusions. In Bad Frog's view, the commercial speech that receives reduced First Amendment protection is expression that conveys commercial information. The frog labels, it contends, do not purport to convey such information, but instead communicate only a "joke," [FN2] Brief for Appellant at 12 n. 5. As such, the argument continues, the labels enjoy full First Amendment protection, rather than the somewhat reduced protection accorded commercial speech.

FN2. Bad Frog also describes the "message" of its labels as "parody," Brief for Appellant at 12, but does not identify any particular prior work of art, literature, advertising, or labeling that is claimed to be the target of the parody. If Bad Frog means that its depiction of an insolent frog on its labels is intended as a general commentary on an aspect of contemporary culture, the "message" of its labels would more aptly be described as satire rather than parody. See generally Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81, 114 S.Ct. 1164, 1171-73, 127 L.Ed.2d 500 (1994) (explaining that "[p]arody needs to mimic an original to make its point").

NYSLA shares Bad Frog's premise that "the speech at issue conveys no useful consumer information," but concludes from this premise that "it was reasonable for [NYSLA] to question whether the speech enjoys any First Amendment protection whatsoever." Brief for Appellees at 24-25 n. 5. Ultimately, however, NYSLA agrees with the District Court that the labels enjoy some First Amendment protection, but are to be assessed by the somewhat reduced standards applicable to commercial speech.

The parties' differing views as to the degree of First Amendment protection to which Bad Frog's labels are entitled, if any, stem from doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved. In particular, these decisions have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content.

\*95 In 1942, the Court was "clear that the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). In Chrestensen, the Court sustained the validity of an ordinance banning the distribution on public streets of handbills advertising a tour of a submarine. Twenty-two years later, in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court characterized Chrestensen as resting on "the factual conclusion [ ] that the handbill was 'purely commercial advertising,' " id. at 266, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921), and noted that Chrestensen itself had "reaffirmed the constitutional protection for 'the freedom of communicating information and disseminating opinion,' " id. at 265-66, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921) (emphasis added). The famously protected advertisement for the Committee to Defend Martin Luther King was distinguished from the unprotected Chrestensen handbill:

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. at 266, 84 S.Ct. at 718 (emphasis added). The implication of this distinction between the King Committee advertisement and the submarine tour handbill was that the handbill's solicitation of customers for the tour was not "information" entitled to First Amendment protection.

In 1973, the Court referred to Chrestensen as supporting the argument that "commercial speech [is] unprotected by the First Amendment." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 384, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). Pittsburgh Press also endeavored to give content to the then "unprotected" category of "commercial speech" by noting that "[t]he critical feature of the advertisement in Valentine v. Chrestensen was that, in the Court's view, it did no more than propose a commercial transaction." Id. at 385, 93 S.Ct. at 2558. Similarly, the gender-separate help-wanted ads in Pittsburgh Press were regarded as "no more than a proposal of possible employment," which rendered them "classic examples of commercial speech." Id. The Court rejected the newspaper's argument that commercial speech should receive some degree of First Amendment protection, concluding that the contention was unpersuasive where the commercial activity was illegal. See id. at 388-89, 93 S.Ct. at 2560-61.

Just two years later, Chrestensen was relegated to a decision upholding only the "manner in which commercial advertising could be distributed." Bigelow v. Virginia, 421 U.S. 809, 819, 95 S.Ct. 2222, 2231, 44 L.Ed.2d 600 (1975) (emphasis added). Bigelow somewhat generously read Pittsburgh Press as "indicat[ing] that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal." Id. at 821, 95 S.Ct. at 2232. However, in according protection to a newspaper advertisement for out-of-state abortion services, the Court was careful to note that the protected ad "did more than simply propose a commercial transaction." Id. at 822, 95 S.Ct. at 2232. Though it was now clear that some forms of commercial speech enjoyed some degree of First Amendment protection, it remained uncertain whether protection would be available for an ad that only "propose[d] a commercial transaction."

That uncertainty was resolved just one year later in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Framing the question as "whether speech which does 'no more than propose a commercial transaction' ... is so removed from [categories of expression enjoying First Amendment protection] that it lacks all protection," id. at 762, 96 S.Ct. at 1825-26, the Court said, "Our answer is that it is not," id. Though Virginia State Board interred the notion that "commercial speech" enjoyed no First Amendment protection, it arguably kept alive the idea that protection was available \*96 only for commercial speech that conveyed information:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

Id. at 765, 96 S.Ct. at 1827; see id. at 763, 96 S.Ct. at 1826-27 (emphasizing the "consumer's interest in the free flow of commercial information").

Supreme Court commercial speech cases upholding First Amendment protection since Virginia State Board have all involved the dissemination of information. See, e.g., 44 Liquormart, 517 U.S. 484, 116 S.Ct. 1495 (price of beer); Rubin, 514 U.S. 476, 115 S.Ct. 1585 (alcoholic content of beer); Central Hudson, 447 U.S. 557, 100 S.Ct. 2343 (benefits of using electricity); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (availability of lawyer services); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (residential "for sale" signs). In the one case since Virginia State Board where First Amendment protection was sought for commercial speech that contained minimal information--the trade name of an optometry business--the Court sustained a governmental prohibition. See Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). Acknowledging that a trade name "is used as part of a proposal of a commercial transaction," id. at 11, 99 S.Ct. at 895, and "is a form of commercial speech," id., the Court pointed out "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time...." Id. at 12, 99 S.Ct. at 895. Moreover, the Court noted, "the factual information associated with trade names may be communicated freely and explicitly to the public," id. at 16, 99 S.Ct. at 897, presumably through the type of informational advertising protected in Virginia State Board. The trade name prohibition was ultimately upheld because use of the trade name had permitted misleading practices, such as claiming standardized care, see id. at 14, 99 S.Ct. at 896, but the Court added that the prohibition was sustainable just because of the "opportunity" for misleading practices, see id. at 15, 99 S.Ct. at 896-97.

[8] Prior to Friedman, it was arguable from language in Virginia State Board that a trademark would enjoy commercial speech protection since, "however tasteless," its use is the "dissemination of information as to who is producing and selling what product...." 425 U.S. at 765, 96 S.Ct. at 1827. But the prohibition against trademark use in Friedman puts the matter in considerable doubt, unless Friedman is to be limited to trademarks that either have been used to mislead or have a clear potential to mislead. Since Friedman, the Supreme Court has not explicitly clarified whether commercial speech, such as a logo or a slogan that conveys no information, other than identifying the source of the product, but that serves, to some degree, to "propose a commercial transaction," enjoys any First Amendment protection. The Court's opinion in Posadas, however, points in favor of protection. Adjudicating a prohibition on some forms of casino advertising, the Court did not pause to inquire whether the advertising conveyed information. Instead, viewing the case as involving "the restriction of pure commercial speech which does 'no more than propose a commercial transaction,' " Posadas, 478 U.S. at 340, 106 S.Ct. at 2976 (quoting Virginia State Board, 425 U.S. at 762, 96 S.Ct. at 1825-26), the Court applied the standards set forth in Central Hudson, see id.

Bad Frog's label attempts to function, like a trademark, to identify the source of the product. The picture on a beer bottle of a frog behaving badly is reasonably to be understood as attempting to identify to consumers a product of the Bad Frog Brewery. [FN3] In addition, the label serves to propose a commercial transaction. Though the label communicates no information beyond the source \*97 of the product, we think that minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in Central Hudson. [FN4]

FN3. The attempt to identify the product's source suffices to render the ad the type of proposal for a commercial transaction that receives the First Amendment protection for commercial speech. We intimate no view on whether the plaintiff's mark has acquired secondary meaning for trademark law purposes.

FN4. Since we conclude that Bad Frog's label is entitled to the protection available for commercial speech, we need not resolve the parties' dispute as to whether a label without much (or any) information receives no protection because it is commercial speech that lacks protectable information, or full protection because it is commercial speech that lacks the potential to be misleading. Cf. Rubin, 514 U.S. at 491, 115 S.Ct. at 1593-94 (Stevens, J., concurring in the judgment) (contending that label statement with no capacity to mislead because it is indisputably truthful should not be subjected to reduced standards of protection applicable to commercial speech); Discovery Network, 507 U.S. at 436, 113 S.Ct. at 1520 (Blackmun, J., concurring) ("[T]ruthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection."). Even if its labels convey sufficient information concerning source of the product to warrant at least protection as commercial speech (rather than remain totally unprotected), Bad Frog contends that its labels deserve full First Amendment protection because their proposal of a commercial transaction is combined with what is claimed to be political, or at least societal, commentary.

[9] The "core notion" of commercial speech includes "speech which does no more than propose a commercial transaction." Bolger, 463 U.S. at 66, 103 S.Ct. at 2880 (citations and internal quotation marks omitted). Outside this so-called "core" lie various forms of speech that combine commercial and noncommercial elements. Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication. See id. at 66-67, 103 S.Ct. at 2879-81. Bolger explained that while none of these factors alone would render the speech in question commercial, the presence of all three factors provides "strong support" for such a determination. Id.; see also New York State Association of Realtors, Inc. v. Shaffer, 27 F.3d 834, 840 (2d Cir.1994) (considering proper classification of speech combining commercial and noncommercial elements).

[10] We are unpersuaded by Bad Frog's attempt to separate the purported social commentary in the labels from the hawking of beer. Bad Frog's labels meet the three criteria identified in Bolger: the labels are a form of advertising, identify a specific product, and serve the economic interest of the speaker. Moreover, the purported noncommercial message is not so "inextricably intertwined" with the commercial speech as to require a finding that the entire label must be treated as "pure" speech. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989). Even viewed generously, Bad Frog's labels at most "link[ ] a product to a current debate," Central Hudson, 447 U.S. at 563 n. 5, 100 S.Ct. at 2350 n. 5, which is not enough to convert a proposal for a commercial transaction into "pure" noncommercial speech, see id. Indeed, the Supreme Court considered and rejected a similar argument in Fox, when it determined that the discussion of the noncommercial topics of "how to be financially responsible and how to run an efficient home" in the course of a Tupperware demonstration did not take the demonstration out of the domain of commercial speech. See Fox, 492 U.S. at 473-74, 109 S.Ct. at 3030-31.

We thus assess the prohibition of Bad Frog's labels under the commercial speech standards outlined in Central Hudson.

III. The Central Hudson Test

[11][12][13] Central Hudson sets forth the analytical framework for assessing governmental restrictions on commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly\*98 advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. The last two steps in the analysis have been considered, somewhat in tandem, to determine if there is a sufficient " 'fit' between the [regulator's] ends and the means chosen to accomplish those ends." Posadas, 478 U.S. at 341, 106 S.Ct. at 2977. The burden to establish that "reasonable fit" is on the governmental agency defending its regulation, see Discovery Network, 507 U.S. at 416, 113 S.Ct. at 1509-10, though the fit need not satisfy a least-restrictive-means standard, see Fox, 492 U.S. at 476-81, 109 S.Ct. at 3032-35.

A. Lawful Activity and Not Deceptive

We agree with the District Court that Bad Frog's labels pass Central Hudson 's threshold requirement that the speech "must concern lawful activity and not be misleading." See Bad Frog, 973 F.Supp. at 283 n. 4. The consumption of beer (at least by adults) is legal in New York, and the labels cannot be said to be deceptive, even if they are offensive. Indeed, although NYSLA argues that the labels convey no useful information, it concedes that "the commercial speech at issue ... may not be characterized as misleading or related to illegal activity." Brief for Defendants-Appellees at 24.

B. Substantial State Interests

NYSLA advances two interests to support its asserted power to ban Bad Frog's labels: (i) the State's interest in "protecting children from vulgar and profane advertising," and (ii) the State's interest "in acting consistently to promote temperance, i.e., the moderate and responsible use of alcohol among those above the legal drinking age and abstention among those below the legal drinking age." Id. at 26.

Both of the asserted interests are "substantial" within the meaning of Central Hudson. States have "a compelling interest in protecting the physical and psychological well-being of minors," and "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989); see also Reno v. American Civil Liberties Union, --- U.S. ----, ----, 117 S.Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

The Supreme Court also has recognized that states have a substantial interest in regulating alcohol consumption. See, e.g., 44 Liquormart, 517 U.S. at ----, 116 S.Ct. at 1509; Rubin, 514 U.S. at 485, 115 S.Ct. at 1591. We agree with the District Court that New York's asserted concern for "temperance" is also a substantial state interest. See Bad Frog, 973 F.Supp. at 284.

C. Direct Advancement of the State Interest

[14] To meet the "direct advancement" requirement, a state must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993) (emphasis added). A restriction will fail this third part of the Central Hudson test if it "provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S. at 564, 100 S.Ct. at 2350. [FN5]

FN5. In Central Hudson, the Supreme Court held that a regulation prohibiting advertising by public utilities promoting the use of electricity directly advanced New York State's substantial interest in energy conservation. See Central Hudson,447 U.S. at 569, 100 S.Ct. at 2353. In contrast, the Court determined that the regulation did not directly advance the state's interest in the maintenance of fair and efficient utility rates, because "the impact of promotional advertising on the equity of [the utility]'s rates [was] highly speculative." Id.

(1) Advancing the interest in protecting children from vulgarity. Whether the prohibition of Bad Frog's labels can be said to materially advance the state interest in protecting minors from vulgarity depends on the extent to which underinclusiveness of regulation is pertinent to the relevant inquiry. The \*99 Supreme Court has made it clear in the commercial speech context that underinclusiveness of regulation will not necessarily defeat a claim that a state interest has been materially advanced. Thus, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court upheld a prohibition of all offsite advertising, adopted to advance a state interest in traffic safety and esthetics, notwithstanding the absence of a prohibition of onsite advertising. See id. at 510-12, 101 S.Ct. at 2893- 95 (plurality opinion). Though not a complete ban on outdoor advertising, the prohibition of all offsite advertising made a substantial contribution to the state interests in traffic safety and esthetics. In United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), the Court upheld a prohibition on broadcasting lottery information as applied to a broadcaster in a state that bars lotteries, notwithstanding the lottery information lawfully being broadcast by broadcasters in a neighboring state. Though this prohibition, like that in Metromedia, was not total, the record disclosed that the prohibition of broadcasting lottery information by North Carolina stations reduced the percentage of listening time carrying such material in the relevant area from 49 percent to 38 percent, see Edge Broadcasting, 509 U.S. at 432, 113 S.Ct. at 2706, a reduction the Court considered to have "significance," id. at 433, 113 S.Ct. at 2706-07. [FN6]

FN6. Though not in the context of commercial speech, the Federal Communications Commission's regulation of indecent programming, upheld in Pacifica as to afternoon programming, was thought to make a substantial contribution to the asserted governmental interest because of the "uniquely pervasive presence in the lives of all Americans" achieved by broadcast media, 438 U.S. at 748, 98 S.Ct. at 3040. The pervasiveness of beer labels is not remotely comparable.

On the other hand, a prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest "to a material degree." Edenfield, 507 U.S. at 771, 113 S.Ct. at 1800. Thus, In Bolger, the Court invalidated a prohibition on mailing literature concerning contraceptives, alleged to support a governmental interest in aiding parents' efforts to discuss birth control with their children, because the restriction "provides only the most limited incremental support for the interest asserted." 463 U.S. at 73, 103 S.Ct. at 2884. In Linmark, a town's prohibition of "For Sale" signs was invalidated in part on the ground that the record failed to indicate "that proscribing such signs will reduce public awareness of realty sales." 431 U.S. at 96, 97 S.Ct. at 1620. In Rubin, the Government's asserted interest in preventing alcoholic strength wars was held not to be significantly advanced by a prohibition on displaying alcoholic content on labels while permitting such displays in advertising (in the absence of state prohibitions). 514 U.S. at 488, 115 S.Ct. at 1592. Moreover, the Court noted that the asserted purpose was sought to be achieved by barring alcoholic content only from beer labels, while permitting such information on labels for distilled spirits and wine. See id. [FN7]

FN7. Posadas contains language on both sides of the underinclusiveness issue. The Court first pointed out that a ban on advertising for casinos was not underinclusive just because advertising for other forms of gambling were permitted, 478 U.S. at 342, 106 S.Ct. at 2977; however, compliance with Central Hudson 's third criterion was ultimately upheld because of the legislature's legitimate reasons for seeking to reduce demand only for casino gambling, id. at 342-43, 106 S.Ct. at 2977-78, an interest the casino advertising ban plainly advanced.

In the pending case, NYSLA endeavors to advance the state interest in preventing exposure of children to vulgar displays by taking only the limited step of barring such displays from the labels of alcoholic beverages. In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, [FN8] barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree.

FN8. Appellant has included several examples in the record.

We appreciate that NYSLA has no authority to prohibit vulgar displays appearing beyond the marketing of alcoholic beverages, but a state may not avoid the criterion of materially advancing its interest by authorizing only one component of its regulatory \*100 machinery to attack a narrow manifestation of a perceived problem. If New York decides to make a substantial effort to insulate children from vulgar displays in some significant sphere of activity, at least with respect to materials likely to be seen by children, NYSLA's label prohibition might well be found to make a justifiable contribution to the material advancement of such an effort, but its currently isolated response to the perceived problem, applicable only to labels on a product that children cannot purchase, does not suffice. We do not mean that a state must attack a problem with a total effort or fail the third criterion of a valid commercial speech limitation. See Edge Broadcasting, 509 U.S. at 434, 113 S.Ct. at 2707 ("Nor do we require that the Government make progress on every front before it can make progress on any front."). Our point is that a state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity. [FN9]

FN9. Though Edge Broadcasting recognized (in a discussion of the fourth Central Hudson factor) that the inquiry as to a reasonable fit is not to be judged merely by the extent to which the government interest is advanced in the particular case, 509 U.S. at 430-31, 113 S.Ct. at 2705- 06, the Court made clear that what remains relevant is the relation of the restriction to the "general problem" sought to be dealt with, id. at 430, 113 S.Ct. at 2705. Thus, in the pending case, the pertinent point is not how little effect the prohibition of Bad Frog's labels will have in shielding children from indecent displays, it is how little effect NYSLA's authority to ban indecency from labels of all alcoholic beverages will have on the "general problem" of insulating children from vulgarity.The District Court ruled that the third criterion was met because the prohibition of Bad Frog's labels indisputably achieved the result of keeping these labels from being seen by children. That approach takes too narrow a view of the third criterion. Under that approach, any regulation that makes any contribution to achieving a state objective would pass muster. Edenfield, however, requires that the regulation advance the state interest "in a material way." The prohibition of "For Sale" signs in Linmark succeeded in keeping those signs from public view, but that limited prohibition was held not to advance the asserted interest in reducing public awareness of realty sales. The prohibition of alcoholic strength on labels in Rubin succeeded in keeping that information off of beer labels, but that limited prohibition was held not to advance the asserted interest in preventing strength wars since the information appeared on labels for other alcoholic beverages. The valid state interest here is not insulating children from these labels, or even insulating them from vulgar displays on labels for alcoholic beverages; it is insulating children from displays of vulgarity.

(2) Advancing the state interest in temperance. We agree with the District Court that NYSLA has not established that its rejection of Bad Frog's application directly advances the state's interest in "temperance." See Bad Frog, 973 F.Supp. at 286. NYSLA maintains that the raised finger gesture and the slogan "He just don't care" urge consumers generally to defy authority and particularly to disregard the Surgeon General's warning, which appears on the label next to the gesturing frog. See Brief for Defendants-Appellees at 30. NYSLA also contends that the frog appeals to youngsters and promotes underage drinking. See id.

The truth of these propositions is not so self-evident as to relieve the state of the burden of marshalling some empirical evidence to support its assumptions. All that is clear is that the gesture of "giving the finger" is offensive. Whether viewing that gesture on a beer label will encourage disregard of health warnings or encourage underage drinking remain matters of speculation.

NYSLA has not shown that its denial of Bad Frog's application directly and materially advances either of its asserted state interests.

D. Narrow Tailoring

[15] Central Hudson 's fourth criterion, sometimes referred to as "narrow tailoring," Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705; Fox, 492 U.S. at 480, 109 S.Ct. \*101 at 3034-35 ("narrowly tailored"), [FN10] requires consideration of whether the prohibition is more extensive than necessary to serve the asserted state interest. Since NYSLA's prohibition of Bad Frog's labels has not been shown to make even an arguable advancement of the state interest in temperance, we consider here only whether the prohibition is more extensive than necessary to serve the asserted interest in insulating children from vulgarity.

FN10. The metaphor of "narrow tailoring" as the fourth Central Hudson factor for commercial speech restrictions was adapted from standards applicable to time, place, and manner restrictions on political speech, see Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)).

In its most recent commercial speech decisions, the Supreme Court has placed renewed emphasis on the need for narrow tailoring of restrictions on commercial speech. In 44 Liquormart, where retail liquor price advertising was banned to advance an asserted state interest in temperance, the Court noted that several less restrictive and equally effective measures were available to the state, including increased taxation, limits on purchases, and educational campaigns. See 517 U.S. at ----, 116 S.Ct. at 1510. Similarly in Rubin, where display of alcoholic content on beer labels was banned to advance an asserted interest in preventing alcoholic strength wars, the Court pointed out "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech." 514 U.S. at 491, 115 S.Ct. at 1594.

In this case, Bad Frog has suggested numerous less intrusive alternatives to advance the asserted state interest in protecting children from vulgarity, short of a complete statewide ban on its labels. Appellant suggests "the restriction of advertising to point-of-sale locations; limitations on billboard advertising; restrictions on over-the-air advertising; and segregation of the product in the store." Appellant's Brief at 39. Even if we were to assume that the state materially advances its asserted interest by shielding children from viewing the Bad Frog labels, it is plainly excessive to prohibit the labels from all use, including placement on bottles displayed in bars and taverns where parental supervision of children is to be expected. Moreover, to whatever extent NYSLA is concerned that children will be harmfully exposed to the Bad Frog labels when wandering without parental supervision around grocery and convenience stores where beer is sold, that concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant's products may be displayed within such stores. Or, with the labels permitted, restrictions might be imposed on placement of the frog illustration on the outside of six-packs or cases, sold in such stores.

NYSLA's complete statewide ban on the use of Bad Frog's labels lacks a "reasonable fit" with the state's asserted interest in shielding minors from vulgarity, and NYSLA gave inadequate consideration to alternatives to this blanket suppression of commercial speech. Cf. Bolger, 463 U.S. at 73, 103 S.Ct. at 2883-84 ("[T]he government may not 'reduce the adult population ... to reading only what is fit for children.' ") (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)) (footnote omitted).

E. Relief

[16] Since we conclude that NYSLA has unlawfully rejected Bad Frog's application for approval of its labels, we face an initial issue concerning relief as to whether the matter should be remanded to the Authority for further consideration of Bad Frog's application or whether the complaint's request for an injunction barring prohibition of the labels should be granted.

NYSLA's unconstitutional prohibition of Bad Frog's labels has been in effect since September 1996. The duration of that prohibition weighs in favor of immediate relief. Despite the duration of the prohibition, if it were preventing the serious impairment of a state interest, we might well leave it in force while the Authority is afforded a further opportunity to attempt to fashion some regulation of Bad Frog's labels that accords with First Amendment requirements. But this case presents no such threat of serious impairment \*102 of state interests. The possibility that some children in supermarkets might see a label depicting a frog displaying a well known gesture of insult, observable throughout contemporary society, does not remotely pose the sort of threat to their well-being that would justify maintenance of the prohibition pending further proceedings before NYSLA. We will therefore direct the District Court to enjoin NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion.

[17] Though we conclude that Bad Frog's First Amendment challenge entitles it to equitable relief, we reject its claim for damages against the NYSLA commissioners in their individual capacities. The District Court's decision upholding the denial of the application, though erroneous in our view, sufficiently demonstrates that it was reasonable for the commissioners to believe that they were entitled to reject the application, and they are consequently entitled to qualified immunity as a matter of law.

IV. State Law Claims

Bad Frog has asserted state law claims based on violations of the New York State Constitution and the Alcoholic Beverage Control Law. See Complaint ¶¶ 40- 46. In its opinion denying Bad Frog's request for a preliminary injunction, the District Court stated that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment. See Bad Frog, 1996 WL 705786, at \*5. In its summary judgment opinion, however, the District Court declined to retain supplemental jurisdiction over the state law claims, see 28 U.S.C. § 1367(c)(3), after dismissing all federal claims. See Bad Frog, 973 F.Supp. at 288.

[18] Contrary to the suggestion in the District Court's preliminary injunction opinion, we think that at least some of Bad Frog's state law claims are not barred by the Eleventh Amendment. The jurisdictional limitation recognized in Pennhurst does not apply to an individual capacity claim seeking damages against a state official, even if the claim is based on state law. See Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir.1993); Wilson v. UT Health Center, 973 F.2d 1263, 1271 (5th Cir.1992) ( "Pennhurst and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities."). Bad Frog purports to sue the NYSLA commissioners in part in their individual capacities, and seeks damages for their alleged violations of state law. See Complaint ¶¶ 5-7 and "Demand for Judgment" ¶ (3).

[19] Nevertheless, we think that this is an appropriate case for declining to exercise supplemental jurisdiction over these claims in view of the numerous novel and complex issues of state law they raise. See 28 U.S.C. § 1367(c)(1). As noted above, there is significant uncertainty as to whether NYSLA exceeded the scope of its statutory mandate in enacting a decency regulation and in applying to labels a regulation governing interior signs. Bad Frog's claims for damages raise additional difficult issues such as whether the pertinent state constitutional and statutory provisions imply a private right of action for damages, and whether the commissioners might be entitled to state law immunity for their actions.

In the absence of First Amendment concerns, these uncertain state law issues would have provided a strong basis for Pullman abstention. Because First Amendment concerns for speech restriction during the pendency of a lawsuit are not implicated by Bad Frog's claims for monetary relief, the interests of comity and federalism are best served by the presentation of these uncertain state law issues to a state court. We thus affirm the District Court's dismissal of Bad Frog's state law claims for damages, but do so in reliance on section 1367(c)(1) (permitting declination of supplemental jurisdiction over claim "that raises a novel or complex issue of State law").

Conclusion

The judgment of the District Court is reversed, and the case is remanded for entry of judgment in favor of Bad Frog on its claim \*103 for injunctive relief; the injunction shall prohibit NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion. Dismissal of the federal law claim for damages against the NYSLA commissioners is affirmed on the ground of immunity. Dismissal of the state law claim for damages is affirmed pursuant to 28 U.S.C. § 1367(c)(1). Upon remand, the District Court shall consider the claim for attorney's fees to the extent warranted with respect to the federal law equitable claim.

***Case 1.3***

C.A.6 (Ky.),2014.

Maxwell's Pic-Pac, Inc. v. Dehner

739 F.3d 936

United States Court of Appeals,

Sixth Circuit.

**MAXWELL'S PIC–PAC, INC; Food with Wine Coalition, Inc., Plaintiffs–Appellees/Cross–Appellants,**

**v.**

**Tony DEHNER, in his official capacity as Commissioner of the Kentucky Department of Alcoholic Beverage Control; Danny Reed, in his official capacity as the Distilled Spirits Administrator of the Kentucky Department of Alcoholic Beverage Control, Defendants–Appellants/Cross–Appellees, LiquorOutlet, LLC, d/b/a The Party Source, Intervenor–Appellant/Cross–Appellee.**

Nos. 12–6056, 12–6057, 12–6182.

Argued: Nov. 19, 2013.

Decided and Filed: Jan. 15, 2014.

**OPINION**

[COOK](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0113779001&FindType=h), Circuit Judge.

A Kentucky statute prohibits businesses that sell substantial amounts of staple groceries or gasoline from applying for a license to sell wine and liquor. [Ky.Rev.Stat. § 243.230(7)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYSTS243.230&FindType=L&ReferencePositionType=T&ReferencePosition=SP_794b00004e3d1). A regulation applies this provision to retailers that sell those items at a rate of at least 10% of gross monthly sales. [804 Ky. Admin. Regs. 4:270](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1013155&DocName=804KYADC4%3A270&FindType=L). Harmed by the statute, Maxwell's Pic–Pac (a grocer) and Food With Wine Coalition (a group of grocers) sued administrators of the Kentucky Department of Alcoholic Beverage Control; The Party Source (a liquor store) intervened as a defendant. The grocers alleged that the statute irrationally discriminates against them in violation of their state and federal equal-protection rights. They also alleged that the statute violates (1) state separation-of-powers principles by granting the administrative board unfettered discretion to define the law and (2) state and federal due-process rights by vaguely defining its terms. The district court granted summary judgment to the grocers on the federal equal-protection claim but rejected the others. All parties appeal.

Because the statute conceivably seeks to reduce access to high-alcohol products, and because the statute offends neither separation of powers nor due process principles, we REVERSE the district court's judgment on the federal equal-protection claim and AFFIRM on the remainder.

I.

In the decades before 1920, the free market for alcohol in the United States begot political corruption, prostitution, gambling, crime, and poverty. (R. 40–19, Erickson Expert Report at 4.) National manufacturers built saloons near factories to attract workers, saturating neighborhoods with alcohol suppliers. The manufacturers funded advertising campaigns, fueling high consumption, and bribed politicians away from crackdowns. The country thus constitutionalized the prohibition of alcohol. Effective in 1920, the 18th Amendment banned the “manufacture, sale, or transportation of intoxicating liquors” in the United States. [U.S. Const. amend. XVIII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOAMENDXVIII&FindType=L).

Prohibition, it turned out, bred a new kind of lawlessness. (R. 40–19, Erickson Expert Report at 4.) Though reducing alcohol consumption, Prohibition, poorly enforced, spawned a violent and unruly organized crime industry to satisfy appetites for alcohol. The country recognized Prohibition as an extreme response to the dangers of alcohol and, with the 21st Amendment, repealed the 18th Amendment in 1933. U.S. Const. amend. XXI § 1. The 21st Amendment also expressly granted each state the right to regulate alcohol use within its borders. *See id.* § 2.

In establishing their regulatory systems, the states relied on a study by Raymond Fosdick and Albert Scott. (R. 40–19, Erickson Expert Report at 5.) Fosdick and Scott argued that a regulatory system must limit access to products with high alcohol content, such as liquor. Raymond B. Fosdick & Albert L. Scott, Toward Liquor Control ix (Center for Alcohol Policy 2011) (1933). To this end, according to the study, license law should restrict the number and character of places selling liquor. *Id.* at 30. Analogizing the saloon-on-every-corner problem to the prevalence of gas stations in the modern world, Fosdick and Scott emphasized the danger of selling liquor at gas stations. *Id.* at 29. “[E]very automobile today is an argument against liquor ...” *Id.* at 86.

In line with these principles, Kentucky banned most grocery stores and gas stations from selling wine and liquor. After the repeal of Prohibition, the General Assembly established a licensing system in 1938 that provided:

No Retailer Package License or Retail Drink License shall be issued for any premises used as or in connection with the operation of a grocery store or filling station. “Grocery Store” shall be construed to mean any business enterprise in which a substantial part of the commercial transaction consists of selling at retail products commonly classified as staple groceries. “Filling Station” shall be construed to mean any business enterprise in which a substantial part of the commercial transaction consists of selling gasoline and lubricating oil at retail.

1938 Ky. Acts c. 2 art. II § 54(8) (codified as Ky. Stat. § 2554b–154(8) (1939)). This basic distinction between grocery stores/gas stations and other retailers exists today. Currently, the state offers two basic alcohol licenses for retail sales—a generic malt beverage license and a wine-and-liquor license-and caps the number of wine-and-liquor licenses available. (R. 40–19, Erickson Expert Report at 8.) The current statute reads:

No quota retail package license or quota retail drink license for the sale of distilled spirits [liquor] or wine shall be issued for any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil.

[Ky.Rev.Stat. § 243.230(7)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYSTS243.230&FindType=L&ReferencePositionType=T&ReferencePosition=SP_794b00004e3d1). In 1982, almost 50 years after the original statute, the Alcohol Beverage Control Board promulgated a regulation defining the terms of the statute. *See* [Ky.Rev.Stat. § 241.060(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYSTS241.060&FindType=L&ReferencePositionType=T&ReferencePosition=SP_f1c50000821b0) (granting the board authority to promulgate reasonable administrative regulations). The regulation provides:

Section 1. For the purpose of enforcing [the statute] “substantial part of the commercial transaction” shall mean ten (10) percent or greater of the gross sales as determined on a monthly basis.

Section 2. For the purpose of enforcing [the statute] staple groceries shall be defined as any food or food product intended for human consumption except alcoholic beverages, tobacco, soft drinks, candy, hot foods and food products prepared for immediate consumption.

[804 Ky. Admin. Regs. 4:270](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1013155&DocName=804KYADC4%3A270&FindType=L). Together, [§ 243.230(7)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYSTS243.230&FindType=L&ReferencePositionType=T&ReferencePosition=SP_794b00004e3d1) and the regulation prevent retailers like Maxwell's Pic–Pac and the grocers comprising Food With Wine Coalition (jointly, “the grocers”) from competing for a wine-and-liquor license.

Agreeing on the pertinent facts, each party to this suit moved for summary judgment, which the district court granted to the grocers on their federal equal-protection claim. The court concluded that no rational reason explains “why a grocery-selling drugstore like Walgreens may sell wine and liquor, but a pharmaceutical-selling grocery store like Kroger cannot.” The court expressly denied relief on the state separation-of-powers claim, concluding that the statute, neither vague nor overbroad, constitutionally delegates legislative authority to the administrative agency.

II.

[[1]](#Document1zzF12032543692)[[2]](#Document1zzF22032543692)[[3]](#Document1zzF32032543692) On appeal, Kentucky and The Party Source contend that a rational basis—reducing access to products with high alcohol content—supports distinguishing grocery stores and gas stations from other retailers, and thus the statute complies with the Equal Protection Clause. The grocers face a high burden to convince us otherwise. For this type of legislation, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” [*City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1985133474); [*Northville Downs v. Granholm,* 622 F.3d 579, 586 (6th Cir.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2023150029&ReferencePosition=586). We must uphold an economic regulation “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” [*F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313–14, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1993113728); [*Smith v. Botsford Gen. Hosp.,* 419 F.3d 513, 520 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2007146470&ReferencePosition=520). Though Kentucky law occasionally subjects economic policies to stricter standards, *see* [*Elk Horn Coal Corp. v. Cheyenne Res.,* 163 S.W.3d 408, 418–19 (Ky.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2006618820&ReferencePosition=418), the grocers contend only that the statute lacks a rational basis.

The state indisputably maintains a legitimate interest in reducing access to products with high alcohol content. According to Fosdick and Scott, “states must use their control systems to steer society to lower alcohol form[s] of products.” Fosdick & Scott, *supra,* at ix. Products with high alcohol content exacerbate the problems caused by alcohol, including drunken driving. *See id.* at 86. The state's interest applies not only to the general public; minors, inexperienced and impressionable, require particular vigilance. And the state's interest applies to abstinent citizens who, morally or practically objecting to alcohol exposure, wish to avoid retailers that sell such drinks. As Kentucky puts it, its legislature “chose to prohibit the sale in those places where all in the community must come together.” (State's Principal Br. at 17.)

We conclude that reasonably conceivable facts support the contention that grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers. A legislature could rationally believe that average citizens spend more time in grocery stores and gas stations than in other establishments; people typically need to buy staple groceries (for sustenance) and gas (for transportation) more often than items from retailers that specialize in other, less-frequently-used products. Consider the district court's pharmacy example. Kentucky could believe that its citizenry visits grocery stores and gas stations more often than pharmacies—people can survive without *ever* visiting a pharmacy given that many grocery stores fill prescriptions. On the other hand, most people who object to confronting wine and liquor conceivably cannot avoid grocery stores and gas stations. Though some modern pharmacies sell staple groceries, grocery stores may remain the go-to place for life's essentials. And though Kentucky otherwise reduces access to wine and liquor by capping the *number* of places that supply it, the state can also reduce access by limiting the *types* of places that supply it—just as a parent can reduce a child's access to liquor by keeping smaller amounts in the house *and* by locking it in the liquor cabinet.

Our conclusion also rings true regarding minors. According to a plausible set of facts, more minors work at grocery stores and gas stations than other retailers; after all, grocery stores and gas stations conceivably provide more low-skilled and low-experience jobs, including clerks, baggers, and stockers. Kentucky could also believe that grocery stores typically outweigh other retailers in size and traffic, allowing minors to more easily steal wine or liquor. Regarding gas stations, their convenience and prevalence near highways suggest an even greater danger in allowing alcohol sales. Fosdick and Scott recognized in the early days of the automobile that the saloon system of the pre-Prohibition era “was not unlike that now used in the sale of gasoline, and with the same result: a large excess of sales outlets.” Fosdick & Scott, *supra,* at 29.

[[4]](#Document1zzF42032543692) Courts, including ours, sustain similar alcohol provisions against challenges under the Equal Protection Clause. For example, we upheld an Ohio provision that subjected taverns, but not breweries, to local referenda prohibiting packaged beer sales. [*37712, Inc. v. Ohio Dep't of Liquor Control,* 113 F.3d 614, 621–22 (6th Cir.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1997110337&ReferencePosition=621). That case's reasoning—that taverns conceivably pose a greater risk of fights, automobile accidents, and crime—applies equally here. So does the reasoning of a case concluding that bars conceivably pose a greater risk of underage drinking than do restaurants, *see* [*Gary v. City of Warner Robins,* 311 F.3d 1334, 1339 (11th Cir.2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2002716154&ReferencePosition=1339) (sustaining ordinance setting age limits for bars), and a case concluding that rural areas conceivably pose a greater risk of unpoliced alcohol use than do urban areas, *see* [*Simms v. Farris,* 657 F.Supp. 119, 124 (E.D.Ky.1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=345&FindType=Y&ReferencePositionType=S&SerialNum=1987048152&ReferencePosition=124) (upholding restrictive license caps for rural areas). [*Simms*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1987048152) relied heavily on the 21 st Amendment's grant of authority to the states to regulate alcohol use; we need not rely on that amendment because Kentucky's provision here satisfies rational-basis review under the Equal Protection Clause. For present purposes, we note that the 21st Amendment's express grant of authority to the states, if it means anything in this context, provides legitimacy to the state's interest in restricting access to alcohol. *See* [*Granholm v. Heald,* 544 U.S. 460, 486, 493, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2006595534) (noting that the states “have broad power to regulate liquor under § 2 of the Twenty–First Amendment”).

III.

In their cross-appeal, the grocers contend that the statute and regulation “are also void for vagueness” under (1) the separation-of-powers principle of the Kentucky Constitution and (2) the due-process clauses of the state and federal constitutions.

[[5]](#Document1zzF52032543692)[[6]](#Document1zzF62032543692) We start with Kentucky's separation of powers. Kentucky's constitution, perhaps more than any other, “emphatically separates and perpetuates what might be termed the American tripod of Government.” [*Bd. of Trs. of Judicial Form Ret. Sys. v. Attorney Gen.,* 132 S.W.3d 770, 782 (Ky.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2003719848&ReferencePosition=782) (internal quotation marks omitted); *see* [Ky. Const. §§ 28](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYCNS28&FindType=L)–[29](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYCNS29&FindType=L). But, even in Kentucky, this principle means only that the “duty to define general terms cannot be delegated by the legislative branch to the executive branch.” [*Kuprion v. Fitzgerald,* 888 S.W.2d 679, 699 (Ky.1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1994233820&ReferencePosition=699). After all, “given the realities of modern rule-making, the General Assembly has neither the time nor the expertise to do it all; it must have help.” [*TECO Mech. Contractor, Inc. v. Commonwealth,* 366 S.W.3d 386, 397 (Ky.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2027369031&ReferencePosition=397) (internal quotation marks and brackets omitted). Therefore, the General Assembly need prescribe only “sufficient standards to prevent the agency from exercising unfettered discretion.” [*TECO,* 366 S.W.3d at 398;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2027369031&ReferencePosition=398) *see also* [*Judicial Form,* 132 S.W.3d at 782](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2003719848&ReferencePosition=782).

[[7]](#Document1zzF72032543692) [Section 243.230(7)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYSTS243.230&FindType=L&ReferencePositionType=T&ReferencePosition=SP_794b00004e3d1) does just that, granting *limited* discretion to the administrative board. The statute, from its 1938 inception to the present, addresses businesses in which “a substantial part of the commercial transaction consists of selling at retail” staple groceries or gasoline. Accordingly, the board may regulate only businesses whose sales of staple groceries and gasoline make up a substantial part of their commercial transactions. The regulation follows these terms: only businesses that sell staple groceries or gasoline at a rate of at least 10% of gross monthly sales may not apply for wine-and-liquor licenses. [804 Ky. Admin. Regs. 4:270](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1013155&DocName=804KYADC4%3A270&FindType=L) § 1. Moreover, the board's authority is further limited to operations selling staple groceries—“major trade item[s] in steady demand.” Webster's II New College Dictionary 1076 (2001). Again the regulation follows these terms, excepting from its definition of “staple groceries” “food products prepared for immediate consumption,” among other things. *See* [804 Ky. Admin. Regs. 4:270](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1013155&DocName=804KYADC4%3A270&FindType=L) § 2.

At bottom, the statutory language limits the board's authority to define the terms of the statute. This fact distinguishes this case from the one relied upon by the grocers, [*Diemer v. Commonwealth,* 786 S.W.2d 861, 864–65 (Ky.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1990023421&ReferencePosition=864). In that case, the General Assembly imposed restrictions for erecting billboards “outside of an urban area” while defining “urban area” as “those areas which the secretary of transportation, in the exercise of his sound discretion and upon consideration being given to the population within boundaries of an area and to the traveling public, determines by official order to be urban.” [*Id.* at 862.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1990023421) The General Assembly expressly granted the executive branch the authority to define the statute's application. Here, by contrast, the General Assembly used the limiting terms “substantial,” “part of the commercial transaction,” and “staple” to cabin its application.

[[8]](#Document1zzF82032543692) The due-process claim similarly lacks grounding. The grocers rely on cases involving criminal statutes for the proposition that a statute is void for vagueness if people of common intelligence must necessarily guess at its meaning. *See* [*Connally v. Gen. Const. Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1926121813); [*Sullivan v. Brawner,* 237 Ky. 730, 36 S.W.2d 364, 367–68 (1931)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1931118729&ReferencePosition=367). But, unlike a criminal statute that threatens a defendant's liberty, the Kentucky statute at issue here affects no liberty interest. Nor do the grocers assert that the statute offends a property right, and thus the statute avoids procedural due-process scrutiny. [*Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 569–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127192); [*Warren v. City of Athens, Ohio,* 411 F.3d 697, 708 (6th Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006801544&ReferencePosition=708).

IV.

For these reasons, we REVERSE in part and AFFIRM in part.

**Supplemental Case Printout for: *Management Faces a Legal Issue***

U.S.,2013.

U.S. v. Windsor

133 S.Ct. 2675, 118 Fair Empl.Prac.Cas. (BNA) 1417, 186 L.Ed.2d 808, 111 A.F.T.R.2d 2013-2385, 81 USLW 4633, 2013-2 USTC P 50,400, 57 Employee Benefits Cas. 1577, 47 NDLR P 120, 13 Cal. Daily Op. Serv. 6655, 2013 Daily Journal D.A.R. 8343, 24 Fla. L. Weekly Fed. S 445

Editor's Note: Additions are indicated by Text and    deletions by ~~Text~~.

Supreme Court of the United States

**UNITED STATES, Petitioner**

**v.**

**Edith Schlain WINDSOR, in her capacity as executor of the Estate of Thea Clara Spyer, et al.**

No. 12–307.

Argued March 27, 2013.

Decided June 26, 2013.

Justice [KENNEDY](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0243105201&FindType=h) delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes. Windsor paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

I

In 1996, as some States were beginning to consider the concept of same-sex marriage, see, *e.g.,* [*Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1993099335), and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA), 110 Stat. 2419. DOMA contains two operative sections: Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States. See [28 U.S.C. § 1738C](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1738C&FindType=L)*.*

Section 3 is at issue here. It amends the Dictionary Act in [Title 1, § 7, of the United States Code](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=1USCAS7&FindType=L) to provide a federal definition of “marriage” and “spouse.” Section 3 of DOMA provides as follows:

“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.” [1 U.S.C. § 7](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=1USCAS7&FindType=L).

The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms, however, does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law. See GAO, D. Shah, Defense of Marriage Act: Update to Prior Report 1 (GAO–04–353R, 2004).

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. See [699 F.3d 169, 177–178 (C.A.2 2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2028902068&ReferencePosition=177).

Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation “any interest in property which passes or has passed from the decedent to his surviving spouse.” [26 U.S.C. § 2056(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=26USCAS2056&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a “surviving spouse.” Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to [28 U.S.C. § 530D](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS530D&FindType=L), that the Department of Justice would no longer defend the constitutionality of DOMA's § 3. Noting that “the Department has previously defended DOMA against ... challenges involving legally married same-sex couples,” App. 184, the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” *Id.,* at 191. The Department of Justice has submitted many [§ 530D](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS530D&FindType=L) letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the [§ 530D](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS530D&FindType=L) letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although “the President ... instructed the Department not to defend the statute in *Windsor,*” he also decided “that Section 3 will continue to be enforced by the Executive Branch” and that the United States had an “interest in providing Congress a full and fair opportunity to participate in the litigation of those cases.” *Id.,* at 191–193. The stated rationale for this dual-track procedure (determination of unconstitutionality coupled with ongoing enforcement) was to “recogniz[e] the judiciary as the final arbiter of the constitutional claims raised.” *Id.,* at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See [Fed. Rule Civ. Proc. 24(a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR24&FindType=L).

On the merits of the tax refund suit, the District Court ruled against the United States. It held that § 3 of DOMA is unconstitutional and ordered the Treasury to refund the tax with interest. Both the Justice Department and BLAG filed notices of appeal, and the Solicitor General filed a petition for certiorari before judgment. Before this Court acted on the petition, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. It applied heightened scrutiny to classifications based on sexual orientation, as both the Department and Windsor had urged. The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.

In granting certiorari on the question of the constitutionality of § 3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case. All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute. [568 U.S. ––––, 133 S.Ct. 786, 184 L.Ed.2d 527 (2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2028600638). She has ably discharged her duties.

In an unrelated case, the United States Court of Appeals for the First Circuit has also held § 3 of DOMA to be unconstitutional. A petition for certiorari has been filed in that case. Pet. for Cert. in *Bipartisan Legal Advisory Group v. Gill,* O.T. 2012, No. 12–13.

II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

[[1]](#Document1zzF12030868161) There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. “[A] taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.” [*Hein v. Freedom From Religion Foundation, Inc.,* 551 U.S. 587, 599, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2012538180) (plurality opinion) (emphasis deleted). Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of § 3 of DOMA.

[[2]](#Document1zzF22030868161) The decision of the Executive not to defend the constitutionality of § 3 in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. Windsor, the Government, BLAG, and the *amicus* appear to agree upon that point. The disagreement is over the standing of the parties, or aspiring parties, to take an appeal in the Court of Appeals and to appear as parties in further proceedings in this Court.

The *amicus'* position is that, given the Government's concession that § 3 is unconstitutional, once the District Court ordered the refund the case should have ended; and the *amicus* argues the Court of Appeals should have dismissed the appeal. The *amicus* submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule on the merits; for the United States seeks no redress from the judgment entered against it.

[[3]](#Document1zzF32030868161) This position, however, elides the distinction between two principles: the jurisdictional requirements of [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) and the prudential limits on its exercise. See [*Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129820). The latter are “essentially matters of judicial self-governance.” [*Id.,* at 500, 95 S.Ct. 2197.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129820) The Court has kept these two strands separate: “Article III standing, which enforces the Constitution's case-or-controversy requirement, see [*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–562, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1992106162); and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction,’ [*Allen* [*v. Wright,*] 468 U.S. [737,] 751, 104 S.Ct. 3315 [82 L.Ed.2d 556 (1984) ]](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984132352).” [*Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11–12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004581269).

[[4]](#Document1zzF42030868161)[[5]](#Document1zzF52030868161) The requirements of [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) standing are familiar:

“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural or hypothetical.” ’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’ ” [*Lujan, supra,* at 560–561, 112 S.Ct. 2130](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1992106162) (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible “rule[s] ... of federal appellate practice,” [*Deposit Guaranty Nat. Bank v. Roper,* 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1980105867), designed to protect the courts from “decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” [*Warth, supra,* at 500, 95 S.Ct. 2197.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129820)

[[6]](#Document1zzF62030868161) In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is “a real and immediate economic injury,” [*Hein,* 551 U.S., at 599, 127 S.Ct. 2553,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2012538180) indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with § 3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) jurisdiction. It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.

[[7]](#Document1zzF72030868161) This Court confronted a comparable case in [*INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415). A statute by its terms allowed one House of Congress to order the Immigration and Naturalization Service (INS) to deport the respondent Chadha. There, as here, the Executive determined that the statute was unconstitutional, and “the INS presented the Executive's views on the constitutionality of the House action to the Court of Appeals.” [*Id.,* at 930, 103 S.Ct. 2764.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415) The INS, however, continued to abide by the statute, and “the INS brief to the Court of Appeals did not alter the agency's decision to comply with the House action ordering deportation of Chadha.” [*Ibid.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983129415) This Court held “that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take,” [*ibid.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983129415), regardless of whether the agency welcomed the judgment. The necessity of a “case or controversy” to satisfy Article III was defined as a requirement that the Court's “ ‘decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold [the statute], the INS will execute its order and deport him.’ ” [*Id.,* at 939–940, 103 S.Ct. 2764](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415) (quoting [*Chadha v. INS,* 634 F.2d 408, 419 (C.A.9 1980)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1980152016&ReferencePosition=419)). This conclusion was not dictum. It was a necessary predicate to the Court's holding that “prior to Congress' intervention, there was adequate [Art. III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) adverseness.” [462 U.S., at 939, 103 S.Ct. 2764.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415) The holdings of cases are instructive, and the words of [*Chadha*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983129415) make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III. In short, even where “the Government largely agree[s] with the opposing party on the merits of the controversy,” there is sufficient adverseness and an “adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.” [*Id.,* at 940, n. 12, 103 S.Ct. 2764.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415)

[[8]](#Document1zzF82030868161)[[9]](#Document1zzF92030868161) It is true that “[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.” [*Roper,* *supra,* at 333, 100 S.Ct. 1166,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1980105867) see also [*Camreta v. Greene,* 563 U.S. ––––, ––––, 131 S.Ct. 2020, 2030, 179 L.Ed.2d 1118 (2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2025354674&ReferencePosition=2030) ( “As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so”). But this rule “does not have its source in the jurisdictional limitations of [Art. III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L). In an appropriate case, appeal may be permitted ... at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.” [*Roper, supra,* at 333–334, 100 S.Ct. 1166.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1980105867)

[[10]](#Document1zzF102030868161)[[11]](#Document1zzF112030868161) While these principles suffice to show that this case presents a justiciable controversy under [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L), the prudential problems inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a “ ‘real, earnest and vital controversy,’ ” the Court faces a “friendly, non-adversary, proceeding ... [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’ ” [*Ashwander v. TVA,* 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1936123029) (Brandeis, J., concurring) (quoting [*Chicago & Grand Trunk R. Co. v. Wellman,* 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed. 176 (1892)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1892180106)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon “that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” [*Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1962127595).

[[12]](#Document1zzF122030868161)[[13]](#Document1zzF132030868161) There are, of course, reasons to hear a case and issue a ruling even when one party is reluctant to prevail in its position. Unlike [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) requirements—which must be satisfied by the parties before judicial consideration is appropriate—the relevant prudential factors that counsel against hearing this case are subject to “countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power.” [*Warth,* 422 U.S., at 500–501, 95 S.Ct. 2197.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129820) One consideration is the extent to which adversarial presentation of the issues is assured by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act. With respect to this prudential aspect of standing as well, the [*Chadha*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983129415) Court encountered a similar situation. It noted that “there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of [this case] in the absence of any participant supporting the validity of [the statute]. The Court of Appeals properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress.” [462 U.S., at 940, 103 S.Ct. 2764.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1983129415) [*Chadha*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1983129415) was not an anomaly in this respect. The Court adopts the practice of entertaining arguments made by an *amicus* when the Solicitor General confesses error with respect to a judgment below, even if the confession is in effect an admission that an Act of Congress is unconstitutional. See, *e.g.,* [*Dickerson v. United States,* 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000387247).

In the case now before the Court the attorneys for BLAG present a substantial argument for the constitutionality of § 3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. Were this Court to hold that prudential rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations. For instance, the opinion of the Court of Appeals for the First Circuit, addressing the validity of DOMA in a case involving regulations of the Department of Health and Human Services, likely would be vacated with instructions to dismiss, its ruling and guidance also then erased. See [*Massachusetts v. United States Dept. of Health and Human Servs.,* 682 F.3d 1 (C.A.1 2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&SerialNum=2027809524). Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent. That numerical prediction may not be certain, but it is certain that the cost in judicial resources and expense of litigation for all persons adversely affected would be immense. True, the very extent of DOMA's mandate means that at some point a case likely would arise without the prudential concerns raised here; but the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved. In these unusual and urgent circumstances, the very term “prudential” counsels that it is a proper exercise of the Court's responsibility to take jurisdiction. For these reasons, the prudential and [Article III](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTIIIS2CL1&FindType=L) requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.

[[14]](#Document1zzF142030868161) The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma. On the one hand, as noted, the Government's agreement with Windsor raises questions about the propriety of entertaining a suit in which it seeks affirmance of an order invalidating a federal law and ordering the United States to pay money. On the other hand, if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’ ” [*Zivotofsky v. Clinton,* 566 U.S. ––––, ––––, 132 S.Ct. 1421, 1427–1428, 182 L.Ed.2d 423 (2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2027373452&ReferencePosition=1427) (quoting [*Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1801123932&ReferencePosition=177)). Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.

The Court's jurisdictional holding, it must be underscored, does not mean the arguments for dismissing this dispute on prudential grounds lack substance. Yet the difficulty the Executive faces should be acknowledged. When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise. But this case is not routine. And the capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons. These circumstances support the Court's decision to proceed to the merits.

III

When at first Windsor and Spyer longed to marry, neither New York nor any other State granted them that right. After waiting some years, in 2007 they traveled to Ontario to be married there. It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage. New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons. After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law Ann. §§ 10–a, 10–b, 13 (West 2013)).

[[15]](#Document1zzF152030868161)[[16]](#Document1zzF162030868161)[[17]](#Document1zzF172030868161) Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution. By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. [*Hillman v. Maretta,* 569 U.S. ––––, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2030644497); see also [*Ridgway v. Ridgway,* 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1981146997); [*Wissner v. Wissner,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1950120129). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See [*McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1800123335&ReferencePosition=421). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.

Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages “entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant” will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes. [8 U.S.C. § 1186a(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=8USCAS1186A&FindType=L&ReferencePositionType=T&ReferencePosition=SP_3fed000053a85) (2006 ed. and Supp. V). And in establishing income-based criteria for Social Security benefits, Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships. [42 U.S.C. § 1382c(d)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=42USCAS1382C&FindType=L&ReferencePositionType=T&ReferencePosition=SP_4be3000003be5).

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See [*Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&SerialNum=2003847757); An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts no. 09–13; [*Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=2018532345); [Vt. Stat. Ann., Tit. 15, § 8](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000883&DocName=VTST15S8&FindType=L) (2010); [N.H.Rev.Stat. Ann. § 457:1–a (West Supp.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000864&DocName=NHSTS457%3A1-A&FindType=L); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Dec. 18, 2009); N.Y. Dom. Rel. Law Ann. § 10–a (West Supp. 2013); [Wash. Rev.Code § 26.04.010](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000259&DocName=WAST26.04.010&FindType=L) (2012); Citizen Initiative, Same–Sex Marriage, Question 1 (Me. 2012) (results online at http:// www. maine. gov/ sos/ cec/ elec/ 2012/ tab– ref– 2012. html (all Internet sources as visited June 18, 2013, and available in Clerk of Court's case file)); [Md. Fam. Law Code Ann. § 2–201 (Lexis 2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000024&DocName=MDFAS2-201&FindType=L); An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same–Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws ch. 19 (2013); An act relating to marriage; providing for civil marriage between two persons; providing for exemptions and protections based on religious association, 2013 Minn. Laws ch. 74; An Act Relating to Domestic Relations—Persons Eligible to Marry, 2013 R. I. Laws ch. 4.

[[18]](#Document1zzF182030868161) In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, see, *e.g.,* [*Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1967129542); but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” [*Sosna v. Iowa,* 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129713).

[[19]](#Document1zzF192030868161) The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See [*Williams v. North Carolina,* 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1942123331) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders”). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” [*Ibid*.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1942123331) “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” [*Haddock v. Haddock,* 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1906100290); see also [*In re Burrus,* 136 U.S. 586, 593–594, 10 S.Ct. 850, 34 L.Ed. 500 (1890)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1890180190) (“The 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”).

[[20]](#Document1zzF202030868161)[[21]](#Document1zzF212030868161) Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In [*De Sylva v. Ballentine,* 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1956108052), for example, the Court held that, “[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin,” under the Copyright Act “requires a reference to the law of the State which created those legal relationships” because “there is no federal law of domestic relations.” [*Id.,* at 580, 76 S.Ct. 974.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1956108052) In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction. See [*Ankenbrandt v. Richards,* 504 U.S. 689, 703, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1992107018). Federal courts will not hear divorce and custody cases even if they arise in diversity because of “the virtually exclusive primacy ... of the States in the regulation of domestic relations.” [*Id.,* at 714, 112 S.Ct. 2206](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1992107018) (Blackmun, J., concurring in judgment).

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for “when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” [*Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383–384, 50 S.Ct. 154, 74 L.Ed. 489 (1930)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1930122642). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare [Vt. Stat. Ann., Tit. 18, § 5142](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000883&DocName=VTST18S5142&FindType=L) (2012), with [N.H.Rev.Stat. Ann. § 457:4 (West Supp.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000864&DocName=NHSTS457%3A4&FindType=L). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful—such as Iowa and Washington, see [Iowa Code § 595.19](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000256&DocName=IASTS595.19&FindType=L) (2009); [Wash. Rev.Code § 26.04.020](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000259&DocName=WAST26.04.020&FindType=L) (2012)—prohibit the practice). But these rules are in every event consistent within each State.

[[22]](#Document1zzF222030868161) Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “ ‘[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.’ ” [*Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1996118409) (quoting [*Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37–38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1928126284)).

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

[[23]](#Document1zzF232030868161) In acting first to recognize and then to allow same-sex marriages, New York was responding “to the initiative of those who [sought] a voice in shaping the destiny of their own times.” [*Bond v. United States,* 564 U.S. ––––, ––––, 131 S.Ct. 2355, 2359, 180 L.Ed.2d 269 (2011).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&ReferencePositionType=S&SerialNum=2025498884&ReferencePosition=2359) These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

[[24]](#Document1zzF242030868161) The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” [*Lawrence v. Texas,* 539 U.S. 558, 567, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003452259). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

[[25]](#Document1zzF252030868161)[[26]](#Document1zzF262030868161) DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. See U.S. Const., Amdt. 5; [*Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1954117300). The Constitution's guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group. [*Department of Agriculture v. Moreno,* 413 U.S. 528, 534–535, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1973126451). In determining whether a law is motived by an improper animus or purpose, “ ‘[d]iscriminations of an unusual character’ ” especially require careful consideration. *Supra,* at 2692 (quoting [*Romer, supra,* at 633, 116 S.Ct. 1620).](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1996118409) DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” [H.R.Rep. No. 104–664, pp. 12–13 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0100014&FindType=Y&SerialNum=0106520958). The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo–Christian) morality.” *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

The arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was “to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.” [*Massachusetts,* 682 F.3d, at 12–13.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2027809524&ReferencePosition=12) The Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.

DOMA's operation in practice confirms this purpose. When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see [*Lawrence,* 539 U.S. 558, 123 S.Ct. 2472,](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003452259) and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See [5 U.S.C. §§ 8901(5)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=5USCAS8901&FindType=L&ReferencePositionType=T&ReferencePosition=SP_362c000048fd7), [8905](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=5USCAS8905&FindType=L). It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See [11 U.S.C. §§ 101(14A)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=11USCAS101&FindType=L&ReferencePositionType=T&ReferencePosition=SP_41120000bc0f0), [507(a)(1)(A)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=11USCAS507&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a5e1000094854), [523(a)(5)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=11USCAS523&FindType=L&ReferencePositionType=T&ReferencePosition=SP_488b0000d05e2), [523(a)(15)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=11USCAS523&FindType=L&ReferencePositionType=T&ReferencePosition=SP_3d8b000000090). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as *Amici Curiae* 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to “assaul[t], kidna[p], or murde[r] ... a member of the immediate family” of “a United States official, a United States judge, [or] a Federal law enforcement officer,” [18 U.S.C. § 115(a)(1)(A)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS115&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a5e1000094854), with the intent to influence or retaliate against that official, [§ 115(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS115&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7b9b000044381). Although a “spouse” qualifies as a member of the officer's “immediate family,” [§ 115(c)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS115&FindType=L&ReferencePositionType=T&ReferencePosition=SP_fcf30000ea9c4), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See [26 U.S.C. § 106](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=26USCAS106&FindType=L); [Treas. Reg. § 1.106–1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1016188&DocName=26CFRS1.106-1&FindType=L), [26 CFR § 1.106–1 (2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000547&DocName=26CFRS1.106-1&FindType=L); IRS [Private Letter Ruling 9850011 (Sept. 10, 1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0004309&FindType=Y&SerialNum=1998275560). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. See Social Security Administration, Social Security Survivors Benefits 5 (2012) (benefits available to a surviving spouse caring for the couple's child), online at http:// www. ssa. gov/ pubs/ EN– 05– 10084. pdf.

DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. See [20 U.S.C. § 1087nn(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=20USCAS1087NN&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a83b000018c76). Same-sex married couples are exempt from this requirement. The same is true with respect to federal ethics rules. Federal executive and agency officials are prohibited from “participat[ing] personally and substantially” in matters as to which they or their spouses have a financial interest. [18 U.S.C. § 208(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=18USCAS208&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). A similar statute prohibits Senators, Senate employees, and their spouses from accepting high-value gifts from certain sources, see [2 U.S.C. § 31–2(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=2USCAS31-2&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7b9b000044381), and another mandates detailed financial disclosures by numerous high-ranking officials and their spouses. See 5 U.S.C.App. §§ 102(a), (e). Under DOMA, however, these Government-integrity rules do not apply to same-sex spouses.

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[[27]](#Document1zzF272030868161) The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

[[28]](#Document1zzF282030868161) The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See [*Bolling,* 347 U.S., at 499–500, 74 S.Ct. 693;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1954117300) [*Adarand Constructors, Inc. v. Penã,* 515 U.S. 200, 217–218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1995125532). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

*It is so ordered.*