Nos. 10-2204, 10-2207, and 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

On Appeal from the United States District Court for the
District of Massachusetts, Cause No. 1:09-CV-11156-JLT
The Honorable Joseph L. Tauro

BRIEF OF *AMICI CURIAE* THE STATES OF INDIANA, COLORADO, MICHIGAN, SOUTH CAROLINA, AND UTAH IN SUPPORT OF DEFENDANT-APPELLANTS AND IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICI* STATES

The *amici*, all of whom are sovereign states of the United States, file this brief pursuant to Federal Rule of Appellate Procedure 29(a), which allows a state to file an *amicus curiae* brief through its attorney general without the consent of the parties or leave of the court. *See* Fed. R. App. P. 29(a).

The *amici* states all have a complex matrix of family law that provides for marriage under the traditional definition of that institution as a legal union between one man and one woman. The *amici* states support and approve of the definition enacted by Congress in Section 3 of the Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419, 2420 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). In addition, as sovereigns, the *amici* states have a compelling interest in monitoring the proper bounds of state and federal power and in assisting courts with deciding where those lines should properly be drawn. In that regard, this brief addresses only whether the district court properly applied to DOMA the Tenth Amendment standard of *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997), but does not delve into other possible Tenth Amendment theories.

SUMMARY OF THE ARGUMENT

Unlike States, Congress does not possess general police powers. That is, Congress may enact legislation only as specifically authorized by one of the Constitution's enumerated powers. And because the Constitution does not directly

authorize Congress to define marriage, Massachusetts has challenged Congress's authority to enact Section 3 of the Defense of Marriage Act, which defines marriage for purposes of administering federal programs. In short, Massachusetts contends that Section 3 transgresses the Tenth Amendment's reservation of general police power to the States.

At one level, the *amici* states appreciate Massachusetts's general desire to resist federal encroachment. Particularly in the wake of the Supreme Court's watershed decisions in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), States have been vigilant about tending the constitutional border between state and federal power. *See generally, e.g., Reno v. Condon*, 528 U.S. 141 (2000) (rejecting Tenth Amendment challenge by South Carolina to Driver's Privacy Protection Act); *Connecticut ex rel Blumenthal v. United States*, 369 F.Supp.2d 237 (D. Conn. 2005) (rejecting Tenth Amendment challenge by Connecticut to Magnuson-Stevens Act).

Indeed, Florida and several other states, including Indiana, are currently in the midst of litigating their own Tenth Amendment challenge to Congress's unprecedented expansion of the federal Medicaid program in the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), *as amended by the* Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010). *See Florida et al. v. U.S.*

Dep't of Health and Human Servs., et al., No. 3:10-CV-91-RV/EMT, 2010 WL 2011620 (N.D. Fla. 2010).

Not all Tenth Amendment challenges to congressional enactments are created equal, however. The Tenth Amendment, as an embodiment of the overall constitutional structure, demands sensitivity for the proper delineation of power between what is delegated to the federal government and what is reserved for States. *See* The Federalist No. 28 (Alexander Hamilton) ("It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority"); *Id*. No. 46 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.").

To be sure, the Tenth Amendment is a critical bulwark for States against relentless federal expansion, but acknowledging that some affairs properly belong to Congress does not diminish that protection. Section 3 of DOMA, as a housekeeping tool for federal programs, fits within Congress's affairs.

Different Tenth Amendment tests apply depending on the underlying enumerated power. In analyzing statutes justified by the General Welfare Clause (sometimes referred to as the "Spending Power"), the Supreme Court has applied the test of *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Congress may

provide grants to states to carry out federal programs that (1) pursue the general welfare; (2) impose unambiguous conditions on the states' receipt of federal funds; (3) impose conditions germane to the federal interest purportedly at issue; and (4) are not otherwise barred by the Constitution. *See id*. Congress may not, however, use its spending power to coerce the states into complying with federal decrees. *See id*. at 211 (recognizing the possibility of financial inducements offered by Congress being so coercive as to violate Tenth Amendment limits on the Spending Power).[1]

When analyzing the Tenth Amendment validity of Commerce Clause enactments, the Supreme Court asks (aside from whether the law fits within the parameters of the Commerce Clause) whether an enactment commandeers the apparatus of state government. *See generally, e.g., Printz*, 521 U.S. 898; *New York*, 505 U.S. 144; *Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Such laws are categorically impermissible because they offend the very principle of state sovereignty. *See, e.g., Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 188.

[1] In their Tenth Amendment challenge to the Affordable Care Act's unprecedented Medicaid expansion, Indiana and the other plaintiff states have invoked each of the *Dole* factors, though their arguments to date have largely focused on the coercion factor. *See generally* Order and Memorandum Opinion, *Florida v. U.S. Dep't of Health and Human Servs.*, 2010 WL 2011620 (N.D. Fla. October 14, 2010) (No. 3:10-CV-91-RV/EMT).

Congress's authority to enact Section 3 of DOMA arises from its Spending Power, not its Commerce Power. That distinction suggests that any Tenth Amendment debates in this case should be about coercion under *Dole* rather than commandeering under *Printz* or *New York*. Massachusetts, however, has eschewed both arguments and has argued instead that this is a case about *germaneness, i.e.*, about whether Congress has acted properly within its Spending Power *a priori*. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 252 n.156 (D. Mass. March 25, 2010) ("[T]he Commonwealth acknowledges that 'this is not a commandeering case.'").

According to Massachusetts, refusing to recognize same-sex spouses can cause Medicaid to subsidize higher-income people, an outcome supposedly incompatible with Medicaid as a program for low-income individuals. *See* Pl's. Mem. of Law in Opp'n to Def's. Mot. to Dismiss and Supp. Pl's. Mot. for Summ. J. at 37, *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F.Supp.2d 234 (D. Mass. March 25, 2010), ECF No. 44 (No. 1:09-cv-11156-JLT). Furthermore, says Massachusetts, limiting the federal government's operational definition of marriage to one man and one woman regardless of a given state's definition of marriage is incompatible with the State Cemetery Grants Program, which provides burial sites for veterans and their spouses. *See id*. Thus,

Massachusetts argues, DOMA's definition of marriage is somehow not germane to the purposes of these particular spending programs.[2] *See id*.

The district court ignored Massachusetts's germaneness argument, however, and held that Section 3 of DOMA transgresses the Tenth Amendment because DOMA impinges upon the "core sovereignty" of the states under the test adopted in *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997).[3] Under this test, a federal statute violates the Tenth Amendment when it: (1) "regulate[s] the States as States;" (2) "concern[s] attributes of state sovereignty;" and (3) is "of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional government functions." *Id*.[4]

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[2] Massachusetts's germaneness arguments can be refuted with the elementary observation that Congress can define the purposes and boundaries of its programs however it wants, and once having established such purposes and boundaries, can even create exceptions in light of countervailing policies. There is no rule of constitutional law saying that once Congress decides to pursue a particular objective all succeeding enactments must advance that particular narrow cause. Congress, like the States, is entitled to balance competing policy interests when establishing its objectives and when setting limits to how far it is willing to go to achieve those objectives.

[3] The district court also said that DOMA's definition of marriage violates the Tenth Amendment because it violates the Equal Protection Clause and therefore constitutes an improper use of the Spending Power. *See Massachusetts*, 698 F. Supp. 2d at 247-49. This Tenth Amendment claim, however, is entirely derivative of the Equal Protection claim, *see id*. at 248-49, and while the *amici* states disagree with the district court's Equal Protection analysis and conclusions, they will leave that issue for others to address.

[4] This test is conjunctive in nature; thus, a federal statute must fail all three of these factors in order to violate the Tenth Amendment. *See id*.

The *Bongiorno* test, however, is rooted in the reasoning of the Supreme Court's Commerce Clause decisions, and in particular *Hodel*, 452 U.S. at 287-88, and *National League of Cities v. Usery*, 426 U.S. 833, 852-853 (1976). To be sure, *National League of Cities* was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985), but more recent cases suggest that the analyses in *Hodel* and *National League of Cities* retain some vitality. *Cf. New York*, 505 U.S. at 171-77. Accordingly, the *amici* states do not criticize the *Bongiorno* test as such, but merely question its applicability in this case. The problem is that *Bongiorno*, like all of the cases upon which it relies, examined Tenth Amendment issues in the context of Congress's use of the Commerce Clause, not its use of the Spending Power, which is the basis for Section 3 of DOMA. As a consequence, the *Bongiorno* test is ill-suited for evaluating Section 3 of DOMA.

Even were the *Bongiorno* test applicable, moreover, it is plain that DOMA does not run afoul of each of its components. Section 3 of DOMA merely defines how the federal government defines marriage for its own purposes and does not perforce "regulate the States as States," "concern attributes of state sovereignty," or impair the states' ability to control their own "traditional government functions." *See Bongiorno*, 106 F.3d at 1033. DOMA itself does not require states to adopt a federal standard as the price for participating in dual-sovereign

endeavors.[5] Accordingly, under *Bongiorno*, DOMA presents no discernible Tenth Amendment transgressions.

ARGUMENT

I. *Bongiorno* Does Not Apply to Spending Clause Legislation Such as DOMA

The *Bongiorno* test has no logical application to Congress's spending decisions. In *Bongiorno* this Court upheld the Child Support Recovery Act—Commerce Clause legislation that provides for interstate enforcement of child support obligations—based on the Supreme Court's reasoning in *Hodel* and *National League of Cities*—both of which also examined Commerce Clause legislation. *See id*. at 1032-33; *see also Hodel*, 452 U.S. at 268, 287-88 (upholding Surface Mining Control and Reclamation Act of 1977 against Commerce Clause and Tenth Amendment challenges); *Nat'l League of Cities*, 426 U.S. at 840-41,

[5] To the extent Massachusetts argues that it would be unconstitutional for the federal government to cut off or recapture Medicaid or State Cemetery Grants as a consequence of Massachusetts's provision of benefits to same-sex spouses, it is targeting the wrong law. The statutes responsible for such consequences are the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, and the State Cemetery Grants Program, Pub. L. No. 95-476, Title II, § 202(b)(1), 92 Stat. 1504 (October 18, 1978) (codified at 38 U.S. § 2408), not DOMA. Similarly, to the extent Massachusetts argues that Congress may not force it, as an employer, to collect portions of Medicare or other payroll taxes that result from the federal definition of marriage, those arguments are properly directed at the applicable tax collection directives, not DOMA. The *amici* states take no position in this case as to the viability of any potential broad-based Tenth Amendment challenges to the Medicaid Act, the Medicare Act, the State Cemetery Grants Program, or any other statutes whose consequences for States have been brought into sharp relief for Massachusetts by virtue of Section 3 of DOMA.

852-53 (striking down amendments to the Fair Labor Standards Act attempting to extend federal minimum wage and maximum hour limitations to state government employees).

In each instance, the Court inquired whether the legislation had a compulsive effect upon the states. In *Hodel*, 426 U.S. at 288-89, the Court held that the states' ability to choose not to implement the Surface Mining Act, and to force the federal government to bear the entire regulatory burden, rendered the Act non-coercive. In *National League of Cities*, 426 U.S. at 851-52, the Court invalidated amendments to the Fair Labor Standards Act imposing minimum wage requirements on states as interfering with the states' authority to make "fundamental employment decisions."

More recent cases applying the same reasoning have also examined federal statutes ostensibly grounded in the Commerce Clause. *See generally Printz*, 521 U.S. at 903-04, 935 (holding that the Brady Act, which forced state officials to run background checks as part of federal regulation of firearms sales, violated the Tenth Amendment); *New York*, 505 U.S. at 160 (holding that, though "[r]egulation of the . . . interstate market in [radioactive] waste disposal is . . . well within Congress' authority under the Commerce Clause," Congress may not force states to take title to such waste). *New York* is particularly instructive, as it makes plain

that Dole is the proper test for uses of the Spending Power, whereas *Hodel* is applicable to the Commerce Power. *See New York*, 505 U.S. at 167-68, 171-77.

Bongiorno, as an application of *Hodel's* reasoning, is therefore limited to testing uses of the Commerce Power. It is designed to prevent Congress from directly regulating the states the way it directly regulates employers and other commercial actors.

Section 3 of DOMA represents an exercise of the Spending Power, not the Commerce Power. It defines the terms "marriage" and "spouse," which are used in at least 1,138 federal statutes defining the parameters of federal programs, to advance federal prerogatives, *see Massachusetts*, 698 F. Supp. 2d at 236, but it does not direct the states to do anything. And while Congress may sometimes go too far when using the Spending Power to coerce states indirectly with federal dollars, that is a different inquiry altogether—one that Massachusetts itself has disclaimed. The district court therefore erred in attempting to adapt *Bongiorno* to the Spending Power context.

II. Even if *Bongiorno* Applies, DOMA is Nonetheless an Acceptable Exercise of Federal Power

Even if the *Bongiorno* test could apply to Spending Power legislation, it is plain that DOMA would survive scrutiny. As a limit on federal spending programs created elsewhere, DOMA itself does not "regulate the States as States," "concern attributes of state sovereignty," or impair the states' ability to control their own

traditional government functions. *See Bongiorno*, 106 F.3d at 1033. The Tenth Amendment permits Congress to define the standards by which the federal government will implement its own programs, even if such definitions have some collateral, non-coercive impacts on states. *See New York*, 505 U.S. at 156.

A. DOMA Does Not Regulate the States as States

A federal statute can violate the Tenth Amendment under *Bongiorno* only if it "regulate[s] the States as States." *Bongiorno*, 106 F.3d at 1033. This language, taken from *Hodel*, 452 U.S. at 287, has its origin in the Supreme Court's acknowledgment in *National League of Cities* that "States as States stand on a quite different footing from an individual or corporation" when challenging congressional acts. See *National League of Cities*, 426 U.S. at 854-55. Thus, Congress may not exercise its Commerce Power to "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id*. No "essential decisions" are being forced on States here.

First, DOMA itself protects the ability of each state to set its own policies on same-sex marriage by easing the force of the Full Faith and Credit Clause as applied to that institution. *See* Defense of Marriage Act § 2, 28 U.S.C. § 1738C ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the

same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."). This state-law protection arose out of a concern that recognition of same-sex marriages solemnized in one state could be imposed through the Full Faith and Credit Clause on those states that have chosen not to recognize such marriages. See H.R. Rep. 104-664, at 6-10, 16-18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910-14, 2920-22 (1996). Thus, DOMA actually protects the internal policies of each state, rather than allowing one state's policies on a contentious social issue to be imposed on others.

Second, DOMA's marriage definition applies when "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." Defense of Marriage Act § 3, 1 U.S.C. § 7. Accordingly, DOMA's definition of marriage for federal purposes has many applications that have *nothing to do* with States. At least 1,138 statutes, covering topics ranging from the availability of retirement benefits for federal employees, *see, e.g.*, 5 U.S.C. § 8341 (retirement annuities, including joint and survivor annuities), to personal leave, 5 U.S.C. §§ 6382-83 (federal employees may use up to a total of twelve administrative work weeks of sick leave each year to care for a spouse with a serious health condition), to Social Security benefits, 42 U.S.C. § 402, and more, differentiate on the basis of marital

status. DOMA targets management of the *federal* government, not States, regardless of any incidental non-coercive impact on state affairs.

Third, as part of its analysis on this point the district court focused on "the impact of DOMA on the state's bottom line," which has nothing to do with whether DOMA targets States as such. *Massachusetts*, 698 F. Supp. 2d at 249. Many unquestionably valid federal laws may have an incidental impact on State revenues—even patent laws may curb corporate profits and therefore constrict state tax revenues. Furthermore, any impact on Massachusetts' "bottom line" is not a result of direct regulation by DOMA so much as other federal programs and Massachusetts' own decisions to spend money in circumstances where the federal government will not reimburse it. It is not as if (for example) DOMA requires Massachusetts to spend money on the burial of veterans' same-sex spouses, but then withholds reimbursement for such burials. DOMA merely uses a traditional definition of marriage to limit the claims the federal government is willing to pay—to states or anyone else.

DOMA is not, therefore, a regulation of states as states, and thus survives the first *Bongiorno* test.

B. Defining Marriage for the Purposes of Federal Law Does Not Implicate Attributes of State Sovereignty

To violate the Tenth Amendment under *Bongiorno*, a statute must also "concern attributes of state sovereignty." *Bongiorno*, 106 F.3d at 1033. The amici

states wholeheartedly embrace the notion that the ability to define marriage for the purposes of state law is a long-standing attribute of state sovereignty. *See Massachusetts*, 698 F. Supp. 2d at 236-39. Indeed, the Supreme Court has repeatedly (and correctly) identified family law as an example of a quintessentially local area of law. *See, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995) (expressing concern that an overly broad reading of the Commerce Clause could lead to federal regulation of "family law (including marriage, divorce, and child custody)"); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . . Besides, it must be conceded that the Constitution delegated no authority to the government of the United States on the subject of marriage and divorce.").

But Section 3 of DOMA does not attempt to regulate domestic relationships recognized by State law—again, Section 2 of DOMA reinforces State sovereignty in that regard. Section 3 merely defines what relationships the federal government itself recognizes and, in effect, is willing to subsidize. Section 3 of DOMA is explicitly restricted to federal law, and does not purport to modify or interfere with state law in any way, so it implicates no attributes of state sovereignty. Defense of Marriage Act §3, 1 U.S.C. § 7.

Put another way, the federal government's refusal to recognize same-sex marriages no more invalidates Massachusetts's same-sex marriages than does Indiana's refusal to recognize them, as DOMA authorizes Indiana to do. Defense of Marriage Act § 2, 28 U.S.C. § 1738C. When Indiana refuses to recognize same-sex marriages, it is exercising its own sovereignty, not trenching on that of Massachusetts. The same goes for the federal government. When Congress chose not to provide same-sex couples with the benefits it provides married couples, it exercised its own sovereignty, not Massachusetts'.

C. DOMA Does Not Impair Massachusetts' Ability to Structure Integral Operations in Areas of Traditional Government Functions

The third *Bongiorno* test asks if the federal statute is "of such a nature that compliance with it would impair a state's ability to structure integral operations in areas of traditional government functions." *Bongiorno*, 106 F.3d at 1033.[6] This test inquires whether the statute "infring[es] on the core of state sovereignty" by usurping a power unique to the states. *Id*.

The core of state sovereignty is most clearly infringed when a federal statute commandeers or otherwise directly coerces state behavior. *See, e.g.*, *New York*, 505 U.S. 144. As Massachusetts admits and the District Court recognized,

[6] Though the Supreme Court once explicitly disavowed this "traditional government functions" analysis, *see Garcia*, 469 U.S. at 531, more recent authority suggests that it is nonetheless appropriate (at least with regard to Commerce Clause legislation). *Cf.*, *e.g.*, *New York*, 505 U.S. at 177

however, DOMA does not commandeer or coerce states. *See Massachusetts*, 698 F. Supp. 2d at 252 n.156.

Beyond commandeering or coercion, the Supreme Court has made plain that the core of state sovereignty includes the power of the state to locate its seat of government, to appropriate its own public funds, and to determine wages, hours, and other compensation for state employees. *See Nat'l League of Cities*, 426 U.S. at 845. Core state sovereignty also includes the ability to educate children and to enact and administer criminal laws. *See United States v. Morrison*, 529 U.S. 598, 613 (2000) (listing criminal law enforcement and education as areas in which states have historically been sovereign). And, the *amici* states agree, core state sovereignty includes regulation of marriage and family. But again, DOMA does not by its terms alter state laws and policies bearing on marriage and family. *See supra* Part II.B. If Section 3 of DOMA, as one among many limits on federal programs, indirectly influences how states govern themselves, such influence is subject to the *Dole* coercion test, which Massachusetts has disclaimed.

The District Court said that Massachusetts's potential loss of federal grants to construct and maintain cemeteries for state military veterans, and the state's incursion of additional costs relating to other federal grant programs, evidence DOMA's "impediments . . . on [Massachusetts'] basic ability to govern itself." *See Massachusetts*, 698 F. Supp. 2d at 252. Under that reasoning, however, the Tenth

Amendment question has become not whether regulation of marriage and family is a matter of "core state sovereignty," but whether a state's ability to define the terms of federal grants qualifies as such. Without a theory that the terms of federal grants are coercive, however, the District Court's essential holding in that regard has no doctrinal support.

Indeed, Congress frequently conditions federal grants on a States' willingness to adhere to *federal* policy, even in areas touching on core state sovereign powers such as appropriations and education. *See, e.g.*, Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6987) (requiring states to appropriate enough money to match federal grants if states are to participate); No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2001) (codified in scattered sections of 20 U.S.C.) (offering federal funds to states that adopt federal education standards). If DOMA is invalid simply because it somehow ties federal grants to state policies in regard to a core sovereign interest, then so are these (and possibly many other) programs.

While Tenth Amendment respect for state sovereignty precludes Congress from using its Spending Power coercively (or in violation of the other *Dole* factors), such respect does not yield a right to federal subsidy of state policies, even where core state sovereign powers are at issue. Federal grants have become a

routine component of the modern administrative and welfare states, but that does not mean States are nothing more than federal dependants constitutionally entitled to minimum annual disbursements regardless of their policies.

Massachusetts disclaims the notion that DOMA, alone or in combination with other statues, unlawfully coerces it into adopting state marriage policies it otherwise would not. DOMA therefore does not impermissibly interfere with Massachusetts' definition of marriage.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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Dated: January 25, 2011

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), this brief contains 4,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Thomas M. Fisher
Thomas M. Fisher

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I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate CM/ECF system on January 25, 2011.

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