

Consolidated Case 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,

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Proposed Amicus Curiae Liberty Counsel states, pursuant to Fed. R. App. P. 26.1, that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

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STATEMENT OF INTEREST

Proposed Amicus Curiae Liberty Counsel is a national public policy, education, and litigation firm that has been substantially involved in drafting constitutional amendments, Defense of Marriage Acts (DOMAs), and defending them in courts throughout the country.

All parties have consented to the filing of this brief.

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The system of government created by our founders is unlike any other in the world. It has at its foundation several different, but related, concepts: “separation of powers,” “federalism,” “limited government,” and “checks and balances.” Taken together, these concepts establish a system in which governmental powers are limited (not all-encompassing), specifically enumerated, delegated to specific sovereigns (state or federal), and divided among different branches of government. The Framers specifically built in these various checks and balances to prevent accumulation of power in any one branch of government because they knew that without such restraints the natural tendency would be to accumulate power and threaten our liberties. A proper understanding of these concepts dictates the outcome of this case, namely, that Congress has authority to define marriage for purposes of federal programs that condition eligibility on marital status. The decision of the lower court should therefore be reversed.

The first question that must be asked with any congressional action is whether the Constitution grants Congress the authority to enact the specific legislation, either expressly or impliedly (through the necessary and proper clause). If not, then the law is void. In this case, while domestic relations matters are unquestionably traditionally deemed state law matters, Congress nevertheless has

authority to define marriage for the narrow purpose of interpreting and implementing validly enacted federal statutes and programs. That is particularly the case when the definition of marriage adopted by Congress is consistent with the definition of marriage in the overwhelming majority of states, which in turn is consistent with the common law definition of marriage in this country that was uniformly recognized for centuries.

ARGUMENT

CONGRESS ACTED WITHIN ITS AUTHORITY WHEN IT DEFINED MARRIAGE IN DOMA FOR PURPOSES OF INTERPRETING FEDERAL STATUTES AND REGULATIONS.

A.

Congress Cannot Act Outside Its Powers.

1.

The federal government is one of limited, enumerated powers.

The federal government is one of delegated, enumerated, and thus limited powers. *See M’Culloch v. Maryland*, 17 U.S. 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.”); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”); *see generally The Federalist* No. 45 (Madison) (“The powers delegated by the proposed Constitution to the Federal

Government, are few and defined” while “[t]hose which are to remain in the State Governments are numerous and indefinite.”). The Tenth Amendment to the United States Constitution makes clear that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.” U.S. Const. amend. X.

With respect to those powers that are expressly granted to the national government in the Constitution, they are divided among three branches of government.

By diffusion of power – horizontally among the three separate branches of the federal government, and vertically in the allocation of power between the central government and the states – the Constitution’s Framers devised a structure of government strong enough to ensure the nation’s future strength and prosperity but without sufficient power to threaten the liberty of the people.

Edwin Meese III, “The Meaning of the Constitution,” The Heritage Foundation Web Memo No. 2616, at 1 (Sept. 16, 2009). James Madison explained that the reason for this horizontal and vertical “double security,” as he called it, was to protect our liberties. *The Federalist* No. 51.

“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.” *The Federalist* No. 51, at 323; *see also* *The Federalist* No. 28, at 180-181 (A. Hamilton).

Printz v. United States, 521 U.S. 898, 922 (1977). The Supreme Court further explained that:

The great innovation of this design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other” -- “a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. *See New York [v. U.S.]*, 505 U.S. 144, 168-69 (1992); *United States v. Lopez*, 514 U.S. 549, 576-577 (1995) (Kennedy, J., concurring). *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (“the State has no legitimate interest in protecting nonresident[s]”). As Madison expressed it: “[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.” The Federalist No. 39, at 245.

* * *

This separation of the two spheres is one of the Constitution's structural protections of liberty. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

Printz, 521 U.S. at 920-21 (citations omitted).

The Declaration of Independence explains that the liberties the Founders sought to protect are God-given inalienable rights derived from our Creator, that government has a duty to protect them, and “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter

or abolish it.” *See* Declaration of Independence. To guard against tyrannical tendencies that seek to infringe our liberties, the first question raised in any case challenging a Congressional act is whether it is “based on one or more of its powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). Thus, in this case, the question is whether Congress has authority to define marriage for purposes of federal statutes and regulations.

2.

Defining marriage for purposes of federal law is within Congress’ authority.

Although the United States Supreme Court long has proclaimed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,” *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992), that general truism does not answer the particular question before the Court concerning Congress’ authority to define terms contained in federal statutes and regulations.

At the outset, it bears emphasis that insofar as Section 3 of the Defense of Marriage Act (“DOMA”) simply defines terms already contained in other federal statutes and regulations, Congress’ authority to enact DOMA need not itself be based on one of its enumerated powers. Rather, the proper question is whether the Constitution grants Congress authority to enact the challenged programs – *i.e.*, the State Cemetery Grants Program, Medicaid, and Medicare -- for which DOMA supplies the definition of “spouse.” For example, in the same Title and Chapter that

contain DOMA, Congress also defined “corporation,” “person,” “child,” and “lunatic.” *See* 1 U.S.C. §§ 1, 5, 8.

A proper challenge to those definitions would be to challenge Congress’ authority to enact the statutes for which those definitions apply, not to challenge Congress’ authority to define terms that are used in other sections of the United States Code. As discussed below, the District Court incorrectly focused on whether Congress had authority to define marriage rather than whether it had authority to enact the challenged programs with the Section 3 definitions for spouse and marriage incorporated into those programs.

Consistent with the concept of a Constitution of limited, enumerated powers, the decision below should have asked, but did not, the following questions: first, whether the Constitution grants Congress authority to pass the challenged Medicaid, Medicare, and State Cemetery Grants programs; and, if Congress has such authority, second, whether Congress had authority to limit benefits available under those programs to “spouses,” as defined in DOMA. Instead, the District Court asked whether DOMA § 3 itself is grounded in the Spending Clause. (*Mass. v. DHHS Op.* at 24-25).

Applying a five-part test set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987), the District Court then concluded that Congress lacked authority to enact DOMA under the Spending Clause because it imposes an unconstitutional

condition, in violation of the Equal Protection Clause, on the receipt of funds to limit marriage to the union of one man and one woman. The court did not reach Massachusetts' separate argument that defining marriage and spouse for purposes of federal statutes and regulations is not sufficiently related to the purposes of the Medicaid or State Cemetery Grants Program. As discussed below, however, Congress' decision to define marriage as the union of one man and one woman for purposes of federal statutes and regulations is a constitutional exercise of its authority. Thus, to the extent Congress had authority to pass the Medicaid, Medicare, and State Cemetery Grants Programs, it also had authority to define the terms contained in those statutes.

If the District Court were concerned about federalism, separation of powers, and protecting state sovereignty, which principles the opinion professes to defend, then it should have asked the more critical question of whether the Constitution grants authority to Congress to enact the Medicaid, Medicare, and State Cemetery Grants programs in the first place. Perhaps the question was not asked because Congress plainly lacks authority to fund Medicaid and Medicare under Article I of the U.S. Constitution: nothing in the enumeration of powers in section 8 grants Congress authority to expend federal tax dollars to fund a national health care program.

Since Congress lacks authority to fund these programs under Article I of the Constitution, it renders moot Appellee's claim that Congress cannot condition eligibility to spouses under those programs in accordance with the definitions in DOMA. With Medicaid and Medicare properly declared void, and therefore, unconstitutional, Massachusetts would remain free to enact and fund a state program to provide medical assistance in a manner that it deems nondiscriminatory (but thousands would be left without their Medicaid and Medicare payments, to the dismay of both the court and the plaintiffs).¹ Instead of declaring Medicaid or Medicare void, however, the District Court declared that Congress lacks authority to define marriage and spouse for purposes of these unconstitutional federal statutes and regulations.

B.
Congress Has Long Defined Marriage for Federal Purposes and
That Definition is Constitutional.

1.

The Supreme Court has affirmed Congress' authority to define marriage.

Assuming that Congress had authority to enact the Medicare, Medicaid, and State Cemetery Grants Programs, the lower court incorrectly concluded that Congress cannot condition eligibility based on the definitions contained in DOMA

¹ Arguably, Congress has authority to fund the State Cemetery Grants programs as necessary and proper to its express power to provide and maintain the military. *See* U.S. Const., art. I, § 8.

§ 3. The District Court ignored the fact that the authority of Congress to define marriage as one man and one woman for purposes of federal matters has a long pedigree in this Nation. In 1885, the United States Supreme Court upheld an act of Congress that prohibited polygamists and bigamists from voting or holding office in any U.S. territory. *See Murphy v. Ramsey*, 114 U.S. 15 (1885). In affirming Congress' definition of marriage to exclude polygamists and bigamists, the Supreme Court explained:

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

Id. at 45. Thus, the Supreme Court specifically affirmed Congress' authority to disenfranchise polygamists and bigamists because those relationships were inconsistent with the longstanding common law meaning of marriage as the union of one man and one woman.

Consistent with that longstanding meaning of marriage, DOMA defined marriage and spouse, for purposes of interpreting all federal statutes and

regulations, as the union of one man and one woman. Prior to DOMA, if a state had legalized polygamy, no one would have seriously questioned the federal government's refusal to treat that relationship as a valid marriage and, based on *Murphy*, the federal government's decision would have been upheld.

[B]ut there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.

Reynolds v. U.S., 98 U.S. 145, 166 (1878).

Similarly, it seems unlikely that anyone would question Congress' authority to refuse to treat as valid an incestuous marriage between a father and daughter, if a state decided to legalize such marriages. Congress thus has authority to define marriage.

2.

DOMA does not interfere with state authority to regulate marriage within its borders.

DOMA simply codified the longstanding definition of marriage in this Nation *for the purpose of interpreting federal law*, and those states that later chose to alter that definition should not expect the federal government to defer to the state's redefinition when interpreting federal law. Thus, after Congress passed

DOMA, if a state, such as Massachusetts, decided to engage in social experimentation by redefining marriage, it arguably retained the authority under the Tenth Amendment to do so. In this respect, consistent with the Tenth Amendment, it arguably retained the authority to regulate the institution of marriage *within its borders*, including for implementation of state programs and conferral of state benefits.

The state lacks the authority, however, to export its redefinition and mandate that the federal government adopt a state's decision to radically change the meaning of marriage. Consistent with the concept of dual sovereigns, the *state* retains the authority to regulate marriage for purposes of *state* laws and programs, while the *federal* government retains the authority to define marriage for purposes of *its* validly enacted laws. The federal government has exercised this authority for two centuries.

For example, the Immigration and Naturalization Act clarifies that marriages entered into for purpose of facilitating immigration are not treated as valid for purposes of immediate relative priority in federal immigration law even though some states treat them as valid, or merely voidable. *See* 8 U.S.C. §§ 1154(a)(92)(A), 1255(e). Similarly, although the federal tax laws generally incorporate the state definition of marriage, there are instances where the federal definition of marriage excludes some marriages treated as valid under state law.

See, e.g., 26 U.S.C. §§ 7703(a)(2), (b) (definitions that exclude from married status couples who under state law are legally separated but still validly married).

Likewise, many federal statutes and cases involving ERISA and other federal pensions adopt federal law governing marriage, not state law. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007-2008: Federalization and Nationalization Continue*, 42 Fam. L.Q. 713, 714-15 (2009) (discussing cases); *see also* Lynn Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 Drake L. Rev. 951 (Summer 2010) (discussing Congressional authority to enact DOMA § 3). Marriage is similarly defined in other federal laws, including federal land grants, military benefits, the census, and copyright. *See generally* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 Drake L. Rev. 951, 976-80 (2010) (discussing history of federal regulation of the meaning and incidents of family relations).

Not only has the federal government long defined marriage for purposes of federal laws, regulations, and programs, but the Supreme Court also has flatly rejected the argument that marriage as the union of one man and one woman violates the federal equal protection or due process clause. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). In *Baker*, two men challenged the state's refusal to grant them a marriage license, requesting that the marriage laws be declared

unconstitutional under the federal guarantees of equal protection and due process. After the Minnesota Supreme Court held that limiting marriage to the union of one man and one woman was constitutional, the United States Supreme Court dismissed the appeal for want of a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972). Despite this precedent, the District Court held that DOMA induces the Commonwealth to violate the equal protection rights of its citizens. (Mass. v. DHHS Op. at 27).

3.

The Parental Kidnapping and Prevention Act is an example of a federal statute that directly interferes with state authority to regulate marriage and family.

Yet another troubling aspect of the District Court decision is its disregard of other federal statutes that directly impinge on a state's ability to regulate the definitions of marriage, parent, and family within its borders (in contrast with DOMA, which does not impinge on a state's ability to regulate marriage within its borders). For example, in 1980, Congress passed the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, to require that one state's child custody and visitation orders be afforded full faith and credit in another state. In response to a national problem of states refusing to treat custody orders as final orders for full faith and credit purposes, the PKPA sought to clarify that child custody orders should be given the same status as final judgments for purposes of the full faith and credit obligation contained in the Full Faith and Credit Act, 28

U.S.C. § 1738. *See Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988). When it passed the PKPA, Congress hoped to significantly decrease the incidence of parental kidnapping by requiring states to treat child custody orders the same as final judgments for full faith and credit purposes. *Id.* at 183. The national interests that supported passage of the PKPA in 1980 do not permit nationalization of the meaning of a parent, yet that is exactly what is happening because a handful of states, including Massachusetts, have redefined marriage and family.

If Congress lacks authority to define marriage here, as Appellee maintains and as the lower court found, then certainly it lacks authority to mandate a nationalized standard of what marriage is and who is a parent set by a small handful of states that have decided to engage in social experimentation with marriage and family, and then force it upon unwilling states. Yet, that is exactly how some state courts are interpreting the federal statute. *See, e.g., Miller v. Jenkins*, 678 S.E.2d 268 (Va. Ct. App. 2009) (directing enforcement of Vermont order); *Miller-Jenkins v. Miller-Jenkins*, no. 0688-06-4, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007) (directing registration of Vermont order); *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006) (concluding that the PKPA deprived Virginia of jurisdiction to entertain a parentage action of a child born in Virginia). A brief discussion of the *Miller-Jenkins* case reveals how the PKPA is

being used to federalize a new parentage paradigm that follows the handful of states that have chosen to redefine marriage and parentage.

Lisa Miller met Janet Jenkins in 1997 while both women were living in Virginia, a state that then and now did not legally recognize same-sex relationships. The two eventually moved in together. In December 2000, just a few months after Vermont legalized same-sex civil unions, they traveled to Vermont to enter into a civil union and immediately returned to their home in Virginia. In August 2001, Miller became pregnant in Virginia via artificial insemination. In April 2002, Miller gave birth to her child in Virginia. Four months later, they all moved to Vermont. Thirteen months later, when the child was only seventeen months old, Miller ended her relationship with Jenkins and returned to Virginia with her daughter.

In November 2003, Miller filed in Vermont to dissolve her civil union. In response, Jenkins asserted a counterclaim seeking an award of physical and legal custody of the child. The counterclaim did not allege that Miller was unfit but alleged that Jenkins was a parent and desired full custody to be awarded to her. The Vermont court eventually created a new parentage rule, declaring that “where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one’s own as part of a family unit, not by biology.”

Miller-Jenkins v. Miller-Jenkins, No. 451-11-03, at ¶11 (Rutland Fam. Ct. 2004). Eventually, the Vermont courts issued an order stripping Miller of primary custody of her child because Miller had refused to comply with the court's visitation orders.

As litigation wore on for six years in Vermont, parallel litigation took place in Virginia, where Jenkins sought to register and ultimately enforce the Vermont orders. Despite the fact that Virginia declares same-sex relationships void in all respects in Virginia, Virginia courts held that Virginia had no choice, as a result of the PKPA, but to register and enforce the Vermont orders that declared a former same-sex partner to be a parent. *See* 28 U.S.C. § 1738C; *see also Miller v. Jenkins*, 678 S.E.2d 268 (Va. Ct. App. 2009) (directing enforcement of Vermont order); *Miller-Jenkins v. Miller-Jenkins*, no. 0688-06-4, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007) (directing registration of Vermont order); *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006) (concluding that the PKPA deprived Virginia of jurisdiction to entertain a parentage action of a child born in Virginia). Thus, if courts decide to follow the improper logic of *Miller-Jenkins*, the handful of states that have redefined family to declare legal strangers to be parents to their former partner's biological children will force the overwhelming majority of states to ignore or override their own laws and strong public policy defining marriage and parentage consistent with their longstanding definitions.

The PKPA, at least as interpreted by Virginia and similar states, directly interferes with how a state defines marriage and family *within* its borders by mandating that the policy decision of a handful of states to change the longstanding tradition of family and marriage be exported to the remaining states. That stands in stark contrast to the case presently before the Court, where each state retains the authority to regulate marriage and family within its borders but must look to a federal definition of marriage for purposes of federal programs. If a state wants federal funding, it is required to follow the federal definition, which definition is consistent with the longstanding definition of marriage specifically adopted by statute or constitutional amendment in the overwhelming majority of states.

4.

Loving v. Virginia is readily distinguishable.

The District Court's reliance on *Loving v. Virginia*, 388 U.S. 1 (1967), as evidence that Congress lacks authority to define marriage for purposes of federal laws is misplaced. (Op. at 7-8). To support its conclusion that Congress lacked authority to define marriage in DOMA, the District Court stated that prior to *Loving*, when some states prohibited interracial marriages, the federal government relied on state law definitions of marriage for purposes of federal law. Not only does this fail to address the other federal statutes mentioned above that defined marriage, it also ignores a critical distinction between the situations when, on the one hand, a state law definition of marriage is more *restrictive* than a federal

definition of marriage (as in the instance of the state bans against interracial marriage), and, on the other hand, a state law definition is more *expansive* than a federal definition that incorporates the longstanding common law definition of marriage as the union of one man and one woman.

As the Supreme Court ultimately and correctly held in *Loving*, it constitutes unconstitutional discrimination to prohibit interracial marriage. Prior to *Loving*, the federal government accepted the state definition of marriage for purposes of many federal statutes from those states that prohibited interracial marriages. Although no state should ever have prohibited such marriages, there are at least two reasons why the federal government might have relied on the state law definitions for purposes of federal statutes even when the state definitions unconstitutionally prohibited interracial marriages.

First, none of the marriages presented to the federal government for recognition was inconsistent with the longstanding definition of marriage as the union of one man and one woman. Thus, while all the marriages allowed by the state fit the longstanding common law definition of marriage, the state's definition included fewer marriages than would be accepted by the federal government. In other words, the federal government was not asked to acknowledge as a valid marriage anything that was inconsistent with the longstanding common law meaning of marriage as the union of one man and one woman. Second, the

interracial couple could relocate to another state that permitted interracial marriage and, in turn, have their marriage recognized for purposes of federal statutes.

In contrast with the federal government's acceptance of the more limiting state definition of marriage before *Loving*, the relief requested by Massachusetts asks the federal government to *broaden* its definition of marriage to include relationships that are *inconsistent* with the longstanding definition of marriage as the union of one man and one woman. In other words, it asks the federal government to recognize as a valid marriage a relationship that is repugnant, as was polygamy and bigamy, to the common law definition of marriage.²

C.

Defining Marriage as the Union of One Man and One Woman in The Challenged Federal Programs Is Related to the Federal Interest in Those Programs.

The relief sought by Plaintiff-Appellee is itself evidence that defining marriage for purposes of the challenged programs is related to the federal interest in Medicaid, Medicare, and the State Cemetery Grants Program. In particular,

² To the extent it is argued that the common law meaning of marriage is anything other than the union of one man and one woman, it should be squarely rejected. *See, e.g., Hernandez v. Robles*, 805 N.Y.S.2d 354, 368 n.1 (N.Y. App. Div. 2005) (citing cases throughout nation that recognized the longstanding definition of marriage as the union of one man and one woman), *aff'd* 855 N.E.2d 1 (2006); Blackstone's Commentaries Book 1, Chapter the Fifteenth (defining marriage as "husband and wife"). Blackstone also was quite clear that any law inconsistent with divine law, such as a law defining marriage to include two people of the same sex, is no valid law at all. Blackstone's Commentaries, Intro, Section the First.

Massachusetts does not argue that limiting benefits to spouses is somehow not germane to Congress' interests in the challenged programs; instead, Massachusetts argues merely that it does not like Congress' definition and therefore Congress should be forced to adopt Massachusetts' definition for purposes of federal, not state, programs. As discussed above, Congress acted within the scope of its authority in defining marriage for purposes of federal statutes, regulations, and programs; Massachusetts' argument should therefore be rejected.

For example, the Code of Federal Regulations long has provided that among the list of those entitled to be buried in a national cemetery is the "spouse, surviving spouse, minor child, or unmarried adult child of a person eligible" for burial in a national cemetery. *See* 38 C.F.R. § 38.620(e). Until 2003, when the Massachusetts Supreme Judicial Court exceeded its authority in redefining marriage to no longer be limited to one man and one woman, marriage meant one man or one woman in all fifty states and for purposes of interpreting all federal statutes and regulations. It is Massachusetts that changed the status quo and now maintains that it can force the federal government to adopt its definition of spouse for purposes of funding construction and maintenance of national cemeteries to bury veterans and their specified family members. Massachusetts has no basis for its claim.

Similarly, to the extent that Congress has an interest in limiting Medicaid or Medicare benefits based on marital status, then Congress would have authority to define spouse for purpose of implementing and funding those programs.

D.

Congress Has an Important Governmental Interest in Defining Marriage, Including Providing a Male and Female Role Model in the Family Unit.

Male gender identity and female gender identity are each uniquely important to a child's development. As a result, one very significant justification for defining marriage as the union of a man and a woman is because children need a mother and a father. We live in a world demarcated by two genders, male and female. There is no third or intermediate category. Sex is binary.

1.

A healthy developing boy needs to affirm and embrace his maleness.

Although, no one knows exactly what "causes" a person to identify as homosexual, as the APA acknowledges, environmental factors play a part.³ Without question, some boys have more difficulty embracing their maleness than girls do their femaleness, and this may explain, in part, why male homosexuals far outnumber female lesbians.⁴ Homosexuality in boys often stems from gender nonconformity. This nonconformity in boys results in two, seemingly opposite,

³ *See* Mathew D. Staver, SAME-SEX MARRIAGE: PUTTING EVERY HOUSEHOLD AT RISK (2004).

⁴ Joseph Nicolosi, A PARENTS' GUIDE TO PREVENTING HOMOSEXUALITY 24 (InterVarsity Press 2002) [hereinafter PREVENTING HOMOSEXUALITY].

reactions. First, in the early stages, the boy shuns his maleness. Second, as this disassociation with males progresses, the boy ultimately idolizes the male and longs to have his inner self filled with the maleness he lacks, and thus becomes attracted to males. “Childhood gender nonconformity turns out to be a very strong predictor of adult sexual preference among . . . males.”⁵

Maintaining the boundaries of gender, as traditional marriage certainly does, is particularly important for boys. “Girls can continue to develop in their feminine identification through the relationship with their mothers. On the other hand, a boy has an additional developmental task – to disidentify from his mother and identify with his father.”⁶ Clinical Professor of Psychiatry at UCLA, Ralph R. Greenson, described this developmental process:

[T]he male child, in order to maintain a healthy sense of maleness, must replace the primary object of his identification, the mother, and must identify instead with his father. I believe it is the difficulties inherent in this additional step of development, from which girls are exempt, which are responsible for certain special problems in the man’s gender identity, his sense of belonging to the male sex. . . . The male child’s ability to disidentify will determine the success or failure of his later identification with his father.⁷

Dr. Nicolosi explains that

⁵ A.P. Bell, N.S. Weinberg & S.K. Hammersmith, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* 76 (1981).

⁶ Nicolosi, *PREVENTING HOMOSEXUALITY*, at 23.

⁷ Ralph R. Greenson, *Dis-Identifying From Mother: Its Special Importance for the Boy*, 49 *INT’L J. PSYCHOANALYSIS* 370 (1968).

Repeatedly, researchers have found the classic triadic (three-way) relationship in the family backgrounds of homosexual men. In this situation, the mother often has a poor or limited relationship with her husband, so she shifts her emotional needs to her son. The father is usually nonexpressive and detached and often is critical as well. So in the triadic family pattern we have the detached father, the over involved mother, and the temperamentally sensitive, emotionally attuned boy who fills in for the father where the father falls short.⁸

Other studies of male homosexuals suggest that the father need not be *hostile* toward the son, but rather merely *indifferent* or emotionally unavailable,⁹ and that male homosexuality is often associated with poor parental relations.¹⁰ Other experts have explained in detail the development process.

From birth to approximately eighteen months, boys receive their foundational security primarily from their mothers. “Ideally, an infant’s first year or two of life is spent developing a deep, secure bond of love with the mother that

⁸ Nicolosi, PREVENTING HOMOSEXUALITY, at 71-72.

⁹ Leif J. Braaten & C. Douglas Darling, *Overt and Covert Homosexual Problems among Male College Students*, 71 GENETIC PSYCHOL. MONOGRAPHS 302-03 (1965).

¹⁰ See John R. Snortum, et al., *Family Dynamics and Homosexuality*, 24 PSYCHOL. REPORTS 763 (1969) (the “present findings lend strong support to the earlier results obtained by Bieber” and “the pathological interplay between a close-binding controlling mother and a rejecting and detached father”); Marvin Siegelman, *Parental Background of Male Homosexuals and Heterosexuals*, 3 ARCHIVES SEXUAL BEHAV. 10 (1974); William Byne & Bruce Parsons, *Human Sexual Orientation: the Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 236 (1993) (“perhaps a majority, of homosexual men report family constellations similar to those suggested by Bieber et al. to be causally associated with the development of homosexuality”).

leads to a healthy sense of personal identity.”¹¹ Sociologist David Popenoe noted that “fathers tend to stress competition, challenge, initiative, risk taking and independence. Mothers in their care-taking roles, in contrast, stress emotional security and personal safety.”¹² Popenoe continues, “While mothers provide an important flexibility and sympathy in their discipline, fathers provide ultimate predictability and consistency. Both dimensions are critical for an efficient, balanced, and human child-rearing regime.”¹³

Beginning at the age of approximately eighteen months and continuing to roughly the age of five, the boy needs verbal and physical affirmation of his maleness. Around eighteen months, the boy is able to begin to see the differences between male and female. At this time the father becomes more significant and the boy tries to reach out to him, and thus form a closer bond with the father. Once the boy’s gender identity is formed, he can develop gender stability.¹⁴ Bonding with the father is critical during these formative years. Of course, a boy raised in a dysfunctional or nonfunctional family is not doomed to grow up homosexual, but such a family structure may predispose the young boy to homosexual considerations. It is typically during this phase of the boy’s development that he

¹¹ Bob Davies & Lori Rentzel, *COMING OUT OF HOMOSEXUALITY* 44 (1993).

¹² David Popenoe, *LIFE WITHOUT FATHER* 144 (1996).

¹³ *Id.* at 146.

¹⁴ *See* A.P. Bell, N.S. Weinberg & S.K. Hammersmith, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* (1981).

emphasizes his gender identity and strongly differentiates between boys and girls. Thus, “the normally developing boy spurns the company of little girls.”¹⁵

There are many ways that a boy may resist associating with a masculine identity. Dr. Richard Fitzgibbons explains that a boy who is not athletic can be teased by his peers, and such teasing can negatively affect the boy’s self-image, his relationships with peers, his gender identity, and his body image. A boy’s negative view of his masculinity and his loneliness can lead him to crave the masculinity of his male peers.¹⁶

If the boy is rejected by his peers and his father demeans the boy’s self-image or does little to affirm the boy’s masculinity, the boy can end up rejecting his maleness while at the same time craving it.

Our fear and hurt at feeling rejected by the male world often led us to disassociate ourselves from the masculine – the very thing we desired most.

* * *

In our own experience, and from the experience of many gay men we have known, it seems very rare for a man who struggles with homosexuality to feel that he was sufficiently loved, affirmed and mentored by his father growing up, or that he identified with his father as a male role model. In fact, oftentimes the father-son relationship is marked by either actual or perceived abandonment, extended absence, hostility or disinterest (a form of abandonment).¹⁷

¹⁵ Nicolosi, PREVENTING HOMOSEXUALITY, at 49.

¹⁶ Richard Fitzgibbons, *The Origins and Therapy of Same-Sex Attraction Disorder*, in HOMOSEXUALITY IN AMERICAN PUBLIC LIFE 86-97 (1999).

¹⁷ http://www.peoplecanchange.com/Root_Problems.htm.

The boundaries of male and female are critically important for the development of boys to men.

2.

A young girl needs a mother who is a healthy female role model.

Commenting on lesbianism and how it may differ from male homosexuality,

Dr. Nicolosi writes:

Male homosexuality tends to follow a relatively predictable developmental pattern, . . . but lesbianism is less predictable and more likely to alternate, during the woman's lifetime, with periods of heterosexuality. Many lesbians believe their sexuality is a choice they made as an outgrowth of their feminist political interests. Still, I believe the most common pathway to lesbianism is a life situation that creates a deeply ambivalent attitude toward femininity, conveying the internal message "it's not safe or desirable to be a woman."¹⁸

Psychiatrist Richard Fitzgibbons states the following:

A number of women who become enthralled in same-sex relationships had fathers who were emotionally insensitive, alcoholic, or abusive. Such women, as a result of painful childhood and teenage experiences, have good reason to fear being vulnerable to men. . . .

Women who have been sexually abused or raped as children or adolescents may find it difficult or almost impossible to trust men. They may, therefore, turn to a woman for affection and to fulfill their sexual desires.¹⁹

To promote a healthy self-esteem and identification with her feminine identity, "there should be a warm mother-daughter intimacy along with a father who does not promote identification of the daughter with himself. Indeed, a healthy

¹⁸ Nicolosi, PREVENTING HOMOSEXUALITY, at 150-51.

¹⁹ Fitzgibbons, *supra* note 23, at 85-97.

relationship with Mom provides the most important foundation for the incorporation of femininity and heterosexuality.”²⁰

“Women who become lesbians have usually decided, on an unconscious level, that being female is either undesirable or unsafe.”²¹ Sometimes the girl might experience early sexual molestation, or she might perceive her mother as a negative or weak feminine object she wants to avoid, or perhaps she may have experienced some rejection from a male. One study of lesbianism noted: “The girls had difficulty in forming an emotional connection to their mothers. In some instances, it seemed to us that either a girl failed to identify with her mother, or disidentified from her mother because she perceived her mother as weak, incompetent or helpless. In fact, many of the mothers devalued their own efficacy and regarded the female gender role with disdain.”²²

A girl’s relationship with her mother and an unhealthy interaction with her father are certainly factors leading to lesbianism. Sexual abuse may also play a critical role. “In women, abuse can lead to a deep fear and even hatred of men if the perpetrator is a male. Men are no longer ‘safe.’ The woman’s deep need to connect with another individual leads her right into close relationships with other women, often women who have been wounded in similar ways. This sets the stage

²⁰ Nicolosi, PREVENTING HOMOSEXUALITY, at 156.

²¹ Nicolosi, PREVENTING HOMOSEXUALITY, at 148.

²² Kenneth Zucker & Susan Bradley, GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS 252 (1995).

for lesbian bonding to occur.”²³ If the mother has a history of severe and chronic sexual abuse by a father, stepfather or a close relative, or if she experienced domestic violence, causing her to feel unsafe with males, she can transmit these feelings to her daughter.

Whether it is male homosexuality or female lesbianism, one common feature between the two is rejecting, idolizing, and longing to fill the emotional deficit of the same sex.

[H]omosexuality represents not an *indifference to* gender but a *deficit* in gender. Deficit-based behavior comes from a heightened sensitivity to what one feels one lacks, and it is characterized by compulsivity and drivenness – but a person will persist in the behavior despite social disadvantage and grave medical risk.²⁴

As one expert explained, “[t]he notion that all ‘family forms’ are equally as helpful or healthful for children has no basis in science.” A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J. L. & Fam. Stud. 213, 213 (2004). Same-sex marriage guarantees that a child will be deprived of either the same or opposite sex parent. Such deprivation is inherently harmful to the child. As a result, contrary to the District Court’s opinion in *Gill v OPM*, Congress has an important governmental interest in defining marriage.

²³ Anita Worthen & Bob Davies, *SOMEONE I LOVE IS GAY* 83 (1996).

²⁴ *Id.* at 44.

CONCLUSION

Amicus respectfully requests that this Court reverse the decision below and hold that DOMA § 3 is a valid exercise of Congress' authority.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Office Word 2007.
2. Exclusive of the corporate disclosure statement; table of contents; table of authorities and the certificate of service, the brief contains 6,993 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

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CERTIFICATE OF SERVICE

I am employed at the law firm of Liberty Counsel. I am over the age of 18 and not a party to the within action. My business address is 100 Mountain View Road, Suite 2150, Lynchburg Virginia 24502.

I hereby certify that on January 26, 2011, I electronically filed the foregoing PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS with Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellant CM/ECF system notice of electronic filing.

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