Case Nos. Nos. 10-2204, 10-2207, 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

NANCY GILL, et al.,
Plaintiffs-Appellees,
DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT, et al.,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF AMICUS CURIAE OF THE JEWISH SOCIAL POLICY ACTION NETWORK

Jacob C. Cohn (#1148704)
Jeffrey I. Pasek
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Amicus Curiae
Jewish Social Policy Action Network

CORPORATE DISCLOSURE STATEMENT

The Jewish Social Policy Action Network is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Pennsylvania. It has no parent corporation and no public corporation owns any interest in it.

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INTEREST OF THE AMICUS CURIAE

The Jewish Social Policy Action Network (JSPAN) is a membership organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, whether they lived in Christian or Muslim societies, Jews were a small religious minority victimized by prejudice and lacking sufficient political power to protect their rights.[1] During the Holocaust, not only Jews, but gays and lesbians, Gypsies and others were targeted for persecution and death at the hands of the Nazis. Perhaps because of their shared history as victimized outsiders, Jews have been especially sensitive to the plight of the lesbian and gay community as a discrete and insular minority within American society and throughout much of the world. As one of many voices within the progressive Jewish community, JSPAN is committed to making marriage under civil law available to consenting couples without regard to their sexual orientation.

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[1] Even in the United States, Jews have been subjected to various forms of discrimination—formally such as in the requirements to hold public office *(see, e.g.,* Hartogensis, *Denial Of Equal Rights To Religious Minorities And Non-Believers In The United States* (1930) 39 Yale L.J. 659), or informally such as through quotas in higher education, particularly medical and legal education *(see, e.g.,* Halperin, *The Jewish Problem in U.S. Medical Education: 1920-1955* (2001) 56 J. Hist. Med. & Allied Sci. 140; Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law* (1995), 52 Wash. & Lee L.Rev. 3, 35).

Since its founding in 2003, JSPAN has filed numerous amicus curiae briefs in the federal and state courts dealing with the enforcement of fundamental rights, including before the United States Supreme Court in *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009), *Salazar v. Buono,* 130 S. Ct. 1803, 176 L.Ed.2d 634 (2010); the Supreme Court of California in *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (2009), the Second Circuit Court of Appeals in *Cooper v. U.S. Postal Service*, 577 F.2d 479 (2d Cir. 2009), *cert. denied sub nom., Sincerely Yours, Inc. v. Cooper*, 130 S. Ct. 1688, 176 L. Ed. 2d 180, 2010 U.S. LEXIS 2164 (2010), and the Third Circuit Court of Appeals in *Busch v. Marple Newtown School Dist.,* 567 F.3d 89 (3d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 597 (2010), and *Combs v. Homer Center School Dist.,* 540 F.3d 231 (3rd Cir. 2008).

RULE 29(c) (5) STATEMENT

Volunteer counsel authored this Brief and submit it on behalf of JSPAN, including Jacob C. Cohn, Esq., who is a member of the Bar of this Court. Counsel who are members of the Board of Directors of JSPAN also commented on the text before it was filed.

None of the counsel who authored or participated in preparing the Brief or who commented on it has contributed money that was intended to fund preparing or submitting this Brief.

No person, other than JSPAN, contributed money that was intended to fund preparing or submitting this Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs here are challenging the constitutionality of Section 3 of the federal Defense of Marriage Act ("DOMA"), which provides that "[i]n 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." The District Court correctly concluded in *Gill v. O.P.M.* that Section 3 has no rational basis and violates the equal protection guarantee implicit in the Due Process Clause of the Fifth Amendment.[2]

The definition of marriage in our federal system is, within constitutional bounds, left to the States. Section 3 of DOMA excludes same-sex couples from all the incidents of marriage specified by well over one thousand federal statutes. That exclusion does not change who is married. All it does is discriminate against one distinct class of persons who are legally married. Like any form of discrimination, it must fall unless, at the least, it has some rational basis. But no

[2] In the companion case, *Massachusetts v. United States Department of Health and Human Services*, the same court held that section 3 of DOMA also violated the Tenth Amendment and could not be upheld under the Spending Clause.

cognizable, legitimate federal interest or interests could justify the effect of Section 3 on the entire range of distinct laws to which it applies and the often harmful, but sometimes just odd or perverse, consequences of excluding same-sex married couples from each of those often varied and complex federal incidents of marriage.

The only conceivable interest underlying Section 3 of DOMA is naked antipathy to same-sex marriage. But in the face of the traditional state authority over marriage, that cannot be a legitimate federal interest.

Moreover, Section 3 cannot stand for the same reason that the Supreme Court struck down an equally sweeping act of discrimination against gay and lesbian Americans in *Romer v. Evans*, 517 U.S. 620, 632 (1996). The provision imposes "a broad an undifferentiated disability on a single named group" and its "sheer breadth is so discontinuous with the reasons offered for it that … [it] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."

ARGUMENT

A. Section 3 of DOMA does not define who is married, but it does unconstitutionally discriminate against one distinct class of married persons by excluding them from the entire range of federal incidents of marriage in so sweeping a fashion that no legitimate state interest could support it.

The issue in this case is narrow. The question is not whether same-sex couples have a constitutional right to marry. Rather, it is whether Congress may constitutionally exclude same-sex couples who are in fact married from every single one of the incidents – across the board – that federal law otherwise attaches to the status of legal marriage.

In our federal system, the definition and regulation of marriage has always, subject only to general constitutional constraints, been considered among the most secure of the traditional powers of the States.[3] *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("The whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States." (quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890)); *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

[3] Contrast this with the allocation of authority in some other federal systems. For example, in the Canadian constitution, the enumerated powers of the federal Parliament includes authority over "Marriage and Divorce," Can. Const. (Constitution Act 1867) § 91(26), though the Provinces have the authority to legislation with respect to the "Solemnization of Marriage.," *id.* § 92(12).

[and that] the Constitution delegated no authority to the Government of the United States on [that subject].”), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942). Tellingly, both majority and dissenting opinions in the Supreme Court’s recent federalism jurisprudence have used the preservation of state authority over marriage and family law as the ultimate test case for analyzing possible limits on federal power.[4]

In exercising their power over marriage, States often face fraught challenges. *See* Perry Dane, *A Holy Secular Institution*, 58 EMORY LAW JOURNAL 1123 (2009). In legislating about civil marriage, States must necessarily decide a range of questions regarding the boundaries of the institution, including the age of consent, the categories of relatives (such as cousins) that persons are allowed or forbidden

[4] *See, e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) (“Petitioners' reasoning … will not limit Congress to regulating violence but may … be applied equally as well to family law and other areas of traditional state regulation”); *United States v. Lopez,* 514 U.S. 549, 564 (1995) (“under the Government's … reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”); *id.*, at 624 (Breyer, J., dissenting) (“To hold this statute constitutional is not to obliterate the distinction between what is national and what is local, nor is it to hold that the Commerce Clause permits the Federal Government to … regulate marriage, divorce, and child custody (internal quotation marks and citations omitted)).

to marry, the formalities necessary to marriage, and, in recent years, whether and why marriage is to be open to same-sex couples.[5]

Section 3 of DOMA does not purport to override state law and state decisions regarding same-sex marriage. Indeed, despite its language, Section 3 is not really a limit on same-sex marriage at all. Same-sex couples who are validly married under state law are no less married by virtue of Section 3 than they would be without it. Rather, Section 3 excludes same-sex couples from the entire undifferentiated range of *incidents* – legal consequences – of marriage specified by more than one thousand federal statutes.[6] That exclusion does not define marriage; rather, it discriminates against one distinct class of married persons. Like any form of discrimination, it must fall unless, at the least, it has some rational basis.

As noted, the need to draw boundaries around marriage is built into the States' authority over the institution. Some boundaries might be more sensible or defensible than others, but boundaries there will be. Congress, however, in attaching federal legal incidents to state-legislated marriage, faces no such dilemma. Indeed, as the District Court emphasized, Section 3 of DOMA is a

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[5] *See, e.g.*, Richard Savill, *Sisters Lose Inheritance Tax Battle; Elderly Pair Wanted Same Rights as Gay Couples*, DAILY TELEGRAPH (London), Apr. 30, 2008, at 11.

[6] The difference between the validity of marriage and the incidents of marriage is central to any adequate understanding of the interjurisdictional complications raised by varying marriage laws. *See* Restatement (Second) of Conflict of Laws §§ 283, 284.

unique and unprecedented across-the-board exclusion of one class of persons from the federal legal incidents of marriage that attach to all other persons. Over more than two centuries, in the midst of constant debates about marriage, and pervasive differences among the States in their legal treatment of marriage, Congress has never before superimposed its will in this way.[7] Thus, any purported rational basis for Section 3 must not only justify this act of discrimination, but the unprecedented need for any across-the-board discrimination at all. *Romer v. Evans*, 517 U.S. 620, 633 (1996). Moreover, because Section 3 legislates, not marriage itself, but the federal incidents of marriage, any justification of the statute must demonstrate a rational and genuine federal interest with respect to those incidents.

To be sure, federal law regarding the incidents of marriage need not always take state law as the last word. For example, certain provisions of federal immigration law withhold the privilege of permanent residency from certain aliens who otherwise qualify based on their marriage to an American if officials, applying precise criteria, determine that the marriage was entered into – usually for a short period – solely to obtain preferable immigration status. *See* 8 U.S.C. § 1186a. These provisions, however, are supported by a distinct federal interest in making

[7] As the District Court pointed out, even the House Report on DOMA admitted that the "determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664 at 3 (1996).

sure that unscrupulous persons not be allowed to game the nation's compassionate concern for family unification.[8]

No such distinct federal interest, however, supports Section 3 of DOMA. Indeed, the blanket generality of the provision is its undoing, for no genuinely federal cognizable interest or interests could possibly cover all the thousand-some legal provisions to which Section 3 applies. This is evident from even a cursory look at some of those many provisions. Consider, for example, 5 U.S.C. § 3110, an anti-nepotism statute that forbids federal officials from involving themselves in the appointment or employment of relatives, including husbands and wives, in their agency. By virtue of DOMA, that statute does not apply to same-sex spouses. Any ostensible rational basis for such a distinction would be farfetched.[9]

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[8] Conversely, federal law sometimes extends the incidents of marriage to persons who are not actually validly married. For example, federal social security law under certain circumstances awards spousal and widow's benefits to persons who went through a marriage ceremony and believed in good faith that they were married to an insured even though the marriage was actually invalid under state law. *See* 42 U.S.C. § 416(h)(1)(B). As in the immigration context, though, there is a distinct federal interest here, in this case taking care of persons who reasonably built up expectations based on their putative spouses' possibly decades-long contributions into the social security system.

[9] It would not do, for example, to argue that excluding same-sex spouses from the reach of the nepotism provision merely treats them the same as cohabiting couples, who are also not covered by the restrictions. Whatever one's substantive views about same-sex marriage, it remains a fact that, as relevant to the specific purposes behind nepotism statutes, legally married same-sex couples will as a rule both have stronger emotional, financial, and other bonds to each other and be far more easily

Consider also that in its application to certain federal statutes and regulations, Section 3 of DOMA simply denigrates married same-sex couples without changing the operative force of the statutes and regulations themselves. For example, federal statutes relating to domestic abuse typically protect both "spouse[s]" and "intimate partner[s]." *See, e.g.*, 18 U.S.C. § 117; 18 U.S.C. § 2261; 18 U.S.C. § 2261A. With respect to such provisions, Section 3 of DOMA effects no change of policy or practical protection; it does, though, constitute an assault on dignity of those affected and requires prosecutors or victims to demonstrate under one rubric what would otherwise be evident under another. No legitimate federal interest could support such an odd result.

DOMA continues denial of federal benefits ranging from spousal survivor benefits, retirement benefits based on spousal earnings and lump sum death benefits under Social Security, to tax benefits from being allowed to file joint returns, to estate and gift tax exemptions and the right to combine tax exemptions benefiting the "second to die" of a married couple, to veteran benefits including right to health care, family separation pay and relocation assistance for spouses. In addition, benefits for federal employees and their families including health insurance for spouses, wages, workers compensation and retirement plan benefits

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identified administratively than other "amorously involved people." *Cf.* Montgomery v. Carr, 101 F.3d 1117, 1131 (6th Cir. 1996).

for surviving spouses are denied under DOMA. Other benefits denied include denial of legal residency status leading to citizenship for non-U.S. citizens even if legally married under state law.

In yet other contexts, the effect of DOMA's interaction with state law is just perverse. For example, same-sex married couples in community property states would be entitled, by virtue of state law, to split their collective income and would then be required by virtue of DOMA to file federal tax returns as single persons, thus reaping a financial windfall. *See* William Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 444 (2005).

The only ostensible interest that links Section 3 of DOMA to the myriad specific provisions of law to which it applies is a naked antipathy to same-sex marriage as such. But in the face of the traditional state authority over marriage, that cannot be a legitimate federal interest. Moreover, even if objection to same-sex marriage *were* a cognizable federal interest, Section 3 of DOMA does not further it. As noted, Section 3 does not, and could not, render same-sex married couples less married than they are under state law. Nor, as the District Court emphasized, does Section 3 even discourage same-sex couples from marrying. In sum, Section 3 simply represents a gratuitous discriminatory classification without a rational basis.

B. *Romer v. Evans*, which struck down another effort at a wholesale, undifferentiated, exclusion of gay and lesbian Americans from the cognizance of law, is directly relevant here and requires that Section 3 of DOMA also be held unconstitutional.

The preceding discussion demonstrates that Section 3 of DOMA fails any reasonable application of "rational basis" analysis. But it also makes clear, more specifically, that this case is directly covered by the Supreme Court's milestone decision in *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the Court held that Colorado's Amendment 2, which forbid all the branches of State government and all political subdivisions of the State from enacting or enforcing any civil rights protection for gays and lesbians as a protected class, violated the equal protection clause. As in the present litigation, the constitutional challenge in *Romer* did not require the Court to reach any conclusions on the underlying policy or constitutional debate – in *Romer*, the need or desirability of specific civil rights protections for gays and lesbians, here the need or desirability of same-sex marriage. As in the instant case, though, the challenged law had "the peculiar property of imposing an undifferentiated liability on a single named group." 517 U.S., at 632. And as here, the "sheer breadth" of the law was "so discontinuous with the reasons offered for it" that it seemed "inexplicable by anything but animus toward the class it affects." *Id.* Indeed, in language that also acutely describes the constitutional defect in Section 3 of DOMA, the Court in *Romer* held that Amendment 2 was "at once too narrow and too broad. It identifie[d] persons by a

single trait and then denie[d] them protection across the board." *Id.*, at 633. And just as Amendment 2's imposition of an undifferentiated disability on a specific group was "unprecedented in our jurisprudence," *id.*, Section 3 of DOMA, for the first time in the history of federal law, unqualifiedly excludes one specific class of married persons from every single incident of federal law with respect to marriage, Indeed, the Court concluded, as this court should here, that the "absence of precedent … is itself instructive; discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.,* at 633 (internal quotation marks and citation omitted).

Responding to the extraordinary problems that Colorado's Amendment 2 posed to the very meaning of equal protection, the Supreme Court insisted that, even applying a deferential constitutional standard, a court must find some "link between classification and objective." *Id.*, at 632. But when an enactment sweeps across every other legal context, without any attention to specific contexts, specific arguments or policies, or specific legislative goals, it "confounds [the] normal process of judicial review." *Id.*, at 633. In sum, the Court concluded that Amendment 2 lacked "a rational relationship to legitimate state interests," *id.*, at 632 and could not be upheld. For the same reasons, this court should strike down Section 3 of DOMA.

One final observation bears emphasis here: It is probably not coincidental that this case and *Romer* both involve the constitutional rights of gay and lesbian Americans. Whether or not classifications based on sexual orientation merit heightened constitutional scrutiny, it is undoubtedly true that gays and lesbians – by virtue of both prejudice and stereotypes about their proper place in American public life – are peculiarly subject to a legislative temptation to render them invisible, to write them out of legal contemplation. The defenders of Colorado's Amendment 2 argued that the provision did not discriminate against gays and lesbians but just put them "in the same position as all other persons" by denying them "special rights." *Id.*, a 626. Nevertheless, the Supreme Court rightly held that peremptorily denying gays and lesbians even the opportunity to receive civil rights protections in any context was a form of discrimination; it *did*, based on nothing more than animus, treat gays and lesbians differently from other persons. The same is true in this case. One defense of Section 3 of DOMA is that it did not alter the federal treatment of same-sex marriage (which did not yet exist in any State when DOMA was passed) but, as the District Court put the argument, merely preserved "the 'status quo,' pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage." But in the face of the possibility and reality of changes in state laws regarding same-sex marriage, a blanket, undifferentiated, unprecedented, refusal to apply the usual

federal incidents to those marriage – to render those marriages invisible to federal legal contemplation – *does* impose a unique disability on gays and lesbians, and is unconstitutionally discriminatory.

CONCLUSION

For the reasons set forth above, this Court should reaffirm the judgment of the District Court and declare Section 3 of the Defense of Marriage Act unconstitutional.

Respectfully Submitted,

/s/Jacob C. Cohn
Jacob C. Cohn (#1148704)
Jeffrey I. Pasek
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Amicus Curiae
Jewish Social Policy Action Network

CERTIFICATE OF COMPLIANCE WITH
LOCAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 3,529 words.

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/s/Jacob C. Cohn
Jacob C. Cohn, (#1148704)
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Amicus Curiae
Jewish Social Policy Action Network

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, I caused the foregoing Brief for Amicus Curiae Jewish Social Policy Action Network to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Jacob C. Cohn
Jacob C. Cohn, (#1148704)
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2147

Counsel for Amicus Curiae
Jewish Social Policy Action Network