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,
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.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, NATIONAL ORGANIZATION FOR MARRIAGE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *amicus curiae*, the National Organization for Marriage, is not a corporation that issues stock or has a parent corporation that issues stock.

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January 17, 2011

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INTERESTS OF THE *AMICI* AND CONSENT TO FILE

The National Organization for Marriage (NOM) is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM was formed in response to the need for an organized opposition to same-sex marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the state and local level, having been described by the Washington Post as "the preeminent organization dedicated to preventing the legalization of same-sex marriage."[1] In 2008, NOM formed a California ballot initiative committee in support of Proposition 8, emerging as the largest single donor to the Prop 8 campaign. The outcome of this litigation will impact NOM's ability to pursue its mission nationally. The National Organization for Marriage is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

All parties have consented to the filing of all amicus briefs.

ARGUMENT

I. The novel interpretation of the Tenth Amendment by the court below is a dramatic departure from long established practice and precedent.

[1] Monica Hesse, *Opposing Gay Unions With Sanity and a Smile*, Washington Post, August 28, 2009, at C01.

The court below found that "DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens" and so "the statute violates the Tenth Amendment." Memorandum at 28.

As Professor Richard Epstein has noted, this is a "novel" understanding of the Tenth Amendment.[2] Columnist Charles Lane suggested a reason for the novel conclusion: "In fairness to the judge, the Justice Department seems not to have presented these facts to the court, and they aren't mentioned in the only historical document in the record before him, an affidavit from Harvard historian Nancy Cott from which [Judge] Tauro quotes frequently."[3]

Whatever the origin of the misunderstanding of the scope of the Tenth Amendment, the court below turned the Tenth Amendment on its head. Rather than protecting against federal usurpation of powers reserved to the states, the ruling below would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause. While Congress *may* adopt state classifications for purposes of federal law, it is under no

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[2] Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, FORBES, July 12, 2010 at http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

[3] Charles Lane, *Judge Tauro's Questionable Past*, WASHINGTON POST, July 9, 2010 at http://voices.washingtonpost.com/postpartisan/2010/07/judge_tauros_questionable_past.html.

compulsion to do so. Plaintiffs offer no other example where such a reverse Tenth Amendment analysis is applied – forcing Congress to adopt state classifications for purposes of federal statutes. As the Department of Justice has noted, the court below also relied on a legal test for its Tenth Amendment that has been overruled. (Brief for the United States Department of Public Health and Human Services, at al. at 59-60).

Here, Congress is not infringing upon the powers of any state to regulate matters of family law, including adopting its own definition of marriage. Similarly, there is no suggestion that Congress lacks authority to legislate in the subject matter areas for which marriage is used to classify (e.g., taxation, immigration, etc.), but only that Congress must defer to each state in defining classifications and eligibility. Thus, under the court's analysis below, Congress may unquestionably legislate in the area of taxation, but must defer to the states in determining who is permitted to file a joint return. Or Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications, creating a patchwork effect in which federal statutes are applied differently to residents of different states (and potential conflict in matters involving more than one state).

The court below failed to consider that Congress regularly adopts definitions for purposes of federal law which may conflict with the definition which some or all states may ascribe to the same term. This provides for a uniform application of federal law throughout the country, without infringing upon the power of states to regulate domestic relationships. Moreover, in the specific context of marriage, there is a clear history of Congressional regulation for purposes of federal law.

A. Historical and current precedent and practice demonstrate consistent adherence to the principle that Congress can regulate family law and define marriage in matters of federal law.

As the Department of Justice has noted (Brief for the United States Department of Public Health and Human Services, at al. at 37-39) and contrary to Judge Tauro's suggestion, Congress regularly defines terms for purposes of federal law, including definitions which may differ from the definitions given by one or more states to those same terms. Specifically relevant here, there is abundant precedent for Congressional regulation of family and of marriage for purposes of federal law, including some which the Supreme Court has explicitly upheld. What follows is not an exhaustive list but one that is ample for purposes of illustrating

that the central holding of the court below is inconsistent with past precedents and practice.[4]

Professors Linda Elrod and Robert Spector have noted: "Probably one of the most significant changes of the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans."[5]

Domestic Relations

Congressional enactments of laws relating to domestic relations have a long history and are clearly part of current practice. Some examples are:

Immigration. The Naturalization Act of 1802 provided that children of parents who have been naturalized will automatically become citizens unless their

[4] For a fuller account of the relevant precedent, *see* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951 (2010).

[5] 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, 713, 751 (2009).

fathers were not naturalized.[6] An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.[7]

Land Grants. In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over 21.[8] An 1804 law protected the land interest of "an actual settler on the lands to granted, for himself, and for his wife and family."[9] The Homestead Act of 1862 specified grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[10] In a 1905 Supreme Court case, *McCune v. Essig*, the Court resolved a dispute between a daughter and her mother and stepfather over a land grant.[11] The daughter argued that state inheritance law should be applied to provide her an interest in the property but the Court said "the words of the [federal Homestead Act] statute are clear" and rejected the daughter's claim that state law, rather than federal, should apply.[12]

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[6] Naturalization Act of 1802, 2 Stat. 153 (1802).
[7] Act of Feb. 10, 1855, 10 Stat. 604 (1855).
[8] Act of Mar. 3, 1803, 2 Stat. 229 (1803).
[9] Land Act of 1804, 2 Stat. 283 (1804).
[10] Homestead Act of 1862, 12 Stat. 392 (1862).
[11] *McCune v. Essig*, 199 U.S. 382 (1905).
[12] Id. at 390.

Military Benefits and Pensions. In 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[13] The 1890 Dependent and Disability Pension Act also provided for widows and other family members of veterans.[14] Federal courts interpreting military benefits laws have used federal interpretations of family, even at times where the definitions did not accord with state law.[15]

Other Pensions. The federal Employment Retirement and Income Security Act (ERISA) and other federal pension laws have consistently been held to control the marital incidents of pensions.[16]

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[13] Act of July 4, 1836, ch. 362, 5 Stat. 127, 127–28 (1836).
[14] Act of June 27, 1890, ch. 634, 26 Stat. 182, 182–83 (1890).
[15] *See United States v. Jordan*, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); *United States v. Richardson*, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); *United States v. Rohrbaugh*, 2 C.M.R. 756, 758 (1952) (noting, *inter alia*, that common law marriages are specifically recognized "in a variety of matters").
[16] *See e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (pensions governed under ERISA, which preempts community property law); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981) (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979)), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); *Hisquierdo*, 439 U.S. at 582, 590 (railroad retirement assets governed by federal

Census. In the enabling legislation for the 1850 Census, Congress included a definition of family: "By the term family is meant, either one person living separately in a house, or a part of a house, and providing for him or herself, or several persons living together in a house, or in part of a house, upon one common means of support, and separately from others in similar circumstances. A widow living along and separately providing for herself, or 200 individuals living together and provided for by a common head, should each be numbered as one family. The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family." [17]

Copyright. In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[18] In 1956, the U.S. Supreme Court issued a decision, *DeSylva v. Ballentine*, holding that, in the absence of a federal definition, state law controlled the question of who counted as a child for copyright law.[19] In 1978, Congress effectively reversed this decision by enacting a definition of "child" to

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law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

[17] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02-ma.pdf.

[18] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831).

[19] *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

include a "person's immediate offspring, whether legitimate or not, and any children legally adopted by that person" so as to ensure that – regardless of state law – copyright law would not exclude illegitimate children.[20]

Bankruptcy. Bankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law.[21]This has been recognized in federal court decisions.[22]

Marriage Definitions

Immigration. The Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes.[23] Some states, to the contrary, recognize immigration marriages as valid or voidable.[24] To defer to state law on marriage for

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[20] 17 U.S.C. § 101 (2006); KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.5 (1982).
[21] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.
[22] *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982).
[23] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e).
[24] *See In re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); *Kleinfield v. Veruki*, 173 Va. App. 183, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *id.* at 620–21 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1994) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d

immigration purposes would allow one state to circumvent the entire federal policy.

Taxation. Federal tax law considers a couple who are married under state law but separated as unmarried for tax purposes.[25] A couple who consistently obtain a divorce at the end of the year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.[26]

Census. The 2010 Census is including same-sex marriages in its count of marriages.[27] Thus, the same-sex couples from states defining marriage as the union of a man and a woman who get married in a state that allows same-sex couples to

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1236, 1238 (9th Cir. 1979) (arguing that the possibility of marriage being a sham is irrelevant because of valid New Mexico marriage is deemed "frivolous" because of INS' authority to inquire into marriage for immigration purposes); *United States v. Sacco*, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).

[25] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status).

[26] Rev. Rul. 76-255, 1976-2 C.B. 40. *See generally* 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 *Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531 (2008); *Perkins v. Comm'r*, 95 T.C.M (CCH) 1165 (2008); *Proctor v. Comm'r*, 129 T.C. 92 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

[27] *Census to Recognize Same-Sex Marriages in '10 Count*, N.Y. TIMES, June 21, 2009, *available at* http://www.nytimes.com/2009/06/21/us/21census.html?_r=1; *Census Bureau Urges Same-Sex Couples to be Counted*, USA TODAY, April 6, 2010, *available at* http://www.usatoday.com/news/nation/census/2010-04-05-census-gays_N.htm.

marry will be counted as "married" for Census purposes even though the state in which they live considers them unmarried.

Pending Legislation

The proposed Domestic Partnership Benefits and Obligations Act, H.R. 2517, would provide government benefits to registered domestic partners (including same-sex couples who are married) of government employees that are equivalent to those given to spouses of employees. The proposed repeal of DOMA, H.R. 3567, would consider same-sex marriages as valid for federal law purposes even if they are not so recognized in the state of the couple. Ironically, the sponsor of this latter bill hailed Judge Tauro's decision on DOMA, though its import would invalidate his own legislation.[28]

The argument that Congress lacks authority to define marriage for purposes of defining the term in federal statutes is clearly contrary to long precedent and practice. If the central holding of the court below that federal law cannot define marriage or family independent of state definitions were applied consistently, it would require the invalidation of current immigration, tax, bankruptcy, census,

[28] Press Release, *Nadler Hails Federal Court Ruling Against the Defense of Marriage Act*, July 8, 2010 at http://nadler.house.gov/index.php?option=com_content&task=view&id=1517&Itemid=119.

copyright, taxation laws and would be contrary to federal (including Supreme Court) precedent upholding federal laws even when they contrast with state laws.

B. The national government's significant involvement in defining marriage for federal law purposes extends back to the Nineteenth Century and was approved by the U.S. Supreme Court.

This case involves an area of federal jurisdiction—the definition of terms in the United States Code. In the mid-Nineteenth Century, Congress legislated heavily in another area of federal jurisdiction—the government of territories of the United States. *Amicus* recognizes that the relationship of the national government to territories is not the same as its relationship to the states. Although there was no conflicting state law at issue with respect to the federal territories here, both governance of the federal territories and definition for purposes of federal statutes are both limited in scope to matters that are clearly matters of federal jurisdiction. The specific example outlined here, however, is still highly relevant, involving as it does, federal adoption and promulgation of a substantive definition of marriage. In the case of the Defense of Marriage Act, Congress has enacted a substantive definition of marriage in an area of federal jurisdiction—the definition of terms used in federal law. In the case of the precedent of polygamy, Congress enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories.

Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the United States: the Morrill Anti-Bigamy Act of 1862[29], the Poland Act of 1874[30], the Edmunds Anti-Polygamy Act of 1882[31], the Edmunds-Tucker Act of 1887[32] and the Utah Enabling Act of 1894.[33]

The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham Lincoln, criminalizes in federal law attempts at polygamy in federal territories. The Act was described in the chapter laws as "An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places."[34] The relevant portion of the law read:

> That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided*, *nevertheless*, That this section shall not extend to any

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[29] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532.
[30] 18 Stat. 253, 1874.
[31] Forty-seventh Congress, Sess. I, Ch. 47.
[32] 24 Stat. 635, 1887.
[33] Act of July 16, 1894, ch. 138, 28 Stat. 107.
[34] Statutes at Large, 37th Congress, 2d Session, Ch. 126 at http://rs6.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=532

> person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

This measure regulates marriage in federal law in two ways: it criminalizes polygamy, and it also establishes in federal law the common law standard that a spouse who has been missing for a prescribed number of years is "judicially dead" for the purpose of remarriage. Both of these are clear examples of regulating marriage for the purpose of federal law.

Like DOMA, the Congressional ban on polygamy was challenged in federal court. That issue was eventually resolved in the U.S. Supreme Court in a landmark decision, *Reynolds v. United States*.[35]

As to marriage, the Court said:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule

[35] 98 U.S. 145 (1878).

> of action for all those residing in the Territories, and in places over which the United States have exclusive control.[36]

The Poland Act facilitated prosecutions under the Morrill Act by giving jurisdiction over all cases arising in Utah to the federal courts. The Edmunds Act made bigamy a felony and created a misdemeanor of "unlawful cohabitation." The point of this latter crime was to aid prosecutions since the government could more easily show cohabitation occurred than to prove a marriage (since the religious marriage records were not made available to the government).

In *Murphy v. Ramsey*, the Supreme Court upheld the Edmunds Act against a challenge arguing the law criminalized behavior *ex post facto*.[37] The Court said the law criminalized continuing cohabitation rather than past marriages. The Edmunds was also addressed by the Supreme Court in *Ex Parte Snow*,[38] which said a defendant could only be charged once with unlawful cohabitation and in *Cannon v. United States*, which said a defendant's promise not to engage in sexual intercourse does not preclude prosecution.[39] The Edmunds-Tucker Act disincorporated the

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[36] Id. at 165-166.
[37] *Murphy v. Ramsey*, 114 U.S. 15 (1885).
[38] *Ex Parte Snow*, 20 U.S. 274 (1887).
[39] *Cannon v. United States*, 116 U.S. 55, 72 (1885) ("[c]ompacts for sexual non-intercourse, easily made and easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates.").

LDS Church. The Act was upheld by the U.S. Supreme Court in *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*.[40] In that case, the Court authorized the escheatment of church property because of the continued practice of polygamy.

When Congress allowed Utah to be admitted as a State, the Enabling Act specified that while religious liberty would be protected "polygamous or plural marriages are forever prohibited."[41]

II. The court below ignored crucial state interests in marriage that amply justify Congress' decision to enact DOMA.

To bolster its conclusion that DOMA violates the U.S. Constitution, the court below referenced a companion case (consolidated here) that held DOMA's definition of marriage in federal statutes violated the Fourteenth Amendment. Other parties will more fully address the serious mistakes in the court's analysis. *Amicus* merely adds that the mistake in the court's analysis of the public interests served by DOMA is similar to the mistake the court made in analyzing the application of the Tenth Amendment to the commonsense exercise of Congress' power to specify the meaning of terms it uses in statutes. In both cases, the court below failed to address relevant precedent that would argue in favor of a result

[40] *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).
[41] Act of July 16, 1894, ch. 138, 28 Stat. 107.

contrary to that reached by the court. Specifically, the court failed to address a body of persuasive precedent from other jurisdictions that found the foremost of the interests advanced by Congress amply justifies retaining the definition of marriage as the union of a man and a woman.

The court below thus notes the interests Congress intended to advance when it enacted DOMA but finds it unpersuasive. Memorandum at 23-27. The court below stated it could "readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation" relying on (1) a government disavowal of this interest, (2) "a consensus . . . among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well adjusted as those raised by heterosexual parents,"[42] (3) a conclusion that "such a denial does nothing to promote stability in heterosexual parenting," and (4) the observation that married couples are not required to have children. Memorandum at 23-24.

These arguments, however, are not relevant to the actual interests Congress sought to advance. In the House Report referenced by the court below, Congress referenced a scholarly report noting "marriage is a relationship which the

[42] The court's statement here is irrelevant to the case at hand since Congress has not asserted that a certain orientation of parents is preferable but rather that, all things being equal, children will benefit by being raised by their own mother and father.

community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair."[43] The Report goes on to say: "That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship."[44]

Far from dismissing these interests, other courts have given them great weight. In holding that New York's marriage law was consistent with the state's constitutional guarantees, the New York Court of Appeals found,

> the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the

[43] House Report 104-664 (July 9, 1996) at http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf at 13 (quoting *Marriage in America: A Report to the Nation* 10 (Council on Families in America 1995) reprinted in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 303 (David Popenoe, et al., eds, 1996)).
[44] Id. at 14.

> relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who make a solemn, long-term commitment to each other.[45]

The court further said:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.[46]

The Maryland Court of Appeals similarly noted:

> safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).[47]

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[45] *Hernandez v. Robles*, 7 N.Y.3d 338, 359,855 N.E.2d 1 (NY 2006).
[46] Id. at 359-360.
[47] *Deane v. Conaway*, 401 Md. 219, 932 A.2d 571, 630-631 (Md. 2007).

To take yet one more example,[48] in an opinion concurring in the Washington Supreme Court's decision that the state's marriage law was constitutional, Justice J.M. Johnson said:

> A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State. Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.[49]

These excerpts make abundantly clear that the procreation interest noted by Congress is not trivial but rather deserving of greater deference than the court below gave it.

In addition to disregarding persuasive precedents on procreation, the court below also ignored a plausible rationale for Congress' interest in conserving resources.

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[48] *See also Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Indiana App. 2005); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941, 995-996 (Mass. 2003) (Justice Cordy dissent).

[49] *Andersen v. King County*, 158 Wash. 2d 1, 138 P.3d 963, 1002 (Wash. 2006) (J.M. Johnson., J. concurring).

The court below said it "could discern no principled reason to cut government expenditures at the particular expense of Plaintiffs, apart from Congress' desire to express its disapprobation of same-sex marriage." Memorandum at 26-27. Assuming ill will is not usually the best way of understanding government motives, however. Congress could as easily have recognized that if marriage has nothing to do with a broader social purpose such as fostering responsible procreation, there would be nothing to prevent any two people where one is, for example, dying from cancer to enter a same-sex marriage for the purpose of passing on social security benefits. These would not be sham marriages; they would be based on love but would not likely advance the kinds of interests meant to be furthered by Social Security laws.

The failure of the court below to examine directly relevant precedent in the context of federal regulation of marriage, persuasive precedent in the context of the public's interests in marriage and procreation, and common-sense in Congress' interests in preserving the public treasury fatally compromise its decisions that DOMA is unconstitutional.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court reverse the judgment of the district court.

Respectfully submitted,

s/ William C. Duncan

Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 17, 2011

Certificate of Service

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 17, 2011.

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