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.

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

BRIEF OF *AMICI CURIAE* FAMILY LAW PROFESSORS IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that amicus curiae, the Family Law Professors, is not a corporation that issues stock or has a parent corporation that issues stock.

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November 3, 2011

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. 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.

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November 3, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTERESTS OF THE *AMICI* AND CONSENT TO FILE

Above-captioned *amici* are American family law professors, including family law casebook authors and reporters for the most recent ALI Principles of Family Law, who seek to clarify the relationship between Congress and the states with regard to family status, particularly marital status. Throughout our nation's history, it has been states' responsibility to confer and withdraw marital status. A state's conferral of married status grants a couple more than the legal incidents of marriage. It allows that couple to partake in a social institution imbued with rich historical and contemporary symbolism. Being married has always entailed an understanding that one is married for all purposes, including for federal purposes, for all time, unless one secures the termination of that married status from the state. Section 3 of the Defense of Marriage Act ("DOMA") disrupts that understanding of marriage and redefines what it means to be married for gay and lesbian married couples by creating a blanket rule of federal non-recognition targeting only one group of marriages. Unlike any other federal statute, DOMA selectively withdraws state-conferred marital status, thus telling some married people that they are not married for all federal purposes and significantly altering the status of being married as conferred by Massachusetts.

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

ARGUMENT

I. DOMA IS THE FIRST AND ONLY FEDERAL LAW TO CREATE A BLANKET FEDERAL RULE OF NON-RECOGNITION OF MARRIED STATUS IN CONTRAVENTION OF STATE FAMILY LAW.

Federal law has always honored state determinations of family status when federal rights turn on that status. "The scope of a federal right is... a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.... This is especially true

when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). The "core" aspect of family law left to the states includes "declarations of status, e.g. marriage, annulment, divorce, custody and paternity." *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

Before DOMA, married status was understood as a comprehensive condition for all purposes, recognized by one's state and federal sovereigns, unless that status was terminated by the state or by death. Black's Law Dictionary defines status as:

> [a] person's legal condition... the sum total of a person's legal rights, duties, liabilities and other legal relations, or any particular group of them separately considered.

BLACK'S LAW DICTIONARY, 1542 (9th Edition 2009). Thus, before DOMA, "the sum total" of one's "legal rights, duties and liabilities" as a married person were determined by one's state. While federal rights and duties flowed from that married status, only states determined who was eligible for that status.

DOMA upends this traditional treatment of married status by denying an entire class of married people the status of being married for federal purposes. As the District Court correctly found in this case, prior to DOMA, "the status quo *at the federal level* was to recognize, for federal purposes, any marriage declared valid according to state law.... [DOMA was]... a significant *departure* from the status quo at the federal level." Joint Appendix ("JA") 1399.

Intervenor Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") argues in its opening brief that this departure from the status quo was necessary to avoid inconsistency and "maintain uniformity" in federal treatment of marriage, endorse the "traditional" treatment of marriage, and "proceed with caution" before disturbing the

"defining element of the most foundational institution of our society." Brief of Intervenor ("BLAG Brief"), 39, 40, 46. As detailed below, BLAG clearly misunderstands the relationship between Congress and family status. Congress has always respected diverse state determinations of marital status, even when that respect resulted in disparate treatment of similarly-situated individuals residing in different states. There has never been any uniformity among the states with regard to marital status and, prior to DOMA, there was no plenary federal definition of marriage. The traditional treatment of marriage required Congress to accept state determinations of married status. In enacting DOMA, the federal government did not "proceed with caution." It acted in haste, before any state had even conferred married status on same-sex couples, to create a blanket rule of federal non-recognition of marriage for only one class of marriages. DOMA does not respect tradition; it disrupts it, just as it disrupts the lives of all those married couples whom the federal government refuses to treat as the married couples they are.

II. FEDERAL LAW RELIES ON STATE DETERMINATIONS OF MARITAL STATUS NOTWITHSTANDING TREMENDUOS DIVERSITY AMONG THE STATES

There has always been variety in the conditions that states impose on who may marry, and when that status matters for purposes of federal law, the federal law has deferred to states, regardless of the varying conditions imposed by the states.[1] *See, e.g.*, Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996) ("at no time before 1996 has Congress ever refused to recognize a state-law determination of marital status" for purposes of access to the tax benefits of marriage). Today, six states, including Massachusetts, and the District of Columbia have determined that opposite-sex composition is not "the defining element" of marriage, just as

[1] Such federal deference is bounded by the Constitution. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *Turner v. Safley*, 482 U.S. 78 (1987).

Massachusetts and other states once determined that same-race composition was not a defining element of marriage. *See, e.g.*, Mass. Acts. 1843, c.5 (repealing interracial marriage ban); *Perez v. Lippold*, 198 P.2d 17 (Ca. 1948) (overturning California's anti-miscegenation law); *see also* Brief of *Amici Curiae*, Family Historians ("Historians' Brief"), Section III(A). And the federal government has always deferred to state-determined marital statuses, even when that meant denying marriage benefits to married interracial couples who resided in states in which they could not marry. *See, e.g.*, *In re D---*, 3 I.&N. Dec. 480, 482-83 (B.I.A. 1956) (refusing to recognize for purposes of immigration law a Canadian marriage of a white immigrant and a black citizen because of criminal prohibition in state of residence against "cohabitation and marriages between negroes and white person"); *In re Ann Cahal*, 9 P.D. 127 (Oct. 2, 1897) (denying pension to African-American widow because it was determined that deceased soldier was Caucasian and the marriage was therefore invalid under Mississippi law). Appellants would have this Court believe that some states' decisions to grant married status to same-sex couples create a seismic rift between states that justifies DOMA. But similarly-situated couples have always been treated differently at the federal level if they lived in states with different marital status requirements. As the Supreme Court concluded with regard to federal deference to different state laws of marital property, "there is no need for uniformity." *U.S. v. Yazell*, 382 U.S. 341, 357 (1966). *See also Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir. 1964) (rejecting claimant's argument that admiralty law seeks "uniformity in application" and holding that the meaning of "widow" in federal Jones Act is determined by state law). Significant distinctions among states is not new. What is new is the uniform federal definition of marriage that DOMA imposed on the states.

A. FEDERAL LAW ACCEPTS STATE DIVERSITY WITH REGARD TO MARRIAGE.

States have always varied considerably in the conditions they impose on those requesting marital status. Even now, New Hampshire lets thirteen-year-old girls and fourteen-year-old boys marry. N.H. Rev. Stat. Ann. §457. North Dakota does not. N.D. Cent. Code §14-03. Mississippi requires a blood test to marry. Miss. Code Ann §93-1-5. Kentucky does not. Ky. Rev. Stat. Ann. §402.100. Some states confer marital status on couples who hold themselves out as married and act as married; most states do not. *See Marriage Laws of the Fifty States, District of Columbia and Puerto Rico,* Cornell University Legal Information Institute, *available at* http://www.law.cornell.edu/wex/table_marriage (listing Alabama, Colorado, Iowa, Montana, Rhode Island, South Carolina, Kansas, Iowa, Texas and Utah as the states that recognize common law marriage.) State statutes also differ considerably on what degree of consanguinity constitutes incest. One can marry one's first cousin in Massachusetts; Mass. Gen. Laws ch. 207, §§1, 2; but not in Michigan. Mich. Comp. Laws Ann. §55.14. In Maine, first cousins can marry only after genetic counseling. Me. Rev. Stat. Ann. Tit. 19-A, §701. Policy differences underlie all of these variations, but the federal government has never taken sides in these policy debates before DOMA.

Thus, a couple who never went through a marriage ceremony but held themselves out as married can be treated as married for federal income tax purposes if they live in Montana, which recognizes common law marriages, but not if they live in Wyoming, which does not recognize common law marriages. Rev. Rul. 58-66, 1958-1 C.B. 60 ("if applicable state law recognizes common-law marriages, the status of individuals living in such relationship that the state would treat them as husband and wife is, for Federal income tax purposes, that of husband and wife.") *See also United States v. White,* 545 F.2d 1129, 1130 (8th Cir. 1976) (holding that trial court did

not err in denying defendant and his common law wife marital privilege in federal criminal case where their home state of Arkansas did not recognize common law marriage).

Comparably, the first cousin "spouse" of a man currently insured under Social Security could receive spousal benefits if she lived in Massachusetts, but not if she lived in Michigan because those states have different consanguinity rules for marriage. 42 U.S.C. §401h(1)(A)(i) ("An applicant is the wife, husband, widow or widower … for purposes of this title if the courts of the state in which such insured individual is domiciled... would find that such applicant and such insured individual were validly married."). *See also Castor v. United States*, 174 F.2d 481, 482-83 (8th Cir 1949) (denying benefits to plaintiff under the National Service Life Insurance Policy because her minor marriage, even though valid in the state in which it was entered, was not valid in the state in which the couple established domicile.).

B. FEDERAL LAW ACCEPTS DIVERSITY WITH REGARD TO DIVORCE

Consistent with the strength of the federal norm of deference to state marital status determinations, the federal government has always respected state authority over divorce determinations. It was not until the early 1980s that most states adopted some provisions for no-fault divorce. Prior to that time, there was tremendous diversity in state fault-based divorce laws, generating enormous practical and legal difficulties on an interstate level. Yet Congress consistently refused to intervene and impose a national policy, instead deferring to state determinations. *See, e.g.*, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381 (2007); Historians Brief, Sections I(E) and III(C). This consistent pattern of deference undermines BLAG's argument that DOMA reflects Congress's legitimate desire for uniform treatment of marital status.

Courts and scholars at the time and since have noted the troubling issues created by this diversity among the states. *See* Estin, *supra*, at 383-95 (noting the discomfort that scholars and others had with the idea that a couple could be divorced in one state but not another). Calls for national rules for adjudicating divorce were common for more than fifty years, during the latter part of the 19th and the first part of 20th centuries, but consensus was elusive. Many lawmakers did not want to disrupt traditional deference to state status determinations. William L. O'Neill, DIVORCE IN THE PROGRESSIVE ERA 252-53 (1967). Congress never stepped in to override this "diversity" by creating national uniformity in the substantive definition of divorce. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267, 313 (2008) (""Congress's enactment of DOMA contrasts with its inaction over decades as the states debated the problem of migratory divorce."). *See also* Historians' Brief, Sections III(B) and (C).

The transformation in family law between 1965 and 1985 largely solved the problem of migratory divorce as states finally accepted some, though differing, versions of no-fault divorce. Those years were some of the most contentious and rapidly changing in the history of family relationships and law. Indeed, the changes that occurred during that time are repeatedly referred to as a "revolution." *See, e.g.*, Lawrence M. Friedman, AMERICAN LAW IN THE 20TH CENTURY 441 (2004) ("no-fault revolution"); Mary Ann Glendon, THE TRANSFORMATION OF FAMILY LAW 1 (1989) ("unparalleled upheaval"). Notwithstanding these changes, the norm of federal deference to state determinations of marital status remained firm. *See, e.g., Slessinger v. Sec. of Health & Human Services*, 835 F.2d 937, 939 (1st Cir. 1987) (refusing claimant's attempt to apply a federal divorce recognition rule for Social Security purposes because marital status is determined by state law).

Despite the moral issues permeating the topic of divorce, despite the threat that unilateral divorce posed to traditional marriage, and despite the widely disparate state responses to these policy debates, Congress has never adopted a plenary definition of divorce. It has never, in the name of caution, uniformity, defending the status quo or preserving traditional marriage, denied to the states the right to define the status of "divorced" as they choose.

The contours and requirements for family status have been divergent and evolving since this country's founding. Historians' Brief, Section I(E). To codify and entrench one particular definition of family status at the federal level, as DOMA does, is a tremendous disruption to the historical treatment of marriage.

III. DOMA IS UNLIKE ANY PAST FEDERAL INTERVENTION INTO THE FAMILY BECAUSE IT DISESTABLISHES FAMILY STATUS AT THE FEDERAL LEVEL.

BLAG, Defendant-Appellant ("DOJ") and opposition *amici* invoke a variety of federal statutes to argue that DOMA is just one of many federal statutes that regulate domestic relations. *See, e.g.*, BLAG Brief, 48 ("Congress has a long history of overriding state definitions of marriage for purposes of federal statutes"); Amicus National Organization for Marriage ("NOM") Brief, 4 ("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."). But none of the statutes cited by BLAG, DOJ or opposition *amici* do what DOMA does, which is to strip same-sex couples of their married status for all federal purposes. [2]

[2] *Amici* Family Law Professors have considered all of the statutory examples cited by BLAG, DOJ and opposition *amici*. *See* BLAG Brief, 48*;* DOJ Brief, 59-60; Brief of *Amicus Curiae*, National Legal Foundation ("NLF Brief"), 16; Brief of *Amicus Curiae*, Family Research Council ("FRC Brief"), 4; NOM Brief, 5-11. None of those examples disrupt the tradition of federal deference to state marital determinations where marital determinations are relevant, as DOMA does. Moreover, we are not aware of any contemporary statutes that depart from the framework discussed herein.

Instead, prior to and since DOMA, all federal statutes pertaining to family status, including all such statutes cited by BLAG, DOJ and opposition *amici*, can be divided into three categories, and all maintain the federal government's traditional deference to state-determined family status. First, and most common, are federal statutes that *implicitly* invoke the state law of family status. Second, are federal statutes and regulations that *explicitly* invoke the state law of family status. Third, there are federal statutes that place limitations on or expand the category of who will be eligible for federal benefits under particular statutes based on policy reasons pertinent to those specific statutes.

A. THE VAST MAJORITY OF FEDERAL STATUTES IMPLICITLY RELY ON STATE DETERMINATIONS OF STATUS.

Most federal statutes that refer to family status fail to provide any definition or guidance on how to determine family status. In using terms like "spouse" or "married" or "parent," these laws necessarily rely on state law for those status determinations. Most of the examples cited by BLAG, DOJ and opposition *amici* fall into this category. The Federal Employees Benefits Act, 5 U.S.C. §8101, assumes a state-conferred marriage when it defines "widow" as a "surviving wife," who "was married," without ever defining "wife" or "marriage". The Military Pensions Act, 10 U.S.C. §1408, defines "spouse" as a person who was "married" without further defining those terms. The Supplemental Nutrition Assistance Program, 7 U.S.C. §2012, allocates food stamps to "households," which it defines as including "spouses," but the Act does not define "spouse." ERISA, 29 U.S.C. §1001 uses the term "spouse" more than 25 times without ever defining it.[3]

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[3] The fact that ERISA, and other federally-provided pensions, preempt state community property law, *see, e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151-52 (2001) in no way indicates Congressional intent to disregard a state-conferred marital statuses, which remain unaltered by ERISA. Just as Congress may decide what one is entitled to as a married person as a matter of tax or social security policies, Congress may decide what one is entitled to as a matter

Additionally, the Parental Kidnapping Prevention Act, 28 U.S.C. §1738A; the Child Support Recovery Act, 18 U.S.C. §228(a)(1); and the Deadbeat Parents Punishment Act of 1998, 18 U.S.C. §228(a)(3), cited by BLAG, DOJ and/or opposition *amici* as examples of federal regulation of family law, all use the term "parent" without defining it. The Copyright Act, 17 U.S.C. §101, defines "children" as "immediate offspring" whether legitimate or not, as well as adopted children, but does not define children. The failure to provide a more precise definition of "parent" or "offspring" is particularly notable given the myriad of contemporary debates, currently being resolved differently among the states, with regard to how to define "parent" and "offspring" in an age when it is common to both buy and sell genetic material and to separate conception from gestation and sexual activity.[4] *See* Rene Almeling, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM (2011). Just as different states define marriage differently, different states resolve issues regarding reproductive technology differently. Just as with marriage, states have always had different ways of determining legal parenthood[5] and the

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of federal pension policy. That is wholly different than deciding whether one is married or not for all federal purposes. *See infra* Part IIIC. *See also* NOM Brief, 9 (arguing that "[b]ankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law") (citing H.R. Rep. No. 95-595, at 364 (1977) reprinted in 1978 U.S.C.C.A.N. 5963, 6320).

[4] For instance, a woman who is party to a surrogacy contract pursuant to which she intends to become the mother of the child once born will be considered the legal mother in Illinois, 750 Ill. Comp. Stat. Ann. 47/15, and California, *Johnson v Calvert*, 851 P.2d 776 (Cal. 1993) (en banc), but not in Indiana, Ind. Code Ann. §31-20-1-1 (surrogacy contract against public policy) or Michigan, Mich Comp. Laws Ann. §722.851-861 (surrogacy contracts illegal).

[5] For instance, states have always differed on the importance of genetic evidence in establishing paternity. *Compare* Cal. Fam. Code Ann. §7541 (2 year statute of limitations to disestablish legal paternity with genetic evidence) *with* Ala. Code §26-17-607(a) (no statute of limitations for disestablishing legal paternity). Some states estop men who have acted as fathers from disestablishing their paternity. *See, e.g., In re Paternity of Cheryl*, 434 Mass. 23, 746 N.E.2d 488 (Mass. 2001). Others do not. *See, e.g., In re C.S.*, 277 S.W.3d 82 (Tex. App. 2009) (husband allowed to challenge his legal paternity with genetic evidence).

federal government has accepted diverse state interpretations of parental status.[6]

For this category of statutes, federal courts have always fallen back on state determinations of family status. For instance, adjudicating a claim under the National Service Life Insurance Policy, the Second Circuit held that "the word 'widow' has no popular meaning which can be determined without reference to the validity of the wife's marriage to her deceased husband… [which] necessarily depends upon the law of the place where the marriage was contracted." *Lembcke v. U.S.*, 181 F.2d 703, 706 (2d Cir. 1950). The Ninth Circuit, in interpreting a Veterans' Administration statute that did not define the term "marriage" held that "[t]he relevant law to which the regulations refer is the general law of the state of residence." *Barrons v. United States*, 191 F.2d 92, 95 (9th Cir. 1951). In interpreting the Jones Act, which did not make clear whether common law spouses should be considered spouses for purposes of the Act, one District Court warned that "[i]f the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved." *Bell v. Tug Shrike*, 215 F. Supp 377, 380 (E.D. Va. 1963), *aff'd* 332 F.2d 330, 335 (4th Cir. 1964) ("the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law").

As all of these courts have found, Congress could not have been assuming one particular definition of "spouse" or "parent" every time it used those status concepts in legislation. There is simply too much diversity in how family status terms are defined by the states to assume one particular federal definition of marriage or parent. The failure to define family status in federal statutes shows that Congress must have been relying on state definitions of family status. And

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[6] Thus, a gestational surrogate might be considered a parent for purposes of the PKPA, 28 U.S.C. §1738A, in Indiana, but not in Illinois. A non-genetically related man who was determined to be a child's father in Massachusetts could be subject to the Child Support Recovery Act, 18 U.S.C. §228(a)(1), while a similarly-situated man in Texas would not be.

the fact that so many federal statutes do not define family status underscores the strength of the norm of federal deference to state determinations of family status.[7]

B. SOME FEDERAL STATUTES EXPLICITLY RELY ON STATE DETERMINATIONS OF STATUS.

Some federal statutes and the regulations implementing them explicitly invoke state law in order to interpret status for purposes of that federal statute. For instance, the Social Security Act, 42 U.S.C. §401h(1)(A)(i), states that "[a]n applicant is the wife, husband, widow or widower of a fully or currently insured individual for purposes of this title if the courts of the state in which such insured individual is domiciled... would find that such applicant and such insured individual were validly married." An administrative ruling by the Internal Revenue Service states that "[t]he marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws." Rev. Rul. 58-66, 1958-1 C.B. 60. The Veteran's Affairs Statute, 38 U.S.C. §103(c) states that "[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proved as valid . . . according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."[8] Clearly, all of these examples, and

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[7] While the Supreme Court, in *De Sylva*, 351 US at 580, cautioned that a State is not free "to use the word "children" in a way entirely strange to those familiar with its ordinary usage," such a limiting principle cannot apply in the context of DOMA, where 6 states (including New York) and the District of Columbia now allow same-sex couples to marry.

[8] The Veteran's Affairs statute explicit reliance on state law is notable because, as BLAG points out, elsewhere in the same title, one finds "spouse" and "surviving spouse" defined as "a person of the opposite sex," 38 U.S.C. Sec 101(3) & 101(31). The legislative history of this statute suggests that these definitions of spouses were inserted in 1975 as part of the effort to re-write the statute to conform with emerging Constitutional mandates for gender equality. *See* S. Rep. No. 94-568, at 19 (1975). However, even if §§101(3) & 31 were intended to exclude same-sex married couples from eligibility for veterans' benefits, such an exclusion for one program only is substantially different in scope and nature from DOMA, which disrupts and redefines a person's married status for all federal purposes and it now conflicts with § 103(c), which explicitly requires deference to state law.

others that fall in this category, only support the argument that the federal government has deferred to state determinations of marital status in the past.[9]

C. SOME FEDERAL STATUTES IMPOSE CONDITIONS BEYOND MARITAL STATUS REFLECTING POLICY CONCERNS SPECIFIC TO THOSE STATUTES.

The third category of federal statutes that invoke marital status either condition eligibility for federal marriage benefits on factors in addition to married status or provide marriage benefits to people who are not married but meet eligibility requirements that Congress has decided warrants protection. Unlike DOMA, these statutes do not disregard state-conferred married status and deny married status to an entire class of married people for all federal purposes. Instead, these statutes address different policy concerns, intrinsic to the particular statute, by conditioning receipt of some government benefits on statute-specific requirements.

1. ELIGIBILITY BASED ON MARRIAGE PLUS OTHER CONDITIONS.

BLAG points to various statutes in federal law that purportedly "overrid[e] state definitions of marriage." *See, e.g.*, BLAG Brief, 48. BLAG fails to mention that these statutes take a valid marriage as conferred by the states as their starting point, and then impose additional requirements aimed towards specific policy goals.

All governmental programs that confer benefits based upon a person's marital status must be concerned about people who try to manipulate eligibility requirements for the sole purpose of

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[9] Despite the fact that the regulations implementing the Family Medical Leave Act explicitly defines "spouse" as a "husband or wife as defined or recognized under State law," 29 C.F.R. §825.122(a), BLAG argues that the Department of Labor, in adopting final regulations, rejected the inclusion of "same-sex relationships" in the definition of spouse. BLAG Brief, 10. In reality, the DOL regulations rejected the inclusions of *unmarried* "domestic partners in committed relationships including same-sex relationships" within the definition of "spouse." 60 Fed. Reg. 2180, 2190-91 (1995). Such action is entirely consistent with 29 C.F.R. §825.122(a)'s deference to state law.

securing benefits. For example, Congress conditions immigration status on marital status to support the important role that marriage plays in most married people's lives. However, when it appears that a couple has married only to secure some immigration benefit, Congress appropriately denies that benefit. *See* 8 U.S.C. §1186a(b)(1)(A)(i) (marriage "entered into for purposes of procuring an alien's admission as an immigrant or otherwise evading the immigration laws" does not qualify for purpose of permanent residency status); 8 U.S.C. §1255(e) (restricting an adjustment of immigration status based on marriages entered during admissibility or deportation proceedings).

Still, immigration laws first defer to state law to define marital status. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 Wm. & Mary J. Women & L. 537, 550 (2010) ("Immigration officials and federal courts first insist that a marriage meets the procedural and substantive requirements of the state or country where the marriage was 'celebrated'"). Once the status has been established, then federal immigration laws may impose other requirements, such as the rule that spouses must be physically present during the marriage ceremony (unless the "marriage" has been consummated). 8 U.S.C. §1101(a)(35). Similarly, 8 U.S.C. §1154(a)(2)(A) restricts and subjects to additional scrutiny the marital treatment of an alien spouse who previously obtained lawful immigration status based on his or her marriage to a U.S. citizen or permanent resident, and then petitions to have a new spouse enter the country. As BLAG concedes, BLAG Brief, 48, these provisions are designed to prevent people from entering into marriages for the purpose of taking advantage of an immigration policy that favors married individuals.

As BLAG notes, in the Social Security context, 42 U.S.C. §§402 & 416, defines "wife,"

"husband," "widow," "widower," and "divorced spouse" for purposes of the Social Security program. BLAG Brief, 48. BLAG does not note that §416 makes it clear that marital status (as opposed to qualifying conditions for benefits) is to be determined by "the courts of the State in which... [the] insured is domiciled at the time such applicant files." 42 U.S.C. §416(h)(1)(A)(i). The more specific definitions in §§402 and 416 do not override this explicit rule of deference to state determinations of family status. *See also* 20 C.F.R §404.345 ("If you and the insured were validly married under State law at the time you apply for wife's or husband's benefits or … if you apply for widow's, widower's, mother's or father's benefits, the relationship requirement will be met"). Rather, the statute imposes additional requirements that are geared to preventing fraud or protecting the public fisc. *See, e.g.*, 42 U.S.C. § 416(d)(4) (for "divorced husband" to qualify for benefits on ex-spouse's earning record, he must have been "married to such individual for period of 10 years immediately before the date the divorce became effective"); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (upholding the legitimacy of a 9-month durational requirement before a spouse is eligible for Social Security benefits in order to "prevent the use of sham marriages to secure Social Security payments.") None of these eligibility requirements abrogate or define an applicant's existing marital status.

Finally, BLAG identifies other provisions in federal laws, creating benefit programs such as workers' compensation, civil service, and retirement from civil service, that attach additional conditions beyond marital status for the purposes of determining eligibility for benefits, such as minimum duration requirements. *See, e.g.*, 5 U.S.C. §8331(23) (defining "former spouse" as a spouse of an individual who performed at least eighteen months of civil service and who was married to the individual for at least nine months); 5 U.S.C. §8341(a) (providing that a person is not a "widow" or "widower" eligible to receive retirement benefits unless they were "married"

for "at least 9 months immediately" before the death of their spouse). These statutes do not abrogate state-determined marital status or signal the federal government's intent to declare that a person unmarried. Rather, these statutes again limit access to certain benefits in order to protect the public fisc and avoid fraud in the program at issue.

All of these additional requirements on top of married status are specific to each statute and do not define marital status at all, let alone for all federal purposes. For example, a widower who has remarried may be considered a "surviving spouse" for tax purposes for a specific tax year provided that he did not remarry "any time before the close of [that] taxable year," 26 U.S.C. § 2(a)(2)(A), even if he would not be considered a "widower" for Social Security purposes. *See* 42 U.S.C. §402(f)(1)(A) (excluding from eligibility for widower benefits any individual who has remarried at all). Whether one is eligible for federal marriage benefits depends on the specific policy concerns of the particular federal statutes, and not on a blanket Congressional declaration of marital status.[10] Indeed, these statutes accept the state-conferred marital status and then go on to determine which married persons are eligible for federal benefits, for reasons specific to the program at issue.

2. ELIGIBILITY IN THE ABSENCE OF MARRIAGE.

BLAG, DOJ and opposition *amici* have argued that some statutes afford some individuals eligibility for marital treatment even in the absence of state-conferred marital status. *See, e.g.*, BLAG Brief, 48. Such examples miss their mark. Just as Congress's decision to impose

[10] *See, e.g.*, 26 U.S.C. §7703(b) (allowing a married individual to file as unmarried only if he or she (a) decides not to file a joint return with his or her spouse, (b) lives apart from the spouse during the last six months of the year, and (c) maintains the home and support of a qualifying child). BLAG, DOJ and opposition *amici*, wholly mischaracterize this example as a denial of marital recognition or benefits to certain married couples. To the contrary, §7703(b) simply provides an *additional* and more beneficial filing option to married taxpayers living apart from their spouses.

additional eligibility requirements beyond marriage does not constitute a federal denial of married status, so Congress's decision to extend some federal marriage benefits to unmarried individuals under specific statutory provisions does not constitute a federal creation of married status.

For example, 42 U.S.C. §416(h)(1)(A)(ii) extends the payment of spousal social security benefits to someone who "in good faith went through a marriage ceremony . . . resulting in a purported marriage . . . [that] . . . but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage" or who would otherwise qualify for a spousal distribution under the state's intestacy laws. Comparably, 38 U.S.C. §103(a) provides marital treatment for someone who lived with or had a child with a veteran if that person married the veteran but was unaware of a legal impediment to the marriage. In the immigration context, 8 U.S.C. §1154 allows an individual to petition for immigrant status based on marriage to a U.S. citizen if the petitioner believed the marriage to the U.S. citizen was legitimate, but later found that the marriage was invalid because of the citizen's bigamous conduct. In these specific settings, Congress has embraced a version of the putative souse rule applied in many states to protect individuals potentially made vulnerable by marriage laws for Social Security, Veteran's Benefits or immigration purposes. These statutes do not make any individual married for all federal purposes in contravention of state law.

Other federal statutes provide narrow recognition for relationships that would constitute common law marriages in some states. Couples can receive marital benefits for purposes of Supplemental Social Security for the Aged, Blind and Disabled under 42 U.S.C. §1382c(d)(2) if "they are found to be holding themselves out to the community in which they reside as husband and wife." This is not a federal definition of marriage, incorporating for all federal law the

common law spouse doctrine. A couple who might be eligible for benefits under §1382c(d)(2) would not be eligible for marital treatment under the Internal Revenue Code - unless their home state recognized common law marriage. *See*, *supra*, Section II(A). In drafting §1382 Congress merely meant to extend social welfare benefits to a particular class of needy people. [11] It chose to extend those benefits by treating that couple as if they were married. Congress' decision to treat certain people as married or not under particular statutes is entirely different in kind and scope from its creation of a blanket rule of federal non-recognition for one subset of state-licensed marriages.

Finally, one example highlighted by *Amicus* NOM, instead of proving its argument, serves as another illustration of the federal government's attempts at fraud prevention, in this instance by extending marital treatment. The IRS may treat a couple as married for purposes of their tax return, even though they consistently divorce at the end of each tax year to receive favorable tax treatment filing as single, but then remarry at the beginning of the tax year. Rev. Rul. 76-255, 1976-2 C.B. 40. Again, nothing about this example alters or dismantles the nature of a couples' marital status, as DOMA does across all sectors of federal law.

In summary, all of the statutes cited by BLAG, DOJ and opposition *amici*, except for those pertaining to family status classification when there is no relevant state authority, *see infra* Section IV, fall into the categories outlined in this section. None of these statutes, individually or together, do what DOMA does. None of them define marital status *per se*. None of them tells an entire class of married people that they are not married for all federal purposes. Before DOMA, one's state-determined status as a married person meant one was considered married for

[11] The same is true for *Amicus* NOM's example of the proposed Domestic Partnership Benefits and Obligations Act, which would, if enacted, provide spousal employment benefits to the same-sex partners (whether married or not) of gay and lesbian federal employees. NOM Brief, 11.

all purposes by one's state and federal sovereigns. DOMA strikes at the heart of that status, and as such, DOMA is an unprecedented anti-status statute.[12]

IV. THE FEDERAL GOVERNMENT HAS DEFINED MARITAL STATUS ONLY WHEN THERE IS NO STATE JURISDICTION TO DETERMINE FAMILY STATUS.

When there is no state sovereign, such as in federal territories, Congress may have a role in regulating marital status. *See* Historians' Brief, Section II. For example, there were federal definitions and proscriptions on who could marry in numerous territories, most notably Utah, before those territories became states. *See, e.g.*, Morrill Anti-Bigamy Act, 37th Cong., 2nd Sess., Ch.125-26, at 501-02 (1862). Federal definitions of marriage still control in the U.S. territories of the Virgin Islands, 48 U.S.C. §1561, and Puerto Rico, 48 U.S.C. §736. Those federal definitions do not usurp state authority to define marital status because there is no state authority in federal territories.

Although family law is a matter of tribal sovereignty, Congress has regulated family law among Native Americans under its plenary powers under Article I, Section 8, in order to protect the sovereignty of tribes from encroachment. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). For example, Congress has established rules related to marriages between American Indians and white persons to protect tribal members from a marital claim to Indian

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[12] Some examples cited by BLAG and opposition *amici* do not even remotely pertain to classifications determinations of family status at the federal level. *See, e.g.*, NLF Br., 16 (citing 18 U.S.C. §922(g)(8) as federal intervention in "domestic relations," where statute simply criminalizes the interstate transportation of firearms by individuals who have been the subject of a protection order involving intimate partner violence); NOM brief, 6 (citing Homestead Act of 1862, which governs the grant of federal land to qualified homesteaders and, in the event of their deaths prior to the requisite 5-year period, their family and heirs). Similarly, even though *Amicus* NOM claims DOMA is a family regulation akin to the 2010 Census counting married same-sex couples as married or the 1850 Census, which utilized a functional definition of "family" for census purposes; NOM Brief, 10, 8; neither example involves extirpating a person's marital status under federal law.

lands by non-members of the tribe. *See, e.g.*, 25 U.S.C. §183 (imposing an elevated standard of proof to show marriage of "any white man with any Indian woman"). Because these rules pertain to American Indian tribes and especially to tribal land, where Congress has plenary authority, no state definition of marital status is implicated.

With respect to the military, another area of plenary federal authority, the federal government has not directly defined "marriage" or "married." However, the Uniform Code of Military Justice has criminalized polygamy in 10 U.S.C. §934. That polygamy provision of the uniform code of military justice has also been interpreted to forbid "bigamy [because it is] prejudicial to good order and discipline and service discrediting." *United States v. Kyles*, 20 M.J. 571 (NMCMR 1985); *see also United States v. Bivins*, 49 M.J. 328, 332 (U.S. Armed Forces 1998) (authorizing prosecution for marriage with a person already married as "conduct of a service-discrediting nature…".). These instances of marital regulation in the military do not define marriage so much as they regulate military personnel conduct. See also *United States v. Smith*, 18 M.J. 786 (NMCMR 1984) (prosecution for adultery). Indeed, the military code regulates and punishes all sorts of behavior that it thinks is "service-discrediting." *Manual for Courts-Martial*, Article 134, ¶60, U.S. DEPT. OF DEFENSE, *available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf (criminalizing conduct that is "of a nature to bring discredit upon he armed forces.") The military's proscriptions on certain kinds of marital conduct are just one piece of the military's extensive regulation of service member behavior.[13] It

[13] *Amicus* NOM's military benefit and pension examples similarly fail for these same reasons, as well as because NOM mischaracterizes its supporting caselaw. *See, e.g.*, NOM Brief, 7 (misrepresenting *U.S. v. Richardson*, 4 C.M.R. 150, 156 (1952), as "holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began," when in actuality, *Richardson*, 4 C.M.R. at 156 holds that "[i]n military law, as in civilian, the validity of a marriage is determined by the law of the place where it is contracted.").

hardly constitutes a uniform federal definition of marriage and it certainly does not usurp state authority to define marriage.

CONCLUSION

Because existing federal statutes operate in an entirely different manner than does DOMA, striking down DOMA will not interfere with the operation of current federal statutes that pertain to the family. DOMA is exceptional. It denies to the states the authority that states have always had to confer married status. It cuts into the class of married people in contravention of state law and in sharp contrast to the entrenched norm of federal deference to state determinations of marital status. DOMA disestablishes marriages comprehensively at the federal level and changes what it means to be married for same sex couples.

Respectfully Submitted,

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November 3, 2011

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed.R. App. P. 32(a)(7)(B) because it contains 6,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word processing software in 14-point Times New Roman font.

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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 November 3, 2011.

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