NO. 12-307

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioners,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE **BRIEF OF NATIONAL ORGANIZATION FOR MARRIAGE ON THE MERITS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP**

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QUESTIONS PRESENTED

1. Whether Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

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INTEREST OF *AMICUS CURIAE*[1]

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 redefining marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the local, state and national level. The *Washington Post* described NOM as "the preeminent organization dedicated" to preserving the definition of marriage as the union of a husband and wife.[2] The outcome of this litigation will impact NOM's ability to pursue its mission nationally.

SUMMARY OF THE ARGUMENT

In this case Plaintiffs have proposed, and the court below seems to have partially accepted a legal theory that would turn the principle of federalism on its head by creating a reverse Supremacy Clause whereby the states can dictate to the national government the meaning of terms used in federal law. This theory conflicts with past precedent and current practice.

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[1] Letters of consent have been filed with the Clerk. *Amicus curiae* also represents that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Monica Hesse, *Opposing Gay Unions With Sanity and a Smile* WASHINGTON POST, Aug. 28, 2009, at C01.

The Defense of Marriage Act provides that when the term "marriage" and its variants are used in federal law they will be interpreted to refer only to the union of a husband and wife. The specific definition does not include unions of two men or two women or of an individual with more than one other person. It preserves the traditional authority of Congress to determine the appropriate interpretation of federal statutes, so that federal law is enacted and federal monies disbursed by the representatives of the people elected for that purpose rather than by the judges or legislators of one state. It prevents a patchwork application of the law where federal statutes apply differently to residents of different states, based not on Congress' intent but on the idiosyncratic definitions favored by state officials.

Perhaps more important is reiterating what DOMA does not do. It does not regulate who may marry in the various states, it creates no mandate that the states define marriage in any particular way for state law purposes. It does not affect the licensing, solemnization, incidents or dissolution of marriage. It does not change the way Congress has treated state marriage definitions that conflict with clear federal policies. It does not "commandeer" state authority for federal purposes.

This Court has recognized Congress' authority to define terms used in federal law consistently and recently. In fact, there is a longstanding practice of Congress creating employing definitions of terms in federal law, rather than invariably relying on state

definitions of those terms over the history of the Republic. It has covered a broad subject matter including immigration, land grants, military benefits, pension regulations, the census, copyrights, bankruptcy and taxation. These discrepancies are also part of current practice.

Interestingly, in 2011 and 2012, one of the public policy organizations bringing this case publicly supported federal legislation that would in one case define marriage for federal purposes and, in another, create a new marriage-like legal status in federal law. This suggests that what they and other opponents of DOMA find offensive is not the consistent practice of Congress defining the terms it uses in the law but rather the definition chosen in this instance. That is an objection appropriately lodged with Congress itself rather than the federal courts.

The lower courts in this case (and similar challenges to DOMA) appear to be confused about the distinction between the common, though not invariable, practice of Congress employing state marriage definitions in federal law on the one hand, and a constitutional mandate to do so in every instance, on the other.

This Court should correct that confusion and uphold the longstanding Congressional practice of defining the terms it uses when it enacts law.

ARGUMENT

I. The Defense of Marriage Act is entirely consistent with longstanding precedent in which Congress defines terms, including terms related to domestic relations and marriage, used in federal law.

The panel below found that the Defense of Marriage Act (DOMA) is an "unprecedented intrusion" into an area of law traditionally governed by state law and called DOMA "an unprecedented breach of longstanding deference to federalism."[3] This finding echoed the District Court conclusion that "DOMA operates to reexamine the states' decisions concerning same-sex marriage. It sanctions some of the decisions and rejects others. But such a sweeping federal review in this arena does not square with our federalist system of government, which places matters at the 'core' of the domestic relations law exclusively within the province of the states."[4]

At the outset, it should be noted that these descriptions of the effect of DOMA bear no relation to the actual statute. When DOMA was enacted in 1996, no state had redefined marriage to include same-sex unions, so Congress could hardly have meant to "reexamine" non-existent same-sex marriage laws. Similarly, although a number of

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[3] *Windsor v. United States*, 699 F.3d 169, 186 (2nd Cir. 2012).
[4] *Windsor v. United States*, 833 F.Supp.2d 394, 405 (S.D. N.Y. 2012).

states have redefined marriage since its passage, DOMA does not require any examination or "intrusion" into those state definitions. Rather, it avoids doing so by enacting a simple statement of the how the term "marriage" will be used in federal statutes, regardless of the variety of state definitions that might be enacted.

While it is true that Congress *may* adopt state classifications for purposes of federal law, it is under no compulsion to do so.[5] Whatever the origin for the lower courts' misunderstanding of DOMA and the notion of federalism, their holdings turn the principle of federalism on its head. Rather than protecting against federal usurpation of powers reserved to the states, the rulings below would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause.

Plaintiff offers no other example where such a reverse Tenth Amendment analysis has been applied, forcing Congress to adopt state classifications for purposes of federal statutes. The District Court wrongly characterized DOMA as "a radical departure from the tradition of federalism in the area of domestic relations," but it is the court's suggestion that states can impose their idiosyncratic definitions of legal terms in the interpretation of federal statutes, even when contrary to the explicit

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[5] *See Windsor*, 699 F.3d at 205 (J. Straub, dissenting) ("Congress may . . . borrow definitions from state law, but Windsor is incorrect to suggest that it is required to do so or is irrational when it does not."")

intention of Congress, that departs from our federalist tradition.

A. Congress has a duty to establish a definition of marriage for federal statutes, and DOMA neither commandeers state governments nor dictates the internal operations of state governments.

Like every branch of government, Congress may not act outside the bounds of its constitutionally granted powers. Thus, Congress is unable "to commandeer state governments or otherwise directly dictate the *internal operations* of state government" and must ensure "conditions on federal funds" are "related to a federal purpose."[6]

But DOMA easily satisfies these two conditions. As a panel of the First Circuit has recently held:

> Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to

[6] *Massachusetts v. Department of Health and Human Services*, 682 F.2d 1, 12 (1st Cir. 2012) (*citing Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987)) (emphasis in original).

> determine the answer does not mean that the Tenth Amendment or Spending Clause requires it to do so.[7]

The First Circuit further explained that the impugned section of DOMA "governs only federal programs and funding, and does not share these two vices of commandeering or direct command."[8]

In enacting DOMA, Congress has not infringed upon the powers of any state to regulate matters of family law. Indeed, since DOMA was adopted, a handful of states have adopted definitions of marriage that differ from the definition in DOMA.[9]

B. Historical precedent and current practice show that Congress has always been free to define terms as used in federal statutes, even in areas related to marriage and domestic relations.

Tellingly, Plaintiff has not suggested that Congress lacks authority to legislate in the subject matter areas impacted by DOMA (e.g., taxation,

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[7] *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[8] *Id*. As discussed below, the First Circuit panel ultimately created an unprecedented and mistaken legal rule in holding that DOMA was unconstitutional. Yet in doing so, it properly and squarely rejected the reasoning of the courts below regarding Congress' ability to define terms used in federal law.

[9] Maine (2012 Question 1); Maryland (2012 House Bill 438); New York (N.Y. Dom. Rel. §10-A); New Hampshire (N.H. Rev. St. Ann. §457:1-a); Vermont (15 Vt. Stat. Ann. §8); Washington (2012 Senate Bill 6239).

immigration, etc.). Instead, they have argued that when regulating in these areas, Congress must defer to each state when touching on matters that also involve marriage or domestic relations.

Thus, under the analysis adopted by the courts below, Congress may unquestionably legislate in the area of taxation, but must defer to each state 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.

Even apart from the patchwork effect this rule would create (in which federal statutes are applied differently to residents of different states), and the potential conflict created in matters involving more than one state, such a rule is patently indefensible in light of history and legal precedent.[10]

In this regard, the courts below were simply incorrect in asserting that DOMA is an unprecedented inroad into an area of domestic

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[10] *See* Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 884, 891-892 (2004) (arguing that "federal constitutional requirements make federal family law inevitable," finding attempts to counter federal involvement in family law matters simply by invoking the talisman of ostensibly local exclusivity "logically unconvincing," and noting that "the legitimacy of . . . DOMA . . . or other federal statutes cannot be logically undermined simply by identifying the statutes as forms of family law [because] [e]ven if these statutes are instances of federal family law, federal laws and constitutional decisions have long regulated family relationships, rights, and responsibilities").

relations law.[11] While DOMA may have been the first time in which Congress adopted a single definition of marriage applicable to all federal statutes, Congress has long defined marriage for purposes of federal statutes, even when such definitions conflicted with applicable state law.

Specifically relevant here, there has never been a special carve-out that requires Congress to defer to state laws on domestic relations and marriage when federal statutes intersect with them. To announce such a carve-out now would be to radically transform the jurisprudence of federalism that has properly prevailed for over two centuries, at a time when the intersection between federal and state laws on domestic relations has dramatically increased.[12]

This Court's recent unanimous decision in *Astrue v. Capato*[13], which addressed Congress' intended definition of a surviving child for purposes of survivor benefits under the Social Security Act, provides no support for Plaintiff's novel approach, which is without warrant in law or past practice

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[11] *Windsor v. United States*, 699 F.3d 169, 185-186 (2nd Cir. 2012); *Windsor v. United States*, 833 F.Supp.2d 394, 405-406 (S.D. N.Y. 2012).

[12] Professors Linda Elrod and Robert Spector have noted that as family mobility has increased, "the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as child support, domestic violence, and division of pension plans," which has led to an "explosion of federal laws, uniform laws, and cases interpreting them." 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 (2009).

[13] 566 U.S. __ (2012), slip op.

Indeed, the notion that Congress must reflexively, and categorically, defer to the states whenever a domestic relations matter is involved is belied by *Astrue*. If the rule proposed by the court below were actually the law, *Astrue* would have been a very simple decision—the Court would have had to apply state law because the question of parentage is a domestic relations matter. While the Court did ultimately apply a state law definition in *Astrue*, that result was not compelled by the Constitution, but rather it *was what Congress intended.*[14]

In affirming Congressional intent, however, the Court also noted that other sections of the Social Security Act have different federal standards for determining the meaning of "child" under the Act.[15] In fact, the Social Security Administration's regulations would allow a child to receive benefits if the child is the biological offspring of the insured person and the parents "'went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment,'" thus implying a broader federal definition of marriage than state law.[16] The Court also noted provisions in the Act that are independent of state law, such as "duration-of-relationship limitations," remarking that "[t]ime limits also qualify the statutes of several

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[14] Slip op. at 11 (noting that the relevant statutory language "directs that, '*for purposes of this subchapter*,' the law of the insured's domicile determines whether '[the] applicant and [the] insured individual were validly married,' and if they were not, whether the applicant would nevertheless have 'the same status' as a wife under the State's intestacy law.").

[15] *Id*. at 5-6.

[16] *Id*. at 6 (quoting 20 CFR §404.355(a)).

States that accord inheritance rights to posthumously conceived children."[17]

Congressional enactments of laws relating to domestic relations, and marriage in particular, have a long history and are clearly part of current practice. Put simply, "[t]he attempt to conclude that, constitutionally and historically, only the states have had and exercised the power to define marriage--and that their definitions have always been, and constitutionally must be, adopted by and incorporated into federal law for purposes of federal programs--is completely wrong as a matter of legal history and constitutional principle."[18]

What follows is not an exhaustive list but one that is ample for purposes of illustrating that the assertions of the courts below are inconsistent with past precedent and practice.[19] In particular, these examples show that (a) Congress has adopted definitions relating to domestic relations since the earliest days of the United States, and (b) such definitions have routinely been upheld even when conflicting with applicable state law.

Immigration. Dating back to the Naturalization Act of 1802, federal law provided that children of parents who have been naturalized will automatically become citizens unless their fathers were not naturalized.[20] An 1855 immigration law allowed citizenship to women who married citizens

[17] *Id*. at 12.

[18] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 968 (2010).

[19] For a fuller account of the relevant precedent, *see* id.

[20] 2 Stat. 155 (April 14, 1802).

and to children of citizens.[21] Current immigration law continues to impose a definition of marriage which may conflict with state law.[22] For example, 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] even though some states may recognize those marriages as valid or voidable.[24] To defer to state law on marriage for immigration purposes would allow one state to circumvent the entire federal policy.[25]

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[21] 10 Stat. 604 (February 10, 1855).

[22] *See* 8 U.S.C. §1186a(b)(A)(i) cited in *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[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, 611-613 (1953); *id.* at 620–21 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (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 1236, 1238 (9th Cir. 1979) (argument that validity of marriage under federal law is "frivolous" because INS can make independent inquiry into validity of marriage law 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] Indeed, even proponents of same-sex marriage agree that immigration laws readily demonstrate that invalidating DOMA based upon the states' ostensibly exclusive role in defining marriage is unsound. *See* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 Drake L. Rev. 923, 926 (2010) (discussing the district court's decision in *Mass. v. U.S. Dep't of Health & Human Servs.*, 698 F.Supp.2d 234 (D. Mass. 2010), and concluding that the argument that DOMA unconstitutionally

Land Grants. In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over 21.[26] An 1804 law protected the land interest of "an actual settler on the lands so granted, for himself, and for his wife and family."[27] The Homestead Act of 1862 specified that 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."[28] Applying this statute, in 1905 this Court resolved a land grant dispute brought by a daughter against her mother and stepfather.[29] The daughter argued that state inheritance law should be applied to provide her an interest in the property, but the Court ruled that "the words of the [federal Homestead Act] statute are clear," rejecting the daughter's claim that state law, rather than federal, should govern the definition of "head of a family" as used in the Homestead Act.[30]

Military Benefits. In 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[31] The 1890 Dependent

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intrudes on traditional government functions is "silly and potentially mischievous," because it implies that "whenever a federal law uses the word 'marriage' to define the scope of some federal program, it is obligated to follow state law," an implication that is flatly refuted by the "obvious counterexample [of] immigration").

[26] 2 Stat. 229 (March 3, 1803).

[27] 2 Stat. 283 (March 26, 1804).

[28] 12 Stat. 392 (May 20, 1862).

[29] *McCune v. Essig*, 199 U.S. 382 (1905).

[30] *Id*. at 389.

[31] 5 Stat. 127 (July 4, 1836).

and Disability Pension Act also provided money for widows and other family members of veterans.[32] Federal courts interpreting military benefits and other military laws have used federal interpretations of the term "family," even at times where the definitions did not accord with state law.[33] This Court has noted, for instance, that the Uniformed Services Former Spouses' Protection Act[34] is an example "where Congress has directly and specifically legislated in the area of domestic relations."[35] The Court held that a claim for military retirement pay was governed by the Act and not by state community property law.[36]

Federal Pension Regulations. The federal Employment Retirement and Income Security Act (ERISA) and other federal pension laws have consistently been held to control the marital

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[32] 26 Stat. 182 (June 27, 1890).

[33] *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"); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981), *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)).

[34] 10 U.S.C. §1408.

[35] *Mansell v. Mansell*, 490 U.S. 581, 587 (1989).

[36] *Id.*

incidents of pensions.[37] For example, in 1997 this Court held that ERISA controlled the distribution of a retirement pension in preemption of Louisiana community property law.[38] Similarly, in 2001 this Court found that ERISA preempted a Washington statute (to the extent it applied to ERISA plans) which provided that "the designation of a spouse as the beneficiary of a nonprobate estate [was] revoked automatically upon divorce."[39] In so doing this Court noted that it has "not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans."[40]

Census. In the instructions to marshals 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

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[37] *See e.g.*, *Hisquierdo v. Hisquierdo*, 439 U.S. 572 at 582 & 590 (1979) (railroad retirement assets governed by federal 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).
[38] *Boggs v. Boggs*, 520 U.S. 833, 853-854 (1997).
[39] *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001).
[40] *Id*. at 151.

> alone 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.[41]

The 2010 Census included same-sex marriages for the first time in its count of marriages.[42] In doing so, rather than deferring to the law of the state of residence, the Census counted same-sex couples as married if they had been validly married in any state, even though that marriage may not be valid under the law of their home state.[43] This "reflect[s] a new federal policy decision regarding the definition

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[41] U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 9 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02marv-pt2.pdf.

[42] *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.

[43] *See* General Counsel of the U.S. Department of Commerce, *Collecting and Reporting Census Data Relating to Same-Sex Marriages* July 30, 2009; U.S. Census Bureau, *A Census That Reflects America's Population* at http://www.washingtonpost.com/wp-srv/nation/documents/same_sex_talking_points.pdf.

of marriage for purposes of a particular program or activity."[44]

Copyright. In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[45] In 1956, this 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.[46] In 1978, however, Congress effectively reversed this decision by enacting a definition of "child" to 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.[47]

Bankruptcy. Bankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law.[48] This has been recognized in multiple federal court decisions.[49]

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[44] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 979 (2010).
[45] 4 Stat. 436 (February 3, 1831).
[46] *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).
[47] 17 U.S.C. § 101.
[48] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.
[49] *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).

Taxation. Federal tax law considers a couple that is married under state law but legally separated as unmarried for tax purposes.[50] A couple who consistently divorces 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.[51]

In sum, as these compelling and multifarious examples show, it is beyond cavil that Congress has the exclusive prerogative to define terms used in federal law and that this prerogative undoubtedly extends to laws implicating domestic relations and marriage. This near truism, although vociferously and conveniently opposed by Plaintiff here, has actually been embraced in previous bills proposed by proponents of same-sex marriage. At least two of these bills, which would legislatively accomplish Plaintiff's objectives here, are predicated upon the central belief that Congress emphatically *does* have a role to play in marriage and domestic relations. The proposed Domestic Partnership Benefits and Obligations Act, S.1910, would provide government benefits to registered domestic partners (including married same-sex partners) of government employees that are equivalent to those given to

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[50] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status).

[51] Rev. Rul. 76-255, 1976-2 C.B. 40. For federal law treatment of marriage for tax purposes, *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*, 19315-04 T.C.M. 2008-135 (2008); *Perkins v. Comm'r, T.C.M.*, 2008-41, 6521-06 (2008); *Proctor v. Comm'r*, 129 T.C. 12 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

spouses of employees. The proposed repeal of DOMA, S.598, would consider same-sex marriages as valid for federal law purposes even if they are not so recognized in the state of the couple. Both of these bills would adopt a uniform federal definition of domestic relations that would conflict with the law of many states. Applying the purported tradition invoked by the court below would invalidate both pieces of legislation.[52] This is particular ironic since the American Civil Liberties Union, one of the organizations bringing this case, has publicly supported both bills.[53]

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[52] *See* Jill E. Hasday, *Canon of Family Law*, 57 STAN L. REV. at 884-890 (noting that federal involvement in family law is not unprecedented but historically pervasive, and maintaining that the argument that family law is "inherently and exclusively a matter of local jurisdiction . . . may be particularly bizarre in the context of DOMA's third section [in that] that section has such practical importance only because . . . so many federal rights and responsibilities already turn on whether a couple is recognized as married for purposes federal law").

[53] ACLU, *Coalition Letter to the Senate in Support of the Domestic Partnership Benefits and Obligations Act*, S.1910 (March 27, 2012) at http://www.aclu.org/lgbt-rights/coalition-letter-senate-support-domestic-partnership-benefits-and-obligations-act-s-1910; ACLU, *ACLU Letter of Support for the Respect for Marriage Act* (S 598) (July 27, 2011) at http://www.aclu.org/lgbt-rights/aclu-letter-support-respect-marriage-act-s-598.

C. The federal government's significant involvement in defining marriage for federal law purposes extends back to the Nineteenth Century and was approved by this Court.

In the mid-Nineteenth Century, Congress legislated heavily concerning marriage in federal territories.[54]

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,[55] the Poland Act of 1874,[56] the Edmunds Anti-Polygamy Act of 1882,[57] the Edmunds-Tucker Act of 1887[58] and the Utah Enabling Act of 1894.[59]

The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham

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[54] From a jurisdictional perspective, it is important to note that this precedent is relevant not because the government of federal territories is analogous to the regulation of states. Indeed, Congress could not impose a definition of marriage upon the various states. Rather, the regulation of federal territories is analogous to other areas of plenary federal regulation, including federal tax law, military benefits, etc. In this respect, the regulation of marriage in the territories is simply one more example of extensive federal regulation of marriage with respect to its definition under federal law.

[55] 12 Stat. 501 (July 1, 1862).

[56] 18 Stat. 253 (1874).

[57] 22 Stat. 30 (March 23, 1882).

[58] 24 Stat. 635 (1887).

[59] 28 Stat. 107 (July 16, 1894).

Lincoln, criminalizes attempts to engage in 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."[60] 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 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

[60] 12 Stat. 501 (July 1, 1862).

> 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.

Like DOMA, the Congressional ban on polygamy was challenged in federal court. The issue was eventually resolved in this Court's landmark decision, *Reynolds v. United States*.[61] 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 of action for all those residing in the Territories, and in places over which the United States have exclusive control.[62]

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[61] 98 U.S. 145 (1878).
[62] *Id*. at 165-166.

Perhaps the Plaintiffs would object to this analogy based on the fact that Congress has plenary authority over territorial matters while with DOMA, Congress applies a federal definition to federal terms rather than deferring to state definitions as it could choose to do. "This objection, however, draws the wrong parallel. Both federal actions—control over territories and defining terms in the United States Code—are areas of federal jurisdiction. In both polygamy regulation and DOMA contexts, Congress has adopted and promulgated a substantive definition of marriage. In the case of DOMA, 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 its historic precedent regarding polygamy, Congress also enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories."[63]

II. Efforts to distinguish prior congressional actions defining domestic relations terms for federal purposes are unavailing.

The courts below suggest that DOMA is unprecedented by saying that "before DOMA, any uniformity at the federal level with respect to

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[63] Joshua Baker & William C. Duncan, *As Goes DOMA:. Defending DOMA and the State Marriage Measures* 24 REGENT U. L. REV. 1, 42 (2012).

citizens' eligibility for marital benefits was merely a byproduct of the states' shared definition of marriage."[64] That is simply not true. As has been amply demonstrated, prior to DOMA, Congress enacted definitions of marriage and other domestic relations terms which vary from State definitions. A few States have now chosen, as is their prerogative, to redefine marriage. But this fact has no relevance to Congress' power to specify what terms used in federal statutes will mean.

If Congress says, in the context of immigration, that marriage is a relationship not entered into in order to avoid deportation, it has defined marriage. That its definition is stricter than an otherwise comparable state definition does not make it any less a definition. This, of course, is precisely what DOMA does: it provides that for all purposes of federal law, marriage means the union of a man and a woman.

As noted above, a First Circuit panel agreed with the analysis of amicus here that federalism principles do not bar the enactment of DOMA. Yet that panel suggested an alternative federalism-infused theory to strike down DOMA under constitutional equal protection principles: "Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily

[64] *Windsor v. United States*, 833 F. Supp. 2d 394, 405 (S.D. N.Y. 2012).

accorded."[65] But that court did not, because it could not, point to any provision in the Constitution or decisions of this Court to justify the idea that more searching judicial scrutiny is required when Congress enacts laws touching on areas typically within the province of state law.

In fact, the First Circuit decision implicitly acknowledged that it created a novel legal rule when it stated: "If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute [DOMA] fails that test."[66] But opinions of federal judges about what the law *might* be cannot substitute for binding declarations of what the law *is*, and none of the latter indicate or even hint that a special type of scrutiny applies to laws like DOMA in which Congress acts to define terms related to marriage and domestic relations.

III. The analysis of the court below, if applied in other contexts, would dramatically alter state and federal relations.

The import of accepting the "novel"[67] theory of federalism used by the courts below would be to

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[65] *Massachusetts v. U.S. Department of Health and Human Services*, 682 F.3d 1, 12 (1st Cir. 2012).

[66] *Id*. at 28.

[67] 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.

potentially unsettle every area of federal law. 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, copyright, and taxation laws, among others,[68] and would be contrary to this Court's precedent upholding federal definitions even when they contrast with state definitions.

The doctrine of preemption would be meaningless if states were free to enact legislation contradicting statutes enacted by Congress *on matters of federal law* and require the federal government to defer to the states' contradictory enactments. Similarly, ERISA, which trumps state law in areas traditionally subject to state regulation prior to its enactment, would be invalidated by the theory of federalism proposed by the court below.

Simply put, Plaintiff's argument that Congress lacks the authority to specify what it means when it enacts law could not be more clearly contradicted by the precedent and practice of Congress and this Court. This Court has appropriately limited the circumstances in which the Supremacy Clause requires state law to be overridden, but that is not the issue in this case. The Defense of Marriage Act does not require any state to adjust its definition of marriage. Unlike some previous cases, there is also

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[68] Although not strictly definitional, the Indian Child Welfare Act, for instance, directly interferes with state law regarding consent to adoption while DOMA easily coexists with state laws that have redefined marriage. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

no question of whether Congress' intention was to have federal law, rather than state law, provide definitions for purposes of federal enactments.[69] "Congress's constitutional authority to direct the application of federal law to supersede and displace state domestic relation law in interpreting federal law is clear; the question usually is whether congressional intent to preempt is clear."[70] Even in the cases where that intent is not completely clear, this Court has held that "federal law governing interests of family members in federal benefits superseded the otherwise applicable state domestic law."[71] If that rule applies in those cases, it clearly should apply here where Congress' intent is absolutely explicit and the effect on state's ability to determine its own definitions for state law purposes is not hampered whatsoever.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the decision of the court below in this case.

Respectfully submitted,

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[69] *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); McCarty v. McCarty, 453 U.S. 210 (1981).

[70] Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951, 981 (2010).

[71] *Id*. at 981-982 (discussing *Hiquierdo* and *McCarty*).

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