Appeal Nos. 12-15388 & 12-15409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
John BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant-Appellant.

Karen GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
John BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants-Appellants,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JEFFREY S. WHITE, JUDGE
CASE NO. 10-CV-00257

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CORPORATE DISCLOSURE STATEMENT

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

Dated: July 10, 2012

By: */s/ Dawn Sestito*

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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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INTERESTS OF THE AMICI AND CONSENT TO FILE

The above-captioned amici are American family law professors, including family law casebook authors and reporters for the ALI Principles of Family Law, who seek to clarify the relationship between Congress and the states with regard to family status, particularly marital status.[1] Throughout our nation's history, it has been the 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. Having married status 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 the states.

All parties have consented to the filing of this amicus brief.

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[1] University affiliation of the professors is given for identification purposes only and implies no endorsement by the universities.

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) (internal citations omitted). The "core" aspect of family law traditionally 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 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 ed. 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 often flowed from marital status, only states determined who was eligible for that status.

DOMA upended this traditional treatment of marital 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, "the passage of DOMA marks a stark departure from tradition and blatant disregard of the well-accepted concept of federalism in the area of domestic relations." D. Ct. Order at 39. "DOMA does not preserve the status quo." *Id*.

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 "creat[e] uniformity in federal marital status across state lines" and "exercise[] caution" before accepting change to "our most fundamental social institution." Brief of Intervenor ("BLAG Brief") 33. But DOMA does not create uniformity in federal marital status; it singles out only one particular kind of marriage for nonrecognition. Moreover, as detailed below, Congress has always respected diverse state determinations of marital status, even when it resulted in disparate treatment of similarly situated individuals residing in different states. In enacting DOMA, the federal government did not "exercise caution." It acted in haste, before any state had even conferred married status on

same-sex couples, to nullify potential federal marital status for a whole class of married persons.

Opposition amici argue that recognizing marriage for same-sex couples "implicates fundamental questions" that our federalist system should resolve. *See* Brief of Amicus Curiae States Indiana et al. ("Indiana Brief") 8, 18. This argument, however, misunderstands how DOMA impacts states' attempts to wrestle with such fundamental questions. DOMA stifles debate between the states by nationalizing one aspect of marriage policy in an unprecedented manner. DOMA does not respect tradition; it disrupts it.

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

There has always been variety in the conditions that states impose on who may marry. When marital status matters for purposes of federal law, the federal law has deferred to the states regardless of the varying conditions they had imposed.[2] *See* Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593, 1602 (1996) (noting that "at no time before 1996 has Congress

[2] Federal judicial deference is, of course, bounded by the Constitution. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

ever refused to recognize a state-law determination of marital status" for purposes of access to the tax benefits of marriage).

As of 2010, even before New York state began marrying same-sex couples, states had issued marriage licenses to an estimated 131,729 same-sex couples. Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, The Williams Institute, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (last visited June 26, 2012). Those states, breaking with the general practice in other states, have granted marital status to same-sex couples, just as years ago many states, including California, broke with the practice of other states in granting marital status to interracial couples. *See Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (overturning California's anti-miscegenation law); *see also* Brief of Amici Curiae, Family Historians ("Historians' Brief") 22. The federal government always deferred to those 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. 1949) (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, 128 (Oct. 2, 1897) (denying pension to African-American

widow because it was determined that deceased soldier was Caucasian and marriage was therefore invalid under Mississippi law).

BLAG and various opposition amici contend that some states' decisions to grant married status to same-sex couples creates a compelling need for uniformity, but uniformity never existed before and does not even exist after DOMA. Similarly situated couples have always been, and still are, treated differently at the federal level if they live 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 here no need for uniformity." *United States v. Yazell*, 382 U.S. 341, 357 (1966); *see also State of Wash., Dept. of Soc. & Health Services v. Bowen*, 815 F.2d 549, 557 (9th Cir. 1987). Significant distinctions among states is not new. What is new is the attempt to single out only one aspect of marriage for uniform federal treatment.

A. Federal Law Accepts State Diversity With Regard To Marriage.

States have always varied considerably in the conditions they impose on those requesting married status. For example, Alaska permits fourteen-year-olds to marry in certain circumstances. Alaska Stat. Ann. § 25.05.171(b) (West 2012). Hawaii does not. Haw. Rev. Stat. Ann. § 572-1 (West 2012). Montana requires a blood test to marry unless certain exceptions apply. Mont. Code Ann. § 40-1-203 (West 2011). California does not. *See* Cal. Fam. Code §§ 350–360 (West 2012).

Some states confer married 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, http://www.law.cornell.edu/wex/table_marriage (last visited July 5, 2012) (stating that Alabama, Colorado, Iowa, Montana, Rhode Island, South Carolina, Kansas, Iowa, Texas, and Utah recognize common-law marriage). State statutes also differ considerably on what degree of consanguinity constitutes incest. It is legal to marry one's first cousin in California, Cal. Fam. Code § 2200 (West 2012), but not in Idaho, Idaho Code Ann. § 32-206 (West 2012). In Oregon, first cousins may marry only if one of them was adopted. Or. Rev. Stat. Ann. § 106.020 (West 2012). Policy differences underlie all of these variations, but the federal government never took 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 lived as married in Montana, which permits common-law marriage, but not if they lived as married in California, which does not. Rev. Rul. 58-66, 1958-1 C.B. 60 (1958) ("[I]f 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. Lustig*, 555 F.2d 737, 747–48 (9th Cir. 1977)

(holding that trial court did not err in denying defendant and his former common-law wife marital privilege in federal criminal case where home state of Alaska did not recognize common-law marriage).

BLAG cites testimony from several senators who were concerned about "people in different states" having "different eligibility" for federal benefits, BLAG Brief 11, but differing eligibility for similarly situated married people is the norm. The first-cousin "spouse" of a man currently insured under Social Security could receive spousal benefits if she lived in California but not if she lived in Washington, because those states have different consanguinity rules for marriage. *See* 42 U.S.C. § 416(h)(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).

Amici Senators imply that without DOMA there would have been too much uncertainty with regard to which states would recognize marriages of same-sex couples, and therefore which of those marriages would be valid at the federal level.

Senators' Brief 26–27. But as Amici Indiana points out, by 1998 two-thirds of all the other states had already clarified their position on same-sex marriage. Indiana Brief 10. States were and are perfectly capable of clarifying which marriages they recognize. Before DOMA, the federal government had always respected those state marital-status determinations.

B. Federal Law Accepts State 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 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. For much of the twentieth century, individuals would travel to states in which they were not regularly domiciled to get divorced, *see* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1504–05 (2000), in the same way that some of BLAG's amici suggest same-sex couples were threatening to travel to Hawaii to get married, *see* Senators' Brief 8. Nevada repeatedly eased its jurisdictional residency requirements in the mid-twentieth century to attract divorce business. *See* Friedman, *supra*, at 1504–05. "'Going to Reno' became almost a synonym for getting a divorce." *Id*. at 1505. By 1946, Nevada had a

divorce rate that was fifteen times higher than California's and fifty times higher than New York's. *Id.*

Courts and scholars at the time and since have noted the troubling issues created by this diversity among the states. *See, e.g.*, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 390–92 (2007) (describing Congressional inaction and noting the discomfort 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 nineteenth and the first part of twentieth centuries, but the debate eluded consensus. 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 a national 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 23–25.

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. States adopted no-fault rules as marriage changed,

both legally and socially, from a permanent union severable only if one spouse could prove unreciprocated fault by the other spouse to a companionate bond dissolvable at will by either party. The years of that transformation 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.*, Leslie J. Harris et al., *Family Law* 303 (2005) ("no-fault revolution"); Homer H. Clark, Jr. & Ann Laquer Estin, *Domestic Relations* 645 (2005) ("divorce revolution"); Mary Ann Glendon, *The Transformation of Family Law* 1 (1989) ("unparalleled upheaval").

Certainly, there were people during that time who thought the emerging redefinition of marriage was just as "novel" and "dangerous" as BLAG and its amici maintain that marriage for same-sex couples is today. Yet Congress did nothing to disrupt the evolving understanding of marriage as a dissolvable bond based on companionship. The norm of federal deference to state determinations of marital status remained firm. Courts continued to respect state diversity with regard to divorce. *See, e.g.*, *Brown v. Astrue*, No. 10-cv-04826 NC, 2012 WL 948926, at *4 (N.D. Cal. Mar. 20, 2012) (citing *Slessinger v. Sec'y of Health & Human Services*, 835 F.2d 937, 941 (1st Cir. 1987) and holding that whether a "wife" is entitled to benefits under Title II of the Social Security Act must be

determined by the validity of her divorce under the law of the state where she is domiciled).

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 never adopted a federal definition of divorce. It never—in the name of caution, uniformity, administrative expediency, defending the status quo, or preserving traditional marriage—denied states the right to define the status of "divorced" as they choose.

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.

C. Federal Law Accepts State Diversity With Regard To Who Is a Parent.

Any claim that the federal government needs to treat family status uniformly is also refuted by the federal government's treatment of parental status. States are responsible for determining parental status just as they are responsible for determining marital status. As with marital status, different states weigh different policy considerations differently in determining who should be afforded parental status. And, as with marital status, the federal government defers to that status.

As an indication of just how varied parental status determinations are, consider that the most recent version of the Uniform Parentage Act provides "four

separate definitions of 'father' . . . to account for the permutations of a man who may be so classified." Uniform Parentage Act, § 102 cmt. (Supp. 2009). The drafters of the Uniform Parentage Act recognized that different states will choose to determine fatherhood differently. There is no "one" definition of parent, and the federal government has always accepted the states' different ways of defining parental status.

There is tremendous variation in how states determine parenthood. Some states still make the marital presumption of paternity irrebuttable after a short statute of limitations. *E.g.*, Cal. Fam. Code § 7541 (West 2012); Minn. Stat. Ann. § 257.57, subdiv. 1(b) (West 2012) (two-year statute of limitations to disestablish paternity). Others make it rebuttable for a longer time. *E.g.*, Tenn. Code Ann. § 36-2-306 (West 2012); Vt. Stat. Ann. tit. 15, § 302 (West 2012) (presumption rebuttable through and past child's age of majority). Still others have no statutes of limitations. *E.g.*, Alaska Stat. Ann. § 26-17-607(a) (West 2012); Mont. Code Ann. § 40-6-108 (West 2011). Some states allow men who have acted as fathers to disestablish their own parental status with genetic evidence. *See, e.g.*, *In re C.S.*, 277 S.W.3d 82, 86–87 (Tex. Ct. App. 2009) (allowing husband to challenge his legal paternity with genetic evidence); *State, Dep't of Revenue, Office of Child Support Enforcement v. Ductant*, 957 So. 2d 658, 660 (Fla. Dist. Ct. App. 2007) (allowing father to rescind acknowledgement of paternity more than 60 days after

executing it). Other states estop men who have acted as fathers from disestablishing their paternity with genetic evidence. *See, e.g.*, *In re Cheryl*, 434 Mass. 23, 37–38 (2001); *Shondel J. v. Mark D.*, 853 N.E.2d 610, 611 (N.Y. 2006). Some states allow both motherhood and fatherhood to be determined in a surrogacy contract. *E.g.*, 750 Ill. Comp. Stat. Ann. 47/15 (West 2012) (making the intended mother and the intended father, as determined in a surrogacy contract, the legal mother and legal father). Some states refuse to enforce or even criminalize surrogacy contracts. *E.g.*, Ind. Code Ann. § 31-20-1-1 (West 2012) (against public policy to enforce a contract in which a surrogate waives her parental rights); Mich. Comp. Laws Ann. § 722.857 (West 2012) (criminalization).

As with marital status, deference to state determinations of parental status leads to disparities in treatment. A non-genetically related man who was determined to be a father in Massachusetts might be subject to provisions of the Child Support Recovery Act, 18 U.S.C. § 228, while a similarly situated man in Texas would not be. A gestational surrogate mother might be considered a parent for purposes of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, in Indiana, but not in Illinois. The fact that somebody might be considered a parent in Nebraska but not in Nevada has never been a reason to adopt a uniform federal definition of parenthood.

As the brief of amici historians and the above analysis make clear, the federal government has always worked with diverse definitions of both marital and parental status. BLAG's claim that the mere threat of marriage between couples of the same sex somehow necessitated federal uniformity that DOMA ostensibly creates is a suspect claim.

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

BLAG and opposition amici invoke a variety of federal statutes to argue that DOMA is just one of many federal statutes that regulate domestic relations. But none of the statutes cited by opposition amici does what DOMA does, which is to strip couples of their married status for all federal purposes.[3] Instead, prior to and since DOMA, all federal statutes pertaining to family status, including all such statutes cited by BLAG 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

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[3] Amici Family Law Professors have considered all of the statutory examples cited by BLAG and opposition amici. *See* BLAG Brief 7–9; Amicus Curiae National Organization for Marriage Brief ("NOM Brief") 7–13; Senators' Brief 20–21. None of those examples disrupts 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.

explicitly invoke the state law of family status. Third 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. Most 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 such as "spouse" or "married" or "parent," these laws necessarily rely on state law for those status determinations. For instance, the Military Pensions Act defines "spouse" as a "husband or wife" who was "married" without further defining those terms. 10 U.S.C. § 1408(a)(6). The Tax Code provides for joint tax returns by "husband and wife," but does not define those terms. 26 U.S.C. § 6013. ERISA uses the term "spouse" more than twenty-five times without ever defining it. 29 U.S.C. §§ 1001 *et seq*.[4]

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[4] The fact that ERISA and other federally provided pensions preempt state community-property law, *see, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 151–52 (2001), in no way indicates Congressional intent to disregard state-conferred marital statuses, which remain unaltered by ERISA. *See* Amicus Curiae Brief of Eagle Forum EDF 23 n.5. Just as Congress may decide what one is entitled to as a married person as a matter of tax or Social Security policy, Congress may decide what one is entitled to as a matter of federal pension policy. *See infra*, Part IIIC. That is wholly different than deciding whether one is married or not for all federal purposes. *See also* NOM Brief 12 (arguing that "[b]ankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather

The Copyright Act, 17 U.S.C. § 101, which NOM cites as an example of federal regulation of family status, *see* NOM Brief 11–12, defines "children," whether legitimate or not, as "immediate offspring" and any adopted children, but does not further define "offspring."[5] The failure to provide a more precise definition of "parent" or "offspring" is particularly notable given the myriad contemporary debates, referenced above, 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. Just this year, the Supreme Court rejected the Third Circuit's own (biological) interpretation of the term "child" in favor of the Social Security Administration's practice of relying on state law to define the term "child." *See Astrue v. Capato ex rel. B.N.C.*, __ U.S. __,132 S. Ct. 2021, 2033 (2012).

The Supreme Court's endorsement of the Social Security Administration's reliance on state law for determinations of family status is consistent with how federal courts have always interpreted family status at the federal level. This Court, 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

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than state law" and citing H.R. Rep. No. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320).

[5] Comparably, the Naturalization Act of 1802, 2 Stat. 153 (April 14, 1802), and 10 Stat. 604 (February 10, 1855), both also cited by NOM, *see* NOM Brief 7, allow for citizenship to certain children of citizens, without defining "children," "parent," "mother," or "father."

general law of the state of residence." *Barrons v. United States*, 191 F.2d 92, 95 (9th Cir. 1951). 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. United States*, 181 F.2d 703, 706 (2d Cir. 1950); *see also Bell v. Tug Shrike*, 215 F. Supp. 377, 380 (E.D. Va. 1963), ("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"), *aff'd*, 332 F.2d 330, 335 (4th Cir. 1964).

As all of these courts have held, 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 is 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 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.

Amici Senators argue that in using the term "marriage," Congress never meant to create "an empty vessel into which the states can pour any relationship

that they please." Senators' Brief 19. The Supreme Court has already encountered and rejected this argument with regard to family status. In *De Sylva*, the Court endorsed reliance on state determinations of family status, cautioning only that a State is not free "to use the word 'children' in a way entirely strange to those familiar with its ordinary usage." *De Sylva*, 351 U.S. at 581.[6] Currently, eleven countries license marriages between same-sex couples. Caitlin Stark, *By the Numbers: Same-Sex Marriage*, CNN, May 12, 2012, http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage/index.html. Nine states, including two of the most populous states, plus the District of Columbia, recognize at least some marriages between same-sex couples. *Marriage Equality & Other Relationship Recognition Laws*, Human Rights Campaign, http://www.hrc.org/state_laws (last updated July 6, 2011). Entire countries, entire states, and millions of other people understand marriages between same-sex couples to be marriages as that term is "ordinarily" used. States are not pouring just any relationship into the marriage vessel.

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[6] Amici NOM argues that "Congress effectively reversed" *De Sylva*, NOM Brief 11, by amending the Copyright Act to include illegitimate children in the definition of "children," 17 U.S.C. § 101 (1978). But by the time Congress amended the statute, the Supreme Court was well on its way to making most distinctions based on illegitimacy unconstitutional on Equal Protection grounds. *See Lalli v. Lalli*, 439 U.S. 259 (1978). More important, there is no reason to think that Congress's later inclusion of illegitimate children in the Copyright Act in any way affects the Supreme Court's reasoning with regard to when federal statutes implicitly rely on state determinations of family status.

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 family status for purposes of that federal statute. For instance, the Social Security Act 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." 42 U.S.C. § 416h(1)(A)(i); *see also Capato*, 132 S. Ct. at 2024 ("The [Social Security] Act commonly refers to state law on matters of family status, including an applicant's status as wife, widow, husband or widower."). 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 (1958). The Veteran's Affairs Statute 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." 38 U.S.C. § 103(c).[7] Clearly, all of these examples, and others that fall

[7] The Veteran's Affairs Statute's explicit reliance on state law is notable because elsewhere in the same title "spouse" and "surviving spouse" are defined as

in this category, support only the argument that the federal government defers to state determinations of marital status.[8]

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 marital status or provide marriage benefits to people who are not married but meet eligibility requirements that Congress has decided warrants protection. 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

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"a person of the opposite sex." 38 U.S.C. § 101(3), (31). The legislative history 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). They were not intended to override section 103(c)'s mandate to determine marital status in accordance with state law. However, even if sections 101(3) and (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.

[8] Amici Senators argue that because Congress used gendered pronouns to define the term "spouse" in the Family and Medical Leave Act, Congress could only have meant the term marriage to apply to opposite couples. Senators' Brief 20. But the regulations drafted pursuant to the FMLA define "spouse" as "husband or wife *as defined or recognized under State law*." 29 C.F.R. § 825.122(a) (emphasis added). The Senators make a comparable argument with regard to the use of gendered pronouns to define "wife" in the Social Security Act, 42 U.S.C. § 416(b). *See* Senators' Brief 20. The Senators ask this Court to believe that the occasional use of gendered pronouns trumps the explicit mandate in the Social Security Act to rely on state law to determine marital status. 42 U.S.C. § 416h(1)(A)(i); *see also* Dictionary Act, 1 U.S.C. § 1 (mandating that "words importing the masculine gender include the feminine as well").

address different policy concerns, intrinsic to the particular statute, by conditioning receipt of some government benefits on statute-specific requirements.

All governmental programs that confer benefits based upon a person's marital status must be concerned with people who try to manipulate eligibility requirements for the sole purpose of 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); *id* § 1255(e) (restricting 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). *See* 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 citizen or permanent resident, but then petitions to have a new spouse enter the country. These provisions are designed to prevent people from entering into marriages for the purpose of taking unfair advantage of an immigration policy that favors married individuals.

Comparably, the Social Security Act imposes additional requirements on married people seeking marital benefits in order to prevent fraud and protect the public fisc. *See, e.g.*, 42 U.S.C. § 416(d)(4) (For a "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 nine-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); *see also* 5 U.S.C. § 8341(a) (providing that a person is not a "widow" or "widower," eligible to receive retirement benefits under the Federal Employees Benefit Act, unless they were "married" for "at least 9 months

immediately" before the death of their spouse).[9] None of these eligibility requirements abrogates or defines an applicant's existing marital status.

The additional conditions required by some statutes for people to be treated as married do not define marital status at all, let alone for all federal purposes.[10] 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). Someone who is validly married for immigration purposes, *see Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006)

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[9] Comparably, Rev. Rul 76-255, 1976-2 C.B. 40 (1976), cited by NOM, *see* NOM Brief 12, is an obvious example of fraud prevention in the tax context. The IRS treats a couple as married for purposes of their tax return if they consistently divorce before the end of each tax year and marry at the beginning of the next tax year.

[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 and amicus NOM mischaracterize this example as a denial of marital recognition or benefits to certain married couples. BLAG Brief 12; NOM Brief 8. To the contrary, section 7703(b) simply provides an *additional* and more beneficial filing option to married taxpayers living apart from their spouses.

Comparably, I.R.C. § 2(b)(2), *see* BLAG 8, does not treat spouses who are separated or married to nonresident aliens as married for tax purposes because those married couples are not sharing a household, which, for reasons particular to the tax code, is the operative unit for taxation purposes.

(vacating removal order on grounds that alien whose citizen spouse died while her adjustment of status application was pending remained an immediate relative), will not necessarily be entitled to collect on their spouse's Social Security account, *see Weinberger*, 422 U.S. at 768 (upholding nine-month durational requirement for spousal benefit eligibility).

Section 3 of DOMA is not a "further requirement" imposed on married couples for policy reasons specific to a given statute. It does not take marital status as a given and impose further requirements. DOMA, unlike any other federal statute, defines marriage for all federal statutes.[11]

In summary, all of the statutes cited by BLAG 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, does what DOMA does. None of

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[11] As we explained in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), there are also some statutes that afford some individuals eligibility for marital treatment even in the absence of marital status. Amicus Br. Fam. Law Profs. 16–18. In certain circumstances, economically needy individuals can be treated as married under the Supplemental Security Income program if they have "held themselves out as husband and wife." 42 U.S.C. § 1382c(d)(2). In limited instances, the Social Security, Immigration, and Veteran's Affairs statutes allow individuals who had a good faith belief that they were married to collect benefits as married people. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(ii) (Social Security); 38 U.S.C. § 103(a) (Veterans' Affairs); 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(BB) (Immigration). None of these statutes adopts, for all federal purposes, either the common-law-marriage or putative-spouse doctrines.

them defines marital status per se. None of them tells an entire class of married people that they are not married for all federal purposes.[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 9. For example, there were federal definitions and proscriptions on who could marry in numerous territories, most notably Utah, before those territories became states. *Id.* Federal definitions of marriage still control in the United States 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.

Congress has also regulated some family law among Native Americans pursuant to its plenary powers under Article I, Section 8.[13] With respect to the

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[12] Some examples cited by NOM do not even remotely pertain to classification determinations of family status at the federal level. *See, e.g.*, NOM Brief 8 (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); *id*. at 10–11 (arguing that 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). Neither example involves extirpating a person's marital status under federal law.

military, another area of plenary federal authority, the federal government has not directly defined "marriage" or "married," though it has criminalized polygamy. *See United States v. Bivins*, 49 M.J. 328, 332 (C.A.A.F. 1998) (authorizing prosecution for marriage with a person already married as "conduct of a service-discrediting nature" under general Article 134 of the Code of Uniform Military Justice, 10 U.S.C. § 934). These instances of marital regulation in the military do not define marriage so much as they regulate military personnel conduct. *See United States v. Smith*, 18 M.J. 786 (N-M. C.M.R. 1984) (prosecution for adultery). They are just one piece of the military's extensive regulation of service member behavior. *See Manual for Courts Martial*, Article 134, ¶ 60, U.S. Dep't 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"). They do not constitute a uniform federal definition of marriage, nor do they usurp state authority to define marriage.[14]

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[13] *See, e.g.*, 25 U.S.C. § 183 (elevated standard of proof for people marrying into an Indian tribe in order to protect tribes from dubious non-Indian claims to tribal marital property).

[14] Amicus NOM's military benefit and pension examples similarly fail for these same reasons, as well as because NOM mischaracterizes its supporting case law. *See, e.g.*, NOM Brief 7 (misrepresenting *United States 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* holds that "[i]n military law, as in civilian,

CONCLUSION

Because existing federal statutes operate in an entirely different manner than 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.

Dated: July 10, 2012

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the validity of a marriage is determined by the law of the place where it is contracted").

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2012.

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Dated: July 10, 2012

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