CASE NO. 12-15388 and 12-15409

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI
Plaintiff,
v.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;
JOHN BERRY, Director of the United States Office of Personnel Management, in his official capacity,
Defendant,
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

BRIEF OF AMICI CURIAE JOAN HEIFETZ HOLLINGER, COURTNEY JOSLIN, KATHARINE SILBAUGH, AND OTHER FAMILY AND CHILD WELFARE LAW PROFESSORS IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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STATEMENT OF INTEREST OF AMICI

Amici, professors of family and child welfare law, submit this brief to address the justifications for the Defense of Marriage Act, ("DOMA") section 3 asserted by the Bipartisan Legal Advisory Group ("BLAG") and their amici that pertain to procreation and child-rearing. Amici's scholarship in family and child welfare law explicates the multiple purposes of marriage reflected in law and the range of mechanisms under state and federal law for extending legal and social support to children. Amici support Appellee's position that the purported child-welfare purposes of DOMA lack footing in law, policy, history, or logic. Amici will show how DOMA operates at cross-purposes to other federal and state laws regarding families and childrearing.[1]

SUMMARY OF THE ARGUMENT

The essence of BLAG's claims is that the federal government should be permitted to exclude married same-sex couples from all federal marital protections because same-sex couples are unable to fulfill the central purposes of marriage. According to BLAG,[2] these purposes are i) to promote "responsible procreation

[1] All parties and the intervener in case numbers 12-15388 and 12-15409 have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), no one other than Amici or counsel for Amici authored, or contributed money intended to fund preparing or submitting this Brief.

[2] References to BLAG include its amici advancing "responsible procreation" and/or "optimal childrearing" arguments. *See Amicus* Brief of American College

and child-rearing" by those whose sexual unions potentially result in the conception of biological children, and ii) to provide a stable structure to facilitate "optimal" childrearing, which is allegedly only childrearing by a man and woman raising their biological children. Brief of the Bipartisan Legal Advisory Group at 47-57 (hereinafter "BLAG Br."); *see also id*. at 13 (conception and rearing of children), 43-45 (addressing parenting). Stated another way, according to BLAG, the federal government's primary interest is supporting families that consist of, or potentially could consist of, children and their married biological parents.

BLAG's asserted justifications cannot sustain the constitutionality of DOMA and its categorical exclusion of all married same-sex couples from the more than 1,000 federal marital benefits, protections and responsibilities. Amici explain why BLAG's asserted procreation and child-rearing justifications for DOMA lack any grounding in history, law, policy or logic and should be dismissed.[3] First, amici show that the states' interest in regulating marriage, and the federal government's interest in supporting marital families have never been

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of Pediatricians at 4-18; *Amicus* Brief of Eagle Forum Education and Legal Defense Fund at 17-19; *Amicus* Brief of National Organization for Marriage ("NOM") at 18-22; *Amicus* Brief of the States of Indiana, Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Kansas, Michigan, Nebraska, Oklahoma, South Carolina, South Dakota and Virginia ("States") at 4, 23-36.

[3] Amici agree with appellee that heightened scrutiny applies because DOMA classifies based on sexual orientation, which is at least a quasi-suspect classification, but submit that DOMA is unconstitutional even under rational basis review.

conditioned on a couple's ability or willingness to procreate. Indeed, constitutional doctrine confirms that while procreation often occurs within marriage, the fundamental right to marry is distinct from, and independent of, the fundamental right to procreate. The claim that Congress excluded married same-sex couples from federal marital benefits and protections because these couples must use adoption or assisted reproduction to have children is based on an erroneous characterization of marriage and its multiple purposes.

Second, amici show that there is no legal basis for the assertion that federal law favors *biological* parentage over the well-considered decisions of many married couples—both opposite-sex and same-sex—to adopt children or conceive children through assisted reproduction. Federal law and policy reflect a deep commitment to the welfare of all children, not just children born to and raised by both of their biological parents.

Third, as family and child welfare law professors, amici share the government's commitment to promoting the welfare of children, and to encouraging parents to be responsible for their children's well-being. Amici also believe that marriage can benefit children by providing support and stability to their families. However, DOMA hinders rather than furthers the child welfare purposes of federal marital protections. DOMA does not change the legal status of opposite-sex couples or their children. Both before and after DOMA, married

opposite-sex couples had and continue to have the same access to federal protections for themselves and their children; DOMA does not expand their rights, nor does it offer any additional inducements to heterosexuals to engage in "responsible procreation" or "optimal childrearing." DOMA's sole effect is to deny federal marital protections to married same-sex couples and their children.

Finally, because DOMA singles out only already-married same-sex couples for adverse treatment and leaves opposite-sex couples and their children untouched, there is no conceivable rational relationship between DOMA and irrational speculation about its effects on the behavior of opposite-sex couples. Thus, the only impact DOMA has with respect to children is with respect to the children of same-sex couples. And, by denying important benefits and protections to these children's families, DOMA's effect is contrary to any legitimate Congressional concerns about child welfare.

ARGUMENT

I. Procreation is Not an Essential Element of Marriage.

BLAG's central justification in defense of DOMA—that Congress limited federal marital protections to opposite-sex married couples because only they have the capability of engaging in unassisted, and sometimes accidental, procreation—is not supported by the history or law of marriage.

A. The Relevant History of Marriage Laws.

The states have always had an interest in the legal institution of civil marriage because it promotes social and economic stability by acknowledging and protecting the mutual commitment of two individuals who choose to integrate their lives, legally and emotionally. *See Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948, 954-58 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384, 421-28 (Cal. 2008); Supplemental Excerpts of Record ("S.E.R.") 686-88 (Expert Decl. Dr. Cott); Brief of Amici Curiae Historians Supporting Appellee Part III(B). Marriage has long been used as a vehicle for ensuring that family members will care for one another personally and financially. *Id.* Marriage has been used to determine property rights and inheritance, support obligations to children and other dependents, and the distribution of benefits. *Id*. Neither procreation nor the ability to biologically procreate has ever been the defining feature or an essential element of marriage under state law. *See id*.

No state has ever required prospective spouses to agree to procreate or to remain open to procreation, or even to be able to procreate to be eligible to marry.[4] Sterile persons have never been precluded from marrying even when they know they are sterile. Indeed, some states expressly presume female infertility after a certain age, but this does not disqualify such women from marrying or enjoying federal marital protections.[5] *See also Lawrence v. Texas*, 539 U.S. 558, 604 (2004) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry") (internal citation omitted). States do not require that the couple have the capacity or intent to engage in sexual relations in order to marry: "men and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their

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[4] Infertility among opposite-sex couples is not unusual. Data from 2002 show that approximately 7 million women and 4 million men suffer from infertility. Michael L. Eisenberg M.D., James F. Smith M.D., M.S., Susan G. Millstein Ph.D., Robert D. Nachtigall M.D., Nancy E. Adler Ph.D., Lauri A. Pasch Ph.D., Patricia P. Katz Ph.D. & Infertility Outcomes Program Project Group, *Predictors of not pursuing infertility treatment after an infertility diagnosis: examination of a prospective U.S. cohort*, 94 Fertility and Sterility 2369, 2369 (2010). In addition, approximately 2 million married couples are infertile. American Pregnancy Association, *Statistics*, *available at* http://www.americanpregnancy.org/main/statistics.html.

[5] *See, e g.*, N.Y. E.P.T.L. § 9-1.3(e) (women over 55 presumed infertile)

loved one never have been excluded from the right to marry." *In re Marriage Cases*, 183 P.3d at 431.[6]

The distinction between the right to marry and the right to procreate is also embedded in state fault-based divorce and annulment laws. These laws focus on the relationship between the spouses, listing as grounds for divorce, for example, willful desertion, cruel and inhuman treatment, non-support, and separation with no reasonable probability of resumption of marital relations.[7] The more recent no-fault divorce laws (enacted in all states beginning in 1969[8]) are even more explicit in allowing dissolution of a marriage when, for example, "irreconcilable differences" between the spouses lead to the "irremediable breakdown" of their

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[6] Consummation is unnecessary for a valid marriage. Once the parties fulfill the statutory requirements for solemnization, they are married, regardless of whether they share any form of sexual intimacy. *See, e.g.*, *Franklin v. Franklin*, 28 N.E. 681, 682 (Mass. 1891) ("consummation of marriage by coitus is not necessary to its validity"); *In re Marriage of Burnside*, 777 S.W.2d 660, 663 (Mo. Ct. App. 1989) ("consummation" unnecessary to validate marriage); *Anderson v. Anderson*, 219 N.E.2d 317, 329 (Ohio C.P. 1966); *Beck v. Beck*, 246 So.2d 420 (Ala. 1971) (sexual activity not essential for valid common law marriage).

[7] *See, e.g.*, Freed and Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 Fam. L. Rptr. 4065, 4075 (1982).

[8] In 1969, California became the first state to enact a no-fault divorce law. Former Cal. Civ. Code, § 4506, added by The Family Law Act, Stats. 1969, ch. 1608, § 8, eff. Jan. 1, 1970, repealed and reenacted as Cal. Fam. Code, § 2310 without substantive change, Stats. 1992, ch. 162, § 10, eff. Jan. 1, 1994. In 2010, New York became the last state to permit no-fault divorce. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1676 n. 41, 1704 (2011).

marital relationship.[9] Nothing in these divorce or annulment laws suggests that the inability or unwillingness to procreate biologically is grounds for divorce or denial of marital protections. As stated by the California Supreme Court in *In re Marriage Cases*,

> [a]lthough California cases hold that one of the types of misrepresentation or concealment that will justify a judgment of nullity of marriage is the intentional misrepresentation or concealment of an individual's inability to have children, no case has suggested that the inability to have children—when disclosed to a prospective partner—would constitute a basis for denying a marriage license or nullifying a marriage.

183 P.3d at 431 n.48.[10]

The lack of procreation-based requirements for marriage or divorce renders implausible any contention that Congress categorically excluded married same-sex couples from all federal marital protections because those couples cannot biologically procreate without assistance.

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[9] Former Cal. Civ. Code, § 4506 (1969). Only two no-fault grounds, "irreconcilable differences which have caused the irremediable breakdown of the marriage" and "incurable insanity," remain available under California's no-fault divorce law. *Id.*

[10] *See also Jarzem v. Bierhaus*, 415 So.2d 88, 90 (Fla. Dist. Ct. App. 1982) ("[I]f the wife's claim for annulment or divorce had been based upon the fact that the husband was impotent, it would have been unavailing if she had knowledge of such fact before the marriage").

B. The Constitutional Doctrine Related to Marriage and Procreation.

The Supreme Court has long recognized that the fundamental right to marry and the fundamental right to procreate are distinct. Marriage is a fundamental right for all individuals regardless of their procreative abilities or choices. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (married couples have the right to prevent procreation through the use of contraception); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing and family relationships"). At the same time, the right of an individual to choose whether or not to procreate is not dependent on their marital status. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("It is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child."). Thus, the right to procreate and the right to marry are two constitutionally distinct rights.

Moreover, the United States Supreme Court has held that individuals cannot be excluded from marriage simply because they cannot procreate. *See Turner v. Safley*, 482 U.S. 78, 95 (1987). In *Turner*, the Court recognized that marriage has multiple purposes unrelated to procreation, e.g., "the expression of emotional support and public commitment," "exercise of religious faith," "expression of

personal dedication," and "the receipt of government benefits." *Id*. at 95-96. Accordingly, the Court struck down a Missouri regulation under which approval of a prison inmate's marriage was generally given only when a pregnancy or the birth of an out-of-wedlock child was involved. *Id*. at 82, 96-97. Even under the more deferential standard applicable to prison regulations, the Court found the non-procreative elements of marriage "sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96.

In *Lawrence*, the Court reaffirmed that sexual intimacy and the potential for procreation are not the core, essential elements of marriage. The Court explained that such an understanding of marriage demeans the depth and significance of the marital relationship. 539 U.S. at 567 ("To say that the issue in *Bowers* [*v. Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse").

The Court has also rejected attempts to prevent "irresponsible procreators" from marrying. In *Zablocki*, Wisconsin sought to deny the right to marry to parents the state considered to be irresponsible because they had failed to pay child support. 434 U.S. at 375. The Court acknowledged the importance of protecting the economic well-being of children, but held that conditioning marriage on a

person's parenting conduct was an unconstitutional infringement of the right to marry. *Id.* at 388-89.

C. Marriage Serves Multiple Purposes, Many of Which Are Not Related to Children.

In the more than 1,000 references to marriage in current federal law, Congress recognizes the diverse purposes of marriage, including those that have nothing to do with the ability or willingness to bring children into a family. Numerous legal protections assume the mutual loyalty of spouses and their emotional interdependence. Under the Family Medical Leave Act, a qualified worker in a covered workplace may take a leave to address the serious illness of his or her spouse. 29 U.S.C. § 2612. When a U.S. citizen falls in love with a foreign national, he or she may petition for an "immediate relative" visa for the non-citizen spouse to enable the couple to remain together. 8 U.S.C. § 1154(a)(1)(A)(i), (b), (c). Conflict of interest rules applicable to spouses assume spousal loyalty. *See, e.g.*, 5 U.S.C. § 3110 (public officials prohibited from appointing, employing, promoting or advancing relatives in an agency in which the official serves or over which the official exercises jurisdiction).

Many other federal laws assume and protect the economic interdependence of the couple. These include the ability to file income taxes under the "married" status, 26 U.S.C. § 6013, social security spousal and surviving spouse benefits, 42 U.S.C. § 402 (b), (c), (e), (f), increased veterans' disability payments upon

marriage, 38 U.S.C. § 1115, and death benefits for a surviving spouse, 38 U.S.C. § 1311 (dependency and indemnity compensation to a surviving spouse). Married couples can transfer assets to each other during marriage or at divorce without incurring added tax burdens. *See, e.g.*, 26 U.S.C. § 1041 (interspousal asset transfers during marriage and at divorce without tax consequences). At divorce, courts may issue a Qualified Domestic Relations Order to divide otherwise non-divisible retirement assets, 29 U.S.C. § 1056(d)(1); 26 U.S.C. §§ 401(a)(13), 414(p).

These and many other of the 1138 current federal marital rights and obligations do not relate in any way to procreation or childrearing.[11]

In sum, there is no historical or legal justification to support BLAG's claim that the essential purpose of marriage is to link marriage and unassisted procreation. While marriage is a relationship in which unassisted procreation often occurs, many married couples use assisted reproduction and adoption to bring children into their families. Others are childless by choice or for other reasons. Amici do not claim that procreation and marriage are never connected, but BLAG's position diminishes the institution of marriage by erroneously focusing on the relationship of marriage to procreative sex and ignoring its myriad other

[11] For a full overview, *see* General Accounting Office Report GAO-04-353R, "Defense of Marriage Act - Update to Prior Report" (Jan. 24, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

purposes, including its protections of the mutual love and commitment of two individuals.

II. The Federal Government Does Not Prefer Biological Parenthood Over Other Forms of Parenthood; Instead, the Federal Government Seeks to Enhance the Welfare of All Children Regardless of the Circumstances of Their Birth or the Way They Enter a Family.

BLAG contends that denying protections to married same-sex couples and providing those protections only to married opposite-sex couples is consistent with the federal government's alleged goal of promoting children's welfare by encouraging biological parents to raise their own children. BLAG Br. at 50-55. But federal law and policy do not support this purported preference for biological parent-child relationships. Moreover, the Supreme Court has made clear that laws may not discriminate against children based on the status of their parents.

A. Congressional Child Welfare Policy Encourages Stability for All Children.

While amici agree that security and stability for children are vital interests, BLAG conflates the federal government's interest in supporting marriage as a secure and stable setting for raising children with a purported interest in privileging the families of *biologically*-related parents and children. This emphasis on biological parenting is misplaced.

First, BLAG is incorrect to suggest that Congress prefers families with children raised by both their biological parents. *See* BLAG Br. 50-52. First, in

devising and implementing its child welfare policies, Congress draws upon the states' determinations of legal parentage.[12] And, as the Supreme Court recently explained in its unanimous opinion in *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2030 (2012): "a biological parent is not necessarily a child's parent under the law."

There are also many circumstances under which a person who is not genetically related to a child may be the child's legal parent under state law. For example, while state laws governing the determination of parentage vary, every state has laws facilitating adoption by individuals who are not a child's biological parents. *Adoption Law & Practice*, at ch. 1 (J.H. Hollinger, ed., Matthew Bender 1988 & Supp. 2011). Also, most states have other procedures that confer legal parentage on non-biological parents, including those who use assisted reproduction with sperm, ova or gestational services provided by others.[13] The revised Uniform

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[12] *See, e.g.*, 42 U.S.C. § 416(h)(2)(A) (Social Security Act looks to the law of the state of residence to determine whether individual is a "child" of the insured wage-earner); 8 U.S.C. § 1101(b)(1)(C) ("a child legitimated under the law of the child's residence or domicile" included within definition of "child" for purposes of immigration and nationality law); *see also* Memorandum Opinion for the Acting General Counsel, Social Security Administration (Oct. 16, 2007), *available at* http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf (DOMA does not prevent the non-biological child of a partner in a Vermont Civil Union from receiving child's insurance benefits).

[13] As the Supreme Court stated in *Astrue*, "[state] laws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion." 132 S. Ct. at 2030. To the contrary, "the

Parentage Act ("UPA") recognizes multiple bases for establishing legal parentage independent of a biological or genetic connection between parent and child, or a parent's marital status. Rather, parentage can depend on some combination of an individual's intent to parent and his or her actual performance of parental responsibilities. Unif. Parentage Act, § 102, cmt., § 201 (amended 2002).[14]

The federal government actively supports adoption through a variety of laws, policies and spending measures. *See* 42 U.S.C. § 670 (Foster Care and Adoption Assistance); The Adoption and Safe Families Act of 2007, P.L. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing time-lines on states for moving children from foster care to adoption); Multiethnic Placement Act of 1994, 42 U.S.C. § 1996(p) (prohibiting states from delaying or denying adoptive placements on the basis of race). In addition to the federal adoption subsidies available to adoptive parents of children with special needs, 26 U.S.C.

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establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law." *In re Marriage of Buzzanca*, 61 Ca. App. 4th 1410, 1418 (1998). *See also* Cal. Fam. Code 7613(a). *See also generally* Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families*, 62 Ark. L. Rev. 29, 34-35 (2009); Courtney G. Joslin, *The Legal Parentage of Children Born To Same-Sex Couples*, 39 Fam. L. Q. 683 (2005); Courtney G. Joslin, *Protecting Children: Marriage, Gender and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177 (2010).

[14] The UPA has "four separate definitions of 'father' . . . to account for the permutations of a man who may be so classified." Unif. Parentage Act, § 102, cmt. (amended 2002).

§ 36C(a)(3), there are income tax credits for adoption related expenses, 26 U.S.C. § 36C, exclusions for employer-paid adoption expenses, 26 U.S.C. § 137, and, of course, an adopted child is a dependent for purposes of the dependency exemptions, 26 U.S.C. §§ 151-152.

Thus, the federal government has long recognized that individuals may become legal parents in many ways other than through biological procreation and has used its authority to encourage and support childrearing by adoptive and other non-biological parents in addition to biological parents.

Moreover, the Supreme Court has clearly distinguished laws that support childrearing within marriage from any necessary connection between procreation and marriage. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Court upheld against a biological father's challenge California's statutory presumption that a mother and her husband are a child's only legal parents when they are cohabiting at the time of conception and birth. *Id.* The state's solicitude for the integrity of the mother's existing marriage, as well as its preference for parenting by two married parents, was so strong that the state essentially cut off the biological father's parental rights, even though he had actually lived with and helped care for his daughter. *Id.* at 114, 129-131. The Court held that California's use of the marital presumption to trump the child's relationship with her biological

father was not unconstitutional. *Id.* at 129-131. In other words, the state's interest in marriage justified the decoupling of biological procreation and childrearing.

The second major reason for rejecting BLAG's claims with respect to the alleged federal preference for biological parents and their children is the abundant evidence that federal law and policies aim to protect the well-being of all children, regardless of how they were conceived. These goals are principally realized by ensuring that parents are responsible for supporting their children. Guidelines setting child support amounts are mandated in all child support cases without any distinction among parents based on method of conception or biological connection. *See* Family Support Act of 1988, P.L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.). Federal law also requires the states to adopt a number of specific mechanisms to improve the enforcement of child support obligations, including wage garnishment, and license revocation. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42. U.S.C.) (1996); Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (1998). These enforcement mechanisms apply in all child support cases, regardless of whether the children have a biological connection to their parents. *Id*

Another goal of federal policy is to help families care for their children. Numerous federal statutes extend benefits to children through their parents and do

so regardless of whether there is a biological relationship between parent and child. As a preliminary matter, all of these federal statutes draw upon state determinations of parentage which, as stated above, are not limited to biological parent-child relationships. Moreover, in addition to incorporating these state definitions of "child," the vast majority of these federal statutes explicitly protect nonbiological children by including adopted children and stepchildren. The Social Security Act provides benefits to children of disabled and deceased parents and provides that a "child" includes an adopted child and a "stepchild who has been such stepchild for not less than one year." 42 U.S.C. § 416(e); *see also* 5 U.S.C. § 8441(4) (for purposes of federal employees' survivor annuities, "child" is defined to include an adopted child and a step-child who lives with the employee in a "regular parent-child relationship"); 5 U.S.C. § 9001(5)(c) (defining "child" for purposes of federal employee insurance benefits to include an adopted child); 26 U.S.C. § 152(f)(1) (defining a dependent "child" for income tax purposes to include an adopted child); 38 U.S.C. § 101 (defining "child" of a veteran entitled to survivor benefits to include an adopted child and a "stepchild who is a member of the veteran's household").

Some federal laws help ensure stability in custodial and support decisions by mandating interstate recognition and enforcement of state custody and support orders. Like the laws described above, the protections of these statutes are not

limited to biologically related parents and children. *See* Parental Kidnapping Protection Act ("PKPA"), 28 U.S.C. § 1738A ("child" defined as "a person under the age of eighteen"; "contestant" defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child"). "Parent" is not defined in the PKPA because, like most federal statutes, it accepts and incorporates each state's own parentage determinations. The same is true in the Full Faith and Credit for Child Support Orders Act. 28 U.S.C. § 1738B ("'contestant' means— (A) a person (including a parent) who— (i) claims a right to receive child support; (ii) is a party to a proceeding that may result in the issuance of a child support order; or (iii) is under a child support order . . . .").

BLAG erroneously claims that the federal government provides marital benefits to protect and encourage the formation of families most likely to consist of opposite-sex adults and their children created through unassisted biological procreation. BLAG Br. at 13, 43-45, 47-51. This is a fictional—and inaccurate—account of federal laws and policies. Other than DOMA itself, BLAG cites no federal statute to support its account for the simple reason that there is none. Existing federal family law and policy demonstrate a commitment to protect the stability and security of all families, whether or not the children and their parents are biologically connected. *See also* III C, *infra*.

In sum, federal law does not support BLAG's claim that DOMA furthers a legitimate government interest in favoring families in which children are conceived through biological procreation because no such interest exists.[15] In shaping federal family law, Congress has long recognized that all children are equally deserving of stability and support. DOMA is a glaring exception to this time-honored approach.

B. The Supreme Court Has Rejected Differential Treatment Of Children Based On The Circumstances of Their Birth.

BLAG claims that the government has an interest in treating children differently depending on the circumstances of their birth and, more specifically, treating children born to married biological parents more favorably than other children. This purported interest serves what BLAG characterizes as the government's goal of maintaining a social link between marriage and procreation. Yet, what BLAG suggests is a legitimate interest is directly counter to the principles established by the United States Supreme Court in the 1960s and 1970s. In a series of cases, the Court held that the equal protection clause does not permit disparate treatment of children based on the circumstances of their birth. *See, e.g.*,

[15] Such a policy would implicate fundamental constitutional rights because whether one chooses to have children biologically, through adoption or some other means, or not at all is a matter of individual liberty. *See, e.g.*, *Zablocki*, 434 U.S. at 384-86 (decisions relating to procreation, childbirth and child rearing are among the "personal decisions protected by the right to privacy"). And when children are part of a family, their parents enjoy the liberty interest in raising them as they see fit, and the responsibility to do so, without unwarranted government interference. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000).

Weber v. Aetna Casualty & Surety Company, 406 U.S. 164, 175 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968). As the Court explained:

> [I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing… no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Weber, 406 U.S. at 175. For these same reasons, it would be equally impermissible now to privilege some children but deny others access to important federal benefits and protections because, for example, they were born to a mixed-race or an atheist couple, or were adopted or born through assisted reproduction, or because their parents are a married same-sex couple. BLAG would have this Court accept that it is constitutional to create a new class of "illegitimate" children who can be denied the federal marital protections affecting children because of the circumstances of their birth to, or adoption by, married same-sex couples. This kind of discrimination cannot survive equal protection review.

III. DOMA Undermines Child Welfare Interests.

A. DOMA Has No Rational Connection To The Asserted Goal Of Encouraging Heterosexuals To Have Children Within Marriage.

BLAG argues that DOMA furthers the government's interest in encouraging opposite-sex couples who accidentally procreate to marry. BLAG Br. at 47-49. Assuming, *arguendo*, that this is a permissible government interest, excluding married same-sex couples from the array of over 1,000 federal marital protections

and responsibilities does nothing to further that interest. The exclusion does not create any new substantive rights or protections for married opposite-sex couples, nor does it provide any other type of incentive to opposite-sex couples to marry. The myriad federal protections enjoyed by married opposite-sex couples existed before DOMA was enacted and are unchanged by DOMA. Moreover, DOMA does not preempt or affect state determinations of who is eligible to marry—and, of course, the appellee in this case is validly married.

BLAG claims that recognizing the marriages of same-sex couples undermines the message that children are the reason for marriage[16] and, thus, could lead to more heterosexual couples departing from traditional marital norms. *See Amicus* Brief of NOM at 20-22; *Amicus* Brief of States at 24-26.

This argument is utterly implausible. It is not credible to claim that heterosexuals' decisions to marry or have children are or will be influenced by the denial of federal marital protections to married same-sex couples. Further, the argument founders on the history and law discussed in Section I, *supra*: Marriage and procreation may overlap for many people as a practical matter, but legally they are independent individual rights and neither is conditioned on the other.

[16] In fact, the message sent by same-sex couples marrying and raising children in their marriages is consistent with the message BLAG says Congress wants to send, *i.e.*, that marriage is about procreation and children.

In addition, DOMA does not prevent states from permitting same-sex couples to marry, and many such couples have married. DOMA does not invalidate their marriages or prevent additional same-sex couples from legally marrying. Nor is there any evidence that denying federal benefits to married same-sex couples has any effect of the behavior of married or unmarried opposite-sex couples. *See e.g. Perry v. Brown*, 671 F.3d 1052, 1089 (9th Cir. 2012).[17] Any asserted or implied connection between DOMA and an increased likelihood that heterosexual couples who have accidentally procreated will marry, BLAG Br. at 47, is illogical and unfounded.

While DOMA does nothing to promote the welfare of opposite-sex couples and their children, it harms the children of married same-sex couples and undermines the vital federal interest in the welfare of *all* children. It makes no difference, as BLAG argues, that only heterosexual couples risk "accidental" pregnancies. Any couple can be irresponsible about bringing a child into their family, whether conceived through their own sexual activity or with the assistance

[17] In fact, in Massachusetts, where same-sex couples began marrying in 2003, marriage rates have remained consistent, starting at 5.8% in 2000, peaking at 6.5% in 2004, and ending at 5.5% in 2009. National Center for Health Statistics, *Marriage rates by State: 1990, 1995, and 1999-2009, available at* http://www.cdc.gov/nchs/data/nvss/marriage_rates_90_95_99-09.pdf. Massachusetts retained the lowest divorce rate among the states. National Center for Health Statistics, *Divorce rates by State: 1990, 1995, and 1999-2009, available at* http://www.cdc.gov/nchs/data/nvss/divorce_rates_90_95_99-09.pdf.

of technology, or acquired through adoption. And all children, whether raised by the most or the least responsible parents, can benefit from federal recognition of their parents' marriages and the supports that come with it. BLAG's arguments simply lack any connection to reality. *See Romer v. Evans*, 517 U.S. 620, 632-33, 635 (1996) (classification must be grounded in a "factual context"); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (rational basis test requires government interest to have "footings in the realities of the subject addressed by the legislation").

In sum, DOMA was not aimed at influencing the behavior of heterosexual couples. DOMA was intended to deny same-sex married couples recognition of their marriages and the protections that would follow for them and their families. Accordingly, BLAG's argument that DOMA promotes responsible procreation by heterosexuals is a charade that must be rejected.

B. DOMA Has No Rational Connection to the Asserted Goal of Promoting the "Optimal" Environment for Childrearing.

There is no connection between DOMA and the purported objective of promoting an "optimal" childrearing environment. *See, e.g.*, BLAG Br. at 47-57. The only remaining argument is that Congress enacted DOMA to deter same-sex couples from having children because the federal government disfavors these families. *See* BLAG Br. at 50-57. That, of course, is not a legitimate government purpose because it would contravene the most fundamental principles of our democracy, including respect for individual freedom and dignity, particularly with

regard to decisions about childbearing and family life. *See, e.g.*, *Eisenstadt*, 405 U.S. at 453 (individual right to be free from "unwarranted governmental intrusion" into decision to have a child); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (Constitution protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education); *Lawrence*, 539 U.S. at 573 (same). Equally important, such a purpose would contravene the bedrock principle that government may not seek to alter the behavior of adults by punishing their children. *See Weber*, 406 U.S. 164, 175 (1972); *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982).

Even if deterring gay people from having children were a permissible goal (which it cannot be under constitutional doctrine), DOMA does not effectuate that goal. Same-sex couples, married and unmarried, are having and raising children whether DOMA exists or not.[18]

Further, except for adherence to traditional beliefs, there is no basis for favoring opposite-sex parents over same-sex parents. The Government has disavowed this claim because the scientific consensus resulting from decades of peer-reviewed social science, psychological, and child development research

[18] The 2010 Census reported that almost a third of married same-sex couples are raising minor children and counted nearly 110,000 same-sex couples raising children. Williams Institute, *2010 Census Snapshot*, *available at* http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-census-snapshot-2010/.

shows that children raised by same-sex couples fare as well as children raised by opposite-sex couples. *See* Brief for the Office of Personnel Management at 42-43, (July 3, 2012); *see also* S.E.R. 724, 727, 730 (Expert Decl. Dr. Lamb) (research demonstrating comparable parenting methods among same-sex and opposite sex couples).

Although BLAG asserts that the optimal environment for child-rearing is both a mother and a father, BLAG Br. at 55-57, the factors predicting healthy child and adolescent adjustment do not turn on the gender of the parents. It is the relationship of the parents to one another, their mutual commitment to their child's well-being and the social and economic resources available to the family that are determinative of children's well-being. S.E.R. 724-27 (Expert Decl. Dr. Lamb).

BLAG claims children need a male and a female role model and that mothers and fathers perform different roles in children's lives. BLAG Br. at 55-56. But this is just another way of saying same-sex couples make inferior parents, which has no factual basis. S.E.R. 728-30 (Expert Decl. Dr. Lamb) (there are no universal differences in the ways mothers and fathers parent). Additionally, generalizations about differences between men and women cannot be the basis for making policy based on gender. *U.S. v. Virginia*, 518 U.S. 515, 533, 541-42 (1996).

Furthermore, federal marital benefits do not turn on the predicate of unassisted procreation. Many married opposite-sex couples use adoption and assisted reproduction,[19] and they, as well as childless couples, readily access all federal marital protections. Thus, any connection between supporting "optimal" childrearing and excluding married same-sex couples from federal marital protections is so attenuated that it cannot be credited. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (state cannot rely on "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). DOMA is so "riddled with exceptions" that this justification "cannot reasonably be regarded as its aim." *See Eisenstadt*, 405 U.S. at 449 (statute "riddled with exceptions" could not justify alleged deterrence).

C. DOMA Undermines the Well-Being of Children.

In the end, it is both puzzling and sad that BLAG points to the protection of children to support DOMA's constitutionality when DOMA does not provide a single protection for a single child. To the contrary, DOMA only denies a group of children access to the important protections the federal government would otherwise afford their married parents.

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[19] 60,190 infants were born with the use of ART in 2009. Centers for Disease Control and Prevention, *2009 Assisted Reproductive Technology Report*, 65 (2009), *available at* http://www.cdc.gov/art/ART2009/PDF/ART_2009_Full.pdf.

DOMA affects children by limiting resources that would be available to their families if their parents' marriages were recognized, e.g. spousal health insurance benefits, leave from work under the Family Medical Leave Act for a spouse's serious health condition, and pension protections. DOMA makes it more complicated for children of same-sex married couples to receive benefits under federal law. Finally, DOMA hurts children of married same-sex couples by sending the message that there is something inferior about their families. *See* S.E.R. 872-73 (Expert Decl. Dr. Peplau).[20]

Denying marital protections to same-sex couples "will not make children of opposite-sex marriages more secure." *Goodridge*, 798 N.E.2d 941, 964 (Mass. 2003); *see also In re Marriage Cases*, 183 P.3d at 433. What is absolutely clear, however, is that denying marital protections to same-sex couples will "prevent children of same-sex couples from enjoying the immeasurable advantages that flow" from marriage. *Goodridge*, 798 N.E.2d at 964. As the California Supreme

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[20] An effort to deter same-sex couples from becoming parents would exacerbate the shortage of adoptive parents. *See* U.S. Dep't of Health and Human Services, Administration for Children and Families, *AFCARS Report, Preliminary FY 2010 Estimates as of June 2011*, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.html;David Brodzinsky, Ph.D., *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, Evan B. Donaldson Adoption Institute (Oct. 2011), *available at* http://www.adoptioninstitute.org/publications/2011_10_Expanding_Resources_BestPractices.pdf.

Court indicated in *In re Marriage Cases*, "a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children … who are being raised by same-sex couples as for those children being raised by opposite-sex couples." 183 P.3d at 433. The perverse logic of BLAG's child welfare argument shows that it cannot serve as a rationale for DOMA.[21]

[21] Since these procreation and child-rearing interests have no "footings in the realities of the subjected addressed by the legislation," *Heller*, 509 U.S. at 321, and are not plausibly furthered by the exclusion of same-sex married couples from existing federal marital protections, DOMA "seems inexplicable by anything other than animus towards the class it affects." *Romer*, 517 U.S. at 632. This Court need not find that Congress acted out of impermissible animus to strike down the law since it lacks even a rational relationship to a legitimate government interest. However, this helps to explain how the law came to pass.

CONCLUSION

BLAG attempts to justify DOMA by singling out the one intrinsic difference between married same-sex and many opposite-sex couples—the possibility of unassisted biological procreation—and claiming that the essential purpose of marriage rests on that difference. Amici have shown that this argument is contradicted by history, law, policy and logic. Moreover, DOMA does not promote responsible procreation or optimal child-rearing by opposite-sex couples because DOMA changes nothing for them or their children. Instead, DOMA undermines the government's compelling interest in the welfare of all children by categorically excluding a class of married parents and their children from the important protections Congress provides other married couples and their children. Amici ask this Court to affirm the ruling below.

Dated: July 10, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH Rule 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

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.

I certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

Dated: July 10, 2012

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