Kristin Perry, et al v. Arnold Schwarzenegger, et al Doc. 426

NO. 10-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT and JOHN BERRY
Defendants-Appellants.

Appeal from United States District Court for the Northern District of California
Civil Case No. C 10-00257 JSW (Honorable Jeffrey S. White)

BRIEF OF *AMICUS CURIAE*, NATIONAL ORGANIZATION FOR MARRIAGE, IN SUPPORT OF INTERVENOR-APPELLANT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES.

William C. Duncan
MARRIAGE LAW FOUNDATION
1868 N 800 E
Lehi, UT 84043
Phone: (801) 367-4570
duncanw@marriagelawfoundation.org

Joshua K. Baker
NATIONAL ORGANIZATION FOR MARRIAGE
2029 K Street NW, Suite 300
Washington, DC 20006
Phone: (888) 894-3604
Fax: (866) 383-2074
jbaker@nationformarriage.org

Dockets.Justia.com

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.

/s/William C. Duncan
William C. Duncan
Counsel for the *Amicus*
June 11, 2012

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.

/s William C. Duncan
William C. Duncan
Counsel for *Amicus Curiae*

June 11, 2012

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Interest of the *Amicus* and Consent to File

The National Organization for Marriage (NOM) is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. NOM was formed in response to the need for an organized opposition to same-sex marriage in state legislatures and it serves as a national resource for marriage-related initiatives at the state and local level, having been described by the Washington Post as "the preeminent organization dedicated to preventing the legalization of same-sex marriage." Monica Hesse, "Opposing Gay Unions With Sanity and a Smile" *Washington Post*, August 28, 2009, at C01. The outcome of this litigation will not only impact NOM's ability to pursue its mission in states throughout the 9th Circuit but will have implications nationally. The National Organization for Marriage is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

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

ARGUMENT

I.
DOMA is entirely consistent with longstanding precedent in which Congress defines terms, including terms related to domestic relations and marriage, as used in federal law.

The court below found that "DOMA marks a stark departure from tradition and a blatant disregard of the well-accepted concept of federalism in the area of domestic relations." Order at 39.

Whatever the origin for the court's misunderstanding of DOMA and the notion of federalism, this holding turns the principle of federalism on its head. Rather than protecting against federal usurpation of powers reserved to the states, the ruling below would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause. While Congress *may* adopt state classifications for purposes of federal law, it is under no compulsion to do so.

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

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

Like every branch of government, Congress may not act outside the bounds of its constitutionally granted powers. Thus, Congress is unable "to commandeer state governments or otherwise directly dictate the *internal operations* of state government" and must ensure "conditions on federal funds" are "related to a federal purpose." Massachusetts v. Department of Health and Human Services, No. 10-2204 (1st Cir. 2012), slip op. at 21 (citing Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); South Dakota v. Dole, 483 U.S. 203 (1987)) (emphasis in original).

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

> Congress surely has an interest in who counts as married. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom. That Congress has traditionally looked to state law to determine the answer does not mean that the Tenth Amendment or Spending Clause require it to do so.

Massachusetts v. Department of Health and Human Services, slip op. at 21. The First Circuit further explained that the impugned section of DOMA "governs only federal programs and funding, and does not share these two vices of commandeering or direct command." Id.[1]

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[1] As discussed below, and addressed in greater detail in the brief of Intervenor-Appellants, the First Circuit panel ultimately created an unprecedented and mistaken legal rule in holding that DOMA was unconstitutional. , Yet in doing so,

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

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

Tellingly, not even the plaintiffs have suggested that Congress lacks authority to legislate in the subject matter areas impacted by DOMA (e.g., taxation, immigration, etc.). Instead, they have argued that when regulating in these areas, Congress must defer to each state when the touching on matters also involving marriage or domestic relations.

Thus, under the analysis adopted by the court below, Congress may unquestionably legislate in the area of taxation, but must defer to each state in determining who is permitted to file a joint return. Or Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications.

Even apart from the patchwork effect in which federal statutes are applied differently to residents of different states, and the potential conflict created in

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it properly and squarely rejected the reasoning of the court below with respect to federalism and the 10th Amendment.

matters involving more than one state, such a rule is patently indefensible in light of history and legal precedent.

In this regard, the court below was simply incorrect in claiming that "the federal government had not [prior to DOMA] attempted to craft its own federal definition of marriage." Order at 39. While DOMA may have been the first time in which Congress adopted a single definition of marriage applicable to all federal statutes, Congress has long defined marriage for purposes of federal statutes, even when such definitions may conflict with applicable state law.

Specifically relevant here, there has never been a special carve-out that requires Congress to defer to state law when federal statutes intersect with domestic relations and marriage.

Professors Linda Elrod and Robert Spector have noted: "Probably one of the most significant changes of the past fifty years [in American family law] has been the explosion of federal laws, uniform laws, and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as child support, domestic violence, and division of pension plans."[2] The most recent authority on this point was handed down by the U.S. Supreme Court just last

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[2] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 713 (2009).

month, in a unanimous ruling addressing Congress' intended definition of a surviving child for purposes of survivor benefits under the Social Security Act. Astrue v. Capato, 566 U.S. __ (2012), slip op. If the rule proposed by the court below were actually the law, this would have been a very simple decision—the Court would have had to apply state law because the question of parentage is a domestic relations matter. The Court did ultimately apply a state law definition in Astrue, not because it was required to do so by the Constitution, but rather because application of state law *was what Congress intended*.

In affirming Congressional intent, however, the Court also noted that other sections of the Social Security Act have different, federal, standards for determining the meaning of "child" under the Act. Slip op, at 5-6. In fact, the Social Security Administration's regulations would allow a child to receive benefits if the child is the biological offspring of the insured person and the parents "'went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment,'" thus implying a broader federal definition of marriage than state law. Id. at 6 (quoting 20 CFR §404.355(a)). The Court also noted provisions in the Act that are independent of state law such as "duration-of-relationship limitations." The Court said: "Time limits also qualify the statutes of several States that accord inheritance rights to posthumously conceived children." Id. at 12.

Congressional enactments of laws relating to domestic relations and marriage specifically have a long history and are clearly part of current practice. What follows is not an exhaustive list but one that is ample for purposes of illustrating that the central holding of the court below is inconsistent with past precedents and practice.[3] In particular, these examples show that (a) Congress has adopted definitions relating to domestic relations since the earliest days of the United States, and (b) such definitions have routinely been upheld even when conflicting with applicable state law.

Immigration. Dating back to the Naturalization Act of 1802, federal law provided that children of parents who have been naturalized will automatically become citizens unless their fathers were not naturalized.[4] An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.[5] Current immigration law continues to impose a definition of marriage which may conflict with state law. See 8 U.S.C. §1186a(b)(A)(i) cited in Massachusetts v. Department of Health and Human Services, No. 10-2204 (1st Cir. 2012), slip op. at 20. For example, the Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential

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[3] For a fuller account of the relevant precedent, *see* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution* 58 DRAKE L. REV. 951 (2010).
[4] 2 Stat. 155 (April 14, 1802).
[5] 10 Stat. 604 (February 10, 1855).

immigration status are not valid for federal law purposes,[6] even though some states may recognize immigration marriages as valid or voidable.[7] To defer to state law on marriage for immigration purposes would allow one state to circumvent the entire federal policy.

Land Grants. In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over 21.[8] An 1804 law protected the land interest of "an actual settler on the lands so granted, for himself, and for his wife and family."[9] The Homestead Act of 1862 specified grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[10] Applying this statute, in 1905 the Supreme Court resolved a land grant dispute brought by a daughter against her mother and stepfather. McCune v. Essig, 199 U.S. 382 (1905). The daughter

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[6] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e).
[7] *See* In re Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d 461, 462 (Minn. 1976); Kleinfield v. Veruki, 173 Va. App. 183, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); Lutwak v. United States, 344 U.S. 604, 611-613 (1953); id. at 620–21 (Jackson, J., dissenting); *see also* Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) (argument that validity of marriage under federal law is "frivolous" because INS can make independent inquiry into validity of marriage law for immigration purposes); United States v. Sacco, 428 F.2d 264, 267–68 (9th Cir. 1970) (ruling, inter alia, that a bigamous marriage did not count as a marriage for federal law purposes).
[8] 2 Stat. 229 (March 3, 1803).
[9] 2 Stat. 283 (March 26, 1804).
[10] 12 Stat. 392 (May 20, 1862).

argued that state inheritance law should be applied to provide her an interest in the property but the Court ruled that "the words of the [federal Homestead Act] statute are clear," rejecting the daughter's claim that state law, rather than federal, should govern the definition of head of family as used in the Homestead Act.[11]

Military Benefits. In 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[12] The 1890 Dependent and Disability Pension Act also provided for widows and other family members of veterans.[13] Federal courts interpreting military benefits and other military laws have used federal interpretations of family, even at times where the definitions did not accord with state law.[14] The Supreme Court has noted, for instance, that the Uniformed Services Former Spouses' Protection Act (10 U.S.C. §1408) is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." Mansell v. Mansell, 490 U.S. 581, 587 (1989). The

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[11] Id. at 389.

[12] 5 Stat. 127 (July 4, 1836).

[13] 26 Stat. 182 (June 27, 1890).

[14] *See* United States v. Jordan, 30 C.M.R. 424, 429–30 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns); United States v. Richardson, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); United States v. Rohrbaugh, 2 C.M.R. 756, 758 (1952) (noting, *inter alia*, that common law marriages are specifically recognized in "a variety of matters"); McCarty v. McCarty, 453 U.S. 210, 232–33, 236 (1981), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)).

Court held a claim for military retirement pay was governed by the Act and not by community property law. Id.

Federal Pension Regulations. The federal Employment Retirement and Income Security Act (ERISA) and other federal pension laws have consistently been held to control the marital incidents of pensions.[15] For example, in 1997 the Supreme Court held ERISA controlled the distribution of a retirement pension in preemption of Louisiana community property law. Boggs v. Boggs, 520 U.S. 833, 853-854 (1997).

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

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[15] *See e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 at 582 & 590 (1979) (railroad retirement assets governed by federal law, not community property law); Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); Wissner v. Wissner, 338 U.S. 655, 658 (1950) (National Service Life Insurance Act governs beneficiary of policy, not community property laws).

similar institution, should be reckoned as one family."[16] The 2010 Census included same-sex marriages for the first time in its count of marriages.[17] In doing so, rather than deferring to the law of the state of residence, the Census counted same-sex couples as married if they had been validly married in any state, even though that marriage may not be valid under the law of their home state [18]

Copyright. In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[19] In 1956, the U.S. Supreme Court issued a decision, DeSylva v. Ballentine, holding that, in the absence of a federal definition, state law controlled the question of who counted as a child for copyright law.[20] In 1978, Congress effectively reversed this decision by enacting a definition of "child" to include a "person's immediate offspring, whether legitimate or not, and any

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

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

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

[19] 4 Stat. 436 (February 3, 1831).

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

children legally adopted by that person" so as to ensure that – regardless of state law – copyright law would not exclude illegitimate children.[21]

Bankruptcy. Bankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather than state law.[22] This has been recognized in multiple federal court decisions.[23]

Taxation. Federal tax law considers a couple that is married under state law but legally separated as unmarried for tax purposes.[24] A couple who consistently obtains a divorce at the end of the year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.[25]

Pending Legislation. Even pending acts in Congress, some of which are intended to legislatively accomplish the plaintiffs' objectives here, would be invalidated under the reasoning adopted by the court below. The proposed

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[21] 17 U.S.C. § 101.

[22] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

[23] Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984) (bankruptcy courts look to federal—not state—law to determine whether obligation is in the nature of alimony, maintenance or support); *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982).

[24] 26 U.S.C. § 7703(a)(2), (b) (definitions of marital status).

[25] Rev. Rul. 76-255, 1976-2 C.B. 40. For federal law treatment of marriage for tax purposes, *see generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (discussing Nihiser v. Comm'r, 19315-04 T.C.M. 2008-135 (2008); Perkins v. Comm'r, T.C.M. 2008-41, 6521-06 (2008); Proctor v. Comm'r, 129 T.C. 12 (2007); 73 Fed. Reg. 37997 (July 2, 2008)).

Domestic Partnership Benefits and Obligations Act, S.1910, would provide government benefits to registered domestic partners (including same-sex couples who are married) of government employees that are equivalent to those given to spouses of employees. The proposed repeal of DOMA, S.598, would consider same-sex marriages as valid for federal law purposes even if they are not so recognized in the state of the couple. Both of these bills would adopt a uniform federal definition of domestic relations that would conflict with the law of many states. Applying the purported tradition invoked by the court below would invalidate both pieces of legislation.

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

In the mid-Nineteenth Century, Congress legislated heavily with respect to marriage in relation to the government of federal territories.[26] I

Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the

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

United States: the Morrill Anti-Bigamy Act of 1862[27], the Poland Act of 1874[28], the Edmunds Anti-Polygamy Act of 1882[29], the Edmunds-Tucker Act of 1887[30] and the Utah Enabling Act of 1894.[31]

The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham Lincoln, criminalizes attempts at polygamy in federal territories. The Act was described in the chapter laws as "An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places."[32] The relevant portion of the law read:

> That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided*, *nevertheless*, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or

[27] 12 Stat. 501 (July 1, 1862).
[28] 18 Stat. 253 (1874).
[29] 22 Stat. 30 (March 23, 1882).
[30] 24 Stat. 635 (1887).
[31] 28 Stat. 107 (July 16, 1894).
[32] 12 Stat. 501 (July 1, 1862).

> pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

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

Like DOMA, the Congressional ban on polygamy was challenged in federal court. The issue was eventually resolved in the U.S. Supreme Court in a landmark decision, Reynolds v. United States.[33]

As to marriage, the Court said:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.[34]

D. The efforts of the court below, and similar attempts, to distinguish this precedent are unavailing.

The court below tries to distinguish these examples by arguing that "in each instance, the federal government accepted the state definitions of marriage and

[33] 98 U.S. 145 (1878).
[34] Id. at 165-166.

merely superimposed further requirements for falling within the federal entitlement statute." Order at 40. This is really an attempt to avoid conceding the obvious. If that is the court's approach, DOMA, too, could be read as a "further requirement" for eligibility.

It is a distinction without a difference.

If Congress says, in the context of immigration, that marriage is a relationship not entered into in order to avoid deportation, it has defined marriage. That its definition is stricter than an otherwise comparable state definition does not make it any less a definition. This, of course, is precisely what DOMA does: it provides that for all purposes of federal law, marriage means the union of a man and a woman.As noted above, a First Circuit panel agreed with the analysis of amicus here that federalism principles provide no barrier to enactment of DOMA. The panel suggests an alternative theory to support its conclusion: "Supreme Court precedent relating to federalism-based challenges to federal laws reinforce the need for closer than usual scrutiny of DOMA's justifications and diminish somewhat the deference ordinarily accorded." Massachusetts v. HHS, slip op. at 20. That court did not, because it cannot, point to any provision in the Constitution or the decisions of the U.S. Supreme Court to justify this idea that more searching judicial scrutiny is required when Congress enacts laws touching on areas typically within the province of state law.

In fact, the First Circuit decision implicitly acknowledges that it has created a legal rule where none has existed before when it states: "If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute [DOMA] fails that test." Id. at 28. Opinions of federal judges about what the law *might* be cannot substitute for binding declarations of the law and none of the latter exist indicating a special type of scrutiny applies to laws like DOMA in which Congress acts to define terms related to marriage and domestic relations.

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

The import of accepting the "novel"[35] theory of federalism used by the court below would be to potentially unsettle every area of federal law. If the central holding of the court below that federal law cannot define marriage or family independent of state definitions were applied consistently, it would require the invalidation of current immigration, tax, bankruptcy, census, copyright, and taxation laws, inter alia, and would be contrary to Supreme Court precedent upholding federal laws even when they contrast with state laws.

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

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

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

Although the parties and other *amici* will surely address the important social interests advanced by DOMA, here *amicus* merely adds that the mistake in the court's analysis of the public interests served by DOMA is similar to the mistake the court made in analyzing the application of principles of federalism to the commonsense exercise of Congress' power to specify the meaning of terms it uses in statutes. In both cases, the court below failed to even acknowledge relevant precedent that would dictate against the result reached by the court. Specifically, the court failed to address a body of persuasive precedent from other jurisdictions that found the foremost of the interests advanced by Congress amply justifies retaining the definition of marriage as the union of a man and a woman.

The court below purported to address the government interest "to encourage responsible procreation and child-rearing." Order at 26. The analysis of the court

addresses an entirely different and unrelated question and then recasts the government interest to make it irrelevant to the interest actually served by DOMA. The court below spent directed most of its analysis to the question of whether "same-sex parents are equally capable at parenting as opposite-sex parents" or whether "parents' genders are irrelevant to children's developmental outcomes." It also recast the interest in procreation as "a desire to encourage opposite-sex couples to procreate and raise their children well." Order at 26-27.

Setting aside the near absurdity of focusing on such matters as whether an individual in a same-sex couples is "capable" of parenting or whether a parent's "gender" (as opposed to family structure or biological connection) contributes to child well being, this line of inquiry is wholly inapposite. The state interest in marriage related to procreation does not derive from a parenting contest, much less from an examination of whether some same-sex couples might do a good job, and some opposite-sex couples a bad job, at raising children. The state interest in marriage, rather, stems from a much more basic set of realities widely recognized and affirmed by American courts over the past decade. Likewise, the assertion by the court below that Congress was interested in getting opposite-sex couples to have children and be good parents seems facetious which may be why the court below focused on these kinds of issues rather than the actual interests motivating Congress in enacting DOMA.

In the House Report referenced by the court below, Congress referenced a scholarly report noting "marriage is a relationship which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair."[36] The Report goes on to say: "That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship." Id. at 14.

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

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

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

> marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement-in the form of marriage and its attendant benefits-to opposite-sex couples who make a solemn, long-term commitment to each other. Hernandez v. Robles, 7 N.Y.3d 338, 359,855 N.E.2d 1 (NY 2006).

The court further said:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold. Id. at 359-360.

The Maryland Court of Appeals similarly noted:

> [S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding). Deane v. Conaway, 401 Md. 219, 932 A.2d 571, 630-631 (Md. 2007).

To take yet one more example,[37] in an opinion concurring in the Washington Supreme Court's decision that the state's marriage law was constitutional, Justice J.M. Johnson said:

> A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State. Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise. Andersen v. King County, 158 Wash. 2d 1, 138 P.3d 963, 1002 (Wash. 2006) (J.M. Johnson., J. concurring).

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

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

CONCLUSION

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

For the foregoing reasons, *amicus curiae* respectfully requests that this Honorable Court uphold the constitutionality of the Defense of Marriage Act and reverse the judgment of the district court.

Respectfully submitted,

/s William C. Duncan
William C. Duncan

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 5,625 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s William C. Duncan
William C. Duncan
Counsel for the *Amicus*
June 11, 2012

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 June 11, 2012.

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/s William C. Duncan
William C. Duncan
Counsel for the *Amicus*
June 11, 2012