No. 12-307

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,
v.
EDITH SCHLAIN WINDSOR
AND
BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
*Respondents*.

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

## BRIEF ON THE MERITS OF *AMICI CURIAE* FAMILY LAW PROFESSORS AND THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR


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*Barrons v. United States*,
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*Bell v. Tug Shrike*,
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*Boggs v. Boggs*,
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*Brinkley v. King*,
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*De Sylva v. Ballentine*,
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*Matter of D---*,
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*Michael H. v. Gerald D.*,
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*Money v. Office of Personnel Management*,
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**TABLE OF AUTHORITIES**
(continued)

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*Slessinger v. Secretary of Health & Human Services*,
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*United States v. Richardson*,
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*United States v. Yazell*,
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*Weinberger v. Salfi*,
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*Weiner v. Astrue*,
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*Windsor v. United States*,
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48 U.S.C. § 1561 ..... 34

A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States, ch. 29, 13 Stat. 571 (Mar. 3, 1865) (codified at R.S. § 2037) ..... 32

An Act Supplementary to an Act Entitled "An Act to Grant Pensions," ch. 247, § 14, 13 Stat. 387, 389 (July 4, 1864) (codified at R.S. § 4773) ..... 32

Morrill Anti-Bigamy Act, ch. 125–26, 12 Stat. 501, 501–02 (July 1, 1862) ..... 34

Uniform Parentage Act, § 102 cmt. (Supp. 2009) ..... 15

**STATE STATUTES**

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23 Pa. Cons. Stat. Ann. § 1304 (West 2012) ..... 9

Ala. Code § 26-17-607 (2012) ..... 15

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(continued)

**Page(s)**

Ariz. Rev. Stat. Ann. § 25-121 (West 2012).....8
Cal. Fam. Code § 2200 (West 2012).....9
Cal. Fam. Code § 7541 (West 2012).....15
Conn. Gen. Stat. Ann. § 46b-21 (West 2012) .....9
Haw. Rev. Stat. § 572-1 (West 2012).....8
Mich. Comp. Laws § 722.857 (2012).....16
Mich. Comp. Laws § 551.3 (2012).....9
Minn. Stat. Ann. § 257.57 (West 2012) .....15
Mont. Code Ann. § 40-6-108 (2011) .....15
Mont. Code Ann. § 40-1-203 (2011) .....8
N.H. Rev. Stat. Ann. § 457:2 (2013) .....9
N.Y. Dom. Rel. Law § 5 (McKinney 2013).....9
N.Y. Dom. Rel. Law § 15 (McKinney 2013).....8
N.Y. Dom. Rel. Law § 15-a (McKinney 2013) .....8
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Tenn. Code Ann. § 36-2-306 (West 2012) .....15
Vt. Stat. Ann. tit. 15, § 302 (West 2012) .....15

**OTHER AUTHORITIES**

20 C.F.R. § 404.345 .....28
29 C.F.R. § 825.122 .....26
60 Fed. Reg. 2180 (1995).....26

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381 (2007) .....11

Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267 (2009).....12

Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 Hastings L.J. 1593 (1996) .....6

*Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx .....18, 24

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 Feb. 22, 2013) .....6

Homer H. Clark, Jr. & Ann Laquer Estin, *Cases and Problems on Domestic Relations* (7th ed. 2005) .....13

Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* (2d ed. 1988).....7

Jane S. Schacter, *Constructing Family in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev 933 (2000) .....16

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497 (2000).....11

Leslie J. Harris et al., *Family Law* (3d ed. 2005).....13

*Manual for Courts Martial*, *United States*, U.S. Dep't of Defense (2012 ed.), *available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf.....35

Mary Ann Glendon, *The Transformation of Family Law: Family Law in Transition in the United States and Western Europe* (1989).....13

Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009).....6

Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* (2011).....21

Rev. Rul. 58-66, 1958-1 C.B. 60 (1958).....9, 25

S. Rep. No. 94-568 (1975).....25

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 (2010).....27

Social Security Administration's Program Operations Manual System, POMS § GN 00305.060 .....8, 9

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

*The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. On the Judiciary*, 104th Cong. (1996) ..... 12, 18

William L. O'Neill, *Divorce In the Progressive Era* (1967) ..... 12

## BRIEF OF FAMILY LAW PROFESSORS AND THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

This brief is submitted on behalf of the Family Law Professors listed in Appendix A and the American Academy of Matrimonial Lawyers in support of Respondent Edith Schlain Windsor.[1]

## INTERESTS OF *AMICI CURIAE*

*Amici* Law Professors are American family law professors, including family law casebook authors and reporters for the ALI *Principles of the Law of Family Dissolution*, who seek to clarify the relationship between Congress and the states with regard to family status, particularly marital status. *Amici* American Academy of Matrimonial Lawyers ("AAML") is a national organization of more than 1,600 family law attorneys in the fifty states. The AAML was founded in 1962 by highly regarded family law attorneys. Its mission is to "promote professionalism and excellence in the practice of family law," with the goal of protecting the welfare of the family and of society.

The Defense of Marriage Act ("DOMA") disestablishes marital status, for any federal purpose, for one subset of married couples in

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' consent letters have been filed with the Clerk's office.

contravention of a strong norm of federal deference to state family-status determinations. Unlike any other federal statute, DOMA selectively withdraws state-conferred marital status, thus telling some married couples that they are not married for any federal purposes and altering the status of being married as conferred by the states.

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

## INTRODUCTION AND SUMMARY OF ARGUMENT

DOMA is the first and only federal law to create a blanket federal rule of non-recognition of family status in contravention of state family law. Before DOMA, married status was understood as a comprehensive condition for all purposes, recognized by state and federal sovereigns, unless that status was terminated by the state or death. While federal rights and duties flowed from married status, only states determined who was eligible for 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." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). This Court noted that "[t]his is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *Id*. The "core" aspect of family law left to the states includes "declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity." *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).

Throughout our nation's history, it has been states' responsibility to confer and withdraw marital status. A state's conferral of married status grants a couple more than eligibility for benefits, reciprocal responsibilities, and other legal incidents of marriage. It allows a couple to partake in a social institution imbued with rich historical and contemporary symbolism. Having married status has always entailed an understanding that one was married for all purposes, including federal purposes, for all time, unless one secured termination of that married status from the state. DOMA disrupts this understanding of marriage and redefines what it means to be married for gay and lesbian couples. As the Second Circuit correctly held, "DOMA is an unprecedented breach of longstanding deference" to state determinations of marital status. *Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012). Regardless of whether the federal government has the power as a sovereign to abrogate marital status for one subset of married couples for all federal purposes, it had never done so before DOMA.

Intervenor Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") argues in its opening brief that DOMA's unprecedented breach of deference was necessary to "maintain uniformity." Brief on the Merits for Respondent BLAG ("BLAG Br.") 33. But DOMA neither maintains nor creates uniformity. Congress has always, and still does, respect non-uniform state determinations of marital status. As detailed in Part I, DOMA does not define marriage nor "clarify what marriage *means*" at the federal level, BLAG Br. 3, because federal law remains silent on critical

eligibility criteria for marriage. Thus, similarly situated couples in different states have always been, and still are, treated differently at the federal level. Instead, DOMA singles out only one feature of marriage for comprehensive nonrecognition.

Section 3 of DOMA's unprecedented rejection of state marital status determinations also conflicts with Congress's long history of deference to different state criteria for divorce. Congress never "maintained uniformity" with regard to divorce—which are marital status determinations—even during times of tremendous social upheaval and state disagreement over eligibility for divorce. Nor has Congress expressed a need for uniformity with regard to parental-status determinations, from which eligibility for many federal benefits flows. Modern technological and scientific achievements have made diversity in the state laws of parenthood far more complicated and extensive than current state disagreements over marriage for same-sex couples. Yet there is no federal law of parenthood.

DOMA is nothing like the numerous federal statutes that BLAG and opposition *amici* cite as indications that the federal government already defines marriage. As detailed in Part II, all federal statutes pertaining to family status can be divided into three categories, and all maintain the federal government's traditional deference to state-determined family status. First, and most common, are federal statutes that *implicitly* invoke the state law of family status. Second are federal statutes and regulations that *explicitly* invoke the state law of family status. Third are federal statutes and regulations that expand or restrict the category of

who will be eligible for federal benefits under particular statutes based on policy reasons, particularly fraud-prevention and public-fisc protection, pertinent to those specific statutes.

In enacting DOMA, Congress did not "[p]roceed[] with [c]aution." BLAG Br. 41. Rather, it acted in haste—before *any* state had even conferred married status on same-sex couples—to nullify potential federal marital status for an entire class of married persons. DOMA does not enhance the debates between the states with regard to marriage. Brief Addressing the Merits of the State of Indiana et al. as *Amici Curiae* in Support of Respondent BLAG ("States Br.") 21. It stifles debate by nationalizing marriage policy in an unprecedented manner. In short, DOMA respects neither federalism nor tradition; it disrupts them.

## ARGUMENT

### I. DOMA DOES NOT CREATE, AND THERE HAS NEVER BEEN, FEDERAL UNIFORMITY WITH REGARD TO MARITAL STATUS. FEDERAL LAW RELIES ON STATE DETERMINATIONS OF FAMILY STATUS NOTWITHSTANDING TREMENDOUS DIVERSITY AMONG THE STATES.

There has always been variety in the conditions that states impose on who may marry, and when that status matters for purposes of federal law. Federal law has deferred to states regardless of the

varying conditions imposed by the states.[2] *See, e.g.*, 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 ever refused to recognize a state-law determination of marital status" for access to tax benefits of marriage).

According to the 2010 Census, an estimated 131,729 same-sex couples in the United States were married under the law of their states. 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 Feb. 22, 2013). These states, breaking with the practice in other states, have determined that same-sex couples may marry, just as years ago many states broke with the practice in other states with regard to interracial marriage. *See Perez v. Lippold*, 32 Cal. 2d 711, 731–32, 198 P.2d 17, 29 (1948) (overturning California's anti-miscegenation law); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* 42, 43, 63 (2009) (charting miscegenation laws in different states); *see also* Brief of *Amici Curiae* Family Historians ("Historians' Br.") § III.A.

The federal government always deferred to those state-determined marital statuses, even when that meant denying marriage benefits to married

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

interracial couples who resided in states in which they could not marry. *See, e.g.*, *Matter of D---*, 3 I. & N. Dec. 480, 481–83 (BIA 1949) (refusing to recognize, for immigration-law purposes, Canadian marriage because of criminal prohibition in state of residence against "cohabitation and marriages between negroes and white person"); *In re Lucy Hart*, 19 P.D. 417, 418 (March 30, 1906); *In re Ann Cahal*, 9 P.D. 127, 128 (Oct. 2, 1897) (denying pensions to, respectively, white and African-American widows, because both were married to men of a different race and therefore marriages were illegal under laws of their states).

BLAG contends that some states' consideration of whether to grant married status to same-sex couples forced Congress to "choose between retaining a uniform federal rule or continuing simply to borrow state definitions." BLAG Br. 33. BLAG constructs a false choice in two ways. First, DOMA is not a uniform federal definition of marriage. There is and always has been diversity between the states with regard to marital status, and the federal government continues to honor that diversity. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 34 (2d ed. 1988) ("A complete list of the laws of all states on licensing and the solemnization of marriage would be unduly long, since, there is a large variety of such statutes.").

Second, there was accordingly no need for Congress to choose between anything. Congress never chose between competing definitions of marriage or family status before 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 this Court concluded with regard to federal deference to different state laws of marital property, "[t]here is here no need for uniformity." *United States v. Yazell*, 382 U.S. 341, 357 (1966); *see also Bell v. Tug Shrike*, 332 F.2d 330, 332–34 (4th Cir. 1964) (rejecting argument that admiralty law seeks "national uniformity" and holding meaning of "widow" under Jones Act is determined by state law).[3]

### 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, New York permits fourteen-year-olds to marry in certain circumstances, N.Y. Dom. Rel. Law §§ 15(3), 15-a (McKinney 2013). Hawaii does not. Haw. Rev. Stat. § 572-1(2) (West 2012). Montana requires a blood test to marry unless certain exceptions apply. Mont. Code Ann. § 40-1-203 (West 2011). Arizona does not. Ariz. Rev. Stat. Ann. § 25-121 (West 2012). Some states confer married status on couples who hold themselves out and act as married; most states do not. *See* POMS

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[3] *Amici* Senators cite the Tax Revenue Act of 1948 as an example of Congress being concerned about uniformity. Brief for *Amici* United States Senators Orrin G. Hatch, et al. ("Senators' Br.") 19–20. Indeed, the 1948 Act helped equalize federal tax burdens between married couples, which had varied depending on whether a couple lived in a community-property or a common-law state. DOMA does the opposite. Not only does it treat married couples in different states differently for tax purposes, it treats married couples within the same state differently for tax purposes.

§ GN 00305.060(A)(1)(e) (Social Security Administration's Program Operations Manual System digest of state laws regarding recognition of common-law marriages).

State statutes also differ considerably with respect to the degree of consanguinity that constitutes incest. For example, it is legal to marry one's first cousin in Connecticut, New York, and California, *see* Conn. Gen. Stat. Ann. § 46b-21 (West 2012); N.Y. Dom. Rel. Law § 5 (McKinney 2013); Cal. Fam. Code § 2200 (West 2012), but not in New Hampshire, Pennsylvania, or Michigan, *see* N.H. Rev. Stat. Ann. § 457:2 (2013); 23 Pa. Cons. Stat. Ann. § 1304(e) (West 2012); Mich. Comp. Laws § 551.3 (2012).

Policy differences underlie all of these variations, but the federal government does not take sides. Thus, two people who never went through a marriage ceremony but hold themselves out as married can be treated as married for federal income-tax purposes if they live in Colorado, which permits common-law marriage, but not if they live in Connecticut, which does not. *See* Rev. Rul. 58-66, 1958-1 C.B. 60 (1958). *Compare Renshaw v. Heckler*, 787 F.2d 50, 52–54 (2d Cir. 1986) (awarding benefits because New York, which does not recognize common-law marriage, would recognize claimant's common-law marriage because couple traveled to jurisdiction that recognized common-law marriage), *with Lynch v. Bowen*, 681 F. Supp. 506, 511–12 (N.D. Ill. 1988) *amended*, 1988 WL 33843 (N.D. Ill. Apr. 1, 1988) (denying benefits because Illinois would not recognize common-law marriage merely because

couple traveled to jurisdiction that recognized common-law marriage).

BLAG cites testimony from several members of Congress who were concerned about "people in different States" having "different eligibility" for federal benefits, BLAG Br. 8, but differing eligibility is and has been the norm in a nation where states determine the marital status implicated in so many federal laws. The Congress members' simultaneous desires (i) for uniformity; and (ii) to treat marriage as it always had been treated suggest a deep misunderstanding of *De Sylva*, *Ankenbrandt,* and the practical functioning of federal agencies that rely on state law for family-status determinations.

For example, a person can marry her first cousin in Massachusetts and be treated as married by the Social Security Administration, because Massachusetts recognizes first cousin marriages. *See* 42 U.S.C. § 416(h)(1)(A)(i). Yet a similarly situated person in Washington cannot marry his first cousin, and thus is not entitled to the same federal benefit. *See Weiner v. Astrue*, 2010 WL 691938, at *3–5 (S.D.N.Y. Mar. 1, 2010) (citing *Renshaw* and holding state recognition of common-law marriage controls whether applicant entitled to Social Security benefits).

The federal government as an employer might have a desire to treat its employees the same whether they live in Virginia or Maryland, *see* BLAG Br. 43, but it has not previously done so. A federal employee whose relationship meets the requirements of common-law marriage is treated as married by the federal government if she lives in

Washington D.C. (which recognizes common-law marriage), but not if she lives in New York (which does not).

### 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.[4] For much of the twentieth century, individuals would travel to states in which they were not domiciled to get divorced, in the same way that some opposition *amici* suggest same-sex couples were threatening to travel to Hawaii to get married. Senators' Br. 16–17; *see* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1504–05 (2000). In an effort to attract divorce business, Nevada repeatedly eased its jurisdictional residency requirements in the mid-twentieth century. *Id.* at 1505. "'Going to Reno' became almost a synonym for getting a divorce." *Id.* By 1946, Nevada's divorce rate was fifteen times higher than California's, and fifty times higher than New York's. *Id.*

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[4] *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 386–88 (2007) (describing different state policies regarding respecting sister-state divorce determinations).

Courts and scholars at the time and since have noted the troubling issues created by this diversity among the states. *See, e.g.*, Estin, 16 Wm. & Mary Bill Rts. J. at 390–92. Different states had different understandings regarding the divisibility of the marital relationship. Thus, contrary to Professor Wardle's suggestion at the Senate Hearings on DOMA, marital-status determinations were not remotely "fungib[le]." *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. On the Judiciary*, 104th Cong. 27, n.4 (1996) ("Senate Hearings").

Calls for national rules for adjudicating divorce were common for more than fifty years between the latter part of the nineteenth and the first part of the twentieth centuries, but Congress never created uniformity in the substantive definition of divorce. Many people assumed that any attempt to draft a uniform federal definition of divorce would impermissibly invade states' rights. *See* William L. O'Neill, *Divorce In the Progressive Era* 252–53 (1967). Congress never stepped in to override this diversity. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267, 313 (2009) ("Congress's enactment of DOMA contrasts with its inaction over decades as the states debated the problem of migratory divorce."); *see also* Historians' Br. § III.

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* 390 (3d ed. 2005) ("no-fault revolution"); Homer H. Clark, Jr. & Ann Laquer Estin, *Cases and Problems on Domestic Relations* 645 (7th ed. 2005) ("divorce revolution"); Mary Ann Glendon, *The Transformation of Family Law: Family Law in Transition in the United States and Western Europe* 1 (1989) ("unparalleled upheaval").

Certainly, there were people during that time who thought the emerging redefinition of marriage was just as "unprecedented" and "fundamentally" different 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 continue to respect state determinations with regard to divorce. *See, e.g.*, *Slessinger v. Sec'y of Health & Human Svcs.*, 835 F.2d 937, 940 (1st Cir. 1987) (refusing to apply federal divorce-recognition rule for Social Security purposes, because marital status determined by state law); *Money v. Office of Pers. Mgmt.*, 811 F.2d 1474, 1478 (Fed. Cir. 1987) (holding court must

determine whether petitioner divorced under state law to determine whether petitioner entitled to relief as a widow of a federal employee); *Brown v. Astrue*, 2012 WL 948926, at *5 (N.D. Cal. March 20, 2012) (holding ALJ must "appl[y] Virgina law to determine the validity of plaintiff's divorce" before ascertaining entitlement to Social Security benefits).

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 plenary definition of divorce. It never, in the name of caution, uniformity, administrative expediency, defending the status quo, preserving past legislative judgments or preserving traditional marriage, jettisoned its longstanding deference to state determinations of marital status.

### C. Federal Law Accepts State Diversity With Regard To Parenthood.

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. That determination matters at the federal level for comparable reasons: Federal rights, responsibilities, and benefits flow from that status.[5] As with marital status, states differ in how they

[5] State determinations of the parent-child status, like state determinations of the marital status, *see supra* note 3, are bounded by the Constitution. *See Stanley v. Illinois*, 405 U.S. 645, 652 (1972); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).

weigh policy considerations 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 recognized that states will take different approaches to defining "father." 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 paternity. Some states still make the marital presumption of paternity irrebuttable after a short statute of limitations. *E.g.*, Cal. Fam. Code § 7541(b) (West 2012) (two years to disestablish paternity); Minn. Stat. Ann. § 257.57, subdiv. 1(b) (West 2012) (same). Others make it rebuttable for a longer time. *E.g.*, Tenn. Code Ann. § 36-2-306 (West 2012) (allowing action before or after birth until three years beyond child's age of majority); Vt. Stat. Ann. tit. 15, § 302(b) (West 2012) (presumption rebuttable through and past child's age of majority). Still others have no statutes of limitations. *E.g.*, Ala. Code § 26-17-607(a) (2012); Mont. Code Ann. § 40-6-108(1) (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. App. 2009) (husband allowed to

challenge legal paternity with genetic evidence); *State, Dept. of Revenue, Office of Child Support Enforcement v. Ductant*, 957 So. 2d 658, 660 (Fla. Dist. Ct. App. 2007) (father allowed to rescind acknowledgement of paternity more than 60 days after its execution). Other states estop men who have acted as fathers from disestablishing their paternity with genetic evidence. *See, e.g.*, *In re Paternity of Cheryl*, 434 Mass. 23, 37–38, 746 N.E.2d 488, 499 (2001); *Brinkley v. King*, 549 Pa. 241, 251, 701 A.2d 176, 181 (1997).

Some states allow both motherhood and fatherhood to be determined in a surrogacy contract. *E.g.*, 750 Ill. Comp. Stat. 47/15(d) (2012) (making intended mother and father, as determined in a surrogacy contract, legal mother and father); *see also Johnson v. Calvert*, 5 Cal. 4th 84, 93, 851 P.2d 776 (1993) (using intent-to-parent standard to determine parental status). Some states not only refuse to enforce, but actually criminalize, surrogacy contracts. *E.g.*, N.Y. Dom. Rel. Law § 122 (McKinney 2013) (surrogate parenting contracts contrary to public policy, void, and unenforceable); Mich. Comp. Laws § 722.857(2) (2012) (criminalization). Some states allow two parents of the same sex to assume parental status through adoption. Other states do not. *See* Jane S. Schacter, *Constructing Family in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev 933, 934 (2000) (describing variety of ways in which some but not all states have recognized second-parent adoption).

As with marital status, deference to state determinations of parental status leads to disparities

in treatment. A man not genetically related to a child but 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 child born to a gestational surrogate mother might be considered a child for Social Security purposes in Indiana, but not in Illinois. *See Astrue v. Capato ex rel. B.N.C.*, __ U.S. __, 132 S. Ct. 2021, 2033 (2012) (noting Social Security Administration's practice of looking to state law to determine who qualifies as a child for benefit purposes); *Murphy v. Houma Well Serv.*, 409 F.2d 804, 811 (5th Cir. 1969) ("daughter" is rightful beneficiary under Jones Act because neither marital father nor any heirs de-legitimated child within short period allowed under Louisiana law). The fact that someone might be considered a parent in Nebraska but not in Nevada has never been a reason to adopt a uniform federal definition of parenthood.

The federal government has always worked with diverse definitions of both marital and parental status. *Amici* Senators imply that without DOMA there would have been too much uncertainty regarding which states would recognize marriages of same-sex couples, and therefore which of those marriages would be valid for purposes of a federal marital benefit or obligation. Senators' Br. 5–6. As the evolving state laws of parenthood and marriage show, however, there is already tremendous diversity and sometimes uncertainty with regard to family-status determinations.

Moreover, the Senators overstate their case. Most state positions on marriage between couples of

the same sex are clear. According to the National Conference of State Legislatures, there are not even a handful of states whose position on marriage between couples of the same sex is remotely in doubt. *See* Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Feb. 2013). In short, states were and are capable of clarifying which marriages they recognize, and thus the federal government's routine reliance on state law does not lead to unmanageable "confusion" or "inconsistency" in this or any other context. Senate Hearings at 34. (Comments of Lynn Wardle, Professor of Law, Brigham Young University).

Even with DOMA, there are no "uniform" federal definitions of marital or parental status. There are instead a variety of different eligibility rules in different states that allow both state and federal authorities to determine family status for people in a given state. These rules have never been consistent or fungible across states. Section 3 of DOMA does not dispense with this diversity and make a uniform rule of federal marriage recognition. It nationalizes one particular marital-status requirement, for all federal purposes, in contravention of the unbroken historical practice of federal deference to state marital-status determinations.

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

BLAG and its *amici* invoke a variety of federal statutes to argue that DOMA is just one of many federal statutes that regulate domestic relations. *See, e.g.*, BLAG Br. 48 (asserting that Congress "has a long history, when it sees fit, of supplying its own definitions of marriage for various federal purposes"); *Amicus Curiae* Brief of Nat'l Org. of Marriage on the Merits in Support of Respondent BLAG ("NOM Br.") 9 (asserting that "Congress has long defined marriage for purposes of federal statutes, even when such definitions conflicted with applicable state law"). But none of the statutes cited by BLAG or its *amici* does what DOMA does, which is to strip one subset of married couples of their married status for all federal purposes. Instead, prior to and since DOMA, all federal statutes pertaining to family status 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, there are federal statutes and regulations that *explicitly* invoke the state law of family status. Third, there are federal statutes that place limitations on or expand the category of who will be eligible for federal benefits under particular statutes

based on policy reasons pertinent to those specific statutes.[6]

### A. The Vast Majority of Federal Statutes Implicitly Rely On State Determinations Of Status.

Most federal statutes that refer to family status fail to provide any definition or guidance on how to determine family status. In using terms such as "spouse" or "married" or "parent," these laws necessarily rely on state law for those status determinations. Most of the examples cited by BLAG and its *amici* fall into this category. The Federal Employees' Compensation Act assumes a state-conferred marriage when it defines "widow" as a surviving "wife" without ever defining "wife." 5 U.S.C. § 8101(6). The Uniformed Services Former Spouses' Protection Act defines "spouse" as a "husband or wife" who was "married" without further defining those terms. 10 U.S.C. § 1408(a)(6). The Employment Retirement Income Security Act (ERISA) uses the term "spouse" more than twenty-five times without ever defining it.[7] *See, e.g.*, 29

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[6] *Amici* Family Law Professors and the AAML have considered all of the statutory examples cited by BLAG and *amici* NOM, Senators, and Law Professors. None of those examples departs from the framework discussed herein, and we are not aware of any contemporary statutes that do depart from this framework.

[7] The fact that ERISA and federally provided pensions may preempt state community-property law, *see, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 853–54 (1997), in no way indicates Congressional intent to disregard state-conferred marital statuses, which remain unaltered. *See* NOM Br. 14–15 (arguing that ERISA preempts some family law). Just as

U.S.C. §§ 1001, 1002, 1021, 1055, 1056, 1162, 1163, 1167, 1181.

Federal law also often uses the term "parent" or "child" without defining it. The Copyright Act cited by *amici* Law Professors defines "children," whether legitimate or not, as "immediate offspring, whether legitimate or not," and any adopted children, but does not further define "offspring." 17 U.S.C. § 101. *See* Brief for *Amici Curiae* Law Professors in Support of Respondent BLAG Addressing the Merits and Supporting Reversal ("Law Prof. Br.") 24–25. 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. *See* Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* 165 (2011).

Just last Term, this Court rejected the Third Circuit's reliance on biology in interpreting the term "child" in favor of the Social Security Administration's practice of relying on state law.

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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. That is wholly different from deciding whether one is married for all federal purposes. *See also* NOM Br. 17 (arguing "[b]ankruptcy law determines the meaning of alimony, support and spousal maintenance using federal law rather 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, but ignoring that bankruptcy law does not define marital status).

*See Capato*, 132 S. Ct. at 2033. Looking to state law is consistent with how federal courts have always interpreted family status at the federal level.[8] *See Murphy*, 409 F.2d at 811 ("[I]n construing the terms 'child' or 'children' in a federal statute, a court should look to state law.").

Comparably, federal courts look to state law to define terms like "spouse" or "widow." As the Second Circuit held, "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

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[8] *Amici* Law Professors appear to claim that 1 U.S.C. section 8 defines "child" for federal purposes in a manner akin to how they maintain DOMA defines "marriage" for federal purposes. Law Prof. Br. 24. If that were the case, however, *Capato* would have been unnecessary, because there would have been a definition of "child" without relying on state law. In context, it is clear that section 8 is meant only to distinguish already-born children from expected children, not define the parent-child relationship. *See* 1 U.S.C. § 8(a) ("[T]he word[] . . . 'child' . . . shall include every infant member of the species homo sapiens who is born alive at any stage of development."). They also suggest that the Immigration and Naturalization Act defines the parent-child relationship without resort to state law. *See* Law Prof. Br. 24 (citing 8 U.S.C. § 1101(b)(1)). But if section 1101(b)(1) defined the parent-child relationship, then the federal government, in contravention of almost all state law, has accepted a notion of three or more parents for one child. Under the INA's definition of "child," it is possible for a child to have two fathers—one who was married to its mother at the child's birth, 8 U.S.C. § 1101(b)(1)(A), and one who was its genetic father, *id.* § 1101(b)(1)(C). Even if the INA meant to give such a child an avenue to citizenship through either relationship, it would be extraordinary if it were interpreted to declare the existence of two fathers and a mother for the child.

of the place where the marriage was contracted." *Lembcke v. United States,* 181 F.2d 703, 706 (2d Cir. 1950). The Ninth Circuit, in interpreting a statute governing the Veterans Administration that did not define the term "marriage," held that "[t]he relevant law to which the regulations refer is the general law of the state of residence." *Barrons v. United States*, 191 F.2d 92, 95 (9th Cir. 1951). In another case interpreting the Jones Act in the context of common-law marriage, one district court warned that "[i]f the federal courts do not apply the existing state law of domestic relations, we will have created a federal common law of domestic relations wherever a federally-created right is involved." *Bell v. Tug Shrike*, 215 F. Supp. 377, 380 (E.D. Va. 1963), *aff'd* 332 F.2d 330, 335 (4th Cir. 1964) (noting "the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law").

As all of these courts have 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. Thus, before DOMA, when past Congresses passed statutes using the term "marriage," it was not, as BLAG contends, intending or not intending to exclude same-sex couples in that definition any more than it was intending or not intending to include common-law marriages or a particular understanding of divorce. BLAG Br. 21. Congress was doing what it had always done, which is rely on states to determine marital status.

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' Br. 15. This Court has already encountered and rejected this argument with regard to family status. In *De Sylva*, the Court explained that state determinations of family status control, though 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 580.

Currently, nine states and the District of Columbia authorize marriage between qualified same-sex couples, while other states such as California recognize marriages of same-sex couples married before a particular date for particular purposes. *See* Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, *available at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last updated Feb. 2013).

In none of these situations is a state just pouring any relationship into the marriage vessel; they are pouring relationships that, in all respects, save the genders of the parties, comport with the rich traditional and contemporary symbolism of marriage.

### 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 . . . 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. § 416(h)(1)(A)(i); *see also Capato*, 132 S. Ct. at 2031.

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 Veterans' Benefits Act states that "[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven 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).[9]

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[9] The statute's explicit reliance on state law is notable because elsewhere in the same title, "spouse" and "surviving spouse" are defined as "a person of the opposite sex." 38 U.S.C. § 101(3), (31). The legislative history suggests that these definitions 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 19–20 (1975). They were not intended to override section 103(c)'s

All of these examples, and others that fall in this category, support only the argument that the federal government defers to state determinations of marital status.[10]

### 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 in good faith thought they were. Unlike DOMA, these statutes do not disregard state-conferred married status and deny married status to an entire class of married people for all federal

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mandate to determine marital status in accordance with state law. Even if sections 101(3) and 101(31) were intended to exclude married same-sex couples from eligibility for veterans' benefits, such an exclusion for only one program is substantially different in scope and nature from DOMA, which disrupts and redefines a person's married status for all federal purposes.

[10] Despite the fact that the regulations implementing the Family and Medical Leave Act explicitly define "spouse" as a "husband or wife as defined or recognized under State law," 29 C.F.R. § 825.122(a), BLAG argues that the Department of Labor, in adopting final regulations, rejected the inclusion of "same-sex relationships" in the definition of spouse. BLAG Br. 5. In reality, the Department of Labor regulations rejected the inclusions of all unmarried "domestic partners in committed relationships including same-sex relationships" within the definition of "spouse." 60 Fed. Reg. 2180, 2190–91 (1995). Such action is entirely consistent with 29 C.F.R. section 825.122(a)'s deference to state law.

purposes. Instead, these statutes address different policy concerns, intrinsic to each particular statute, by conditioning receipt of some government benefits on statute-specific requirements.

1. *Eligibility Based On Marriage Plus Other Conditions*

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. When it appears that a couple has married only to secure some immigration benefit, however, Congress appropriately denies that benefit. *See* 8 U.S.C. § 1186a(b)(1)(A)(i) (marriage "entered into for the purpose of procuring an alien's admission as an immigrant" does not qualify for permanent residency status purposes); *id.* § 1255(e) (restricting adjustment of status based on marriages entered into during admissibility or deportation proceedings).

Still, immigration laws first defer to state law to define marital status. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 Wm. & Mary J. Women & L. 537, 550 (2010) ("Immigration officials and federal courts first insist that a marriage meets the procedural and substantive requirements of the state or country where the marriage was 'celebrated' . . . ."). Once the status has been established, then federal

immigration laws may impose other requirements, such as the rule that spouses must be physically present during the marriage ceremony (unless the "marriage" has "been consummated"). 8 U.S.C. § 1101(a)(35). Similarly, section 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 marriages to take advantage of an immigration policy that favors married individuals.

BLAG suggests that, instead of deferring to state law, Congress has "suppl[ied] its own definitions of marriage" with the Social Security Act's definitions of "wife," "husband," "widow," "widower," and "divorce" and the Federal Employee Benefits Act's comparable definitions. BLAG Br. 4, 5, n.2 (citing 42 U.S.C. § 1382c(d)(2); 5 U.S.C. §§ 8101(6), (11), 8341(a)(1)(A)–(a)(2)(A)). BLAG omits the crucial distinction: The Social Security Act *requires* that marital status—as opposed to qualifying conditions for benefits—must first be determined by the law of "the courts of the State in which . . . [the] insured individual is domiciled at the time such applicant files." 42 U.S.C. § 416(h)(1)(A)(i).

The more specific rules for qualification do not override the initial rule of deference to state determinations of family status. *See also* 20 C.F.R. § 404.345. Rather, the statute imposes additional requirements that are geared to preventing fraud or protecting the public fisc. *See, e.g.*, 42 U.S.C.

§ 416(d)(4) (for "divorced husband" to qualify for benefits on ex-spouse's earning record, he must have been "married to such individual for a period of 10 years immediately before the date the divorce became effective"); *Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (upholding legitimacy of nine-month durational requirement before spouse is eligible for Social Security benefits, to "prevent the use of sham marriages to secure Social Security payments"). None of these eligibility requirements abrogates or defines an applicant's existing marital status.

Comparably, when the Federal Employees Retirement System Act defines "former spouse" as a spouse of a civil servant who was married to the individual "for at least 9 months," 5 U.S.C. § 8331(23), or a "widow" as someone "married" for "at least 9 months immediately" prior to the death of her spouse, *id.* § 8341(a)(1)(A), it is not negating the existence, at a federal level, of a five-month marriage or a ten-year marriage that ended two years before the employee died. It is instead attaching additional conditions beyond marital status for the purpose of determining eligibility for benefits. Marital status in the first instance is determined by state law.

These statutes limit access to certain benefits in order to protect the public fisc and avoid fraud in the program at issue. The requirements in addition to marital status are specific to each statute and do not define marital status at all, let alone for all federal purposes. For example, a widower who has remarried may be considered a "surviving spouse" for tax purposes for a specific tax year provided that he did not remarry "any time before the close of [that] taxable year," 26 U.S.C. § 2(a)(2)(A), even if he

would not be considered a "widower" for Social Security purposes, *see* 42 U.S.C. § 402(f)(1)(A) (excluding from eligibility for widower benefits any individual who has remarried). Whether one is eligible for federal marriage benefits depends on the specific policy concerns of the particular federal statutes, and not on a blanket Congressional declaration of marital status. Indeed, these statutes accept state-conferred marital status and then go on to determine which married persons are eligible for federal benefits, for reasons specific to the program at issue.[11]

2. *Eligibility In the Absence of Marriage*

BLAG also notes that some statutes afford some individuals eligibility for marital treatment even in the absence of state-conferred marital status. *See, e.g.*, BLAG Br. 4 n.1. These statutes, however, do not constitute federal definitions of marriage. Just as Congress's decision to impose additional eligibility requirements beyond marriage does not constitute a federal denial of married status, Congress's decision to extend some federal marriage benefits to unmarried individuals under specific statutory

[11] *See, e.g.*, 26 U.S.C. § 7703(b) (allowing married individual to file as unmarried only if he or she: (a) decides not to file a joint return with the spouse; (b) lives apart from the spouse during last six months of the year; and (c) maintains the home and support of a qualifying child). BLAG and NOM mischaracterize this example as a denial of marital recognition or benefits to certain married couples. BLAG Br. 5; NOM Br. 18. To the contrary, section 7703(b) simply provides an additional and more beneficial filing option to married taxpayers living apart from their spouses.

provisions does not constitute a federal creation of married status.

For example, the Social Security Act extends the payment of spousal Social Security benefits to someone who "in good faith went through a marriage ceremony . . . resulting in a purported marriage . . . which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage" or who would otherwise qualify for a spousal distribution under the state's intestacy laws. 42 U.S.C. § 416(h)(1)(B)(i). Comparably, the Veterans' Benefits Act provides marital treatment for someone who lived with or had a child with a veteran if that person married the veteran but was unaware of a legal impediment to the marriage. 38 U.S.C. § 103(a). In the immigration context, federal law allows an individual to petition for immigrant status based on marriage to a citizen if the petitioner believed the marriage was legitimate, but later found that the marriage was invalid because of the citizen's bigamous conduct. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(BB).

In these specific settings, Congress has embraced a version of the putative-spouse rule applied in many states to protect individuals potentially made vulnerable by marriage laws for Social Security, veterans' benefits, or immigration purposes. These statutes do not make any individual married for all federal purposes in contravention of state law.

BLAG and its *amici* point to two other instances of potential Congressional recognition of relationships that might constitute common-law marriage in some states. First, income from

cohabitants who "hold[] themselves out to the community" as married may be deemed to applicants under the Supplemental Social Security Income Program, which provides extra income for the aged, blind, and disabled. 42 U.S.C. § 1382c(d)(2); *see* BLAG Br. 4. Deeming income from cohabitants, in a program intended to provide benefits to only the most needy individuals, is a measure designed to protect the public fisc and prevent fraud. This provision attempts to ensure that applicants have no other source of financial support. It not an attempt to incorporate common-law marriage even into all of the Social Security Act, much less into all federal law.

Second, *amici* Law Professors cite two Civil War statutes that recognize, for pension and freedom purposes, cohabitants of Colored Union War soldiers.[12] Law Prof. Br. 25. These statutes, however, offered federal benefits to a class of women who were prevented, under Confederate state laws, from marrying without the consent of their owners or from inheriting property. *Andrews v. Page*, 50 Tenn. (3 Heisk.) 653, 666 (1871). These statutes did not recognize common-law marriages for all Union soldiers or for all African Americans, much less for all federal purposes. Congress's decision to grant these women widow's benefits and freedom in order to recruit African American soldiers to the Union

[12] *See* A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States, ch. 29, 13 Stat. 571 (Mar. 3, 1865) (codified at R.S. § 2037); An Act Supplementary to an Act Entitled "An Act to Grant Pensions," ch. 247, § 14, 13 Stat. 387, 389 (July 4, 1864) (codified at R.S. § 4773).

army is entirely different in kind and scope from its creation of a blanket rule of federal non-recognition for one subset of state-licensed marriages.

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 III, fall into the categories outlined in this section. None of these statutes, individually or together, does what DOMA does. None of 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.[13]

## III. 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

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[13] Some examples cited by *Amici* NOM and Law Professors do not even remotely pertain to classification determinations of family status at the federal level. *See, e.g.*, NOM Br. 13 (citing Homestead Act of 1862, which governs the grant of federal land to qualified homesteaders and, in the event of death prior to the requisite 5-year period, to their spouses); Law Prof. Br. 27–28 (same). The fact that the Homestead Act delineated that the spouse of a patentee should inherit the patent in the event of death in no way overrides state intestacy law or state determinations of family status. NOM Br. 15–16 (arguing 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.

regulating marital status. *See* Historians' Br. § IV.B. For example, there were federal definitions and proscriptions on who could marry in numerous territories, most notably Utah, before those territories became states. *See, e.g.,* Morrill Anti-Bigamy Act, ch. 125–26, 12 Stat. 501, 501–02 (July 1, 1862). Federal definitions of marriage still control in the U.S. territories of the Virgin Islands, 48 U.S.C. § 1561, and Puerto Rico, 48 U.S.C. § 736. Those federal definitions do not usurp state authority to define marital status because there is no state authority in federal territories.

Although family law is a matter of tribal sovereignty, Congress has also regulated family law among Native Americans to protect the sovereignty of tribes from encroachment. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978). For example, Congress has established rules related to marriages between American Indians and white persons to protect tribal members from marital claims to Indian lands by non-members of the tribe. *See, e.g.*, 25 U.S.C. § 183 (imposing elevated standard of proof to show marriage of "any white man with any Indian woman"). Comparably, the Indian Child Welfare Act reflects Congress's desire to protect tribal integrity during adoption proceedings. *See* NOM Br. 26 n.68. Because these rules pertain to American Indian tribes, over which Congress has plenary authority under Article I, Section 8, no state definition of marital status is implicated.

With respect to the military, 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 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); *United States v. Kyles*, 20 M.J. 571, 574 (N.M.C.M.R. 1985) (interpreting Code of Uniform Military Justice to forbid bigamy as "prejudicial to good order and discipline" and "service-discrediting").

These instances of marital regulation in the military regulate military personnel conduct rather than define marriage. Indeed, the military code regulates and punishes all sorts of behavior that it thinks is "service-discrediting." *Manual for Courts Martial*, *United States*, Part IV, Art. 134, ¶ 60, U.S. Dep't of Defense (2012 ed.), *available at* http://armypubs.army.mil/epubs/pdf/mcm.pdf (last visited Feb. 25, 2013) (criminalizing conduct "of a nature to bring discredit upon he armed forces"); *see also United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984) (prosecution for adultery as discrediting behavior). The military's proscriptions on certain kinds of marital conduct are just one piece of the military's extensive regulation of service

member behavior.[14] They do not constitute a uniform federal definition of marriage, nor do they usurp state authority to define marriage.

## 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.

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[14] *Amicus* NOM's military benefit and pension examples fail for these same reasons, as well as because NOM mischaracterizes its supporting case law. *See, e.g.*, NOM Br. 14 n.33 (misrepresenting *United States v. Richardson*, 4 C.M.R. 150, 158–59 (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 *Richardson* holds that "[i]n military law, as in civilian, the validity of a marriage is determined by the law of the place where it is contracted," *id.* at 156).

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