Nos. 12-15388 & 12-15409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI
Plaintiff-Appellee,

v.

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

and

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

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

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

and

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

On Appeal from the United States District Court
for the Northern District of California, No. CV 10-00257
The Honorable Jeffrey S. White, United States District Judge

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS ORRIN G. HATCH, SAXBY CHAMBLISS, DAN COATS, THAD COCHRAN, MIKE CRAPO, CHARLES GRASSLEY, LINDSEY GRAHAM, MITCH McCONNELL, RICHARD SHELBY AND ROGER WICKER IN SUPPORT OF INTERVENOR-DEFENDANT-APPELLANT

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STATEMENT OF INTEREST

Amici Orrin G. Hatch, Saxby Chambliss, Dan Coats, Thad Cochran, Mike Crapo, Charles Grassley, Lindsey Graham, Mitch McConnell, Richard Shelby and Roger Wicker are sitting United States Senators who served in the 104th Congress and voted for the Defense of Marriage Act (DOMA) in 1996. As such, they have an interest in the constitutionality of that statute and in ensuring that the federal courts understand the important governmental interests that it was enacted to serve. All parties have consented to the filing of this brief.

Amici are particularly concerned that the decision below is predicated on a fundamental misunderstanding of the judicial role in passing on the constitutionality of a federal statute. Rather than according congressional action with a presumption of constitutionality, the District Court adopted a virtual presumption of unconstitutionality based on its evident distaste for isolated statements made by individual legislators during the course of the debate. The District Court's subjective perception of congressional motivation is not a basis for declaring a statute unconstitutional.

One of the *Amici*, Senator Orrin Hatch, chaired the Senate Judiciary Committee, which had jurisdiction over the DOMA legislation. In considering DOMA, the committee heard from witnesses regarding the

potential recognition of same-sex marriage by the highest court in the State of Hawaii and the impact that this would have on federal law. The committee also heard testimony from constitutional scholars supporting the constitutionality of DOMA,[1] and Senator Hatch received written assurance from the Department of Justice that it saw no constitutional infirmity in the statute.[2] The District Court makes no mention of the committee's consideration of these matters.

Amici state pursuant to Rule 29 of the Federal Rules of Appellate Procedure that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amici* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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[1] Two witnesses, Professor Lynn D. Wardle and Mr. David Zweibel, testified that Section 3 of DOMA, which is at issue in this case, was clearly within Congress's constitutional power. *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 37-38, 54 (1996) ("Senate Hearing"). Another witness, Professor Cass R. Sunstein, testified in opposition to DOMA; however, Professor Sunstein's testimony related solely to Section 2, and he noted that he did not believe that Section 3 was unconstitutional. *Id.* at 44 n.1.

[2] Senate Hearing at 2.

INTRODUCTION AND SUMMARY OF ARGUMENT

DOMA was enacted in 1996 after passing each house of Congress with more than 80% of the votes in favor, an overwhelming and bipartisan majority.[3] President Clinton signed DOMA into law on September 21, 1996. 32 Weekly Comp. Pres. Doc. 1891 (1996).

"[I]n large part, the enactment of DOMA can be understood as a direct legislative response to *Baehr v. Lewin*,[4] a 1993 decision issued by the Hawaii Supreme Court, which indicated that same-sex couples may be entitled to marry under that state's constitution." Order at 9, No. 3:10-CV-00257 (N.D. Cal. Feb. 22, 2012) (ECF No. 186) ("Order"). The *Baehr* decision had found that denials of marriage licenses to same-sex couples were subject to strict scrutiny under the Hawaii Constitution, and it had remanded the case to the lower courts to determine whether the state could meet that burden. At the time Congress considered DOMA, it appeared that the Hawaii courts were "on the verge of requiring that State to issue marriage licenses to same-sex couples." H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("House Report").

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[3] The House approved the bill by a vote of 342-67, while the Senate passed it by a vote of 85-14. 142 Cong. Rec. 17094, 22467 (1996).

[4] 852 P.2d 44 (Haw. 1993).

Congress's concern was not with Hawaii's marriage laws. *See* House Report at 5 (House Judiciary Committee "expresses no opinion on the propriety of the ruling in *Baeher*"). Instead, Congress was concerned with the impact that recognition of same-sex marriage in one or more states would have on other states and on the federal government. The likely effects were explored in hearings held before the House and Senate Judiciary Committees, which showed (1) *Baehr* was merely one facet of an organized litigation strategy designed to secure nationwide recognition of same-sex marriage;[5] and (2) numerous legal experts, both for and against DOMA,

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[5] At a May 15, 1996 hearing before the House Judiciary Subcommittee on the Constitution, a 23-page memorandum from the Lambda Legal Defense and Education Fund, Inc. (LLDEF) was placed into the record. This memorandum laid out a strategy for using the expected legal victory in Hawaii to obtain recognition of same-sex marriages in other states and by the federal government:

> Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions. Despite a powerful cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states *and the federal government*, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?
>
> We at Lambda believe that the correct answer to these questions is "Yes."

agreed that recognition of same-sex marriage in one or more states would likely have unpredictable and inconsistent legal impacts on other states and the federal government.[6] Indeed, same-sex marriage advocates hoped to use the "legal and practical nightmare" created by this situation to generate pressure for uniform nationwide recognition of same-sex marriages. *See* House Hearing at 19.

Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 15 (1996) ("House Hearing") (emphasis added).

[6] For example, Professor Michael W. McConnell of the University of Chicago Law School opined that it was "not unlikely" that couples who entered into same-sex marriages in Hawaii would be entitled to legal recognition in other states under the Full Faith and Credit Clause, U.S. Const. art. V, § 1, although he allowed that it was "not certain" and "[i]t is possible that states with laws against same-sex unions will be able to resist recognition of these marriages under the so-called 'public-policy' exception." Senate Hearing at 57. Professor Cass R, Sunstein, also of the University of Chicago Law School, thought it was "unlikely" that the Full Faith and Credit Clause would require the recognition of out-of-state marriages, but he acknowledged that it was not clear how this "traditional view" could be squared with the language of the clause. *Id.* at 44-45. All legal experts agreed that if the public policy exception applied, it would mean varying results in different states.

As Professor Lynn D. Wardle of Brigham Young University, an expert in family law, testified: "[T]his is the kind of issue that is best resolved before the cases arise. Waiting until after some state legalizes same-sex marriage and a flood of cases are filed demanding that same-sex unions formed in such as state be treated as 'marriages' for purposes of federal laws would be very unwise. It would invite a multitude of unnecessary litigation, and create confusion, inconsistency, and unfairness. Different courts in different districts and circuits might reach contradictory conclusions adding to the uncertainty." Id. at 33-34.

To address these problems, DOMA has two basic provisions. Section 2, 28 U.S.C. § 1738C, provides a uniform national rule under which states may, but are not required to, recognize same-sex marriages entered into in other states. Section 3, which is at issue in this case, defines the terms "marriage" in federal law as "mean[ing] only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

By adopting Section 3, Congress sought to avoid the federal government having to litigate, on a statute by statute and state by state basis, whether (a) federal law provided benefits for same-sex marriages that were valid under state law and if so, (b) the particular marriage in question was valid under state law. As Professor Wardle testified before the Senate Judiciary Committee, "Section 3 eliminates what could be a lot of very messy and costly litigation for the federal government." Senate Hearing at 34.

The District Court found that Section 3 violates the equal protection rights of same-sex couples who are married under state law. In so doing, it relied heavily on evidence from the legislative history, particularly statements made by individual members during floor debate, which it viewed as showing that DOMA was motivated by "animus" against gays and lesbians and/or the concept of same-sex marriage. The District Court

virtually ignored Congress's interest in avoiding massive legal uncertainty, needless litigation, and inconsistent results with regard to the availability of federal benefits.

As *Amici* will explain in this brief, the District Court opinion misunderstands and misapplies the Supreme Court's precedent on "animus." Nothing in that jurisprudence authorizes a court to strike down an otherwise constitutional law based on the belief that legislators individually, or the Congress as a whole, were motivated by "animus." Adopting any such doctrine would be highly dangerous to the separation-of-powers and the proper functioning of our constitutional system.

The District Court's focus on "animus" may explain why the court overlooked the significant government interest in clarifying the federal definition of marriage at a time when Congress anticipated that there would be a flood of litigation by same-sex couples seeking benefits under federal law. First, the District Court failed to understand that federal law *necessarily* defines "marriage" in some fashion beyond mere incorporation of state law. Second, it incorrectly assumed that, under the pre-DOMA "status quo," a same-sex couple would be considered married for federal law purposes if married under state law. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), a decision of this Court that the District Court evidently overlooked, shows

that this was not the case. As shown by *Adams* and the statements of numerous members of Congress during the enactment of DOMA, Section 3 merely clarified the existing federal law definition of marriage. It preserved, rather than disrupted, the "status quo."

Finally, even if the pre-DOMA "status quo" had been as the District Court erroneously assumed, Congress had compelling reasons to adopt a uniform federal policy on recognition of same-sex marriages. Absent such a policy, hundreds or thousands of same-sex couples could have traveled to Hawaii (or any other state that recognized same-sex marriage) and returned to their home states to seek federal benefits. In addition to the costly litigation that would have been required to determine if these marriages were valid under state law, this inevitably would have led to inconsistent and unequal treatment of same-sex couples throughout the country. In enacting Section 3, Congress ensured (or sought to ensure) that any extension of federal benefits to same-sex couples would occur by its own deliberate policy choice, not through piecemeal litigation in state or federal courts.

ARGUMENT

I. **The District Court's Decision is Erroneously Predicated on the Assertion that DOMA was Motivated by "Animus"**

The District Court's opinion repeatedly asserts that Congress's enactment of DOMA was motivated by "animus." *See* Order at 24 ("Here, the legislative history is replete with expressed animus toward gay men and lesbians."); *id.* at 25-26, 30-31, 34, 42. The court found such animus in expressions of opinion by Members of Congress that (1) homosexuality is immoral and (2) the definition of marriage should be reserved for a man and a woman. There is no indication in the court's opinion that anyone could oppose same-sex marriages *without* being infected by "animus" as the court defines the term.[7] Without saying so expressly, the District Court appears to treat this alleged "animus" as creating, at the very least, a presumption of unconstitutionality.

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[7] A recent decision of another district court in this Circuit makes this point explicit. *See Dragovich v. United States Dep't of the Treasury*, No. 4:10-CV-01564, 2012 WL 1909603, at *10 (N.D. Cal. May 24, 2012) ("[T]here is no principled distinction between anti-gay animus and a conception of civil marriage as an institution that cannot tolerate equally committed same-sex couples"). This reasoning is entirely circular- opposition to same-sex marriage is defined as "animus" and therefore any law which fails to accept same-sex marriage is deemed to be invalid as based on such animus. This is little more than an attempt to win an argument by disparaging the motives of the other side.

The Supreme Court's "animus" jurisprudence is generally traced to the case of *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), which involved an amendment to the Food Stamp Act withdrawing benefits from otherwise eligible individuals if they lived in a household with unrelated individuals. . The Court first noted that the provision was clearly irrelevant to the purposes stated in the original Act itself (e.g., to provide a market for agricultural surpluses and to satisfy the nutritional requirements of food stamp recipients). *Id.* at 534. Noting that there was "little legislative history" to illuminate the purposes of the amendment, the Court observed that the only purpose reflected in the history was "that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* The Court held that "[t]he challenged classification clearly cannot be sustained by reference to this congressional purpose [because] . . . a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534-35.

Note that *Moreno* does not suggest that the law in question is invalid because it was allegedly *motivated* by disapproval or dislike of "hippies." A law furthering a legitimate governmental interest, such as a law making it a crime to use marijuana, would not be unconstitutional even if some or all

members who voted for it expressed disapproval of "hippies" as their reason for doing so. *Moreno* merely stands for the proposition that such views *alone* do not constitute a legitimate government purpose or interest.[8]

Subsequent Supreme Court cases are to the same effect. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a Colorado constitutional amendment which (1) repealed existing laws classifying gays and lesbians as a group protected from discrimination and (2) prohibited any future legislative, executive or judicial action to provide such protection at any level of state or local government. *Id.* at 624. Although the Court noted that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 634, this inference was based on the structure of the amendment and the absence of "any identifiable legitimate purpose or discrete objective." *Id*. at 635. It was not based on a subjective evaluation of the motives of the legislative actors, in this case the people of Colorado.

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[8] *See also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985) (overturning the denial of a special use permit under local zoning regulations to build a home for the mentally disabled). The Court "found unconvincing interests like protecting the inhabitants against the risk of flooding, given that nursing or convalescent homes were allowed without a permit; mental disability too had no connection to alleged concerns about population density." *Massachusetts v. U.S. Dep't of Health & Human Servs.,* Nos. 10-2204, 10-2207 & 10-2214, 2012 WL 1948017, at *5 (1st Cir. May 31, 2012) (citing *Cleburne*, 473 U.S. at 448).

Moreover, the Court did not suggest that an otherwise constitutional law would be invalidated by improper motives of some legislators.[9]

This distinction is of critical importance because judicial scrutiny of legislative motives is fraught with peril.[10] First, evaluating constitutionality

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[9] *See Perry v. Brown*, 671 F.3d 1052, 1104 (9th Cir. 2012) (Smith, J., concurring in part and dissenting in part) ("*Romer* was a case where the only basis for the measure at issue was animus. However, in a case where the measure at issue was prompted both by animus and by some independent legitimate purpose, the measure may still be constitutionally valid.").

In *Perry*, this Court held that Proposition 8, an amendment to the California Constitution adopted by a vote of the people in 2008, violated the Equal Protection Clause of the Fourteenth Amendment by withdrawing from same-sex couples the right to be married, a right that had first been afforded to such couples by a decision of the California Supreme Court earlier in 2008. 671 F.3d at 1063; *see also In re Marriage Cases,* 183 P.3d 384 (Cal. 2008). The *Perry* ruling rested on two conclusions. First, the majority emphasized that Proposition 8 *eliminated* the existing right to same-sex marriage, rather than merely preserving the status quo or declaring the state of the law at the time of the California Supreme Court decision. 671 F.3d at 1079-80. Second, it found no legitimate reason for which Proposition 8, which it viewed as having no practical effect other than to strip same-sex couples of the right to use the designation "marriage," could have been enacted. *Id.* at 1063, 1081.

As discussed *infra*, Section II, neither of these conclusions can be drawn with respect to Section 3 of DOMA. Moreover, while *Perry* discusses evidence that Proposition 8 "was born of disapproval of gays and lesbians," id. at 1094-95, it does so only *after* concluding that there was no possible legitimate justification for the measure. Nothing in Perry suggests that "objective indicators of the voters' motivations," *see id.* at 1094 n.26, would have invalidated Proposition 8 if it had not, in the court's view, withdrawn existing rights without any legitimate basis.

[10] *See Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry

based on assessment of legislative motives would mean that the same law could be constitutional or unconstitutional, depending on the particular legislature that enacted it. Such an approach would be utterly at odds with our constitutional traditions.[11]

Second, judicial scrutiny of legislative motives inevitably raises insoluble problems of proof. A court lacks information to determine the true motives of particular legislators, much less to determine whether to impute such motives to the legislature as a whole. As Chief Justice Marshall noted in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810), a court cannot declare a legislative act to be "a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law." Inevitably, a court's subjective assessment of the motives of a particular legislature will be influenced by the court's own prejudices, as illustrated by the District Court's dismissal of "prior law, history, tradition, the dictionary and the Bible" as sources relevant to understanding the governmental interest in marriage. Order at 37.

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seeks to go behind objective manifestations it becomes a dubious affair indeed.").

[11] Justice Story explained that it would be "novel and absurd" to suggest that "the same act passed by one legislature will be constitutional, and by another unconstitutional," depending on the motives for enacting it. 2 Joseph Story, Commentaries on the Constitution of the United States 533 (1833).

Third, judicial review of legislative motives raises serious separation of powers problems. Judicial "psychoanalysis" of legislative motives, to use Justice Cardozo's phrase, is a highly subjective exercise, which threatens needless friction between the branches.[12] Scouring the congressional record for "sound-bites" to divine and disparage the motives of individual legislators also chills the freedom of legislative speech that is the hallmark of robust democratic debate.[13]

All of these dangers are well-illustrated by the attack on DOMA as allegedly motivated by "animus." It is one thing for the District Court to conclude that traditional moral views, standing alone, do not justify the enactment of DOMA; it is quite another to find that legislators who hold or express such moral views somehow taint the constitutionality of the statute.[14] Because "other reasons exist to promote the institution of marriage

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[12] *See United States v. Constantine,* 296 U.S. 287, 298-99 (1935) (Cardozo, J., dissenting).

[13] *See* U.S. Const. art. I, § 6, cl.1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

[14] Moreover, the District Court's equation of moral opposition to homosexuality and the type of racial bigotry which led to the anti-miscegenation laws is inconsistent with how the Supreme Court has discussed this topic. *See Lawrence v. Texas,* 539 U.S. 558, 571 (2002) (noting that for many persons moral objections to homosexuality "are not trivial concerns but profound and deep convictions accepted as ethical and

beyond mere moral disapproval of an excluded group," as Justice O'Connor explained in her concurring opinion in *Lawrence v. Texas*,[15] the fact that many legislators hold traditional views on the subject of homosexuality cannot possibly invalidate DOMA.

The District Court's approach cherry-picks statements made by individual members, construes them as reflective of improper motivation, and then imputes these improper motives to the Congress as a whole. But one could just as easily identify numerous supporters of DOMA who did not base their votes on moral objection to homosexuality and who opposed discrimination against gays and lesbians. *See, e.g.,* 142 Cong. Rec. 22452 (1996) (Sen. Mikulski) ("My support for the Defense of Marriage Act does not lessen in any way my commitment to fighting for fair treatment for gays and lesbians in the workplace."). These include, for example, 16 original Senate co-sponsors of S.932, which was introduced in 1995 to ban employment discrimination on the basis of sexual orientation.[16] The

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moral principles to which they aspire and which thus determine the course of their lives.").

[15] 539 U.S. at 585 (O'Connor, J., concurring).

[16] *See* Employment Nondiscrimination Act of 1995, S. 932, 104th Cong. The primary sponsor of S. 932, Senator Jeffords, voted for DOMA, as did 15 co-sponsors (Senators Bingaman, Bradley, Chafee, Dodd, Glenn, Harkin, Kohl,

arbitrary nature of invalidating legislation based on the presumed motives of a few members is particularly apparent with regard to a statute like DOMA, which passed both houses of Congress with overwhelming support across the political spectrum, including the sitting Vice President of the United States, and was signed by President Clinton.

In a recent decision, the U.S. Court of Appeals for the First Circuit rejected the argument that Section 3 of DOMA could be ascribed to animus, noting that "[t]he many legislators who supported DOMA acted from a variety of motives, [including] to preserve the heritage of marriage as traditionally defined over centuries of Western civilization." *Massachusetts v. HHS,* 2012 WL 1948017, at *11. The desire to preserve this institution cannot be equated to "mere moral disapproval of an excluded group," *id.* (*quoting Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring)), because "[t]raditions are the glue that holds society together." *Id*. Furthermore, "selected comments by a few individual legislators . . . cannot taint a statute supported by large majorities in both Houses and signed by President Clinton." *Id.*

There is no logical stopping point to the proposition that a legislative act may be declared unconstitutional based on divining and disparaging the

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Lautenberg, Leahy, Levin, Lieberman, Mikulski, Murray, Sarbanes and Wellstone). *See* 142 Cong. Rec. 22467 (1996).

motivations of individual legislators, or even of the people themselves. This approach is corrosive of the rule of law, disrespectful of the co-equal branches of government, and ultimately destructive of democratic debate in a free society.

II. Section 3 of DOMA Advances a Significant Government Interest in Clarifying the Federal Definition of Marriage

In order to assess the governmental interests advanced by Section 3 of DOMA, it is critical to understand the legal and factual landscape at the time that Congress acted. The pendency of the *Baehr* litigation in Hawaii had raised an issue that few, if any, members of Congress previously had considered-- whether a same-sex couple could be considered as "married" within the meaning of federal law.

As of the enactment of DOMA, there were 1,049 federal statutory provisions in which benefits, right and privileges were contingent on marital status or in which marital status was a factor.[17] Congress clearly had a legitimate interest in determining how these provisions would be affected by the recognition of same-sex marriage in Hawaii or other states. *See Massachusetts v. HHS,* 2012 WL 1948017, at *7 ("Congress surely has an interest in who counts as married" for purposes of federal law).

[17] *See* U.S. Gen. Accounting Office, GAO-04-353R, Defense of Marriage Act 1 (Jan. 23, 2004).

The constitutional attack on Section 3 is predicated on the assumption that, absent its enactment, any same-sex couple married in a state that recognized such marriages would be automatically entitled to federal marriage benefits. However, this assumption is unsupported by any legal precedent that existed at the time DOMA was enacted and is in fact contradicted by the precedent in this Circuit. It is certainly not the understanding on which Congress acted when it passed DOMA.

Furthermore, even if it were true that pre-DOMA federal law would have followed state law with regard to recognition of same-sex marriages (which, again, it is not), Congress was aware that determining the validity of a same-sex marriage under state law in many cases would also have involved substantial uncertainty. Thus, there was a significant governmental interest in providing a uniform federal definition of marriage in order to avoid the likelihood of substantial litigation and inconsistent results regarding the eligibility of same-sex couples for federal benefits.[18]

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[18] The District Court's ruling to some extent sounds in a hybrid federalism/equal protection analysis, in which Section 3 is subject to heightened scrutiny because it allegedly altered "the federalist balance in the area of domestic relations." Order at 10. Recently, other courts have also suggested this approach. *See Massachusetts v. HHS,* 2012 WL 1948017, at *8 ("Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns."); *Windsor v.*

(a). Pre-DOMA federal law did not automatically recognize all state marriages. No one seriously contends that the term "marriage" in federal law, before or after enactment of DOMA, is simply an empty vessel into which the states can pour any relationship they please.[19] If that were the

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United States, No. 10-8435-CIV, 2012 WL 2019716, at *10 (S.D.N.Y. June 6, 2012) (expressing federalism concern because, among other things, "DOMA operates to reexamine the states' decisions concerning same-sex marriage").

Whatever the merits of this novel theory in the abstract, it cannot invalidate Section 3 of DOMA. First, as discussed i*nfra*, Section 3 did not alter anything, but merely preserved the status quo with regard to the meaning of marriage in *federal law*. Second, DOMA in no way infringes on the rights of states to define marriage however they wish for state law purposes. If anything, it does the contrary through Section 2, which expressly guarantees the autonomy of states with regard to recognition or non-recognition of same-sex marriage.

Finally, it is not accurate to suggest that Congress could have, simply by doing nothing, been more "neutral" with regard to state decisions in defining marriage. Assuming that same-sex couples married and domiciled in Hawaii (for example) would have been entitled to some federal benefits, this would have required the vast majority of other states to subsidize marriages not recognized under their law. More importantly, it would raise the question of whether their own citizens who were married in Hawaii and returned home would be entitled to federal benefits. As discussed *infra*, how different courts in different states would answer this question would be difficult to predict, but it almost certainly would lead to instances of conflict between a particular court's interpretation of federal law and the public policy of the state of domicile with regard to same-sex marriage.

[19] One DOMA opponent did argue that states should be permitted to recognize situations in which "[e]lderly people . . . live together with friends of the same sex" as "marriages" for purposes of receiving federal benefits.

case, it would be irrational for Congress to condition any benefits on the existence of the marriage relationship because one state's definition of marriage might be completely distinct from another's. Accordingly, interpreting the term "marriage" (and related terms) in federal law requires *some* understanding of the meaning of that term apart from state law.[20]

That pre-DOMA federal law embraces the traditional understanding of "marriage" can be seen plainly by looking at the language of particular statutes. *See, e.g.,* 26 U.S.C. § 6013 (providing for joint tax returns by "husband and wife"); 29 U.S.C. § 2611 (13) (term "spouse" for Family and Medical Leave Act "means a husband or wife, as the case may be"); 42 U.S.C. § 416 (b) (for Social Security Act a "'wife' means the wife of an individual, but only if she . . . is the mother of *his* son or daughter [or]was married to *him* . . .") (emphasis added).

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142 Cong. Rec. 16975 (1996) (Rep. Farr). It is safe to say, however, that this was not a view widely shared by either supporters or opponents of DOMA.

[20] Thus, Professor Wardle testified before the Senate Judiciary Committee: "[I]f some state legalizes same-sex marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely the essential fungibility of the concepts of 'marriage' from one state to another. Section 3 clarifies the premise upon which two centuries of federal legislation using marriage terms has been predicated." Senate Hearing at 27 n.4.

Even a valid state law marriage of a husband and wife does not necessarily qualify as a marriage for federal law purposes. Some federal statutes, such as the anti-fraud provisions of the immigration laws, limit recognition of state law marriages for federal purposes.[21] Moreover, federal law may not recognize a marriage valid at the place of celebration if it is invalid under the law of the place of domicile.[22]

(b). The recognition of same-sex marriages for federal law purposes was not the "status quo" prior to DOMA. The District Court characterizes Section 3 of DOMA as "drastically altering the benefits structure based on state definitions of marriage and the federalist balance in the area of domestic relations." Order at 10. It further claims that DOMA represented "a stark departure from tradition" and exhibited a "blatant disregard" for the status quo with regard to the federal definition of marriage. *Id.* at 39.

However, this description mischaracterizes the legal and practical reality that formed the backdrop for Congress's consideration of DOMA in 1996. First, it is undisputed that, at that time, no state had ever recognized

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[21] *See* 8 U.S.C. § 1186a(b)(1)(A)(i).

[22] *See* 42 U.S.C. § 416(h)(1)(A)(i) (under Social Security Act, family status is determined by the law where the applicant is domiciled at the time of application); 29 C.F.R. § 825.800 (for Family and Medical Leave Act, "spouse" means "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides").

same-sex marriage, nor had any same-sex couple ever been "married" within the meaning of federal law. These facts are clearly relevant to what constituted the "status quo" in 1996.

The District Court defines the "status quo" as "federal recognition of the individual states' authority to define marriage." Order at 39. But at the time DOMA was enacted, federal law did not recognize every state law marriage, and it had never recognized a same-sex marriage.

To the contrary, in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), this Court specifically held, in the context of federal immigration laws applying to the "spouse" of a U.S. citizen, that a same-sex marriage was not a "marriage" within the meaning of federal law. Facing the claim of a same-sex couple who purported to be married under state law,[23] the court began its analysis by noting "Congress did not intend the mere validity of a marriage under state law to be controlling." *Id.* at 1039. Concluding that Congress did not intend the term "spouse" to apply to same-sex partners married under state law, it relied primarily on the canon of construction that "words will be interpreted as taking their ordinary, *contemporary* meaning,"

[23] The couple had obtained a marriage license from a county clerk in Boulder, Colorado. The court did not reach the question of whether Colorado would recognize such a marriage, deciding the case instead solely on the federal definition of marriage. *Id.* at 1039 n.2.

that the "term 'marriage' ordinarily contemplates a relationship between a man and a woman," and that nothing in the legislative history of the statute indicated a congressional intent to expand this definition. *Id*. at 1040 (emphasis added).

The significance of *Adams* to the present case goes beyond its status as controlling legal precedent in this circuit.[24] Just as importantly, it demonstrates that automatic recognition of state-law marriages, particularly with respect to same-sex couples, was not the "status quo" when Congress enacted DOMA in 1996. To the contrary, as was stated throughout the legislative history of DOMA, Congress believed that Section 3 merely clarified and restated the existing definition of "marriage" in federal law. *See* House Report at 10 ("Until the Hawaii situation, there was never any reason to make explicit what has always been implicit—namely, that only heterosexual couples could get married."); *id.* ("[T]he Committee believes that it can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples."); 142 Cong. Rec. 22446 (1996) (Sen. Byrd) ("We are not overturning the status quo in any

[24] Rather surprisingly, the District Court's opinion fails to mention *Adams*, though it was prominently cited by the U.S. House Bipartisan Legal Advisory Group in the briefs below.

way, shape or form. On the contrary, all this bill does is reaffirm for purposes of Federal law what is already understood by everyone."); *id.* at 23186 (Sen. Dorgan) ("For thousands of years, marriage has been an institution that represents a man and a woman, and I do not support changing the definition of marriage or altering its meaning."); *id.* at 16796 (Rep. McInnis) ("If we look at any definition, whether its Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as a union between a man and a woman. . . ."); *id.* at 17076 (Rep. Canady) ("all we are doing . . . is reaffirming what everyone has always understood by marriage, what everyone has always understood by the term 'spouse'").

The District Court may believe that history, tradition and the dictionary are irrelevant to the governmental interest in preserving traditional marriage, *see* Order at 37, but it cannot retroactively change the meaning of words as they were used and understood by Congress when it enacted DOMA and all preceding statutes related to marriage. As understood by Congress, the legal "status quo" in 1996 was that the term "marriage" or "spouse" did not include same-sex couples, even if they were recognized as married under state law.[25] Congress certainly cannot be accused of acting

[25] *See also Dean v. District of Columbia*, 653 A.2D 307, 314 (D.C. 1995)(When it enacted the 1901 District of Columbia marriage statute, Congress intended "that 'marriage' is limited to opposite-sex couples.").

unreasonably or arbitrarily when it proceeded on the same understanding of the law as reflected in this Court's *Adams* decision.

(c). Congress had ample reasons to clarify the federal definition of marriage in 1996. Even under the District Court's erroneous version of the legal "status quo" in 1996, the uncontradicted evidence presented to Congress provided compelling reason to believe this status quo would not be stable in light of efforts by organized litigants such as LLDEF to obtain, for the first time, a single-state recognition of same-sex marriage, and then to use that to obtain federal benefits throughout the nation. Consider the scenario in which Hawaii recognized same-sex marriages, and hundreds or thousands of out-of-state same-sex couples were married there and returned to their home states, seeking to be considered as "married" for purposes of both state and federal law.

Absent DOMA, the outcome of these cases would depend (1) whether the particular federal statute authorized benefits for same-sex couples who were married under state law and (2) whether the couple in question *was* married under state law. Assuming (contrary to congressional intent) that a court answered the first question in the affirmative, it would then face the second.

If there was one thing that all of the legal experts who testified before Congress agreed on, it was that determining whether State A would recognize a same-sex marriage performed in State B would be a difficult, uncertain and unpredictable task.[26] It would in all likelihood depend on whether State A had a "strong public policy" against same-sex marriages, which in turn would depend on a variety of factors that might differ from state to state. There was a virtual certainty of varying and inconsistent results, which would only multiply if both state and federal courts were simultaneously ruling on the issues. Results would likely vary among and within states, among judges and court systems, between types of jurisdictions and laws (state or federal) and among different statutory schemes.[27]

LLDEF recognized that this situation would be a "legal and practical nightmare" that would create enormous pressure for a uniform national

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[26] *See supra*, note 6.

[27] In enacting DOMA, members of Congress noted the unfairness and lack of uniformity in eligibility for federal benefits that could result from some states recognizing same-sex marriage, some states recognizing out-of-state same-sex marriages only, and some states not recognizing such marriages at all. For example, Senator Ashcroft explained that "unless we have a Federal definition of what marriage is, a variety of States around the country could define marriage differently [and] people in different States would have different eligibility to receive Federal benefits, which would be inappropriate." 142 Cong. Rec. 22459 (1996).

solution. Its objective, of course, was (and is) that the solution would be, for the first time, national recognition of same-sex marriages. By enacting DOMA, Congress sought to mitigate this national confusion by clarifying the definition of marriage for purposes of federal law, while preserving the authority of states to make determinations with regard to their own state laws. Congress sought to preserve the status quo, not disrupt it.

It has been suggested that it was somehow improper for Congress to provide a uniform definition of marriage that did not affect other matters on which state laws differ, such as age of consent and consanguinity. However, there is not a shred of evidence to suggest that these state law differences had caused, or threatened to cause, anything approaching the consequences discussed above.[28] Among other things, there is no evidence that (1) these differences impacted a large number of people to begin with; (2) that there was anything remotely resembling the "marriage tourism" anticipated for same-sex couples in Hawaii; or (3) that there was an organized effort to alter the status quo and obtain nationwide recognition of particular age or consanguinity rules.

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[28] *See* 146 Cong. Rec. 7484 (Rep. Sensenbrenner) (noting that "the difference in State marriage laws, although numerous, are relatively minor").

Notwithstanding the District Court's attempts to rewrite history, Section 3 of DOMA was an entirely reasonable and measured response to the likelihood that same-sex marriages would soon be recognized in Hawaii or other states, thereby leading to significant litigation and uncertainty regarding the impact on federal law. It did not alter the status quo, and it did not sweep more broadly than needed to further the governmental interest in preserving the uniformity and integrity of federal law.

CONCLUSION

Amici respectfully submit that the District Court erred in finding Section 3 of DOMA unconstitutional. Its judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel for *Amici* certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6885 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Undersigned counsel for *Amici* certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011.

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Dated: June 11, 201

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 appellant CM/ECF system on June 11, 2012.

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

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