

No. 12-307

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IN THE  
**Supreme Court of the United States**

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THE UNITED STATES OF AMERICA,  
*Petitioner,*

v.

EDITH SCHLAIN WINDSOR, in her capacity as  
Executor of the estate of THEA CLARA SPYER,  
*Respondent.*

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

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**BRIEF OF DR. DONNA E. SHALALA,  
DR. LOUIS W. SULLIVAN, TOGO D. WEST JR.,  
KENNETH S. APFEL, SHELDON S. COHEN,  
RUDY F. DELEON, JAMIE S. GORELICK,  
MICHAEL J. GRAETZ, DR. JOHN J. HAMRE,  
BENJAMIN W. HEINEMAN JR.,  
KATHRYN O. HIGGINS, CONSTANCE BERRY  
NEWMAN, AND HARRIET S. RABB AS AMICI  
CURIAE IN SUPPORT OF RESPONDENT**

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ARA BETH GERSHENGORN  
CATHERINE C. DENEKE  
FOLEY HOAG LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210  
(617) 832-1000  
agershengorn@  
foleyhoag.com

LISA S. BLATT  
CHRISTOPHER S. RHEE  
*Counsel of Record*  
ZACHARY B. ALLEN  
ARNOLD & PORTER LLP  
555 12th Street, N.W.  
Washington, DC 20004  
(202) 942-5000  
christopher.rhee@  
aporter.com

*Counsel for Amici Curiae*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT.....	3
I. FEDERAL AGENCIES HAVE NEVER APPLIED A UNIFORM DEFINITION OF MARRIAGE. ....	3
A. Marriage is regulated and defined at the state level. ....	5
B. Federal agencies look to state marriage law when administering federal programs. ....	7
1. When federal law includes choice of law provisions, agencies apply the law of a particular state. ....	8
2. When federal law is silent, agencies still apply state law.....	10
II. FEDERAL AGENCIES HAVE EXPERIENCE NAVIGATING SUBSTANTIAL VARIATION IN STATE MARRIAGE LAW.....	13
A. Federal agencies have addressed significant differences regarding interracial marriage. ....	15

TABLE OF CONTENTS—Continued

	Page
B. Federal agencies have addressed significant differences regarding divorce.....	18
C. Federal agencies have addressed significant differences regarding common law marriage.....	23
D. Federal agencies have addressed other significant differences among state marriage laws.....	27
III. FEDERAL AGENCIES MAKE OTHER DETERMINATIONS THAT ARE FAR MORE BURDENSOME THAN APPLYING STATE MARRIAGE LAW....	29
CONCLUSION .....	35
APPENDIX	
AMICI CURIAE IN SUPPORT OF RESPONDENT.....	1a

## TABLE OF AUTHORITIES

FEDERAL CASES	Page(s)
<i>Astrue v. Capato ex rel. B.N.C.</i> , 132 S. Ct. 2021 (2012) .....	9
<i>Bd. of Trs. of Univ. of Ala. v. Garrett</i> , 531 U.S. 356 (2001) .....	15, 22
<i>Beebe v. Moormack Gulf Lines</i> , 59 F.2d 319 (5th Cir. 1932) .....	12
<i>Boyster v. Commissioner</i> , 74 T.C. 989 (1980) .....	20
<i>De Sylva v. Ballentine</i> , 351 U.S. 570 (1956) .....	10, 11
<i>Dunne v. Office of Pers. Mgmt.</i> , 173 F. App'x 814 (Fed. Cir. 2005) .....	12
<i>Estate of Goldwater</i> , 539 F.2d 878 (2d Cir. 1976).....	12
<i>Estate of Steffke</i> , 538 F.2d 730 (7th Cir. 1976) .....	12
<i>Ex parte Burrus</i> , 136 U.S. 586 (1890) .....	5
<i>Gartland v. Schweiker</i> , 1982 WL 171060 (D. Ariz. Mar. 25, 1982)...	28
<i>Haddock v. Haddock</i> , 201 U.S. 562 (1906) .....	5
<i>Heller v. Doe</i> , 509 U.S. 312 (1993) .....	4
<i>Helvering v. Fuller</i> , 310 U.S. 69 (1940) .....	11

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Huff v. Dir., Office of Pers. Mgmt.</i> , 40 F.3d 35 (3d Cir. 1994).....	21
<i>Lembcke v. United States</i> , 181 F.2d 703 (2d Cir. 1950).....	19
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967) .....	15
<i>Madewell v. United States</i> , 84 F. Supp. 329 (E.D. Tenn. 1949).....	21
<i>Massachusetts v. U.S. Dep’t of Health &amp; Human Servs.</i> , 682 F.3d 1 (1st Cir. 2012).....	6, 7
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982) .....	34
<i>Powell v. Rogers</i> , 496 F.2d 1248 (9th Cir. 1974) .....	12
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	2
<i>Seaboard Air Line Ry. v. Kenney</i> , 240 U.S. 489 (1916) .....	12
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975) .....	5
<i>Thompson v. Harris</i> , 504 F. Supp. 653 (D. Mass. 1980).....	21
<i>United States v. Mason</i> , 103 F. Supp. 619 (S.D. Iowa 1951).....	28, 29
<i>United States v. Snyder</i> , 177 F.2d 44 (D.C. Cir. 1949) .....	9

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Williams v. North Carolina</i> , 317 U.S. 287 (1942) .....	5
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012).....	6, 8
<b>FEDERAL AGENCY DECISIONS</b>	
<i>Balasubramanian</i> , GSBCA No. 15382-RELO, 01-1 BCA ¶ 31,271 (2000) .....	24, 25
<i>Matter of Balodis</i> , 17 I. & N. Dec. 428 (BIA 1980) .....	27, 28
<i>In re Barragan</i> , No. A098 323 725, 2009 WL 3713201 (BIA Oct. 23, 2009) .....	12, 13
<i>Matter of C-</i> , 7 I. & N. Dec. 108 (BIA 1956) .....	17
<i>Matter of D-</i> , 3 I. & N. Dec. 480 (BIA 1949) .....	16, 17
<i>Matter of Da Silva</i> , 15 I. & N. Dec. 778 (BIA 1976) .....	28
<i>Erickson v. Shinseki</i> , No. 11-2588, 2012 U.S App. Vet. Claims LEXIS 1892 (Vet. App. Aug. 31, 2012). .....	24
<i>Estate of James Franklin Macer Crow</i> <i>Allottee No. 377</i> , 69 Interior Dec. 35, 1962 WL 9765 (DOI Apr. 24, 1962) .....	17

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Mary A. Miller</i> , 9 P.D. 209 (Bd. Pens. App. 1898)* .....	17
<i>Perdue</i> , GSBCA No. 14122-RELO, 98-1 BCA ¶ 29,674 (1998) .....	25
<i>Louise P. Pettey</i> , 34 Comp. Gen. 629, 1955 WL 1040 (May 25, 1955) .....	20
Rev. Rul. 58-66, 1958-1 C.B. 60.....	12
<i>Emily Rincke</i> , 17 P.D. 257 (Bd. Pens. App. 1907)* .....	17
SSR 66-4, 1966 WL 3045 (1966).....	21
SSR 67-4, 1967 WL 2988 (1967).....	20
SSR 72-26, 1972 WL 12314 (1972).....	24
<i>United States v. Poole</i> , 39 M.J. 819 (A.C.M.R. 1994).....	13
<i>Ida N. Waters</i> , B-155582, 1965 WL 3236 (Comp. Gen. Jan. 6, 1965) .....	17, 18

---

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## TABLE OF AUTHORITIES—Continued

	Page(s)
No. 03-02 677, 2006 WL 4438322 (Bd. Vet. App. Sept. 8, 2006) .....	25
No. 10-27 646, 2012 WL 6558182 (Bd. Vet. App. Oct. 23, 2012).....	25
No. L-99-5 (R.R. Ret. Bd. Mar. 11, 1999).....	25, 26
 CONSTITUTIONAL PROVISIONS	
U.S. Const. art. I, § 8 .....	6
 FEDERAL STATUTES	
5 U.S.C.	
§ 8101(6).....	10
§ 8101(11).....	10
§ 8341 .....	20
10 U.S.C. § 1408(a)(6) .....	10
17 U.S.C. § 101.....	8
20 U.S.C. § 1087vv(d)(1) .....	10
26 U.S.C. § 4980B(f)(3)(C) .....	20
38 U.S.C.	
§ 103(c).....	8
§ 1310 .....	30
§ 1311(a)(1) .....	30
§ 1311(a)(2) .....	31
§ 1311(a)(3) .....	31

## TABLE OF AUTHORITIES—Continued

	Page(s)
42 U.S.C.	
§ 409(a).....	30
§ 409(a)(4)(A)–(K) .....	30
§ 416(d) .....	20
§ 416(h)(1)(A)(i).....	8
Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 .....	7
Act of June 7, 1794, ch. 52, § 1, 1 Stat. 390 ...	6
LEGISLATIVE MATERIALS	
H.R. Rep. No. 104-664 (1996) .....	4, 33
FEDERAL REGULATIONS	
5 C.F.R.	
§ 831.613(e).....	26
§ 842.605 .....	26
§ 1651.5.....	26
§ 1651.5(a).....	9
20 C.F.R.	
§ 219.32.....	26
§ 222.13.....	26
§§ 404.1041–1059 .....	30
§ 404.1520(a)(4)(i)–(v) .....	32
§ 404.726 .....	26
§ 725.204(a)(1) .....	9
28 C.F.R. § 32.3 .....	26
29 C.F.R.	
§ 825.122(a).....	9
§ 825.800 .....	9

## TABLE OF AUTHORITIES—Continued

	Page(s)
38 C.F.R.	
§ 3.10 .....	30
§ 3.10(b).....	30
§ 3.10(d).....	30, 31
§ 3.10(e).....	31
§ 3.10(f) .....	31
 FEDERAL AGENCY GUIDANCE	
IRS Form 8958 .....	34
IRS Publ'n 17: Tax Guide for 2012 (2013) .....	26
IRS Publ'n 555 (rev. May 2007).....	34
IRS Publ'n 555 (rev. Dec. 2010).....	34
IRS Publ'n 555 (rev. Jan. 2013).....	34
Social Security Administration, <i>Annual Statistical Report on the Social Security Disability Insurance Program, 2011</i> (July 2012).....	32
Social Security Administration, <i>Information About Social Security's Hearings and Appeals Process</i> , <a href="http://ssa.gov/appeals/">http://ssa.gov/appeals/</a> (last accessed Feb. 25, 2013).....	32
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## TABLE OF AUTHORITIES—Continued

	Page(s)
Social Security Administration, <i>Monthly Statistical Snapshot</i> (Jan. 2013), <a href="http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2013-01.pdf">http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2013-01.pdf</a> .....	33
Social Security Administration, <i>The Appeals Process</i> , SSA Publ'n No. 05-10041 (Jan. 2008).....	32
U.S. Dep't of Labor, <i>Common-Law Marriage Handbook</i> (Apr. 2010), <a href="http://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/CommonLaw_Marriage.pdf">http://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/CommonLaw_Marriage.pdf</a> .....	26
 STATE CASES	
<i>Coates v. Watts</i> , 622 A.2d 25 (D.C. 1993) .....	23
<i>Conklin ex rel. Johnson-Conklin v. MacMillan Oil Co.</i> , 557 N.W.2d 102 (Iowa Ct. App. 1996) .....	24
<i>Estate of Love</i> , 618 S.E.2d 97 (Ga. Ct. App. 2005) .....	24
<i>Mott v. Duncan Petroleum Transp.</i> , 414 N.E.2d 657 (N.Y. 1980).....	23, 24
<i>People v. Badgett</i> , 895 P.2d 877 (Cal. 1995) .....	23
<i>Staudenmayer v. Staudenmayer</i> , 714 A.2d 1016 (Pa. 1998) .....	24

## TABLE OF AUTHORITIES—Continued

	Page(s)
STATE STATUTES	
Ariz. Code Ann.	
§ 63-107 (1939) .....	16
§ 63-108 (1939) .....	16
Ariz. Rev. Stat. Ann. § 25-312 .....	19
Colo. Rev. Stat. § 14-10-106(1)(a)(I) .....	19
Fla. Stat. § 741.21 .....	27
Ga. Code Ann. § 19-3-1.1 .....	23
750 Ill. Comp. Stat. Ann. 5/212(a)(4) .....	27
Kan. Stat. Ann. § 23-2502.....	23
Ky. Rev. Stat.	
§ 391.100 (1966).....	16
§ 402.020 (1966).....	16
§ 402.040 (1966).....	16
§ 402.090 (1966).....	16
Md. Code art. 27, § 398 (1957).....	16
Mo. Rev. Stat.	
§ 451.020 .....	27
§ 451.020 (1966).....	16
§ 563.240 (1966).....	16
N.J. Stat. § 2A:34-10.....	19
Or. Rev. Stat. § 11-106.010.....	27
23 Pa. Cons. Stat. § 1103 .....	23
Utah Code Ann. § 30-1-9.....	27
Va. Code Ann. § 20-91.....	19

## TABLE OF AUTHORITIES—Continued

	Page(s)
OTHER AUTHORITIES	
Ann Laquer Estin, <i>Family Law Federalism: Divorce and the Constitution</i> , 16 Wm. & Mary Bill Rts. J. 381 (2007) .....	18, 19
Lawrence M. Friedman, <i>A Dead Language: Divorce Law and Practice Before No-Fault</i> , 86 Va. L. Rev. 1497 (2000) .....	18
Kaiser Family Foundation, <i>Medicaid Enrollment: June 2011 Data Snapshot</i> (June 2012), <a href="http://www.kff.org/medicaid/upload/8050-05.pdf">http://www.kff.org/medicaid/upload/8050-05.pdf</a> .....	33
Letter from R.I. Att’y Gen. Patrick C. Lynch to Jack R. Warner (Feb. 20, 2007) .....	14
Charles S. Mangum Jr., <i>The Legal Status of the Negro</i> (Lawbook Exchange 2000) (1940) .....	15, 16
Rachel F. Moran, <i>Interracial Intimacy: The Regulation of Race and Romance</i> (2001) .....	15
N.M. Op. Att’y Gen. 11-01 (Jan. 4, 2011) .....	14
StateHealthFacts.org, <i>Total Number of Medicare Beneficiaries, 2012</i> , <a href="http://www.statehealthfacts.org/comparemaptable.jsp?ind=290&amp;cat=6&amp;sort=a">http://www.statehealthfacts.org/comparemaptable.jsp?ind=290&amp;cat=6&amp;sort=a</a> (last accessed Feb. 25, 2013) .....	33
U.S. General Accounting Office, <i>Defense of Marriage Act</i> , GAO/OGC-97-16 (Jan. 31, 1997) .....	7

TABLE OF AUTHORITIES—Continued

	Page(s)
U.S. General Accounting Office, <i>Defense of Marriage Act: Update to Prior Report</i> , GAO/OGC-04-353R (Jan. 23, 2004) .....	7
Carroll D. Wright, <i>A Report on Marriage and Divorce in the United States, 1867–1886</i> (1889) .....	22

## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae are former Cabinet secretaries, commissioners, and other senior administrative agency officials with years of experience administering federal benefit programs and other federal laws. Amici have served a wide range of agencies in both Democratic and Republican administrations, including the Department of Health and Human Services, the Social Security Administration, the Department of Defense, the Department of Labor, the Office of Personnel Management, and the Internal Revenue Service. The federal programs that they administered regulate many aspects of American life and often require agencies to make determinations of marital status. Thus, amici are well positioned to discuss the impact of the Defense of Marriage Act (DOMA), which categorically bars federal agencies from treating marriages of same-sex couples like any other state-sanctioned marriages.

### **SUMMARY OF ARGUMENT**

From the earliest days of our nation, when Congress authorized survivor benefits for widows of soldiers after the Revolutionary War, administrative agencies overseeing federal benefits and laws have determined marital status by turning to state marriage laws. Such laws have varied and evolved

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<sup>1</sup> A list of the amici filing this brief is set forth in the Appendix. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this amicus brief have been filed with the Clerk of the Court.

over time, reflecting different views about, for example, whether to permit mixed-race marriages, whether and how marital status could end by divorce, and whether to recognize the validity of non-ceremonial common law marriages. Despite the diversity and ongoing evolution of state laws, federal agencies have historically proven adept at applying choice of law rules to ascertain state marital status while administering the scores of federal programs that rely on marriage determinations.

Section 3 of DOMA, by prohibiting the federal government from recognizing the legal marriages of same-sex couples, represents a stark and unconstitutional departure from this practice. At a bare minimum, government action that discriminates against a group of citizens must “bear[] a rational relation to some legitimate end,” *Romer v. Evans*, 517 U.S. 620, 631 (1996), thereby ensuring “that classifications are not drawn for the purpose of disadvantaging the group burdened by the law,” *id.* at 633. The Bipartisan Legal Advisory Group (BLAG) contends that DOMA serves a legitimate end—the government’s interest in national “uniformity”—because Section 3 establishes a categorical rule regarding the validity of marriages of same-sex couples under federal law. But Section 3 has no rational relationship to that end. It fails to foster uniformity because it does not alter the federal government’s incorporation of other variations in state marriage law. Rather, it singles out the marriages of same-sex couples and wholly excludes these couples from access to federal benefits and obligations applicable to other married couples. In fact, Section 3 diminishes uniformity by creating two classes of married people.

Contrary to BLAG’s further contention, Section 3 of DOMA does not ease administrative burdens or simplify the determinations made by federal agencies. Congress has never enacted a uniform definition of marriage—not prior to 1996, and not with the passage of Section 3. Under DOMA, federal agencies undertake a routine analysis of state law to determine marital status for all marriages between heterosexual couples. The effort that would be borne by agencies absent DOMA is no different. It is the product of how our federalist system has regulated marriage since the Founding, embracing diversity under state law rather than mandating uniformity across the nation. Indeed, the task of interpreting state marriage laws, particularly for a modest number of married same-sex couples, pales in magnitude, complexity, and fact intensity to many other benefit determinations made by federal agencies every day.

## **ARGUMENT**

### **I. FEDERAL AGENCIES HAVE NEVER APPLIED A UNIFORM DEFINITION OF MARRIAGE.**

The contention raised by BLAG to justify Section 3 of DOMA, that the law “ensures national uniformity in eligibility for federal benefits and programs based on marital status,” BLAG Br. 33, utterly lacks merit. According to BLAG, it was reasonable for Congress to enact a uniform rule rejecting legal marriages of same-sex couples under federal law “rather than adopting a patchwork of disparate state-law rules,” which would potentially recognize some but not all same-sex relationships under federal law. *Id.* BLAG also defends DOMA on the basis that Section 3

ensures that “similarly-situated [same-sex] couples will have the same federal benefits regardless of the state in which they happen to reside.” *Id.*<sup>2</sup>

These arguments lack any “footing in the realities of the subject addressed” by DOMA. *Heller v. Doe*, 509 U.S. 312, 321 (1993). Federal agencies applying federal law have never administered a “uniform” definition of marriage. Marriage is regulated at the state level, and different states have crafted different requirements for marriage. When applying federal law and administering federal programs, administrative agencies manage this diversity by choosing and following the appropriate state marriage law.

Section 3 of DOMA does not displace the settled regime of deference to different state-by-state definitions of marriage—except for married same-sex couples, who are systematically excluded from federal benefits and obligations applicable to all other married couples. DOMA announces no uniform nationwide rule of divorce, consanguinity, or common law marriage. Apart from denying recognition to married same-sex couples, Section 3 entirely leaves in place the same “patchwork of disparate state-law rules” that administrative agencies have regularly used to determine marital status. *See, e.g.*, H.R. Rep. No. 104-664, at 30 (apart from denying recognition of marriages of same-sex couples, “the federal government will continue to determine marital status in the same manner as it does under current law”). Thus,

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<sup>2</sup> Notably, the legislative history of DOMA is largely devoid of any discussion of “uniformity” as a justification for the law. *See, e.g.*, H.R. Rep. No. 104-664, at 12–18 (1996) (discussing four governmental interests purportedly advanced by DOMA).

BLAG’s characterization of Section 3—DOMA operates “not by singling out any category of relationships for specific exclusion, but rather by clarifying what marriage *means* for purposes of federal law,” BLAG Br. 3—bears no relation to the language or effect of the law.

**A. Marriage is regulated and defined at the state level.**

Unlike the states, the federal government does not issue marriage licenses, grant divorce decrees, or otherwise regulate marital relationships (with very limited exceptions for territories and enclaves under its exclusive jurisdiction). Nor has it ever. As this Court has explained: “[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. . . . [T]he Constitution delegated no authority to the government of the United States on the subject of marriage and divorce.” *Haddock v. Haddock*, 201 U.S. 562, 575 (1906), *overruled on other grounds by Williams v. North Carolina*, 317 U.S. 287 (1942); *see also Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing “domestic relations” as “an area that has long been regarded as a virtually exclusive province of the States”); *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.”).

A necessary consequence of federalism is that marriage law in America is characterized by diversity, not uniformity. As discussed in Part II below, state requirements for marriage and divorce have varied significantly, especially as the institution of marriage has changed over many years. This “patchwork

of disparate state-law rules” is precisely what the Founders envisioned.

To be sure, state authority over marriage does not preclude all federal legislation that references marital relationships.<sup>3</sup> Congress has the power to levy taxes, provide for the common defense and general welfare, regulate commerce, raise and support armies, and enact uniform rules for naturalization and bankruptcy. *See* U.S. Const. art. I, § 8. All of these powers to some degree touch upon personal relationships, including marriage. But since the earliest days of the nation, Congress has enacted federal legislation that assumes, builds upon, and incorporates the status of marriage as defined by the states. *See, e.g.*, Act of June 7, 1794, ch. 52, § 1, 1 Stat. 390, 390 (providing pensions for “widow, or if no widow, such child or children” of “any commissioned officer in the troops of the United States [who] shall . . . die by reason of wounds received in actual

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<sup>3</sup> BLAG contends that, notwithstanding the clear pattern of federal law expressly relying on state law to determine marital status, “Congress also has a long history, when it sees fit, of supplying its own definitions of marriage for federal purposes.” BLAG Br. 4 (citing examples). However, the few specialized provisions cited by BLAG have nothing in common with DOMA. *See generally* Amici Br. of Family Law Professors. They do not purport to define marriage for all federal purposes. They are tailored to specific programs, designed to advance the underlying legislative purposes and prevent documented abuses. As Judge Straub noted below: “It may be that prior to DOMA, any federal ‘definition’ of marriage was limited to advancing the targeted goal of a particular federal program, not a blanket, undifferentiated policy choice imposed on statuses created by states.” *Windsor v. United States*, 699 F.3d 169, 203 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part); *see also Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012).

service of the United States”); Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436, 436–37 (extending right to renew author’s copyright, if author not living, to “a widow, or child, or children, either or all then living”).

With the rise of the modern administrative state, and the vast expansion of federal benefits including Social Security, Medicare, and Medicaid, federal law now includes abundant references to marriage, spouses, and surviving spouses. The General Accounting Office has identified well over one thousand provisions of federal law in which benefits, rights, and privileges are expressly contingent upon marital status. U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Jan. 31, 1997) (1,049 provisions identified); U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO/OGC-04-353R (Jan. 23, 2004) (1,138 provisions).

Each of the amici once administered some of these laws and understands how they operate. As discussed below, federal agencies routinely turn to state marriage law to determine marital status.

### **B. Federal agencies look to state marriage law when administering federal programs.**

With the sole exception of DOMA, Congress has never purported to define marriage for all federal law purposes. Rather, the U.S. Code is a mixture of many programs and regulatory regimes. *See Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012). Some federal programs and laws that depend on determinations of marital status include explicit statutory or regulatory choice of law provisions for applying state law, the source of domestic relations law in this country.

Although others are silent about how to determine marital status, agencies and courts have routinely filled the void by adopting their own choice of law rules for applying state law.

If there is one consistent rule, it is that federal law has incorporated state law definitions of marriage into federal law in one form or another. *See Windsor v. United States*, 699 F.3d 169, 186 (2d Cir. 2012). Section 3 of DOMA, “a blanket, undifferentiated policy choice,” represents a stark departure from this approach. *See id.* at 203 (Straub, J., dissenting in part and concurring in part).

**1. When federal law includes choice of law provisions, agencies apply the law of a particular state.**

In some circumstances, federal statutes explicitly impose choice of law rules for applying state law regarding marital status. For example, 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). Similarly, the Veterans’ Benefits Act directs 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); *see also* 17 U.S.C. § 101 (definition of “widow” and “widower” under Copyright Act).

Federal agencies have adopted comparable choice of law provisions through administrative rulemaking.

See, e.g., 29 C.F.R. §§ 825.122(a), 825.800 (defining spouse under Family and Medical Leave Act as “a husband or wife as defined or recognized under state law for purposes of marriage in the State where the employee resides”); 20 C.F.R. § 725.204(a)(1) (defining spouse under Federal Coal Mine Health and Safety Act according to whether “[t]he courts of the State in which the miner is domiciled would find that such individual and the miner [are] validly married”); 5 C.F.R. § 1651.5(a) (defining spouse under Thrift Savings Plan according to “[t]he state law of the participant’s domicile”).

Under these provisions, federal agencies routinely discern and apply state marriage law to determine eligibility for federal programs tied to marital status. See, e.g., *United States v. Snyder*, 177 F.2d 44, 46 (D.C. Cir. 1949) (“The validity of marriages is no new problem in veterans’ affairs.”). Contrary to BLAG’s argument, these choice of law rules are not “obscure” or “[un]settled,” and they are no more “complex” than the rules federal agencies interpret and apply on a daily basis to make other eligibility and benefit determinations. BLAG Br. 34 (also discussing “vagaries and difficulties of undertaking a multitude of . . . complex choice-of-law determinations”). Indeed, just last term, this Court concluded that a parallel choice of law provision in the Social Security Act (applying the term “child” by looking to state intestacy law) “installed a *simple test*, one that ensured benefits for persons plainly within the legislators’ contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations.” *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2031 (2012) (emphasis added) (rejecting uniform rule of construction).

## **2. When federal law is silent, agencies still apply state law.**

In many instances, federal statutes that reference marital relationships are silent about how those relationships are to be determined. For example, the Higher Education Act, which established the modern financial aid system, directs that the income of a student's parents should not factor in an aid determination if the applicant is an "independent student," defined in part as "a married individual." 20 U.S.C. § 1087vv(d)(1). But the Act and the accompanying regulations say nothing about who qualifies as a "married individual." In other instances, federal provisions that address marital status are basically tautological. The Federal Employees Benefits Act, which provides for compensation in the event of the death or disability of a federal employee, defines "widow" and "widower" as a surviving "wife" or "husband," without further defining those terms. 5 U.S.C. § 8101(6), (11); *see also* 10 U.S.C. § 1408(a)(6) (defining "spouse" in Military Pensions Act as "the husband or wife . . . of a member who, on or before the date of a court order, was married to that member").

Absent explicit statutory or regulatory guidance, courts and agency adjudicators have routinely turned to state law to determine marital relationships referenced in federal legislation.

This Court's ruling in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), is instructive. *De Sylva* involved a dispute under the Copyright Act between an author's widow and the author's child born to another woman. The widow challenged whether the child born out of wedlock fell within the statutory provision that "children of the author . . . shall be entitled to a

renewal and extension of the copyright.” *Id.* at 571 (quoting former provision of Copyright Act). The Court concluded it was appropriate to look to state law to determine how to define both “widow” and “children”:

The scope of a federal right is, of course, a federal question, but this does not mean that its content is not to be determined by state, rather than federal law. This 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.

. . . . To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. . . . We think it proper, therefore, to draw on the ready-made body of state law to define the word “children” in § 24.

*Id.* at 580–81 (citations omitted).

Notably, the Court did not adopt the position of two concurring justices, who supported a nationwide rule that “illegitimate children were ‘children’ within the meaning of § 24 of the Copyright Act, whether or not state law would allow them dependency benefits.” *Id.* at 584 (Douglas, J., concurring). Instead, the Court embraced, in the words of the concurring justices, “the diversity which would flow from incorporating into the Act the laws of forty-eight States.” *Id.* at 583 (Douglas, J., concurring).

Other court decisions have followed the same course, looking to state law to determine marital status for federal purposes. See *Helvering v. Fuller*, 310 U.S. 69, 74–75 (1940) (“[A]n inquiry into state

law seems inescapable. For the provisions in the [tax code and regulations] . . . imply[] the necessity for an examination of local law to determine the marital status and the obligations which have survived a divorce.”); *cf. Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 493–94 (1916) (looking to state law to define “next of kin” entitled to collect judgment under Federal Employers’ Liability Act). As the Federal Circuit summarized: “[A]lthough federal law controls the right to federal benefits resulting from familial relationships, state law applies to define such relationships.” *Dunne v. Office of Pers. Mgmt.*, 173 F. App’x 814, 815 (Fed. Cir. 2005); *see also, e.g., Estate of Goldwater*, 539 F.2d 878, 880 (2d Cir. 1976) (affirming agency ruling applying state law to define “surviving spouse” under estate tax provision); *Estate of Steffke*, 538 F.2d 730, 735 (7th Cir. 1976) (affirming agency ruling applying state law to determine validity of foreign divorce under estate tax); *Powell v. Rogers*, 496 F.2d 1248, 1250 (9th Cir. 1974) (affirming agency ruling applying state law to define “surviving wife” under Longshoremen’s and Harbor Workers’ Compensation Act); *Beebe v. Moormack Gulf Lines*, 59 F.2d 319, 319–20 (5th Cir. 1932) (applying state law to define “surviving widow” under federal statutes regarding death of seamen and railroad employees).

Agencies have followed the same rule in their adjudications. *See, e.g., Rev. Rul. 58-66*, 1958-1 C.B. 60 (“The marital status of individuals as determined under state law is recognized in the administration of the Federal Income tax law.”); *In re Barragan*, No. A098 323 725, 2009 WL 3713201, at \*1 (BIA Oct. 23, 2009) (unpublished) (under immigration law, “[t]he issue of the validity of a marriage under State law is generally governed by the law of the place of

celebration of the marriage”); *United States v. Poole*, 39 M.J. 819, 820–21 (A.C.M.R. 1994) (under Uniform Code of Military Justice, “[m]ilitary law recognizes the legitimacy of marriages by service personnel if valid in the state in which they are contracted”).

In sum, the legal framework for determining marital status under federal law embraced and continues to embrace state law diversity, except for marriages of same-sex couples. As demonstrated in the next section, administrative agencies implementing federal programs have routinely applied choice of law rules to incorporate variable and sometimes contentious state law definitions. DOMA unconstitutionally interferes with a long-standing and well-functioning system by singling out and excluding from federal benefits one class of married couples.

## **II. FEDERAL AGENCIES HAVE EXPERIENCE NAVIGATING SUBSTANTIAL VARIATION IN STATE MARRIAGE LAW.**

States have taken sometimes very different approaches to regulating marriage. For example, the states were long divided over whether to recognize marriages between members of different races and whether to permit divorces without finding evidence of fault. To the present day, states have different rules for divorce, common law marriage, consanguinity, and age of consent. In fact, neither state nor federal law has ever treated “similarly-situated couples” the same across the nation—a purported justification for DOMA Section 3. *See* BLAG Br. 33.

BLAG contends that in 1996 the prospect of same-sex couples marrying was an “unprecedented situation”—the first time in the history of the nation that the states engaged in a “reconsideration of the

traditional definition of marriage.” *Id.* at 32, 35. But, as demonstrated below, the idea that state marriage laws were static and uniform before DOMA is a fallacy. Instead, states have continually amended and modernized their laws, and as they have done so, agencies have expertly navigated these differences while administering federal law.

Supporters of DOMA dismiss these substantial variations in state law as “particulars” and “minor variations.” BLAG Br. 4; Amici Br. of Senators Hatch *et al.*, at 20. But the differences among state marriage laws have been anything but “minor,” especially compared to the clear positions that the states have taken on the marriage of same-sex couples.<sup>4</sup>

While BLAG argues that DOMA “avoids a confusing situation in which same-sex couples could gain (or lose) federal marital status simply by moving between states with different policies on recognition of same-sex marriages,” BLAG Br. 33, Congress has never seen fit to address this problem for any class of heterosexual couples, whose marital status could just

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<sup>4</sup> There is no basis for confusion about where states stand on the subject of marriage between same-sex couples. Nine states and the District of Columbia sanction these marriages. Thirty-nine states prohibit them, most typically in their state constitutions. In the two remaining states—Rhode Island and New Mexico—marriages between same-sex couples are not performed although they are not expressly prohibited by law. Their state attorneys general have opined that their states would recognize marriages of same-sex couples from other jurisdictions. *See* Letter from R.I. Att’y Gen. Patrick C. Lynch to Jack R. Warner, at 5 (Feb. 20, 2007); N.M. Op. Att’y Gen. 11-01, at 4 (Jan. 4, 2011).

as easily ebb and flow as they moved across the country. A law must fail even rational basis review where the “purported justifications” make “no sense” in light of how the government has “treated other groups similarly situated in relevant respects.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Despite significant differences among the states over the validity of marriages, Congress never imposed a single federal benchmark before 1996 and then did so only with respect to one particular aspect of marital eligibility. Since 1996, federal agencies have continued to accommodate the differences among state marriage laws on a regular basis, each agency determining how best to apply state law. Marriages of same-sex couples pose no issue for agencies already adept at applying diverse state marriage laws.

**A. Federal agencies have addressed significant differences regarding interracial marriage.**

From colonial times until well past the middle of the twentieth century, the states did not agree whether white persons and persons of color could legally wed. So called “anti-miscegenation” laws prohibiting interracial marriage were common, but not universal, prior to this Court’s decision declaring them unconstitutional. *Loving v. Virginia*, 388 U.S. 1, 6, 11–12 (1967) (invalidating laws in 16 states); Charles S. Mangum Jr., *The Legal Status of the Negro* 238 n.6 (Lawbook Exchange 2000) (1940) (30 of 48 states prohibited interracial marriages or relationships in 1940); Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* 4 (2001). These laws differed considerably among states.

They varied, for example, in how they determined an individual's race and which racial groups were restricted from marrying. Mangum, *supra*, at 245–47, 253–54. Missouri restricted marriages between a white person and one “having one-eighth part or more Negro blood,” Mo. Rev. Stat. §§ 451.020, 563.240 (1966), whereas in Kentucky, the definition was based on one-quarter, *see* Ky. Rev. Stat. §§ 391.100, 402.020, 040, 090 (1966). Arizona's statute voided marriages of “persons of Caucasian blood, or their descendants, with Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants,” Ariz. Code Ann. §§ 63-107, 63-108 (1939), while Maryland prohibited whites from marrying “a person of negro descent to the third generation inclusive,” Md. Code art. 27, § 398 (1957). States also differed in whether they recognized an interracial marriage performed by another state. *See* Mangum, *supra*, at 249 n.81.

In the face of this diversity, federal agencies administered the range of programs that turn on marital status by applying choice of law rules and adroitly incorporating state law differences.

The Board of Immigration Appeals, for example, addressed whether an interracial couple seeking immigration benefits was married under the laws of their state of residence when they had traveled elsewhere to get married. *See Matter of D-*, 3 I. & N. Dec. 480 (BIA 1949). The claim at issue involved a marriage between a white Norwegian man and a black woman. The man admitted that the couple had traveled to Canada and married there “for the purpose of circumventing the laws of North Dakota, where both reside.” *Id.* at 481. The Board determined that under North Dakota law—which invali-

dated marriages performed elsewhere if they would violate North Dakota law—the marriage was void, and therefore void for purposes of federal immigration law as well. *Id.* at 482–83. *Cf. Matter of C-*, 7 I. & N. Dec. 108, 110–13 (BIA 1956) (comparing Maryland and North Dakota laws banning interracial marriage, and finding that a Filipino immigrant’s first marriage to a white woman in District of Columbia was valid in the couple’s home state of Maryland, even though they could not have celebrated it there; second marriage was bigamous and claimant was deportable because of adultery).

The Department of the Interior addressed questions of state law and interracial marriage in determining pension claims. *See, e.g., Mary A. Miller*, 9 P.D. 209, 209–10 (Bd. Pens. App. 1898) (denying pension claim of a “colored woman, and former slave” as the widow of a “white man and ex-soldier” in Texas because under state law, the marriage was “null and void”); *Emily Rincke*, 17 P.D. 257, 261 (Bd. Pens. App. 1907) (recognizing validity of a Canadian marriage between a white woman and a black man—which was not recognized in original home state of Maine—because the couple moved to California, which also outlawed interracial marriages but recognized such marriages performed elsewhere).

The Bureau of Indian Affairs and the U.S. Armed Forces considered similar disputes. *See Estate of James Franklin Macer Crow Allottee No. 377*, 69 Interior Dec. 35, 41–42, 1962 WL 9765, at \*1–2 (DOI Apr. 24, 1962) (concluding that a man was not “white” under Montana law so his marriage to a black decedent was legal under Montana law); *Ida N. Waters*, B-155582, 1965 WL 3236, at \*1–2 (Comp. Gen. Jan. 6, 1965) (withholding benefits to the black

widow of a white man because Texas statute prohibited interracial marriage).

As these examples show, in the face of substantial differences among state marriage laws, federal agencies deferred to state law and applied choice of law rules to determine marital status. Federal law did not prioritize uniformity or treat all mixed-race couples the same nationwide. Instead, couples who were married under relevant state law were considered married by the federal government. Any lack of uniformity among the states with respect to the marriage of same-sex couples is plainly no more challenging for federal agencies than the historic lack of uniformity among state laws regarding interracial marriage.

**B. Federal agencies have addressed significant differences regarding divorce.**

At the Founding, divorce was extremely rare and southern colonies did not even permit it. Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 383–84 (2007); *see also* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1501 (2000). By the early twentieth century, however, a few states (most notably Nevada) had enacted lenient divorce laws with short residency requirements. Estin, *supra*, at 384; Friedman, *supra*, at 1502–05. Married individuals increasingly crossed state lines to take advantage of these variations and secure so-called “migratory

divorces.” Estin, *supra*, at 384. This led to a vehement public outcry, including several unsuccessful proposals to amend the Constitution to empower Congress to enact uniform divorce legislation. *Id.* at 390–92. Instead, state residency requirements and statutory grounds for divorce continued to vary dramatically for many years. *Id.* at 394–95.

Some states prohibited a person “at fault” in the dissolution of a marriage, such as an adulterous party, from remarrying. *See, e.g., Lembcke v. United States*, 181 F.2d 703, 704–07 (2d Cir. 1950) (Under New York law, person divorced on basis of adultery could not remarry anyone during lifetime of former spouse without court permission, whereas Pennsylvania law prohibited adulterer from marrying only the person with whom he or she had committed adultery). To this day, states have differing residency requirements to obtain a divorce. *Compare, e.g.,* Colo. Rev. Stat. § 14-10-106(1)(a)(I) (must live in the state 91 days) *with* N.J. Stat. § 2A:34-10 (one-year residency requirement). “No fault” divorce provisions, which are now the norm, are still not uniform. *Compare, e.g.,* Ariz. Rev. Stat. Ann. § 25-312 (“no fault” divorce requires showing that “marriage is irretrievably broken”; no separation required), *with* Va. Code Ann. § 20-91 (no showing of marriage being “irretrievably broken” required; “no fault” divorce generally requires continuous separation without cohabitation for one year). Although most states historically recognized other states’ divorce decrees, some states refused. *See Estin, supra*, at 387 (New York, Pennsylvania, North Carolina, and South Carolina did not recognize *ex parte* divorce decrees from other states in 1900).

Divorce and remarriage affect the administration of many federal programs. Divorce can, for example, constitute a “qualifying event” triggering COBRA insurance availability. *See* 26 U.S.C. § 4980B(f)(3)(C). Divorced spouses are eligible for certain Social Security benefits based on their prior spouses’ earnings. *See* 42 U.S.C. § 416(d). Remarriage can terminate benefits received from federal agencies. *See* 5 U.S.C. § 8341 (terminating survivor annuity upon remarriage before age 55).

When administering federal programs, agencies have frequently turned to differing state laws to determine the validity of divorces and subsequent marriages by claimants. In *Boyer v. Commissioner*, 74 T.C. 989 (1980), for example, both the IRS and the Tax Court rejected a married couple’s attempt to avoid the “marriage penalty” by obtaining divorces in foreign countries in December in two consecutive years, only to remarry each January, because the divorces were not valid under applicable state law. *Id.* at 993, 994 (“We . . . agree with the [agency’s] assertion . . . that ‘the Tax Court is bound by state law rather than federal law when attempting to construe marital status.’”); *see also* SSR 67-4, 1967 WL 2988, at \*2 (1967) (Social Security Administration analyzing timing of divorce under Nebraska law where divorce reinstated widow’s entitlement to her mother’s insurance benefits); *Louise P. Pettey*, 34 Comp. Gen. 629, 631, 1955 WL 1040, at \*2 (May 25, 1955) (denying claim for spousal quarters allowance where marine’s alleged wife could not prove dissolution of previous marriage before 1945, the year she married the marine because New York law would not recognize retroactive divorce decree).

Federal agencies have handled these issues as adeptly when the place of celebration of the marriage differs from the couple's state of residence. In SSR 66-4, 1966 WL 3045 (1966), the Social Security Administration applied "the law of the place where the marriage was contracted to determine the validity of such marriage." *Id.* at \*1. Although the couple lived in Wisconsin, the agency found that the post-divorce marriage celebrated in Iowa was valid under Iowa law even though it would have been invalid under the law of Wisconsin, and awarded benefits. *Id.*

When disputes over the validity of a divorce and choice of law have led to court litigation, the federal courts, too, have referred to, and deferred to, state law. *See Madewell v. United States*, 84 F. Supp. 329 (E.D. Tenn. 1949) (Veterans Administration case determining, under Tennessee law, validity of marriage putatively entered in Georgia during divorce proceedings in California); *see also Huff v. Dir., Office of Pers. Mgmt.*, 40 F.3d 35, 36-37 (3d Cir. 1994) (for purposes of federal employee survivors' benefits, validity of remarriage after disputed divorce was determined according to Pennsylvania law, the state with most "significant interest" in marriage); *Thompson v. Harris*, 504 F. Supp. 653, 654-55 (D. Mass. 1980) (where husband divorced first wife in Mexico, married plaintiff in New Hampshire and then divorced her in Mexico, the court, applying Massachusetts law, found that the first divorce was invalid, the second marriage was, therefore, invalid,

and plaintiff was accordingly unmarried under Social Security Act).<sup>5</sup>

Variable state laws regarding divorce treat couples in different states differently. More than a century ago, in authorizing funds for a county-by-county survey regarding marriage and divorce in the United States, Congress observed that “a marriage is often treated at the same time in one state as dissolved and in another state or county as subsisting, and a man may be convicted of bigamy or adultery in one jurisdiction upon what would be a lawful second marriage in another.” Carroll D. Wright, *A Report on Marriage and Divorce in the United States, 1867–1886*, at 11 (1889) (quoting House of Representatives Judiciary Committee report). But even this lack of uniformity—triggering possible culpability under criminal law—did not prompt Congress to supplant the diversity of state laws with a national rule.

In light of this long history, the argument that Section 3 of DOMA was necessary to solve an administrative problem caused by the marriage of same-sex couples, *see, e.g.*, BLAG Br. 43, is irrational. Federal agencies have a history of deference to state law, and this deference is the legacy of a longstand-

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<sup>5</sup> Amici in support of BLAG contend that Section 3 of DOMA was a rational way of avoiding “state by state and statute by statute litigation seeking federal benefits.” Amici Br. of Senators Hatch *et al.*, at 9. But lawsuits challenging adverse agency rulings are an established part of administrative law practice. There is no rational reason to supplant the federal government’s deference to states in this area only for married same-sex couples. *See Garrett*, 531 U.S. at 366 n.4 (measure fails “basic principles of rationality review” where “purported justifications” make “no sense in light of how” defendant treats “other groups similarly situated in relevant respects”).

ing and well-functioning federal agency structure. As with laws prohibiting interracial marriage, agencies have applied choice of law rules and analyzed state law without the need to resort to or impose a uniform federal definition of marriage or divorce. This reservoir of experience demonstrates that federal agencies have the ability to interpret and apply diverse state marriage laws regarding same-sex couples.

**C. Federal agencies have addressed significant differences regarding common law marriage.**

Common law marriage is another area of significant diversity among the states. At one time, most states recognized common law (or non-ceremonial) marriage, but today only ten states and the District of Columbia do so. *See, e.g., Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). Even among these states, there are differences. Kansas recognizes common law marriage provided that neither party is under 18 years of age. *See* Kan. Stat. Ann. § 23-2502. Other states recognize common law marriages that were entered into only before a certain date. *See, e.g., Ga. Code Ann. § 19-3-1.1* (prohibiting common law marriages entered into after 1996); 23 Pa. Cons. Stat. § 1103 (prohibiting common law marriages entered into after 2004). Some states that no longer (or never did) recognize the creation of common law marriages within their borders may still recognize those marriages for some or all purposes if they were validly created somewhere else. *See, e.g., People v. Badgett*, 895 P.2d 877, 897 (Cal. 1995) (noting that California recognizes common law marriages “contracted in another state that would be valid by the laws of that state”); *Mott v. Duncan Petroleum Transp.*, 414 N.E.2d 657, 658–59 (N.Y. 1980) (New York will

recognize a common law marriage as valid “if it is valid where contracted”).

The law of common law marriage often requires detailed factual findings to determine marital status, and requirements vary by state. For example, Georgia requires proof of consummation, *Estate of Love*, 618 S.E.2d 97, 100–01 (Ga. Ct. App. 2005); Iowa requires “continuous cohabitation,” *Conklin ex rel. Johnson-Conklin v. MacMillan Oil Co.*, 557 N.W.2d 102, 105 (Iowa Ct. App. 1996); and Pennsylvania requires “an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that,” *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020–21 (Pa. 1998).

As with other issues surrounding marriage that vary by state, federal agencies have long been able to administer benefit programs by making determinations whether common law marriages exist. *See, e.g., Erickson v. Shinseki*, No. 11-2588, 2012 U.S. App. Vet. Claims LEXIS 1892, at \*9–15 (Vet. App. Aug. 31, 2012) (assessing under Iowa law whether veteran was a party to a legally recognized common law marriage); SSR 72-26, 1972 WL 12314, at \*2 (1972) (applying Florida law and concluding that claimant for Social Security benefits was not validly married because her purported husband was still married to another person at time of claimant’s ceremonial marriage in Missouri and was not divorced until after Florida stopped recognizing common law marriage in 1968).

In *Balasubramanian*, GSBCA No. 15382-RELO, 01-1 BCA ¶ 31,271 (2000), the Department of Veterans

Affairs looked to Georgia law to find that there was a valid common law marriage for purposes of relocation benefits. The agency considered that the claimant and his ex-wife had renewed their vows in a religious ceremony, the ex-wife had redrafted her will to leave her estate to him, and the couple had held themselves out as husband and wife.

In *Perdue*, GSBCA No. 14122-RELO, 98-1 BCA ¶ 29,674 (1998), the General Services Board of Contract Appeals analyzed Alabama, Louisiana, and North Carolina law and concluded that a federal employee was married for purposes of federal law because the employee established the elements of common law marriage under Alabama law before moving to Louisiana and then North Carolina. Neither Louisiana nor North Carolina recognizes in-state common law marriage, but, as the agency determined, both recognize common law marriages established out of state.

The Board of Veterans' Appeals and the Railroad Retirement Board have issued numerous decisions analyzing common law marriage under state law in determining entitlement to benefits. *See, e.g.*, No. 10-27 646, 2012 WL 6558182 (Bd. Vet. App. Oct. 23, 2012) (applying South Carolina law and concluding that veteran was not validly married to purported wife because, at the time of ceremonial marriage, veteran was still married to another person under South Carolina's common law marriage rules); No. 03-02 677, 2006 WL 4438322 (Bd. Vet. App. Sept. 8, 2006) (applying Illinois law and finding that claimant's ceremonial marriage with veteran was valid because claimant's admitted prior common law marriages were not valid in Illinois); No. L-99-5

(R.R. Ret. Bd. Mar. 11, 1999) (analyzing common law marriage laws of Wisconsin, Minnesota, Florida, and Georgia in determining whether appellant was entitled to lump-sum death benefit as common law widow of a federal employee).

Given the challenges posed by common law marriage, some agencies have developed their own internal guidance for applying state law. The Department of Labor has issued a 52-page handbook describing variances in state law and explaining how to address common law marriage under the agency's benefits programs. See U.S. Dep't of Labor, *Common-Law Marriage Handbook* (Apr. 2010), [http://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/CommonLaw\\_Marriage.pdf](http://www.dol.gov/owcp/energy/regs/compliance/PolicyandProcedures/CommonLaw_Marriage.pdf) (instructing claims examiners to conduct choice of law analysis and apply the appropriate state law to determine validity of common law marriage). The IRS provides that a person is married if living in a common law marriage recognized by the state in which the person lives or in the state where the common law marriage began. See IRS Publ'n 17: Tax Guide for 2012, at 20 (2013). See also 5 C.F.R. §§ 831.613(e), 842.605, 1651.5 (Office of Personnel Management guidance for civil service benefits programs); 20 C.F.R. § 404.726 (Social Security Administration guidance); 28 C.F.R. § 32.3 (Department of Justice guidance for administering public safety officers' benefits); 20 C.F.R. §§ 219.32, 222.13 (Railroad Retirement Board guidance for Railroad Retirement Act).

Federal agencies have developed, through decades of experience, a remarkable degree of sophistication

and competence in applying the diverse laws of the states to determine whether to recognize common law marriages. That competence is equally applicable when assessing the validity of a post-divorce marriage, an interracial marriage, or the marriage of a same-sex couple.

**D. Federal agencies have addressed other significant differences among state marriage laws.**

State marriage laws have other variations that factor into the administration of federal benefits. These include variations in minimum age requirements and the permissible degree of relation between the parties.

Some states allow persons under the age of 18 to marry with parental consent, although the minimum age varies. *Compare, e.g.*, Or. Rev. Stat. § 11-106.010 (parties must be at least 17 years old), *with* Utah Code Ann. § 30-1-9 (parties must be at least 15 years old). There is also variation in state law as to whether first cousins can marry. *Compare, e.g.*, Mo. Rev. Stat. § 451.020 (prohibiting marriages between first cousins), *with* Fla. Stat. § 741.21 (not prohibiting first cousin marriages), *and with* 750 Ill. Comp. Stat. 5/212(a)(4) (permitted if both persons are at least 50 or with proof one party is “permanently and irreversibly sterile”).

As in every other area in which states have different marital requirements, the federal government navigates these differences and incorporates them into eligibility determinations. In *Matter of Balodis*, 17 I. & N. Dec. 428 (BIA 1980), the Regional Commissioner of the Board of Immigration Appeals addressed a petition to classify a beneficiary as a

“fiancée” where the petitioner and the beneficiary were first cousins. Michigan, the state in which the couple intended to reside, does not allow marriages between first cousins, although, as the opinion notes, “[o]ver one-fourth of the states do.” *Id.* at 429. Analyzing Michigan law and state court decisions, the BIA determined that, under Michigan law, “a marriage which is valid where contracted is recognized as valid in Michigan despite the fact that it would be invalid if contracted in Michigan.” *Id.* And, based on an Opinion of the Michigan Attorney General, the Board noted that Michigan permits first cousins to leave the state solely to contract a lawful marriage in a state that allows such marriages. Accordingly, the petition was approved. *Id.*; *see also Matter of Da Silva*, 15 I. & N. Dec. 778, 779–80 (BIA 1976) (determining marriage between uncle and niece, conducted in Georgia to evade New York’s consanguinity law, would nonetheless be recognized under New York law).

In *Gartland v. Schweiker*, 1982 WL 171060 (D. Ariz. Mar. 25, 1982), the court addressed the validity of a marriage entered into with parental consent to determine eligibility for Social Security benefits. The applicant married at age 14 in Texas, and the couple then quickly separated. The marriage was annulled seven years later in Arizona. Looking to Arizona’s choice of law provisions, the court applied Texas law and found that the applicant was married. *Id.* at \*2, \*5; *see also United States v. Mason*, 103 F. Supp. 619 (S.D. Iowa 1951) (applying Iowa law to analyze

whether applicant was widow of first husband under National Service Life Insurance Act when first marriage occurred in Iowa without parental consent when the applicant was 14 and husband was 16). These cases examine just the sorts of questions that arise under our longstanding and well-established system of federal agency deference to state marriage law. DOMA's abrupt departure from this system cannot rationally be grounded in a claim of uniformity, a claim that applies only to marriages between same-sex couples.

In sum, while every variation of state marriage law is incorporated in federal law for heterosexual couples, only same-sex couples are categorically excluded from federal marital benefits under DOMA.

### **III. FEDERAL AGENCIES MAKE OTHER DETERMINATIONS THAT ARE FAR MORE BURDENSOME THAN APPLYING STATE MARRIAGE LAW.**

As demonstrated above, federal administrative agencies have been applying choice of law rules for determining marital status under state law for as long as there has been an administrative state. Although BLAG attempts to justify Section 3 of DOMA based on a need to "eas[e] administrative burdens," BLAG Br. 34, federal agencies routinely make determinations that are far more burdensome than deciding whether state law would recognize a particular marriage. Federal administrative programs are riddled with complexities, and eligibility and benefit determinations often require extensive legal and factual judgments.

Under the Social Security Act, for example, the statutory definition of “wages” used to calculate the total retirement benefits awarded to a beneficiary includes twenty different exceptions. *See, e.g.*, 42 U.S.C. § 409(a). The accompanying administrative regulations to interpret and apply this statutory definition span twelve pages in the Code of Federal Regulations. *See* 20 C.F.R. §§ 404.1041–1059. Just one of the statutory exceptions to “wages,” excluding payments from various trusts, annuities, and pensions, includes eleven subparts and cross-references twenty-two different provisions of the Internal Revenue Code (and one provision of ERISA). 42 U.S.C. § 409(a)(4)(A)–(K).

Likewise, the Veterans’ Benefits Act and the accompanying regulations impose a complex set of rules for certain survivor benefits. Under the Act, the surviving spouse of a veteran who dies after 1956 from a service-connected or compensable disability is entitled to dependency and indemnity compensation. 38 U.S.C. § 1310. Wholly apart from the determination of who qualifies as a spouse, the Department of Veterans Affairs (VA) has a complex, sophisticated methodology for determining appropriate compensation rates in order to administer this program. 38 C.F.R. § 3.10.

The VA begins by employing one of two options for calculating the “basic monthly rate” owed to the spouse. Typically, this rate is established by cross-referencing dollar amounts prescribed in a subsection of a different federal statute, 38 U.S.C. § 1311(a)(1), which Congress updates to account for cost of living increases. 38 C.F.R. § 3.10(b). However, when the deceased veteran died prior to 1993, an “[a]lternative

basic monthly rate” can be calculated based on the amount in 38 U.S.C. § 1311(a)(3) corresponding to the veteran’s pay grade in service—but only if that amount is greater than the sum of the “basic monthly rate” and any applicable increases. 38 C.F.R. § 3.10(d). Under this latter approach, the Secretary of the concerned service department must certify the deceased veteran’s pay grade. *Id.*

The VA also increases compensation levels under a variety of factual scenarios. *See* 38 U.S.C. § 1311(a)(2) (increasing basic monthly rate if veteran, at time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for continuous period of at least eight years immediately preceding death).<sup>6</sup> In addition to the “basic monthly rate” and the first increase, the VA pays increases for various situations such as if the surviving spouse has one or more children under the age of 18 of the deceased veteran, or if the surviving spouse is in a nursing home or is housebound. 38 C.F.R. § 3.10(e).

In short, the VA must navigate an extensive flow-chart of statutory and regulatory steps before reaching a benefits calculation under the Veterans’ Benefits Act. In the face of such complexity, the VA’s determination whether a would-be beneficiary even qualifies as a “spouse” under applicable state marriage law imposes a marginal administrative burden.

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<sup>6</sup> Determinations of entitlement to such an increase are subject to conditions described in 38 C.F.R. § 3.10(f). These conditions include a continuous marriage requirement during the minimum eight years of disability, a determination by the VA of “total disability,” and an additional three-part test confirming that the veteran was “entitled to receive.”

These are just two examples of the challenges that confront federal agencies on a regular basis when administering benefit programs with vast and complex legal requirements. Even when the legal determinations are straightforward, agencies face extensive administrative burdens in making factual determinations for large numbers of beneficiaries.

The Social Security Administration, for example, distributed disability benefits to 9.8 million people in 2011. See Social Security Administration, *Annual Statistical Report on the Social Security Disability Insurance Program, 2011*, at 21 tbl.3 (July 2012). The agency has a fact-intensive process for considering every disability claim, evaluating work activity, the medical severity of the impairment (its length and how it compares to impairments that are recognized as sufficient to obtain benefits), “residual functional capacity” and past work, and age, education, and work experience to determine whether one could find other work. 20 C.F.R. § 404.1520(a)(4)(i)–(v). Administrative hearings are handled by the Office of Disability Adjudication and Review (ODAR), one of the largest administrative judicial systems in the world. Social Security Administration, *Information About Social Security’s Hearings and Appeals Process*, <http://ssa.gov/appeals/> (last accessed Feb. 25, 2013). Hearings usually involve testimony from the claimant and other witnesses, as well as medical or vocational experts. Social Security Administration, *The Appeals Process*, SSA Publ’n No. 05-10041 (Jan. 2008), <http://www.socialsecurity.gov/pubs/10041.pdf>. Each year, “more than 1,300 ALJs render over 700,000 decisions . . . .” *Information About Social Security’s Office of Disability Adjudication and Review*, [http://www.ssa.gov/appeals/about\\_odar.html](http://www.ssa.gov/appeals/about_odar.html) (last modified Nov. 13, 2012). At the appellate level,

ODAR's Appeals Counsel "consists of about 100 administrative appeals judges and appeals officers and renders the agency's final decision in over 89,000 cases per year." *Id.*

DOMA was enacted at a time when marriages between same-sex couples were not legal in any states or foreign countries, based on the fear that one jurisdiction (Hawaii) might one day begin recognizing them. *See* H.R. Rep. No. 104-664, at 2–3 (1996). But even now that marriages between same-sex couples are legal in certain states, the number of married same-sex couples represents a small sliver of the total number of beneficiaries under many federal programs, including Social Security (62 million), Medicaid (52.6 million), and Medicare (49.4 million). *See* Social Security Administration, *Monthly Statistical Snapshot* (Jan. 2013), [http://www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot/2013-01.pdf](http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2013-01.pdf); Kaiser Family Foundation, *Medicaid Enrollment: June 2011 Data Snapshot* (June 2012), <http://www.kff.org/medicaid/upload/8050-05.pdf>; StateHealthFacts.org, *Total Number of Medicare Beneficiaries, 2012*, <http://www.statehealthfacts.org/comparemaptable.jsp?ind=290&cat=6&sort=a> (last accessed Feb. 25, 2013).

Simply put, administrative agencies process a staggering number of claims for federal benefits—claims that often involve complex legal judgments and/or detailed factual determinations. The notion that DOMA served to reduce administrative burdens in any appreciable way, by eliminating the need to

determine marital status for one small class of people who might wed, is impossible to credit.<sup>7</sup>

In this “Nation that prides itself on adherence to principles of equality under law,” *Plyler v. Doe*, 457 U.S. 202, 219 (1982), Section 3 of DOMA cannot stand. BLAG cannot justify the law’s unequal treatment of marriages of same-sex couples by claiming that Section 3 furthers a federal interest in uniformity. Federal agencies have never adopted uniform rules for making marital determinations, and they have always been able to develop choice of law rules in the face of substantial diversity among state marriage laws. Applying these same principles and practices to marriages of same-sex couples would pose no administrative challenges.

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<sup>7</sup> Section 3 of DOMA—which sweeps broadly across federal law without consideration of its particularized effects—can actually heighten burdens on agencies. For example, the IRS spent several years creating a special tax form and updating guidance for same-sex couples whose marriages are recognized in community property states like California and Washington, because the IRS interprets Section 3 to prohibit individuals in same-sex marriages from filing joint tax returns. *See* IRS Form 8958; *compare* IRS Publ’n 555 (rev. May 2007), *with* IRS Publ’n 555 (rev. Dec. 2010), *and with* IRS Publ’n 555 (rev. Jan 2013).

**CONCLUSION**

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

ARA BETH GERSHENGORN  
CATHERINE C. DENEKE  
FOLEY HOAG LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210  
(617) 832-1000  
agershengorn@  
foleyhoag.com

LISA S. BLATT  
CHRISTOPHER S. RHEE  
*Counsel of Record*  
ZACHARY B. ALLEN  
ARNOLD & PORTER LLP  
555 12th Street, N.W.  
Washington, DC 20004  
(202) 942-5000  
christopher.rhee@  
aporter.com

*Counsel for Amici Curiae*

March 1, 2013

## **APPENDIX**

**APPENDIX****AMICI CURIAE IN SUPPORT  
OF RESPONDENT**

**Dr. Donna E. Shalala** served as Secretary of Health and Human Services (HHS) from 1993 to 2001, becoming the nation's longest serving HHS Secretary. HHS manages a wide variety of federal benefits programs, including Medicare, Medicaid, Child Care and Head Start, Welfare, and the Public Health Service. At the start of Dr. Shalala's tenure, HHS also included the Social Security Administration. Dr. Shalala also served as Assistant Secretary for Policy Development and Research at the Department of Housing and Urban Development during the Carter administration. She is currently President of the University of Miami, where she is also Professor of Political Science.

**Dr. Louis W. Sullivan** was Secretary of Health and Human Services from 1989 to 1993. During his tenure, HHS included the Health Care Financing Administration, which then managed Medicare, Medicaid, and the Social Security Administration and served the needs of 50 million aged and disabled beneficiaries. Both before and after his tenure at HHS, Dr. Sullivan served as President of the Morehouse School of Medicine. He currently holds the title of President Emeritus there.

**Togo D. West Jr.** served as Secretary of Veterans Affairs (VA) from 1998 to 2000. As head of the VA, he was responsible for administering several significant benefits programs for veterans, their survivors, and their families. The Veterans Benefits Administration, one of three main branches of the VA, manages initial veteran registration, eligibility

determination, and five key lines of benefits and entitlements: Home Loan Guaranty, Insurance, Vocational Rehabilitation and Employment, Education, and Compensation & Pension. Mr. West also served in a number of positions with the Department of Defense during the Carter and Clinton administrations, most notably General Counsel from 1980 to 1981 and Secretary of the Army from 1993 to 1997.

**Kenneth S. Apfel** served as the Commissioner of the Social Security Administration (SSA) from 1997 to 2001. SSA administers many important benefit programs for over 60 million people, including the Old-Age (Retirement), Survivors, and Disability Insurance programs and the Supplemental Security Income program. Professor Apfel also served as Associate Director for Human Resources at the Office of Management and Budget and Assistant Secretary for Management and Budget at HHS. At HHS, he was the agency's chief financial officer, overseeing a \$700 billion budget. He is currently Professor of the Practice at the University of Maryland's School of Public Policy.

**Sheldon S. Cohen** served from 1965 to 1969 as Commissioner of the Internal Revenue Service (IRS). In the year prior, he served as Chief Counsel for the IRS. The IRS administers numerous federal tax programs, including the collection of individual income tax, employment tax, estate tax, and the gift tax. Mr. Cohen is currently a Director at the investment firm Farr Miller & Washington, LLC.

**Rudy F. deLeon** served as Deputy Secretary of Defense from 2000 to 2001. In earlier posts at the Pentagon, he served as Under Secretary of Defense for Personnel and Readiness from 1997 to 2000, and as Under Secretary of the Air Force from 1994 to

1997. Currently, Mr. deLeon is the Senior Vice President of National Security and International Policy at the Center for American Progress.

**Jamie S. Gorelick** served as General Counsel of the Department of Defense from 1993 to 1994. Among other responsibilities, the General Counsel offers legal advice regarding the Department's many federal benefit programs, including military survivor benefits and TRICARE, which provides health care to active and retired military personnel and their families. From 1994 to 1997, Ms. Gorelick was Deputy Attorney General of the United States, the second highest position in the Department of Justice. In that role, she had oversight responsibility for the Immigration and Naturalization Service, which at the time administered the nation's immigration laws. She is currently a partner at the law firm WilmerHale LLP.

**Michael J. Graetz** served as Deputy Assistant Secretary for Tax Policy at the Department of the Treasury from 1990 to 1991. He then served as Assistant to the Secretary and Special Counsel for the Treasury Department in 1992. The Treasury Department oversees the IRS and is responsible for managing federal finances, collecting taxes, enforcing the federal tax laws, and advising on tax policy. Professor Graetz has been a law professor for more than 25 years and is currently the Columbia Alumni Professor of Tax Law and the Wilbur H. Friedman Professor of Tax Law at Columbia Law School.

**Dr. John J. Hamre** served as the Deputy Secretary of Defense from 1997 to 2000. In that post, he had responsibility for helping to oversee and manage the day-to-day operations of the Defense Department. From 1993 to 1997, he was the Under Secretary of

Defense (Comptroller), the principal assistant to the Secretary of Defense for the preparation, presentation, and execution of the defense budget and management improvement programs. Since 2000, Dr. Hamre has served as president and chief executive officer of the Center for International and Strategic Studies.

**Benjamin W. Heineman Jr.** served in the Department of Health, Education, and Welfare from 1977 to 1979, ending his tenure there as Assistant Secretary for Planning and Evaluation. At that time, the Department had responsibility for a diverse range of federal programs, including the Social Security Administration, Medicare, Medicaid, the Family Support Administration, and agencies constituting the Public Health Service. In 1987, Mr. Heineman became Senior Vice President, General Counsel and Secretary of the General Electric Company. He is currently senior fellow at the Belfer Center for Science and International Affairs at Harvard University's Kennedy School of Government and a distinguished senior fellow at Harvard Law School's Program on the Legal Profession.

**Kathryn O. Higgins** was Deputy Secretary of Labor from 1998 to 2000. She also served in many other positions within the Department of Labor during more than three decades of service there. In her role as Deputy Secretary, she helped direct initiatives to expand pension benefits for workers and assist workers affected by trade and other economic dislocations. The Department of Labor oversees the implementation of the Health Insurance Portability and Accountability Act, and the Department's Wage and Hour Division administers benefits provisions of the Family and Medical Leave Act. Ms. Higgins is

currently Chair of the Board of Directors of the Fair Labor Association.

**Constance Berry Newman** was the Director of the Office of Personnel Management (OPM) from 1989 to 1992. OPM manages the civil service of the federal government, including the administration of health care and retirement benefits for most federal employees. From 1969 to 1971, Ms. Newman was Special Assistant to Elliot Richardson, Secretary of the Department of Health, Education, and Welfare.

**Harriet S. Rabb** served as General Counsel of the Department of Health and Human Services from 1993 to 2001. As chief legal officer of the Department, she was responsible for counseling and supporting the programs of eleven agencies including the Health Care Financing Administration, which at the time administered Medicare and Medicaid, and the Administration for Children and Families, which addresses family and children's services and assistance. Since 2001, Ms. Rabb has been Vice President and General Counsel of The Rockefeller University.