Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,
Defendant-Appellants.

DEAN HARA,
Plaintiff-Appellee-Cross-Appellant,
and

NANCY GILL, *et al.*,
Plaintiff-Appellees,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
***Defendant-Appellants-Cross-Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant-Appellants United States Dep't of Health & Human Services, *et al.* and Cross-Appellees Office of Personnel Management, *et al.* Supporting Reversal

---

Steven W. Fitschen
Counsel of Record for Amicus Curiae
Douglas E. Myers
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, Virginia 23454
(757) 463-6133; nlf@nlf.net

FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae, The National Legal Foundation, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae* The National Legal Foundation, its members, or its counsel, contributed money that was intended to fund preparing or submitting the Brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages(s)**

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501(c)(3) public interest law firm. Our donors and supporters, including those in Massachusetts, have a vital interest in issues pertaining to America's moral heritage, including protecting marriage as an exclusive and unique relationship existing between one man and one woman. This protection of traditional values of the family and of our nation is of great importance to our supporters. Further, we support efforts taken by Congress to acknowledge that understanding in our laws.

This brief is filed pursuant to consent of Counsel of Record for all parties.

SUMMARY OF THE ARGUMENT

Your *Amicus* addresses one argument raised by the Plaintiff-Appellees (collectively "Gill"[1]) in the court below. There, Gill argued for an innovation to the well-established standard for applying heightened scrutiny by suggesting that the federal government's legislating a definition of marriage in 28 U.S.C. § 1738C (LEXIS, current through Dec. 18, 2010) ("DOMA") constituted discrimination of an unusual character, thus requiring heightened scrutiny. Such an innovation is not grounded in apposite authority, and Gill's purported authority actually stands for

[1] Although the Plaintiff-Appellees from *Gill, et al. v. Office of Personnel Management, et al.* make the most overt attempt to make the arguments addressed in this Brief, the Plaintiff-Appellees in *Massachusetts v. United States Department of Health & Human Services, et al.* made similar arguments below, albeit less directly. Because both sets of Plaintiff-Appellees made similar arguments that this Brief will address, your *Amicus* has chosen to refer to them collectively as "Gill."

the proposition that rational basis review, and not heightened scrutiny, was the appropriate standard for the court below to have applied. Furthermore, questions levels of scrutiny have no application in the context of federalism and Tenth Amendment cases. Finally, even if levels of scrutiny apply to federalism and Tenth Amendment cases, federal laws such as DOMA fall well within the bounds of how the federal government has interacted with marriage and domestic relations law over the course of the history of the nation.

ARGUMENT

Black letter law teaches that strict scrutiny[2] is applicable when a law impinges on a fundamental right or when it targets a suspect class. However, Gill asked the court below (and presumably will ask this Court) to abandon black letter law—and the authoritative teachings of the United States Supreme Court—and apply strict scrutiny to DOMA for *the additional reason* that it purportedly "represents such a dramatic departure from federalist tradition, and implicates the core State power to govern domestic relations." (Gill Mem. in Opp. to Motion to

[2] Gill was imprecise as to exactly what type of scrutiny she desired the court below to apply. Gill most often used the general term "heightened scrutiny," (Gill Mem. in Opp. to Motion to Dismiss at 1, 11, 12, 18, 19, 20, 21, 22, 23, 25, 26) and (Massachusetts Mem. in Opp. to Motion to Dismiss at 3, 31, 32, 33, 35, 36), but supported her claim with case citations applying *strict* scrutiny. (Gill Mem. in Opp. to Motion to Dismiss at 20) and (Massachusetts Mem. in Opp. to Motion to Dismiss at 22, n.7, 35.) Because your *Amicus's* analysis applies with equal force regardless of whether Gill sought intermediate or strict scrutiny, the ambiguity need not be addressed.

Dismiss at 12.)

Although Gill brought only an Equal Protection claim, she seeks, through the debate over the level of scrutiny, to back door federalism and Tenth Amendment concerns into the Equal Protection analysis. This is demonstrated by the fact that Gill led with these arguments in her Memorandum in Opposition to the Motion to Dismiss, (12-19), placing these argument before her argument concerning her "fundamental interest," (19-22), and her argument concerning discrimination against a class of persons, (22-26). Having gone to such great lengths in her attempt to establish that DOMA is subject to heightened scrutiny, Gill then expends the grand total of one paragraph on "demonstrating" that DOMA fails such scrutiny. (Gill Mem. in Opp. to Motion to Dismiss at 26.)

Gill does, however, repeatedly rely upon federalism and Tenth Amendment concerns in her rational basis arguments. (*See*, Gill Mem. in Opp. to Motion to Dismiss at 29-30 (§ III.A.1, "DOMA Does Not 'Maintain the Status Quo,' and Continuing the Exclusion of Married Same-Sex Couples from Marital Benefits Is Not an 'Interest'"); 30-32 (§ III.A.2, "DOMA Is Not an 'Incremental' Response to Marriage by Same-Sex Couples, and Incrementalism Alone Is not an Interest in the Absence of some Underlying Purpose"); 32-34 (§ III.A.3, "DOMA's Discrimination Among Married Persons Cannot Be Justified as Treating All Same-Sex Couples Alike, Whether Married or Not"); 36-37 (§ III.B.2, "DOMA Cannot

Be Justified as Preserving 'Traditional' Marriage"); and 37-38 (§ III.B.3, "DOMA Undermines Rather than Protects State Sovereignty").) Thus, it is important to note that Gill's argument is dangerous for two different reasons. First, she seeks to craft a radical innovation in level of scrutiny analysis. And second, her argument contaminates her rational basis arguments.

The court's opinion, like Gill's Memorandum in Opposition, also supposedly evaluated an Equal Protection claim. However, in reality, the federalism and Tenth Amendment concerns animated virtually the entire opinion.

Gill's trick was a neat one, and as just noted, it was persuasive to the court below.

Ironically, the court below began by giving lip service to existing black letter law: "courts apply strict scrutiny, the most searching of constitutional inquiries, only to those laws that burden a fundamental right or target a suspect class. A law that does neither will be upheld if it merely survives the rational basis inquiry—if it bears a rational relationship to a legitimate government interest." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 386 (D. Mass. 2010). However, the court then explicitly noted that Gill did not limit herself to the traditional two reasons for seeking heightened scrutiny but relied on those reasons *plus her federalism arguments*. *Id.* at 387. The court passed over this would be jurisprudential sea change in silence and merely noted that it would evaluate DOMA under rational

basis review. *Id.*

However, that marked the end of the court's ignoring of Gill's federalism and Tenth Amendment arguments. The court's entire evaluation of the government's currently proffered interests (as opposed to those discussed by Congress during the debate over DOMA's passage) reads like a Tenth Amendment analysis, not an Equal Protection analysis. *Id.* at 390-97. In fact, in this analysis, the court twice cross referenced its entire analysis in the companion case, *Massachusetts v. Department of Health & Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010), which, of course, *does* contain a Tenth Amendment argument. *Gill*, 699 F. Supp. 2d at 391, n.121; 393, n.133 (in both instances citing *Dep't of HHS* with the signal "*See generally*").

As will be discussed below, two points here are especially important. First, the federalism and Tenth Amendment concerns are completely out of place in the Equal Protection analysis. Those courts that have faced a case in which plaintiffs have brought both Tenth Amendment and Equal Protection challenges have treated the claims completely independently. Second and relatedly, because those tests are different, federalism concerns cannot possibly be a reason why a law should be subjected to heightened scrutiny. Equal Protection claims deal with the rights of citizens and groups of citizens. Tenth Amendment claims deal with the federal government's treatment of states *qua* states.

The Defendant-Appellants (collectively the "United States") have adequately demonstrated why DOMA is not subject to strict scrutiny for the traditional reasons (*i.e.*, it does not impinge on a fundamental right and it does not target a suspect class). (Opening Br. at 25-26.) Therefore, this Brief will demonstrate why, based on the points in the prior paragraph, this Court should reject Gill's proferred third reason for evaluating DOMA—or any statute—under heightened scrutiny.

I. HEIGHTENED SCRUTINY IS NOT APPROPRIATE IN THE INSTANT CASE BECAUSE GILL'S AUTHORITY FOR APPLYING HEIGHTENED SCRUTINY ACTUALLY STANDS FOR THE PROPOSITION THAT RATIONAL BASIS APPLIES.

Before proceeding to the differing nature of the tests and the inapplicability of heightened scrutiny to Equal Protection claims, it is important to point out an underlying problem with Gill's argument: she supports her assertion with citation to but a single authority—and that authority is demonstrably talking about reasons to apply rational basis scrutiny. Gill twice cites the Supreme Court's opinion in *Romer v. Evans*, 517 U.S. 620, 633 (1996). Gill first writes:

> Because it represents such a dramatic departure from federalist tradition, and implicates the core State power to govern domestic relations, DOMA should be subjected to more searching constitutional scrutiny than that applicable to conventional social or economic legislation. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (imposition of a broad and unprecedented legal disability on one group of citizens requires closer equal protection scrutiny than conventional legislation).

(Gill Mem. in Opp. to Motion to Dismiss at 12.)

Gill elaborates a bit when she writes:

> "The absence of precedent for" a measure imposing disadvantages "is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional [equal protection] provision.'" *Romer v. Evans*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

(Gill Mem. in Opp. to Motion to Dismiss at 19.)[3]

Romer was, of course, decided under rational basis. 517 U.S. at 631-32. There, the Supreme Court addressed the constitutionality of Colorado's Amendment 2, a state constitutional amendment that prohibited the state from providing "[p]rotected [s]tatus" to people based upon their sexual orientation. 517 U.S. at 624. In striking down Amendment 2, the Supreme Court applied rational basis review, noting that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* at 631. The Court went on to hold that Amendment 2 "fail[ed], indeed defie[d], this conventional [*i.e.* rational basis] inquiry." *Id.* at 632. The Court further emphasized its rational basis review, finding Amendment 2 "lack[ed] a *rational* relationship to legitimate state

[3] Gill's punctuation of the quotation is garbled. Your *Amicus* has restored proper punctuation in our quotation of it from Gill's brief without using "[*sic*]" to indicate these corrections.

interests," and that courts "requir[e] that the classification bear a *rational* relationship to an independent and legitimate legislative end." *Id.* at 632, 633 (emphasis added).

Furthermore, both *Romer's* use of the *Louisville Gas* quotation and that quotation's original context in *Louisville Gas* itself demonstrate one clear conclusion—the *Romer* Court believed that Amendment 2 was an *easy* case under rational basis, not that it was a hard case that deserved "rational basis plus" or any other kind of heightened scrutiny. After noting the deferential standard inherent in rational basis review, the Court went on to explain the necessity of a link between the "classification adopted and the object [of the law] to be obtained." *Id.* at 632. The Supreme Court concluded that such a link did not exist in Amendment 2, and supported its view by noting that the "disqualification [in Amendment 2] of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." *Id.* at 633. The Court found this "absence of precedent" to be a significant component to Amendment 2's lack of rational basis, further noting that "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). But the Supreme Court's language in no way suggests the inference Gill drew. Far from suggesting heightened scrutiny, the quotation from *Louisville*

Gas simply explains the Supreme Court's conclusion that Colorado lacked a rational basis for enacting Amendment 2—not the application of a different standard of scrutiny.

Additionally, *Louisville Gas* itself supports the interpretation set forth above. There, in discussing whether a tax law passed muster under the Equal Protection Clause, the Supreme Court examined whether the classifications created within the law "rest[ed] upon some difference which bears a *reasonable* and just relation to the act in respect to which the classification is proposed." 277 U.S. at 37 (emphasis added). The Court unremarkably noted that any deference given to the legislature in creating the classifications could not be "arbitrary" and that "[d]iscriminations of an unusual character especially suggest [a need for] careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 37-38. Thus, consistent with the *Romer* Court's use of the quotation, the *Louisville Gas* Court explained the nature of its rational basis review (*i.e.* not blind deference to the government), but the Court did not impose heightened scrutiny as Gill has suggested.

Yet, on this slender—or more aptly, broken—reed of *Romer's* quotation of *Louisville Gas*, Gill leaned her entire federalism-concerns-warrant-heightened-scrutiny argument.

II. HEIGHTENED SCRUTINY IS NOT APPROPRIATE IN THE INSTANT CASE BECAUSE "SCRUTINY" ANALYSIS IS INAPPLICABLE TO QUESTIONS OF FEDERALISM AND THE TENTH AMENDMENT.

Two courts have decided cases in which both Equal Protection and either Tenth Amendment or federalism claims were brought. *See In re Kandu*, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004), and *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301 (M.D. Fla. 2005). In both cases, the courts undertook the Equal Protection analysis and the Tenth Amendment or federalism analysis completely independently of each other.

In *In re Kandu*, a bankruptcy court confronted a direct challenge to DOMA in the context of a bankruptcy filing. There, a lesbian who had obtained a Canadian same-sex marriage had included her partner as a joint debtor pursuant to 11 U.S.C. § 302 (LEXIS, current through Dec. 22, 2010). 315 B.R. at 130-31. In response to the bankruptcy court's Order to Show Cause for Improper Joint Filing, the claimant, challenged DOMA's constitutionality on, *inter alia*, both Tenth Amendment and Equal Protection grounds. *Id.* The claimant argued that marriage is not among Congress's enumerated powers and that that power was retained by the states. The court simply applied the test from *New York v. United States*, 505 U.S. 144 (1992). *Id.* at 131-32. That test asks "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *Id.* at 131 (quoting *New York*, 505 U.S. at 155). The

important point here is there was *no* discussion of the appropriate level of scrutiny in the Tenth Amendment analysis.

Significantly, the *Kandu* court did not engage in this analysis until it conducted its Due Process and (relevantly here) Equal Protection analyses. 315 B.R. at 135-44. And, even more significantly, there was no discussion of the Tenth Amendment in the Equal Protection analysis. There, the court merely held that because no evidence showed that "DOMA's purpose is to discriminate against men or women as a class," an Equal Protection challenge "under this theory" was not entitled to heightened scrutiny. *Id.* at 143. The *Kandu* court also held that, because "'homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment,'" rational basis review was appropriate in analyzing those equal protection claims made by homosexuals. *Id.* (*quoting High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990)).

Similarly, the court in *Wilson v. Ake* strictly separated its Equal Protection analysis from its federalism analysis. 354 F. Supp. 2d at 1301. There, a same-sex couple who had received a Massachusetts marriage license attempted to have their marriage recognized in Florida. Citing DOMA, among other reasons, the state refused to do so. *Id.* The couple sued, and specifically attacked DOMA on

federalism principles as violative of the Full Faith and Credit Clause. *Id.* at 1302. The court engaged in a common sense analysis, finding that DOMA was a quintessentially correct exercise of Congress's authority under the Full Faith and Credit Clause and was "exactly what the Framers envisioned." *Id.* at 1303. The court correctly noted that if laws such as DOMA were unconstitutional under the Full Faith and Credit clause, then any state could force its views on the entire country. *Id.* This the Constitution has simply never required.

Once again, there was no discussion of levels of scrutiny in the court's federalism analysis. This discussion only occurred in the court's Due Process and Equal Protection analyses. *Id.* at 1305-08. And once again, there was no federalism discussion in the Equal Protection analysis. There, the court simply conducted an analysis similar to the court's in *Kandu*, and determined rational basis clearly applied because DOMA did not discriminate based on sex and because sexual orientation is not a suspect or quasi-suspect class. *Id.* at 1307-08.

Inserting issues of scrutiny into Tenth Amendment or federalism analyses is truly a case of apples and oranges. This point is made by Professor Adam Winkler in an article discussing which rights have been protected by strict scrutiny. In his article, Professor Winkler has persuasively argued that regardless of how one defines a "fundamental right,"—despite the standard rhetoric—only *certain* of them have ever been thus protected. Adam Winkler, *Fundamentally Wrong About*

Fundamental Rights, 23 Const. Commentary 227, 227 (2006). In discussing where one might look to ascertain which "fundamental rights" have actually been protected, he examines the Bill of Rights. *Id.* at 228-32. He shows that strict scrutiny protection has not been extended to rights arising under the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and *Tenth* Amendments. *Id.* at 229.

Moreover, with regard to the Tenth Amendment, Professor Winkler makes a point especially germane to our discussion:

> The [Supreme] Court has held that the amendment reflects an inviolable principle of the constitutional structure under which the federal government must respect the sovereignty of the states. The Court has been explicit that balancing of the interests, such as we might expect with some form of scrutiny, has no place in the Tenth Amendment context."

Id. at 231-32. In support of this assertion, Professor Winkler quotes the Court's opinion in *Printz v. United States*, 521 U.S. 898, 932 (1997): "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." (emphasis in original).

The court below, of course, had to address the Tenth Amendment issue since it was raised directly in *Massachusetts v. Department of Health & Human Services*, 698 F. Supp. 2d 234, 248-49 (D. Mass. 2010). The point however, is that Gill cannot "double dip" and use her federalism concerns to ratchet up the level of scrutiny or to backdoor the issue into the Equal Protection analysis. The court

below should have followed the lead of the *Kandu* and *Ake* courts by keeping the analyses separate. Nor can the court's conflation of the issue be attributable to the differing governmental interests asserted in this case (as opposed to those asserted in *Kandu* and *Ake*). It is true that in *Kandu* and *Ake*, the government's stated interests were not in preserving the *status quo* (or any of the other stated interests presented by the United States here). *See Kandu*, 315 B.R. at 145; *Ake*, 354 F. Supp. 2d at 1308 (discussing the interests asserted in those cases). However, maintaining the *status quo* cannot implicate the Tenth Amendment or federalism concerns unless preexisting federal laws were already violating those principles—which Gill has not asserted. This is true notwithstanding Gill's assertion that the *status quo* has been changed, not maintained. Her argument is based on the premise that the *status quo* consisted of federal reliance upon state regulation of marriage. This premise will be demonstrated to be false in Section III below.

However, even assuming *arguendo* that Gill's assertion is true, states only permitted opposite-sex marriages at the time DOMA was enacted. *Gill*, 699 F. Supp. 2d at 377; Opening Br. at 34. Therefore, regardless of how it is viewed, DOMA clearly protected the *status quo* of opposite-sex-only marriage. Since, as noted above, Gill has not asserted—nor could she—that preexisting federal laws were already violating the Tenth Amendment and federalism concerns, the court

had no cause for inflating its Equal Protection analysis with those extra considerations.

III. HEIGHTENED SCRUTINY IS NOT APPROPRIATE IN THE INSTANT CASE BECAUSE DOMA FALLS WITHIN THE FEDERAL GOVERNMENT'S GENERAL PRACTICE OF DEFINING MARRIAGE AND DOMESTIC RELATIONS MATTERS FOR THE PURPOSES OF FEDERAL LAW.

Even were issues of scrutiny somehow appropriate for Tenth Amendment and federalism claims, the appropriate level would not be heightened scrutiny or strict scrutiny.[4] This is so because, contrary to Gill's assertion, DOMA does not "represent[ ] such a dramatic departure from federalist tradition, and [does not] implicate[ ] the core State power to govern domestic relations." (Gill Mem. in Opp. to Motion to Dismiss at 12.) Nor does DOMA "uniquely break[]" with historic tradition and "rewrite wholesale the U.S. Code, the Code of Federal Regulations, and various other rules to disadvantage married same-sex couples." (Gill Mem. in Opp. to Motion to Dismiss at 18.) And, despite Gill's contention that "[f]ederal law governing eligibility for marriage . . . has been limited to situations in which the federal government exercises the police power, such as administration of the territories" (Gill Mem. in Opp. to Motion to Dismiss at 17), DOMA actually falls squarely within the federal government's general practice of defining traditional domestic relations matters *for the purposes of federal law*.

[4] *See* footnote 2, *supra* at 2.

Simply put, federal "interventions" into domestic relations and family law are common under current federal law and have been a part of federal law for well over 100 years. Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 Drake L. Rev. 951 (2010); Br. Nat'l Org. for Marriage, at 4-12. As Professor Wardle notes, "Congress has, and for two centuries has exercised, the power to define terms used in federal law, including terms of marriage and family relationships, for purposes of federal programs' benefits." Wardle, at 974. Further, "[n]ot infrequently" these definitions are defined "inconsistently with some states' definitions of those domestic relationships and incidents in state law. *Id.*

The United States has identified several areas where the federal government currently has legislated in domestic relations matters. In particular, federal laws implicate military benefits (at times construing interpretations of families contrary to state law), federal pensions (including ERISA laws), the Food Stamps Program, the Social Security Act, the Child Support Recovery Act of 1992, the Deadbeat Parents Punishment Act of 1998, and 18 U.S.C. § 922(g)(8) (a statute criminalizing possession of a firearm by "individuals who have been subject to a judicial anti-harassment or anti-stalking order). (Opening Br. at 38-39, 62.) *Amicus* National Organization for Marriage ("NOM") also noted five additional areas not included by the United States above. In particular, the federal government has legislated in

the area of domestic relations under immigration law (especially with regard to birth and naturalization), land grants (providing special protections for heads of families), the census (implementing a federal definition for what constitutes a family, regardless of state law differences), copyright, and bankruptcy (using federal definitions for alimony, support, and spousal maintenance). (Br. Nat'l Org. for Marriage, at 5-9.)

The United States also noted that a federal *definition for marriage* has been implemented for the purposes of immigration (INS rejects certain "sham" marriages that may be valid or only voidable under state law). (Opening Br. at 38.) Additionally, NOM identified two other areas where the federal government specifically legislated its own definition for marriage—again, regardless of how states would have viewed the relationship. (Br. Nat'l Org. for Marriage, at 9-11.) First, the IRS uses its own definition of marriage under the tax laws (imposing specific requirements for claiming single or married status, regardless of state law requirement), and second the Census Bureau expanded the definition of marriage for its counting purposes beyond most states' definitions (counting same-sex couples with a valid marriage license as married even if they reside in a state that does not recognize the relationship as a marriage). (Br. Nat'l Org. for Marriage, at 9-11.)

It is now obvious, as noted above, that laws regulating or defining domestic relations for federal purposes were not limited to police power over territories. The federal government did, however, regulate marriage in its territories in a very specific way in the mid to late nineteenth century. Specifically, Congress passed a series of statues "intended to repress the development of polygamy as a recognized marriage system in the United States." William Duncan, *The Polygamy Precedents: On Congress's Power to Define Marriage as One Man and One Woman*, iMapp Policy Brief, Vol. 2, No. 4, July 14, 2010, at 1. Those legislative enactments included the Morrill Anti-Bigamy Act of 1862, the Poland Act of 1874, the Edmunds Anti-Polygamy Act of 1882, and the Edmunds-Tucker Act of 1887. *Id.*

However, contrary to Gill's assertion, the federal government did not limit its legislating a marriage definition to criminal laws concerning polygamy *in the territories*. In fact, the federal government explicitly conditioned *entrance into the Union* of several *states* on their forbidding polygamy in their constitutions. In particular, Utah's, New Mexico's, Arizona's, and Oklahoma's Enabling Acts all included language that "polygamous or plural marriages, or polygamous cohabitation . . . are forever prohibited." Enabling Act of July 16, 1894, ch. 138, § 3, 28 Stat. 108 (1894) (Utah); Enabling Act of June 16, 1906, ch. 3335, § 36, 34 Stat. 267, (1906) (Oklahoma); Enabling Act of June 20, 1910, ch. 310 , §§ 2(A),

20, 25, 36 Stat. 557 (1910) (New Mexico and Arizona). Requiring a state to define marriage in a particular way (*i.e.* no plural marriages) and to require the state to write the definition into its constitution are much greater interventions into state domestic relations law than DOMA's mere definitional nature influencing the distribution of federal funds.

Furthermore, as the United States has argued, DOMA merely preserves the *status quo*. (Opening Br. at 32-41.) This point, however, has additional importance that helps explain why heightened scrutiny review is not appropriate for DOMA. DOMA is perhaps best seen as an "explanatory statute." As such, it cannot be changing the *status quo*, as Gill asserts, but must be seen as maintaining the *status quo*; which, as just mentioned, is the position of the United States.

A note of explanation about explanatory statutes may be in order. As Professor James E. Pfander has explained:

> Although explanatory statutes thrived in the early American world of legislative supremacy that predated the ratification of the Constitution in 1788, they have largely disappeared from the repertoire of the modern American legislative assembly. Modern treatises mention them in passing, if at all, and modern legislatures rarely enact them, at least in such terms. To find a working definition, we must turn to leading nineteenth century treatises on legislative interpretation. One treatise writer gave the following account:
>
> > A declaratory or expository statute is one passed with the purpose of removing a doubt or ambiguity as to the state of the law, or to correct a construction deemed by the legislature to be erroneous. It either declares what is, and has been, the rule of the common law on a given point, or

> expounds the true meaning and intention of a prior legislative act.
>
> Other treatise writers of the period agree that expository or declaratory statutes provide one vehicle that legislative bodies may use to correct or clarify ambiguities in the law.
>
> Explanatory or declaratory statutes look odd to modern eyes because they claim a role for legislative assemblies in the business of interpreting or expounding upon the law. It was precisely this task of exposition—of saying "what the law is"—that Chief Justice Marshall famously claimed for the judicial branch in *Marbury v. Madison*, and few today would dispute that claim. By Marshall's account, and under the American doctrine of separation of powers on which it rests, the legislature makes general laws for future application and the judiciary applies and interprets those laws in the context of a concrete dispute. Courts following this conception of the separation of powers will ordinarily refuse to give effect to laws of a retrospective character, and will resist attempts by legislative bodies to interfere with the final disposition of judicial proceedings between private parties.

James E. Pfander, *History & State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1314-16 (1998) (*quoting* Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws*, 370 (St. Paul, West 1896)) (footnotes omitted).

DOMA is, in effect, an explanatory statute that does not suffer from the defects described above. First, it was not retroactive. Second, it did not seek to reverse any decision of any federal court. Indeed, it did not seek to reverse the decision of any court, since it was a response to a state court's decision regarding the definition of marriage *for state law purposes*. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010); and Opening Br. at 34, n.17 (explaining

proceedings in Hawaii in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)). Thus, even were the concept of levels of scrutiny a valid one for Tenth Amendment or federalism claims and even were Gill's invocation of *Romer* and *Louisville Gas* apposite; DOMA, as a (non-problematic) explanatory statute, cannot "represent[ ] such a dramatic departure from federalist tradition, and [does not] implicate[ ] the core State power to govern domestic relations." (Gill Mem. in Opp. to Motion to Dismiss at 12.)

DOMA, despite the sound and fury created by Gill, does nothing more than restate the *status quo*.

CONCLUSION

As noted above, the Supreme Court has declared in *Printz* that interests are not to be balanced in Tenth Amendment analyses. It is equally invalid to backdoor a balancing of Tenth Amendment or federalism interests into Equal Protection claims. Thus, because DOMA does not implicate a fundamental right nor target a suspect class, and because Gill's third, new purported reason for applying heightened scrutiny is invalid, this Court should evaluate the Equal Protection claim under rational basis review. For reasons stated in the government's Brief and in the Briefs of various *amici*, DOMA does not violate the Equal Protection component of the Fifth Amendment's Due Process Clause under rational basis

review. Furthermore, for the reasons stated above and for reasons stated in the government's Brief and in the Briefs of various *amici*, DOMA does not violate the Tenth Amendment or the Spending Clause. Therefore, this Court should reverse the judgment of the Court below.

Respectfully Submitted,
this 27th day of January, 2011

/s/ Steven W. Fitschen
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing Brief is presented in proportionally-spaced font typeface using Microsoft Word 2007 in 14-point Times New Roman font. The Brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 5,125 words, as counted by the Microsoft Word 2007 word count feature.

/s/ Steven W. Fitschen

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
The National Legal Foundation
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Massachusetts, et al. v. Dep't of Health & Human Servs., et al.*, Nos. 10-2204, 10-2207, 10-2214 on all required parties by filing electronically on ECF. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Steven W. Fitschen

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
The National Legal Foundation
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net