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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee/Cross-Appellant,
NANCY GILL, *et al.*,
Plaintiffs-Appellees,
KEITH TONEY; ALBERT TONEY, III,
Plaintiffs,
v.
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants/Cross-Appellees,
HILARY RODHAM CLINTON,
in her official capacity as United States Secretary of State,
Defendant.

Appeals from the United States District Court for the District of Massachusetts
Civil Action Nos. 1:09-cv-11156-JLT, 1:09-cv-10309-JLT
(Honorable Joseph L. Tauro)

BRIEF OF *AMICUS CURIAE*, MASSACHUSETTS FAMILY INSTITUTE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae, Massachusetts Family Institute, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. As it has no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Massachusetts Family Institute, Inc., a not-for-profit research and education corporation organized under the laws of the Commonwealth of Massachusetts, is dedicated to strengthening the family and upholding traditional moral values in the public policy and cultural arenas. Founded in 1991, MFI is a strong supporter of male-female marriages and mother-father-children families. MFI seeks to carry out its mission by a team of professional staff and volunteers made up of physicians, lawyers, and university professors. The case at bar is of the utmost interest to MFI. The family values espoused by MFI directly conflict with the plaintiffs' request for same-sex "marriage" to be recognized by the federal government. MFI is concerned with the untold consequences same-sex "marriages" will have on American society, moral principles, and the family.

This Brief is filed pursuant to consent of all parties. No party or party's counsel authored any part of the brief nor contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

These cases are not the first challenges to the Defense of Marriage Act (DOMA). Since its enactment, the Department of Justice has successfully

defended the law, in part due to the binding precedent of *Baker v. Nelson*, 409 U.S. 810 (1972). *See, e.g., Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005). But in these cases, surprisingly, the Department of Justice has not mentioned *Baker v. Nelson*. But because *Baker* is controlling precedent, this Court must consider it. This brief provides the Court with the missing argument that the Supreme Court has foreclosed assertions that there is a fundamental right to same-sex "marriage" in *Baker v. Nelson*.

ARGUMENT

In *Baker v. Nelson*, 409 U.S. 810 (1972) ("appeal dismissed for want of a substantial federal question"), the United States Supreme Court considered and rejected the claims by two Minnesota men that Minnesota's exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the U.S. Constitution. The Court affirmed the Minnesota Supreme Court's ruling that there is no fundamental right to same-sex "marriage" under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker v. Nelson*, 291 Minn. 310, 311-13, 191 N.W.2d 185, 186-87 (Minn. 1971). Although the question presented in *Baker v. Nelson* was in the context of the Minnesota law

rather than DOMA, the laws are identical in their definition of marriage as the union of a man and a woman. As a result, *Baker*'s precedent controls.[1]

I. *BAKER V. NELSON* HAS PRECEDENTIAL VALUE THAT PREVENTS A LOWER COURT FROM HOLDING THAT DOMA'S DEFINITION OF MARRIAGE VIOLATES THE U.S. CONSTITUTION.

Under current *certiorari* jurisprudence, it seems strange to say that there is precedential value in a Supreme Court dismissal of an appeal from a State Supreme Court, with no opinion from the Court. Indeed, under current rules, review of a State Supreme Court decision is entirely discretionary under the U.S. Supreme Court's *certiorari* jurisdiction. 28 U.S.C. § 1257(a). "*Cert. denied*" now has little, if any, precedential effect. *See Hopfmann v. Connolly*, 471 U.S. 459, 460-61 (1985) (unlike dismissal for want of a substantial federal question, denial of *certiorari* has no precedential effect). But the Supreme Court jurisdictional rules were altered in 1988. Until then, 28 U.S.C. § 1257 stated:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) *By appeal*, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution,

[1] Prior to this case, the Justice Department agreed. "Because *Baker* specifically resolved due process and equal protection challenges to the traditional definition of marriage . . . *Baker* remains the governing precedent with respect to marriage." Brief for Appellee United States at 16, *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2005) (No. 05-56040).

> treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1257 (as amended July 29, 1970, Publ. L. 91-358, 84 Stat. 590) (emphasis added). Because the Minnesota Supreme Court decided that the Minnesota statute was valid under the U.S. Constitution, 28 U.S.C § 1257 gave the plaintiffs an automatic right of appeal to the U.S. Supreme Court.

Governed by the same language in effect at the time of *Baker*, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court described the significance of an order dismissing an appeal for lack of a substantial federal question. In *Hicks*, a movie theater owner filed suit in federal court, seeking an injunction against enforcement of California's obscenity statute on the ground that it violated the U.S. Constitution. On June 4, 1974, a three-judge District Court panel relied on *Miller v. California*, 413 U.S. 15 (1973) (*Miller I*) and held that the California obscenity statute did not meet the *Miller* standards and was, therefore, unconstitutional. *Hicks*, 422 U.S. at 340. But six weeks later, in *Miller v. California*, 418 U.S. 915 (1974) (*Miller II*), the U.S. Supreme Court dismissed for want of a substantial federal question a subsequent appeal from a state court decision *upholding* the same California obscenity statute against a federal constitutional challenge. *Hicks*, 422 U.S. at 340. The three-judge *Hicks* panel, however, rejected a motion to reconsider and concluded that it was not bound by the Supreme Court's dismissal of *Miller II*. *Hicks*, 422 U.S. at 341. The Supreme Court, however, disagreed:

> We agree with appellants that the District Court was in error in holding that it would disregard the decision in *Miller II*. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and *we had no discretion to refuse adjudication of the case on its merits* as would have been true had the case been brought here under our *certiorari* jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but *we were required to deal with its merits*. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. *The three-judge court was not free to disregard this pronouncement*.

Hicks, 422 U.S. at 343-44 (emphasis added).

The Supreme Court further clarified the extent of precedential impact of a case in which an appeal was dismissed for want of a substantial federal question in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). In *Mandel*, the Court criticized a three-judge panel for assuming that *Hicks* meant that a summary affirmance of a district court opinion meant that the Court had adopted the reasoning (and not just the judgment) of the decision being appealed. It reiterated its statement in *Hicks* that "'[a]scertaining the reach and content of summary actions may itself present issues of real substance.'" *Id*. (quoting *Hicks*, 422 U.S. at 345 n.14). The Court also reaffirmed and clarified the significance of a dismissal for want of a substantial federal question:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. *They do prevent lower courts from coming to opposite*

> *conclusions on the precise issues presented and necessarily decided by those actions*.

Mandel, 432 U.S. at 176 (emphasis added). The elimination of the Court's appellate jurisdiction in 1988 does not change the applicability of this rule to current cases. 16B Charles A. Wright et al., *Federal Practice and Procedure* § 4014 (2d ed. 2010) ("Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it").

II. *BAKER V. NELSON* MUST BE READ AS AN ADJUDICATION ON THE MERITS, UNDER THE PRINCIPLE OBSERVED BY THIS COURT IN *AUBURN POLICE UNION V. CARPENTER*.

A number of courts have cited *Hicks*, and then mistakenly added, "overruled on other grounds, *Mandel v. Bradley*, 432 U.S. 173 (1977)."[2] *See, e.g.*, *Postscript Enters., Inc. v. Peach*, 878 F.2d 1114, 1116 (8th Cir. 1989); *Commc'ns Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1016 (9th Cir. 1999); *American Constitutional Law Found., Inc. v. Meyer*, 113 F.3d 1245, No. 94-1145, 1997 WL 282874, at *4 (10th Cir. May 29, 1997) (unpublished table decision). But in *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993), this Court correctly cites *Hicks* as holding that "[t]he Supreme Court's summary disposition

[2] It is noteworthy that these cases fail to identify the ruling in *Hicks* that *Mandel* purportedly overruled. In any event, *Mandel* did not purport to overrule *Hicks*. Only Justice Brennan's concurrence, which no other Justice joined, claimed that *Mandel* created a new rule. *Id*. at 179-80 (Brennan, J., concurring). But the rule Justice Brennan stated differs from the rule stated in the *per curiam* opinion.

of an appeal to it is an adjudication on the merits that must be followed by lower courts." *Id.* at 894. The Supreme Court agrees that this Court's interpretation of *Hicks* as controlling authority that a dismissal for want of substantial federal question "constitutes a decision on the merits" is appropriate. *Boggs v. Boggs*, 520 U.S. 833, 849 (1997) (citing *Hicks'* holding on this point); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982) (following abstention holding in *Hicks*). Many other courts agree that *Hicks* stands as controlling precedent for the interpretation of a dismissal for want of a substantial federal question. *See, e.g., Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 549 (6th Cir. 2007) (citing *Hicks* as authority that the Supreme Court's dismissal of an appeal "for want of a substantial federal question . . . constituted a decision on the merits"); *Green v. City of Tucson*, 255 F.3d 1086, 1099 (9th Cir. 2001) (citing abstention holding in *Hicks*); *Neely v. Newton*, 149 F.3d 1074, 1078 (10th Cir. 1998) (citing precedential discussion in *Hicks*); *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 272 (2d Cir. 1985) (same).

Thus, according to *Hicks*, the Court had no discretion to refuse to consider the merits of the appeal in *Baker v. Nelson*, and the dismissal of the appeal for want of a substantial federal question was a definitive decision on the merits of the precise issues presented on appeal. As a result, other federal courts may not decide

that the issue presented to the Court in *Baker* presents a substantial federal question that they are entitled to decide differently.

III. *BAKER V. NELSON* IS NOT LIMITED TO THE IDENTICAL LAW CHALLENGED IN THAT CASE, RATHER, *BAKER* CONTROLS ALL FEDERAL COURT DECISIONS CONCERNING A CONSTITUTIONAL RIGHT TO REDEFINE MARRIAGE TO INCLUDE SAME-SEX PARTNERS UNDER EQUAL PROTECTION AND DUE PROCESS.

Baker is not limited to just the Minnesota state law that its plaintiffs challenged. Courts that have discussed the nature of the dismissal in *Baker* have recognized the binding nature of the decision regarding the definition of marriage in various contexts, including DOMA. *See, e.g.*, *Adams v. Howerton*, 673 F.2d 1036, 1039 n. 2 (9th Cir. 1982) (denying marital recognition for purposes of federal immigration law and noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits") (citation omitted) *cert. denied*, 458 U.S. 1111 (1982); *Walker v. Mississippi*, No. 3:04CV140LS, 2006 U.S. Dist. LEXIS 98320, at *4 (S.D. Miss. Apr. 11, 2006) (unpublished) (dismissing challenge of Mississippi law defining marriage as the union of one man and one woman because "until the United States Supreme Court makes a different pronouncement on the issues decided in *Baker*, other federal courts must reach the same result on those issues"); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) ("*Baker v. Nelson* is binding precedent upon this Court and Plaintiffs' case against [DOMA] must be dismissed.").

The Statement of Jurisdiction in the appeal from the Minnesota Supreme Court's rejection of the claims of a right to same-sex "marriage" specifically raised the issues of whether excluding same-sex couples from marriage:

> deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment . . . [and] violates their rights under the equal protection clause of the Fourteenth Amendment . . . [and] deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.

Appellants' Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (attached as addendum). The *Baker* appellants directly raised a claim of a fundamental right to marry, "fully protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id*. at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923). The right-to-privacy argument of the *Baker* appellants relied on *Griswold*, *Loving*, and *Boddie*, *id*. at 18-19, and the Supreme Court's dismissal of the *Baker* appeal for want of a substantial federal question was a rejection of the merits of those claims.

As a result, the Supreme Court has held that there is no federal due process, equal protection or privacy right to same-sex "marriage" in the Ninth or

Fourteenth Amendments to the U.S. Constitution.[3] Courts are "not free to disregard this pronouncement."[4] *Hicks*, 422 U.S. at 344. Yet the district court did exactly that when it entertained the *Gill* plaintiffs' claims that DOMA violates their federal due process and equal protection right to same-sex "marriage." Second Am. and Supplemental Compl. for Declaratory, Injunctive, or Other Relief and for Review of Agency Decision at paras. 432, 444, 452, 467, 482, 491, 500, 509, 518, 527, 536, 545, 554, 563, 573, 583, 592, 601, 609, 617, 626, 630, *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (2010) (No. 09-10309-JLT) (alleging violations "of the right of equal protection secured by the Fifth Amendment"). This is the same issue that *Baker v. Nelson* addressed, and the district court and this Court "do not have the authority to refuse to follow a binding precedent from the Supreme Court of the United States." *Irving v. U.S.*, 162 F.3d 154, 187 (1st Cir. 1998) (Bownes, J., dissenting). Irrespective of the parties' silence concerning

[3] *Baker*, of course, does not foreclose challenges to DOMA under other Constitutional provisions. In particular, *Baker* does not prevent this Court from weighing the merits of Massachusetts' arguments that DOMA violates the Tenth Amendment and Spending Clause. But as described in the briefs of defendants and other amici, it is well-established that Congress has the authority to regulate marriage for federal purposes.

[4] Although *Baker* may not have the same precedential weight before the U.S. Supreme Court as plenary consideration would have, *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974), the issues "necessarily decided" prevent other federal courts from reaching opposite conclusions. *Mandel*, 432 U.S. at 176.

Baker, courts cannot disregard *Baker*'s holding that there is no equal protection or substantive due process right to same-sex "marriage."

CONCLUSION

As this Court accurately stated, "invocation of constitutional authority, without more, cannot breathe life into a theory already pronounced dead by the Supreme Court in binding precedent." *E. Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003). The Supreme Court's binding precedent of *Baker v. Nelson* rejected the theory that equal protection and substantive due process require that people of the same gender can marry. Because that theory has been "pronounced dead by the Supreme Court" in *Baker v. Nelson*, this Court must reverse the district court's decision.

For the foregoing reasons, and for additional reasons stated in the Appellees' Brief, the judgment of the district court should be reversed.

Respectfully submitted,
this 27th day of January 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2011, I have electronically filed the foregoing Brief *Amicus Curiae* of the Massachusetts Family Institute in the consolidated cases of *Massachusetts v. United States Department of Health and Human Services* and *Hara, Gill et al. v. Office of Personnel Management*, Nos. 10-2204, 10-2207 and 10-2214, with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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

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