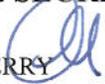




July 30, 2009

**MEMORANDUM FOR THE SECRETARY**

FROM: CAMERON F. KERRY 

SUBJECT: COLLECTING AND REPORTING CENSUS DATA RELATING TO SAME-SEX MARRIAGES

**QUESTION PRESENTED**

Does the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7, require the Census Bureau to edit data reflecting answers to survey questions in which a respondent describes another household member of the same sex as “husband or wife”?

**SHORT ANSWER**

No. DOMA defines the meaning of the words “marriage” and “spouse” when they appear in acts of Congress, rulings, regulations, or interpretations of federal administrative bureaus and agencies. These terms do not appear anywhere in the Census Act, or in any relevant rulings, regulations, or interpretations promulgated pursuant to the Secretary’s authority under the Census Act. Rather, the Census Act instructs the Secretary to take a census of the population every ten years, “in such form and content as he may determine.” 13 U.S.C. § 141.

The exercise of this broad discretion is informed by the historical role of the census in compiling a portrait of the nation’s evolving characteristics. Although the constitutional requirement of “actual enumeration” is rooted in the requirements of apportionment, the Supreme Court has recognized that the census has come to serve much broader functions than simply counting the population. *See, e.g., Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (the census serves as “a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country.”) Congress has amended the Census Act on several occasions in ways that enhance the Census Bureau’s role as the nation’s objective demographer. In carrying out its mission to capture a statistical snapshot of American society, the census routinely collects and reports information that reflects changes in social mores.

For the 2010 decennial census, the Secretary of Commerce created a questionnaire (“the 2010 Questionnaire”) to elicit answers that will form the basis for the

statistical information the Census Bureau will collect, tabulate, and report. This 2010 Questionnaire is not an act of Congress or a ruling, regulation, or interpretation as those terms are used in DOMA. The collection of information pursuant to this form is a matter of objective demographic and statistical tabulation and reporting ordinarily conducted by the Census Bureau rather than the kind of legally-operative interpretation governed by DOMA. The Secretary's discretion under the Census Act is broad enough to permit him to report statistical data reflecting accurate information about an emerging demographic phenomenon.

## FACTS

Pursuant to 13 U.S.C. § 141 and to the Secretary's delegation of authority in Department Organization Order 35-2A (July 22, 1987), the Census Bureau developed a plan for conducting the 2010 decennial census that includes the 2010 Questionnaire used to collect information and a design for reporting results. Among other things, the 2010 Questionnaire asks about gender and relationships. (See Attachment). The gender question asks, "[w]hat is this person's sex?" The person in the household who answers ("the respondent") has the option of checking "Male" or "Female."

If the respondent indicates that more than one person is "living or staying" in his or her residence, the respondent is directed to a relationship question asking, "[h]ow is this person related to Person 1 [the respondent]?" The respondent has the option of checking one of 14 boxes that include among other categories of relationship: "Husband or wife," "Other relation," "Roomer or boarder," "Unmarried partner," and "Other nonrelative." The Census Bureau can derive a count of marriages based on responses to the "husband or wife" category of the decennial census supplemented with Census Bureau surveys on marital status such as the American Community Survey.

In the past, the Census Bureau's practice has been to edit answers to survey questions in which a respondent describes another member of the household of the same sex as the respondent as "husband or wife." In the 1990 census, the Census Bureau's practice was to "edit" the sex of the individual described as the respondent's husband or wife to reflect the opposite sex from that of the respondent. In the 2000 census, the Census Bureau's practice changed: instead of editing the sex of the individual the respondent identified as the respondent's husband or wife, the Census Bureau edited the data to describe these couples as "unmarried partners." The Census Bureau followed this same practice in the American Community Survey conducted subsequently.

Since the 2000 decennial census, the states of Connecticut, Iowa, Massachusetts, Maine, New Hampshire, and Vermont have determined through judicial opinions or legislation to license same-sex marriage. In addition, California, New York, and the District of Columbia give full faith and credit to same-sex marriages that are lawful elsewhere and California continues to recognize same-sex marriages licensed there during the period in which they were lawful. Because of such developments, the question arose whether DOMA required the editing described above to continue. In July 2007, Census Bureau staff asked counsel "whether the Census Bureau is required under the

Federal Defense of Marriage Act (DOMA) to change the answers in the ‘relationship question’ of those individuals that appear to be claiming same-sex marriage from ‘husband or wife’ to ‘unmarried partner’ in the 2010 Decennial Census.” Bureau Counsel responded that “[w]hile DOMA does not govern how marriage-related information should be collected, there is a strong legal basis for a policy decision to be made to act in accordance with DOMA.” And, in making such a policy decision, “it is reasonable and appropriate for the Census Bureau to consider DOMA when preparing decennial census questions as well as when editing or allocating responses in order to make the reported Federal data useful.” To our knowledge, there has never been a legal opinion concluding that DOMA *requires* editing.

Pursuant to 13 U.S.C. § 141(f)(1), the Secretary must submit a report to Congress containing the subjects proposed to be included in the census and the types of information to be compiled no later than three years before the decennial census. Under 13 U.S.C. § 141(f)(2), no later than two years before the decennial census, the Secretary must submit to Congress a report containing questions proposed by the Secretary to be included in the Census. The Secretary has complied with both requirements, and has printed the questionnaires to be used in the 2010 census.

#### ANALYSIS

- I. DOMA does not require editing of Census data because DOMA’s reach is limited to circumstances in which the terms “marriage” or “spouse” are contained in acts of Congress, rulings, regulations, or interpretations.**
  - A. The Census Act does not use the terms “marriage” or “spouse” as defined or intended in DOMA.**

The Defense of Marriage Act consists of two substantive sections. Section 2 protects the power of the states to make their own decisions about marriage by providing that the states are not required to accord full faith and credit to a same-sex marriage lawfully entered into in another state. Section 3 addresses federal law by adding definitions to the Rules of Construction in Title 1, the General Provision of the United States Code:

SECTION 3. DEFINITION OF MARRIAGE. In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. Pub. L. No. 104-199, § 3, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7).

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the

legislative purpose.” *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation omitted). By its terms, DOMA applies only where the words “marriage” or “spouse” appear in acts of Congress, or in any ruling, regulation, or interpretation of the various federal bureaus and agencies. Under these circumstances, DOMA provides the legal definition of the terms. Thus, wherever the word “marriage” appears, it refers exclusively to a legal union between one man and one woman as husband and wife, and wherever the word “spouse” appears, it refers only to a person of the opposite sex who is a husband or a wife.

DOMA’s Section 3 definitions are codified in Title I, Chapter 1 of the United States Code. This section, known as the “Dictionary Act,” is designed to provide definitional guidance for interpreting the rest of the Code. *See U.S. v. Reid*, 206 F. Supp. 2d 132, 138 (D. Mass. 2002). Placement of the DOMA definitions in this section is consistent with the legislative history of the statute, which reflects that the statute provides the meaning of defined terms only insofar as they are used in federal law. *See* H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905-06 (July 9, 1996) (“Section 3 defines the terms ‘marriage’ and ‘spouse,’ for purposes of federal law only”).

In this light, the application of DOMA to the census rests on whether the defined terms are used in connection with the conduct or reporting of the census. The words “marriage” and “spouse” are not found anywhere in the Census Act, including the section governing the taking of the decennial census. Instead, the Census Act delegates to the Secretary the authority to take the census in the form and content he determines. In contrast, several of the other terms defined by the same Dictionary Act section – “person,” “company,” “vessel” – are found in either the Census Act or Census Bureau regulations. The Census Bureau applies the latter definitions as instructed by Congress.

A question also could arise whether the exercise of the Secretary’s discretion in the 2010 Questionnaire or the tabulation and reporting of data amounts to a “ruling, regulation, or interpretation” within the meaning of DOMA. Analysis of the legal meaning of “ruling, regulation, or interpretation” indicates these terms do not include either the questionnaire or the processing of data received in response to the questionnaire.

DOMA does not define the terms in question. The accompanying House Report reflects that Section 3 defines the terms “marriage” and “spouse” only for purposes of “federal law.” *See* H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905-06 (July 9, 1996). The House Report describes the problem Section 3 was attempting to address as follows:

Recognition of same-sex “marriages” [by the states] could also have profound implications for federal law as well. The word “marriage” appears in more than 800 sections of federal statutes and regulations, and the word “spouse” appears more than 3,100 times. With very limited exceptions, these terms are not defined in federal law. ... [To] the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage [by a state] to include

homosexual couples could make such couples eligible for a whole range of federal rights and benefits.

*Id.* at 2914. More specifically, “Section 3 applies only to federal law, and will provide the meaning of those two words only insofar as they are used in federal law.” *Id.* at 2934.

This legislative history indicates that DOMA applies only to legislative and administrative expressions of “federal law,” especially as they apply to laws concerning federal rights and benefits. Thus, a “ruling, regulation, or interpretation” intended to mean the “federal law” as prescribed by Congress (statutes) and federal agencies (rules, regulations, and interpretations). See *Smelt v. County of Orange, California*, 447 F.3d 673, 683 (9<sup>th</sup> Cir. 2006) (“Section 3 of DOMA is definitional. The word ‘marriage’ and the word ‘spouse’ are defined for the purposes of federal statutes, rules and regulations”).

The 2010 Questionnaire and the plain factual data the Census Bureau collects, tabulates, and reports are not expressions of “federal law” in these senses. While this data may affect a myriad of decisions by agencies other than the Census Bureau, in and of itself the data does not have the binding effect of law or regulation; it has no operative effect on states’ legal obligations, individuals’ entitlement to federal benefits, or otherwise. Because the Census Act does not use terms defined in DOMA and does not implicate DOMA’s intent,<sup>1</sup> ordinary rules of construction indicate that DOMA does not apply.

**B. The 2010 Questionnaire or census reports are not a “ruling, regulation, or interpretation” within the meaning of other federal law.**

The Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, provides the chief guidance on the meaning of the terms “ruling, regulation, or interpretation” under federal law. The APA is the fundamental statute governing administrative agency rulemaking, adjudication, the exercise of other agency authority, and the judicial review thereof. See *generally*, 5 U.S.C. § 551 *et seq.* The APA has been used to establish the meaning of similar terms in other statutes pertaining to administrative law. See, e.g., *U.S. v. Fla. East Coast Rwy. Co.*, 410 U.S. 224, 240 (1973) (“reference to [the APA], in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term ‘hearing’ used in another”).

The term “ruling” is not defined in the APA,<sup>2</sup> but it appears in several places, including the APA’s provisions concerning judicial review:

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<sup>1</sup> See H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905-23 (July 9, 1996) (detailing Congress’s concern that defining “marriage” was a necessary response to the possibility that the marital policy of one state could, because of the Full Faith & Credit Clause, affect the marital policies of other states or people’s entitlement to federal benefits).

<sup>2</sup> Black’s defines a “ruling” as “the outcome of a court’s decision either on some point of law or on the case as a whole.” BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or **ruling** not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 704 (*sic*, emphasis added). The Attorney General's Manual on the APA treats a "ruling" as being equivalent to a final "order." Attorney General's Manual on the Administrative Procedure Act 103 (1947). In turn, according to the APA, an "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). "Orders" are issued pursuant to agency "adjudications." See 5 U.S.C. §551(13).

The collection of data pursuant to census questionnaires is not an "order" or "adjudication" under the APA. For example, the Supreme Court has distinguished administrative fact-finding investigations from "orders" and "adjudications" where the investigation does not lead to a final disposition with "determinate consequences" for a party's rights. *Int'l Telephone & Telegraph Corp. v. Local 134, Int'l Brotherhood of Electrical Workers*, 419 U.S. 428 (1975). The Fourth Circuit has likewise concluded that an "order" within the APA's meaning must "fix[] obligations or legal relationships." *Georator Corp. v. Equal Employment Opportunity Comm'n*, 592 F.2d 765, 768 (4th Cir. 1979). As the collection and reporting of census questionnaire data has no direct effect on rights or obligations, such an action fails to constitute an "order" within the meaning of the APA or a "ruling" within the meaning of DOMA.

The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...." 5 U.S.C. § 551(4). Under the APA and the relevant case law, the term "rule" encompasses "regulation" and certain "interpretations." The terms "rule" and "regulation" are sometimes used interchangeably. See *Chrysler Corp v. Brown*, 441 U.S. 281, 301-02 (1979) ("The central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other"). More often, however, regulations are understood to be substantive or "legislative" rules, subject to notice and comment procedures under the APA, which have the force and effect of law. See 5 U.S.C. § 553; Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947); *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency . . . and any ensuing regulation is binding in the courts."). The 2010 Questionnaire is not a binding regulation that prescribes law.

Finally, the statistical analysis and reporting of the information collected using the 2010 Questionnaire does not amount to "interpretation" as this term is used in federal administrative law. Interpretations or "interpretive rules" are also considered "rules"

under the APA, but are exempt from the statute’s notice and comment requirements, and include statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers. *See* 5 U.S.C. § 551, *et seq.* Such interpretations might be found, for example, in policy statements, agency manuals, and enforcement guidelines. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citing *Christensen v. Harris Country*, 529 U.S. 576, 587 (2000)).

While an extremely expansive construction of the term administrative “interpretation” might reach such information collected from private citizens, statutory language “may or may not extend to the outer limits of its definitional possibilities.” *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). “Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . .” *Id.* Thus, the term “interpretation” must be understood in its textual context at the end of a list containing “Act of Congress,” “ruling,” and “regulation.” Because the first three items in this list have the force of law, canons of statutory construction<sup>3</sup> counsel that “interpretation” is best read as an interpretation that likewise affects rights or obligations. The most logical understanding of “interpretation” is therefore that it is intended to be equivalent to an “interpretative rule” as that term is used in the APA and relevant case law.

The Paperwork Reduction Act (“PRA”), 44 U.S.C. § 3502 *et seq.*, further indicates that the 2010 Questionnaire constitutes the “collection of information” rather than a ruling, regulation, or interpretation. The PRA defines “collection of information” as “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form of format, calling for . . . answers to identical questions posed to . . . ten or more persons . . .” 44 U.S.C. § 3502(3).

Although it does not define the terms “ruling” or “regulation,” the PRA clearly distinguishes between “rules” and “collections of information” by establishing separate procedures for collections that are associated with a proposed rule and those that are not. The Supreme Court has also recognized this difference under the PRA, noting that agencies must meet one set of requirements prior to adopting regulations, and then must undergo a “second layer of review” by the Office of Management and Budget (“OMB”) for new paperwork requirements. The information collection requests to which this separate OMB review applies “include tax forms, Medicare forms, financial loan applications, job applications, *questionnaires*, compliance reports, and tax or business records . . . Agencies impose the requirements on private parties in order to generate information to be used by the agency in pursuing some other purpose.” *Dole v. United Steelworkers of America*, 494 U.S. 26, 32-33 (1990) (emphasis added and citations omitted). The 2010 Questionnaire clearly fits the description of a “collection of

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<sup>3</sup> The principle *noscitur a sociis* – a word is known by the company it keeps – counsels that a word in a statute “gathers meaning from the words around it.” *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Statutes should be construed together if they are *in pari materia* – that is, if they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. *See generally*, SUTHERLAND STATUTORY CONSTRUCTION, §§ 51:1- 3 (7<sup>th</sup> ed. 2008).

information.” In fact, it has already been approved by OMB as a “collection of information” under control number 0607-0919. Office of Management and Budget, Notice of Office of Management and Budget Action (Dec. 3, 2008).

For the foregoing reasons, the 2010 Questionnaire is not an Act of Congress and is not a ruling, regulation, or interpretation. It is not a statement of general or particular applicability and future effect that prescribes law or policy; nor does it describe the agency’s organization, procedure, or practice. It is best understood simply as a request for information from the public.

## **II. The Secretary of Commerce has the discretion to report statistical data reflecting accurate information provided to the Census Bureau.**

The responsibility of the Secretary of Commerce to conduct the decennial census is derived from the Census Clause of the United States Constitution art. I, §2 cl. 3, and governed by the Census Act. Section 141(a) of the Census Act provides for the Secretary to conduct a decennial census as of April 1980 and every ten years thereafter, “in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.” 13 U.S.C. § 141(a).

The Secretary’s authority over the procedures for conducting the census is broad. As the Supreme Court explained in *Wisconsin v. City of New York*:

The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’ see Art. I, §2, cl. 3, and notwithstanding the plethora of lawsuits that inevitably accompany each decennial census, there is no basis for thinking that Congress’ discretion is more limited than the text of the Constitution provides. *See also Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (noting broad scope of Congress’ discretion over census). Through the Census Act, Congress has delegated its broad authority over the census to the Secretary. *See* 13 U.S.C. §141(a) (the Secretary shall take “a decennial census of [the] population . . . in such form and content as he may determine . . .”).

517 U.S. 1, 19 (1996) (footnotes omitted); *see also Franklin v. Massachusetts*, 505 U.S. 788 (1992); *City of Los Angeles v. U.S. Dept. of Commerce*, 307 F.3d 859 (9th Cir. 2002).

In exercising this discretion, the Secretary is guided by the need to provide information not only for use in apportionment of congressional districts, but also for use in many other public and private purposes. The Supreme Court has found that the Census Clause’s call for “actual enumeration” is rooted in the requirements of apportionment,<sup>4</sup> but has recognized that the Census has come to serve much broader functions. As the Court explained in *Baldrige v. Shapiro*, “The census today serves an important function in the allocation of federal grants to states based on population. In addition, the census

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<sup>4</sup> *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996).

also provides important data for Congress and ultimately for the private sector.” 455 U.S. 345, 353 (1982). As early as 1901, federal courts found the Census Clause to permit the collection of non-population statistics “for the intelligent exercise of other powers enumerated in the constitution.” *United States v. Moriarity*, 106 F. 886, 891 (S.D.N.Y. 1901). The Census “now serves as ‘a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country.’” *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (quoting National Research Council, *Counting People in the Information Age 1* (D. Steffey & N. Bradburn eds., 1994)).

Congress has amended the Census Act several times in ways that affirm the Secretary’s discretion and facilitate the Census Bureau’s role as the nation’s objective demographer. The Act was amended in 1954 to codify the Secretary’s authority to “issue such rules and regulations as he deems necessary” to carry out the Act’s provisions. 13 U.S.C. § 4. It was amended again in 1957 to add Section 195, which authorizes the use of sampling “where [the Secretary] deems it appropriate,” except in “the determination of population for apportionment purposes.” 13 U.S.C. § 195. In establishing a schedule and procedures in 1976, Congress defined the term “census of population” as encompassing “a census of population, housing, and matters relating to population.” 13 U.S.C. § 141(g).

In carrying out its mission to produce a portrait of the evolving American population, the Census Bureau has reported data that reflect changes in social mores. For example, the Census Bureau has been tracking the number of households with unmarried opposite-sex partners since 1996. In 2007, a direct question was added to the Current Population Survey (“CPS”) asking whether adults living with non-related adults had a “boyfriend/girlfriend or partner” in the household. The fact that such living arrangements exist as well as their extent is information that may be of great concern to all branches of government, policymakers, researchers, commentators, and citizens regardless of their point of view. In reporting data such as this, the Census Bureau does not endorse any particular point of view, but merely documents demographic facts about the American population.

The previous application of DOMA as a matter policy would require that the Secretary entirely edit out statistical data about same-sex marriages that is accurate information where such marriages are lawful – and in the process disregard an emerging demographic phenomenon. Government agencies, policymakers, and the public rely on the accuracy of the Census Bureau’s reports to form the basis for a wide range of decisions about trends in our society and use its data as a benchmark for other demographic surveys. Because of the wide variety of important uses for census data, the Census Bureau seeks to apply rigorous methodological and statistical principles to produce high-quality data. Applying political judgments about marriage to the tabulation of census data could undermine the valuable neutral scientific role of the Census Bureau as a source of definitive and objective data on American society.

The 2010 Questionnaire asks respondents to identify the people in their household and describe the relationships of these people to the respondent. Where respondents indicate on the 2010 Questionnaire that a person of the same sex is the respondent's "husband or wife," it is within the Secretary of Commerce's discretion to compile and report this information. What other federal government agencies do with reports of the numbers of respondents who state that they are married to a person of the same sex is a separate question. To the extent a government agency requests that the Census Bureau produce a report in which the data comports with the definition of marriage in DOMA, the Census Bureau can and will produce such a report. But DOMA does not require that the Secretary produce reports exclusively in such form.

### **CONCLUSION**

DOMA does not require the Census Bureau to edit data reflecting answers to census questions in which a respondent describes another member of the household of the same sex as "husband or wife." Notwithstanding DOMA's definitions of "marriage" and "spouse," the Secretary's broad discretion to conduct the census "in such form and content as he may determine" allows the Census Bureau to compile and report on such responses so as to report on the characteristics of the American population in 2010 according to its best scientific judgment.