No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON THE MERITS FOR THE STATES OF NEW YORK, MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR

MARTHA COAKLEY
Attorney General of Massachusetts
MAURA T. HEALEY
JONATHAN B. MILLER
JOSHUA D. JACOBSON
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
ANDREW W. AMEND
MARK H. SHAWHAN
Assistant Solicitors General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Page

State Statutes

Regulations

Administrative Sources:

Page

Miscellaneous Authorities:

INTEREST OF THE *AMICI* STATES

Amici States New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, together with the District of Columbia, file this brief in support of respondent Edith Schlain Windsor. While *amici* States have made different choices about protecting the rights of same-sex couples and their families, *amici* share a strong interest in ensuring that, when a State has chosen to recognize or authorize same-sex marriage, its considered judgment is not disregarded by Congress in the exercise of a different judgment about sound domestic relations policy.

There are millions of gay and lesbian individuals living in the United States, and many of those individuals form households and families based on committed, long-term relationships. Section 3 of the Defense of Marriage Act rejects state attempts to protect and recognize such same-sex couples by sanctioning their marriages,[1] although Congress made no finding that state laws authorizing marriages between individuals of the same sex are unconstitutional or discriminatory.

Some of the *amici* States sanction full civil marriage for same-sex couples, while others offer legal recognition through civil-union or domestic-partnership laws, or have chosen to protect same-sex couples and their families

[1]Section 3 provides that, for the purposes of all federal law, "the word 'marriage' means only a legal union between one man and one woman . . . and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

through other, more targeted laws. Regardless of their particular laws, the *amici* States object to Congress's unprecedented act of rejecting the decisions of sovereign States to authorize same-sex marriage. Variation among the States on this point does not interfere with federal interests. But allowing Congress to impose uniformity by rejecting state domestic relations decisions on the scant rationales offered in support of DOMA sets a dangerous precedent incompatible with our federal system and the role of the States in that system. Section 3 of DOMA is but a small step away from Congress refusing to recognize other marriages of which it disapproves, as well as domestic partnerships and civil unions, divorces, adoptions, custody decisions, and other domestic relations law determinations, historically committed to state regulation and control.

DOMA subjects state marriage laws to a contrary policy determination of Congress, upending over two hundred years of congressional deference to state domestic relations determinations. *Amici* States have an interest in explaining that there is no federal interest adequate to justify DOMA's categorical disregard of the choice of some States to recognize or authorize same-sex marriage.

This case does not require the Court to reach the broader question of whether the Constitution mandates same-sex marriage, as the amicus brief of Indiana and other States suggests (*see* Br. of Indiana, et al. at 13-15, 21-22), and this brief takes no position on that question. *Amici* States here file this brief to explain that section 3 of DOMA is invalid no matter how that question is answered.

SUMMARY OF ARGUMENT

DOMA's sweeping refusal to recognize for federal purposes a class of marriages valid under state law violates the equal protection component of the Fifth Amendment.

Section 3 of DOMA should be subjected to closer scrutiny because it combines three features that warrant special skepticism: it discriminates against validly married couples on the basis of sexual orientation, it discriminates among the States based on their decision to sanction same-sex marriage, and it does so in a way that intrudes on the States' traditional authority to regulate marriage and family relations. The combination of these three factors requires a searching review of the justifications offered in support of the law.

Since the founding of our Nation, the subject of domestic relations, including determination of marital status, has been committed to state law and state policy judgments, and the federal government has deferred to state determinations about marriage even when States adopted different marital policies. Section 3 of DOMA departs radically from that historic pattern. By treating validly married same-sex couples differently from other married couples, DOMA not only discriminates against individuals, but also discriminates against the States—endorsing the policy judgments made by some States, and rejecting the decisions of other States on the question whether to offer marital rights to same-sex couples. Moreover, DOMA compels those States that recognize same-sex marriage to discriminate among their own lawfully married couples in the many programs that are

jointly administered by federal and state governmental authorities. And it imposes these forms of discrimination in an area that is traditionally committed to state control.

For all these reasons, this Court should examine carefully both the interests invoked to justify DOMA and the extent to which DOMA serves those interests. Section 3 of DOMA cannot survive that examination. Indeed, the justifications offered to support DOMA cannot survive even rational basis review.

DOMA amends all of federal law—an immense body of statutes, regulations, and administrative rulings—to deny same-sex marriages legal effect and same-sex spouses recognition as spouses, now and in the future. None of the asserted justifications for section 3 of DOMA supports its sweeping operation across the entire body of federal law, without respect or consideration for the particular objectives of the thousands of underlying federal statutes and regulations it amends. Nor do the asserted rationales justify the substantive irrationalities that section 3 inflicts on federal policy goals. Instead, the only coherent aim served by DOMA is to stigmatize married same-sex couples by codifying disapproval for all past or future state decisions to sanction same-sex marriage. That aim alone cannot justify Congress in denying equal respect to the States' domestic relations laws and to the couples validly married under those laws.

ARGUMENT

I. Section 3 Is an Unprecedented Infringement on the States' Regulation of Domestic Relations and Therefore Warrants Closer Judicial Scrutiny

Respondent BLAG and its *amici* argue that section 3 of DOMA is a routine exercise of congressional power and accordingly should be subject to highly deferential rational-basis review. (BLAG Merits Br. at 19-20.) Section 3, however, is anything but routine. Section 3 imposes a sweeping disability—non-recognition of lawful state marriages between same-sex couples—based on a novel exercise of federal power that comes at the expense of historic state authority.

Never before has Congress refused to recognize an entire category of state-sanctioned marriages throughout all of federal law with the express goal of rejecting state policy decisions about marriage. To the contrary, federal law traditionally has deferred to state marriage determinations—even when States differed sharply as to domestic relations policy. DOMA's dramatic departure from more than two hundred years of state-federal relations should give this Court pause.

A. Section 3's Novel Disregard of the Traditional Role of the States Warrants Searching Scrutiny.

DOMA's discriminatory treatment of state marriage laws and same-sex couples married under state law requires more than minimal justification. This Court has recognized that laws that impose novel disabilities and

"'[d]iscriminations of an unusual character'" warrant more searching scrutiny even under a rational basis standard. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Section 3 of DOMA imposes just such a novel and unusual rule of non-recognition on marriages that are valid under state law, and thereby constitutes a broad, unprecedented intrusion into state regulation of domestic relations.

The ability to define and authorize marriages is a fundamental sovereign power. (BLAG Merits Br. at 31, 43.) And under our federal system, that power has long been understood as reserved primarily to the States, not the federal government. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) ("As a general matter, '[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942) (holding that divorce decrees are entitled to full faith and credit).

Prior to DOMA, there had never been a "federal law of domestic relations" to define or recognize marriage for federal purposes independently from, and contrary to, the regulatory judgments of the States. *See*, *e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (The Court

will look to state law "especially . . . where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."). Congress's attempt to assert a new and expansive "conception[ ] of federal power" warrants more skeptical examination, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.), particularly when its assertion of power comes at the expense of state domestic relations authority.

When Congress interferes in an area of historic and primary state concern and deviates from any previously known legislative pattern, it is by definition operating in a field where it has little experience and no expertise—negating one reason for judicial deference to congressional judgments. Moreover, in the context of marriage, judicial deference is warranted not to the congressional judgment but rather to the state policy judgments that Congress has sought to displace, given the States' special experience and interest in marriage under our federal system of government.

Marriage is a central aspect of state regulation of domestic relations. State regulation of marriage is connected to much broader interests, such as the protection of children and regulation of family law in general. *See, e.g.*, *Williams*, 317 U.S. at 298 ("The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal."). Congressional interference in this area risks substantial damage to coherent state regulation of domestic relations in all its manifold applications. *Cf.*

Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (noting "substantial federalism costs" of "federal intrusion into sensitive areas of state and local policymaking" (quotation marks omitted)).

Moreover, by stepping outside the bounds of its normal role and favoring some States at the expense of others, Section 3 "differentiates between the States" in violation of the Nation's historic tradition of equal state sovereignty, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Such a vast departure from equal deference to fundamental state policy choices requires meaningful justification from Congress. *See id.*; *see also* Tr. of Oral Argument at 34-35, *Nw. Austin Mun. Util. Dist.*, 557 U.S. 193 (No. 08-322) (the federal government has "a very substantial burden" in contending "that our States must be treated differently") (statement of Kennedy, J.).

The nature of DOMA warrants a reasonable skepticism. This Court should more closely examine whether section 3 of DOMA meaningfully advances a legitimate federal end and whether Congress has identified "extraordinary circumstances" justifying its unprecedented intrusion into state domestic relations policy and differential treatment of state marriage laws. *See Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). *Cf. Rose v. Rose*, 481 U.S. 619, 625 (1987) ("Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests." (quotation marks omitted)).

B. Section 3's Complete Rejection of an Entire Class of Valid State Marriages Has No Historical Parallel.

Pointing to discrete federal statutes that touch on marriage, BLAG and its *amici* attempt to depict section 3 as a familiar exercise of federal power to define the scope of federal programs. But section 3 is not comparable to other federal statutes. It is, instead, an unprecedented intervention by Congress on one side of a state debate over marital and domestic relations regulation.

1. Section 3 cannot be defended on the ground that DOMA simply "preserved" the federal government's "sovereign[ ] ability to define marriage for itself," or that Congress may choose not to recognize same-sex marriages for "the same reasons" a State might decline to do so. (BLAG Merits Br. at 31, 43.) These arguments fundamentally misconstrue the relationship between the federal government and the States in regulating marriage. The States, as sovereigns endowed with general police powers, have always enjoyed primacy with respect to regulation of marriage and domestic relations—authority not shared, let alone shared on an equal basis, with Congress. *See, e.g.*, *Boggs*, 520 U.S. at 848.

Moreover, prior to DOMA, Congress always recognized the primacy of the States in domestic relations. As Congress recognized in enacting DOMA, "[t]he determination of who may marry in the United States is uniquely a function of state law." H.R. Rep. No. 104-664, at 3 (1996). The vast majority of citizens can be married only under state law. Outside of federal territories and other discrete pockets of federal control, there is no such

thing as federal marital status or a federal marriage. It is simply not accurate to say that federal law respects and recognizes state marriages only when Congress "has found it convenient to" do so. (BLAG Merits Br. at 4; *see also id.* at 4-6, 33-37.)

Far from being a matter of convenience, federal recognition and incorporation of state marriage laws is a practical necessity, not merely historic happenstance. As this Court has long recognized, the right to marry "under our federal system" is "defined and limited by state law." *Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring in the judgment). It is the States, not Congress, that "possess[ ] full power over the subject of marriage and divorce." *Haddock*, 201 U.S. at 575.

2. The federal statutes that BLAG and its *amici* identify do not deviate from this historical tradition, and do not establish a "long history" of Congress defining marriage. (BLAG Merits Br. at 4-5 & n.2.) In particular, they do not provide a single instance, apart from DOMA, in which Congress has ignored or overridden entire classes of lawful state marriages. For example, Congress has preempted state property laws under comprehensive federal remedial schemes like the Bankruptcy Code and ERISA.[2] These provisions, however, follow the tradition of

[2] *See Boggs*, 520 U.S. at 841 (ERISA preempts state community-property law); 11 U.S.C. § 523(a)(15) (federal, rather than state, law determines whether a debt owed under state law for alimony or for support of a spouse or child is eligible under federal law for bankruptcy discharge); *see also Mansell v. Mansell*, 490 U.S. 581, 589 (1989) (federal Uniformed Services Former Spouses' Protection Act preempts some applications of state community-property law to disposition of military retirement benefits).

deferring to state-sanctioned marriages. They continue to treat state marital *status* as controlling, substituting only a different federal rule with respect to the disposition of certain forms of marital *property*.

Likewise, Congress has imposed specialized federal requirements in addition to the fact of a valid state marriage to establish eligibility for federal rights or benefits made available to married couples. Once again, these provisions continue to treat state marital status as controlling. They simply require proof of additional facts so as to further particularized policy interests, such as deterring unmarried couples from marrying solely to qualify for a federal right or benefit,[3] or avoiding treating married couples as economically interdependent when they are not.[4] Each of these provisions is precisely what section 3 is not: a targeted federal statute that treats all state marriages as equal rather than imposing a congressional policy choice about marriage on States that have made different choices.

3. BLAG's assertion that it "runs entirely counter to our basic constitutional structure" for varying state definitions of marriage to determine "what the words

[3] *See, e.g.*, 8 U.S.C. § 1255(e) (requiring an alien seeking adjustment in immigration status based on marriage to a United States citizen to establish that the marriage was not entered into so as to secure admission to the United States); 42 U.S.C. § 416 (b)(2), (f)(2) (requiring a marriage to have lasted at least one year before an individual can receive Social Security benefits following the death of a spouse).

[4] *See, e.g.*, 26 U.S.C. § 7703(b) (treating married individuals who maintain separate households for more than half the year as unmarried in certain circumstances).

'marriage' and 'spouse' mean for purposes of *federal* law" likewise fails. (BLAG Merits Br. at 36.) Congress has never before imposed federal uniformity at the expense of state regulation of marriage. To the contrary, federal programs have consistently allowed marital status to be determined by state law, and thus have refrained from promoting the nationwide uniformity that DOMA seeks to advance. The Court of Appeals for the Second Circuit has noted, for example, that widowhood, for purposes of the Social Security Act, is determined under the law of the deceased worker's domicile at death, and that the Act accordingly does not promote uniformity in the administration of benefits nationwide. *Capitano v. Sec'y of Health & Human Servs.*, 732 F.2d 1066, 1068-69 (2d Cir. 1984).[5]

[5] Nor do scattered federal laws defining terms such as "spouse," "husband," or "wife" with reference to a traditional male-female couple (*see* BLAG Merits Br. at 5-6, 37-39) provide any precedent for DOMA. Federal statutes often contain gendered language that expresses no exclusionary policy. Congress has provided since 1871 that statutes written in masculine terms can be applied to women. Ch. 71, § 2, 16 Stat. 431, 431 (1871); *see also* 1 U.S.C. § 1 (current codification). Statutes referring to spouses in gendered terms are therefore more likely to reflect the fact that when they were written, marriage was largely defined by the States in gendered terms; the federal laws do not indicate any intent to discriminate against spouses on the basis of gender. *Cf.* S. Rep. No. 94-568, at 19-20 (1975) (adding a definition to 38 U.S.C. § 101 of "spouse" as "a person of the opposite sex who is a wife or husband" for purposes of veterans' benefits was intended to *remove* unconstitutional gender-based assumptions about military service members). Nor do such statutes provide evidence that Congress meant to interfere with state policy judgments about marriage, or in particular to reject valid same-sex marriages across the board.

Federal reliance on state-defined marital status has stemmed from express provisions of various federal statutes and regulations, *see, e.g.*, 17 U.S.C. § 101 (Copyright Act); 42 U.S.C. § 416(h)(1)(A) (Social Security Act); 29 C.F.R. § 825.122(a) (Family and Medical Leave Act), as well as the federal courts' interpretation of federal law where statutes are silent, *see*, *e.g.*, *Slessinger v. Sec'y of Health & Human Servs.*, 835 F.2d 937, 939 (1st Cir. 1987) (deferring to state rule rather than applying federal common law to make an eligibility determination under the Social Security Act).

The historical record underscores that, prior to DOMA, Congress did not ever override or limit state domestic relations regulation despite wide state-by-state variation in many respects, including with respect to who may marry. (Joint Appendix ("JA") 289-90 (Affidavit of Professor Nancy F. Cott).)

Laws prohibiting interracial marriage, for example, were once matters of fierce division among States. Some States, such as New York and Vermont, never imposed restrictions of this nature, while others, like Massachusetts, enacted them early but repealed them as the abolition movement gained traction. (JA298.) By 1930, thirty States prohibited some form of interracial marriage. (JA300.) The number of States with such prohibitions then began to decline. When this Court held in *Loving v. Virginia*, 388 U.S. 1 (1967), that state laws banning interracial marriage violated equal protection, sixteen States maintained such restrictions. (JA301.) Throughout the course of the anti-miscegenation controversy, which spanned more than a century, Congress never sought to impose uniformity on the States. Ultimately, the matter

was resolved by constitutional adjudication, but while variation persisted, Congress accepted the differences among the States on whether to permit interracial marriage.

The States have also differed considerably in other judgments about who may marry, and how they may do so, and Congress has never sought to impose uniformity. For example, only a minority of States recognize common-law marriages today, and some only for limited purposes. (JA294.) The federal government has never declined to recognize common-law marriages valid under applicable state law, notwithstanding the administrative burden of determining whether a common-law marriage exists and the possibility that couples may lose or gain marital status by moving between jurisdictions. (JA294; *but cf.* BLAG Merits Br. at 33-34.)

Similarly, the federal government continues to defer to considerable variation, including among *amici* States, regarding marriageable age and consanguinity. (JA295, 296.) Some States have a statutory minimum age—sixteen in Vermont, for example, but thirteen for women in New Hampshire—while others, such as Washington and Connecticut, permit marriage of individuals under the age of consent, but only with a court order.[6] Many *amici* allow first cousins to marry, but Iowa, New Hampshire, and Washington do not.[7] Yet Congress has not established a uniform rule.

---

[6]*See, e.g.*, Conn. Gen. Stat. § 46b-30; N.H. Rev. Stat. Ann. § 457:4; Vt. Stat. tit. 18, § 5142; Wash. Rev. Code § 26.04.010.

[7]*See* Iowa Code § 595.19; N.H. Rev. Stat. Ann. § 457:2; Wash. Rev. Code § 26.04.020.

Nor has Congress ever sought to impose uniformity despite wide variation in how the States permit marriages to end. Early in the Nation's history, the States were relatively uniform in limiting the grounds for divorce to adultery, desertion, and conviction for certain crimes. (JA302.) Over time, some States relaxed their divorce laws far more quickly and more extensively than others. For instance, Indiana allowed divorces based on any grounds deemed proper as early as the 1850s. (JA302-03.) Other States, such as New York, remained restrictive into the twenty-first century—indeed, New York adopted no-fault divorce only in 2010. Critics of liberal divorce rules pressed for a uniform divorce code to solve the problem of "migratory divorce" that resulted from substantial interstate variation (JA303), but Congress never enacted such a uniform regulation of divorce (JA304).

Thus, before 1996 and the enactment of section 3 of DOMA, Congress had never intervened on one side to tip the balance even as States confronted controversies over marriage and addressed them in differing fashion over time. Rather than pursue a "uniform federal legal rule[ ] of nationwide applicability" with respect to marriage (BLAG Merits Br. at 37), Congress uniformly accepted state marital status determinations—as it continues to do to this day in all respects other than the sex of the married spouses.

C. The Staggering Breadth of Section 3 Also Warrants Skeptical Review.

Section 3 of DOMA is also unprecedented in the breadth of its application, and that fact further supports the need for closer scrutiny. Because it applies to all federal

programs and statutes, it is not and cannot be based on, or tailored to, the purposes of any particular federal program. Indeed, as explained below, in practice section 3 frustrates rather than promotes the purposes of numerous individual federal programs.

BLAG claims that DOMA simply codified preexisting law (*see* BLAG Merits Br. at 37-38), but that cannot be correct. If that were so, then section 3 would be superfluous; even without DOMA, courts and executive officials should be able to discern congressional intent to limit statutory references to "marriage" and "spouse" in federal law to different-sex couples.

Congress did not enact a superfluous statute. Before DOMA there was no broad congressional disapproval of same-sex marriage; indeed, there is no evidence that Congress even contemplated the question, much less had any specific intent regarding it. Thus, the status quo was federal recognition of all valid state marriages, absent specific indicia of a contrary congressional purpose. DOMA made a dramatic change in the status quo by mandating a defined outcome, without regard to any program-specific congressional intent on the matter and without attention to the goals and functions of the federal laws and regulations section 3 amends.

As a result, DOMA supplants the normal process of statutory and regulatory interpretation. In the absence of DOMA, congressional intent would not be ignored; it would be analyzed as to specific federal laws by the executive officials charged with administering those laws. The Secretary of Defense, for example, has recently indicated that the words "spouse" and "marriage" in

federal regulations governing military benefits should be interpreted to include same-sex spouses—and that only DOMA, rather than any other indication of congressional intent, forecloses that result. Secretary of Defense, Extending Benefits to Same-Sex Domestic Partners of Military Members at 2, Feb. 11, 2013; *see also* Absence and Leave, 75 Fed. Reg. 33,491 (June 14, 2010) (expanding definition of "family member" in 5 C.F.R. § 630.201 to include same-sex domestic partner); Same-Sex Domestic Partners, 77 Fed. Reg. 42,901 (July 20, 2012) (same, with respect to 5 C.F.R. § 315.608(e)(1)). Section 3 of DOMA, rather than codifying preexisting congressional intent, forecloses the normal interpretive processes that would allow officials and courts to reasonably discern it.

By interfering with state judgments about marriage and how best to protect same-sex couples and families, Congress deviated from an unbroken pattern of deference to state marriage laws even when States differed substantially in their underlying policies. Preserving state authority over domestic relations from congressional interference protects not only the States, but more broadly the interests of individual liberty.

"One virtue of federalism is that it permits . . . diversity of governance based on local choice," *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 16 (1st Cir. 2012), including the choice of States to allow same-sex couples to marry. By doing so, and by offering other protections to same-sex couples, States are enhancing rights for individuals in committed relationships. Section 3 is an unprecedented congressional intervention to impede state-law protections for married couples and their families—a core area of state, not federal, responsibility.

That unique and discriminatory legislative impingement on state authority warrants closer, more skeptical scrutiny.

II. Section 3 of DOMA Fails Any Level Of Scrutiny, Even Rational-Basis Review

Section 3 of DOMA is so sweeping that it cannot survive the skeptical examination warranted by its legislative novelty and its substantial federalism costs. But even if more searching scrutiny did not apply, section 3 is so unmoored from any concrete federal end that it fails even rational basis review. Like the state constitutional amendment struck down in *Romer*, DOMA's staggering breadth "confounds [the] normal process of judicial review" because it lacks even a rudimentary fit between "the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632, 633.

A. Section 3 Amends an Enormous Body of Federal Law Bearing No Relation to Specific Domestic Relations Policies.

DOMA is not a single legislative classification. It retroactively and prospectively amends all of federal law, denying same-sex marriages legal effect throughout more than a thousand federal statutes, regulations, and administrative rulings. The breadth of the statute is so sweeping that its scope and effects were unknown at the time of its enactment, and Congress made no attempt to even analyze DOMA's reach or budgetary impact. (*See* Windsor Merits Br. at 8-9.) *See also, e.g.,* 142 Cong. Rec. S10,100, S10,102 (daily ed. Sept. 10, 1996) (noting DOMA was "gratuitously brought before Congress 1 month before adjournment" and "placed on a suspiciously fast track to

enactment despite the press of other business") (statement of Sen. Kennedy).

Further, the government's own reported efforts to catalog the effect and operation of DOMA on federal statutes—after enactment—have been incomplete. *See* General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R, at 2 (Jan. 23, 2004) (letter to Senate Majority Leader Bill Frist) (cautioning that GAO's attempt to survey DOMA's impact on federal statutes may be under-inclusive because of the myriad ways in which the "the United States Code . . . deal[s] with marital status"). And those efforts did not even purport to catalog affected regulations and other federal actions.

Section 3 is so broad in scope that it exhibits vast indifference to actual legal effects and real world impact. Section 3 instead subordinates all federal statutory and regulatory interests—whatever the underlying governmental purpose or end, and however unrelated to substantively shaping or limiting domestic relations policy—to the single goal of denying recognition to lawful state same-sex marriages. At bottom, section 3 accomplishes only one coherent objective: making married same-sex couples "unequal to everyone else," *Romer*, 517 U.S. at 635, an aim that violates equal protection.

B. In Light of Its Enormous Breadth, Section 3 Does Not Advance a Coherent Federal Purpose.

As a direct result of DOMA's enormous breadth, the purported interests asserted in support of section 3 fail even a basic rationality test.

1. Congress's asserted interests in encouraging responsible procreation and child-rearing by different-sex biological parents (see BLAG Merits Br. at 43-48; H.R. Rep. No. 104-664, at 12-13), cannot justify section 3 of DOMA. Because Congress does not traditionally regulate marriages, families, or other domestic relations matters, see *supra* at 5-15, the immense body of federal law that DOMA amends was not enacted to encourage child-rearing by married couples of a specific type. BLAG and its *amici* do not even claim that the vast majority of federal requirements altered by DOMA can in any way be tied to procreation or encouraging marriage.[8]

2. The asserted interest in preserving federal resources and maintaining uniformity in providing federal benefits (*see* BLAG Merits Br. at 33-34, 38-41) is likewise insufficient. Section 3 does not merely amend federal benefit programs; rather, it captures a far wider swath of federal law having nothing to do with the provision of federal benefits or the expenditure of federal funds. *See* GAO Report, *supra*, at 4-5, 7-10.

Further, even where DOMA has an effect on federal expenditures, its effects are so varied it may well cost the government more than it saves. *Massachusetts*, 682 F.3d

[8]For similar reasons, section 3 of DOMA cannot be justified as a legitimate effort to avoid "reverse preempt[ion]" by the States. (BLAG Merits Br. at 37.) Since there is no federal law of domestic relations, *Boggs*, 520 U.S. at 848; *Haddock*, 201 U.S. at 575, the federal government has always relied on state definitions of marriage for federal statutes that refer to marital status. Even in enacting DOMA, Congress did not claim a general police power to regulate marital status that could somehow be "reverse preempted" by the exercise of state domestic relations authority.

at 14 & n.9. For example, the Congressional Budget Office concluded that equal application of the federal income tax "marriage penalty" to same sex-married couples would likely result in annual *increases* in federal revenue of $500 million to $700 million—increases that section 3 eliminates by rejecting these marriages. Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* 3 (2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

For means-tested programs like Medicaid, failing to recognize the income of a same-sex spouse under DOMA may create greater eligibility for federal benefits, a result directly at odds with conserving scarce federal resources. And for programs like federal food stamps and section 8 housing vouchers, where a cohabiting couple need not even be married to qualify,[9] DOMA's refusal to recognize same-sex marriages does nothing to conserve federal resources, while inflicting stigmatic harm on married same-sex couples who are excluded from statutory definitions of marriage. *Cf. Romer*, 517 U.S. at 632 (no legitimate state interest where law is "inexplicable by anything but animus toward the class it affects").

Moreover, the immense sweep of DOMA means that it applies in areas where Congress has rejected any effort at "uniformity of benefits." *See Capitano*, 732 F.2d at 1068-69 (the Social Security Act is not designed to promote "uniformity" in the administration of benefits nationwide). Many federal programs, such as Medicaid, establish jointly

[9] *See* 7 U.S.C. § 2012(n)(1)(B) (food stamps); 42 U.S.C. § 1437f, 24 C.F.R. § 5.403 (section 8).

funded federal-state schemes with "States, as first-line administrators" that "guide the distribution of substantial resources among their needy populations." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Programs like Medicaid were specifically designed to advance cooperative federalism by giving the States flexibility to implement their own policy choices. The intended result was not to compel uniformity. States are instead empowered to make "dramatically different" choices and to establish "a myriad" of different programs. *Id.* (quotation marks omitted). Under cooperative federal-state programs—all of which DOMA amends—state-by-state variation is the norm, not a problem to be eliminated.

Indeed, while not advancing a coherent federal goal of uniformity, DOMA compels nonuniform treatment of married couples by the States. DOMA requires States that authorize same-sex marriage to treat same-sex married couples as unmarried for purposes of joint federal-state programs like Medicaid, imposing additional administrative burdens and requiring those States to violate their own deliberate and considered policies to accord equal treatment to all validly married couples. *See*, *e.g.*, *Massachusetts*, 682 F.3d at 12 (noting that Massachusetts "stands both to assume new administrative burdens and to lose funding for Medicaid . . . solely on account of its same-sex marriage laws").

And because section 3 applies to all of federal law, the administrative burdens and unequal treatment extend to many areas even outside joint federal-state programs. For example, States that provide health insurance benefits to same-sex spouses of public employees must treat those

benefits as taxable income for federal purposes, incurring additional administrative burdens and denying the families of public employees equal benefits and uniform protection. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 244 (D. Mass. 2010) (describing costs of complying with DOMA's requirement to treat as taxable income for federal purposes the health insurance that state employees provide to their same-sex spouses), *aff'd*, 682 F.3d 1.

3. BLAG's contention that DOMA serves a rational need for "caution" in the face of changing social institutions (BLAG Merits Br. at 41-43) is belied by the breadth of the statute itself. Congress evinced no caution in amending over a thousand statutes and regulations unrelated to judgments on the ideal form of social institutions or the virtues of encouraging opposite-sex couples to marry. In fact, Congress did not even *attempt* to determine what effects would result from this vast alteration of federal law. See *supra* at 18-19.

Further, there was nothing cautious about Congress's decision to break with more than two hundred years of equal treatment of state marriages and marriage laws. Prior to DOMA, a marriage authorized by a State was a marriage for purposes of federal law, subject only to additional requirements imposed in light of a targeted federal purpose—such as the prevention of fraud in granting a spousal benefit. See *supra* at 10-11. Section 3 departs from that tradition, and it does so with vast indifference to the actual aims of the federal statutes and regulations it amends; the results irrationally render federal law at war with itself.

4. Finally, DOMA's irrationality is shown by the fact that it undermines, rather than furthers, the purposes of many federal statutes. DOMA disregards the existence of same-sex married couples for purposes of, among many other examples: (1) federal criminal laws prohibiting harm against spouses; (2) a wide range of federal statutes and regulations prohibiting conflicts of interest and nepotism; (3) federal means-testing provisions that look to the income and assets of spouses in determining eligibility for federal benefits; and (4) federal laws that seek to protect families irrespective of their composition. In each of these areas, and countless more, section 3 impairs the intent and goals of federal law.

Section 3, for instance, exempts same-sex spouses from the federal criminal law that makes it a crime to intimidate a federal official by threatening to injure the official's spouse, 18 U.S.C. § 115. Exempting threats against same-sex spouses is directly contrary to the aims of the criminal prohibition—both public order and safety and ensuring that federal officials are not intimidated in fulfilling their public duties. Likewise, many federal laws are not concerned with encouraging marriage but instead with preventing conflicts of interest based on potential financial benefit to a spouse. Arbitrarily excluding same-sex couples from these conflict-of-interest provisions impairs the federal interest in impartiality—increasing the evils of favoritism and the appearance of conflict that Congress meant to prevent.

Similarly, many federal programs are means-tested; and in determining eligibility, Congress mandated that not only the applicant's financial resources, but also those of the applicant's spouse, be considered in assessing

eligibility. Section 3 exempts same-sex couples from the same restrictions that apply to other married couples—making it easier for same-sex spouses to shield assets and qualify for federal benefits at taxpayer expense.

In addition, section 3 undermines federal statutes and regulations whose aim is protection of families and spouses. The Bankruptcy Code, for example, makes debts for alimony and spousal support nondischargeable. *See* 11 U.S.C. §§ 523(a)(5) (nondischargeability), 101(14A)(A)-(B) (definitions). And the federal government authorizes States to garnish portions of a federal employee's paychecks to "enforce the legal obligation of the individual to provide . . . . periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual," 42 U.S.C. §§ 659(a) (permission to garnish), 659(*i*)(3)(A) (definition of obligation). Likewise, Department of the Navy regulations describe spousal and family support as "an inherent natural and moral obligation" of "[e]very member" of the Navy, 32 C.F.R. § 733.3(a)(2), and emphasize that "[t]he naval service will not be a haven or refuge for personnel who disregard or evade their obligations to their families," *id.* § 733.3(a)(1). Section 3 of DOMA, however, undermines these objectives, which are untied to any judgment about encouraging marriage or marriages of a specific type.

Section 3 also weakens the Family and Medical Leave Act (FMLA). One of the FMLA's several important goals is to better enable workers to care for seriously ill spouses without being forced to "choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home." 29 C.F.R. § 825.101(b). The FMLA thus requires employers,

including state governments, to grant employees leave to care for a seriously ill or injured spouse. 29 U.S.C. § 2612(a)(1)(C). Section 3 denies that protection to same-sex spouses. DOMA's insistence on disregarding the legal existence of same-sex marriages throughout federal law, it seems, outweighs the FMLA's policy of "promot[ing] the stability and economic security of families, and . . . promot[ing] national interests in preserving family integrity," 29 C.F.R. § 825.101(a).

* * *

In this case, the application of section 3 denied respondent Edith Windsor the benefit of a spousal tax deduction for estate taxes under federal law. New York has long recognized as valid same-sex marriages that were solemnized under the laws of other States or nations, such as Windsor's Canadian marriage to Thea Spyer. All three statewide elected executive officials—the Governor, the Attorney General, and the Comptroller—endorsed that conclusion prior to 2009, finding it to have deep roots in New York's general principle of marriage recognition. *See Godfrey v. Spano*, 13 N.Y.3d 358, 368 n.3 (2009) (describing 2004 opinions of the Attorney General and Comptroller); *Dickerson v. Thompson*, 73 A.D.3d 52, 54-55 (3d Dep't 2010) (citing 2008 directive of the Governor).

Every New York State appellate court that addressed the issue before New York began to permit its own same-sex marriages in 2011 agreed, rejecting the argument that same-sex marriages were contrary to New York's public policy. *See In re Estate of Ranftle*, 81 A.D.3d 566 (1st Dep't 2011) (Canadian same-sex marriage is valid in New York); *Lewis v. N.Y. State Dep't of Civil Serv.*, 60 A.D.3d

216 (3d Dep't Jan. 22, 2009) (agency recognition of same-sex marriage), *aff'd on other grounds sub nom. Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dep't 2008).[10] Indeed, recognizing out-of-state same-sex marriages is consistent with a long list of public policies of New York State, undertaken prior to 2009, to afford equal rights to same-sex couples—through nondiscrimination guarantees, Executive Law § 296 (relevant provision enacted in 2002); legal recognition of domestic partnerships for purposes such as hospital visitation rights, *see* Public Health Law § 2805-q (enacted 2004), and the September 11 Victim Compensation Fund, *see Cruz v. McAneney*, 31 A.D.3d 54, 58 (1st Dep't 2006); and the like.

Section 3's application to respondent and to other same-sex couples in New York and other *amici* States—now and in the future—does not survive constitutional scrutiny. Although Congress has the power to make sweeping changes in federal law, its asserted aims must match the sweep and scope of its legislative change. *Romer*, 517 U.S. at 635. To the extent Congress has passed laws in the past touching on marriage, see *supra* at 9-15, it has acted through statutes "narrow enough

[10]While the New York Court of Appeals found it unnecessary to reach the issue in *Godfrey*, the four-judge majority opinion said nothing to cast doubt on the uniform lower-court authority recognizing the validity of out-of-state same-sex marriages, *see Godfrey*, 13 N.Y.3d at 377 (declining to reach the question), and a three-judge concurrence expressly endorsed that line of cases, *id.* (Ciparick, J., concurring). *See generally Dickerson*, 73 A.D.3d at 54-56 (summarizing New York's "clear commitment to respect, uphold and protect parties to same-sex relationships" both through decisional law and executive action).

in scope and grounded in a sufficient factual context" to make the legitimate aim served by the statutory classification rationally discernable. *Romer*, 517 U.S. at 632-33. Section 3 of DOMA, by contrast, is so haphazard, and so broadly indifferent to the actual effect of denying same-sex marriages legal effect across all of federal law, that the only credible explanation for section 3 is a desire to supplant state policy choices regarding marriage in order to codify second-class status for married same-sex couples. The "sheer breadth" of section 3 is fatal under rational-basis review, *id.* at 632, and under the more searching scrutiny that section 3 merits because of its unprecedented intrusion into state regulation of marriage.

CONCLUSION

The Court should affirm the judgment of the circuit court.

Dated: New York, New York
March 1, 2013

Respectfully submitted,

MARTHA COAKLEY
Attorney General of Massachusetts
MAURA T. HEALEY
JONATHAN B. MILLER
JOSHUA D. JACOBSON
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
ANDREW W. AMEND
MARK H. SHAWHAN
Assistant Solicitors General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

KAMALA D. HARRIS
Attorney General of California
1300 I Street
Sacramento, California 95814

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106

JOSEPH R. BIDEN, III
Attorney General of Delaware
Department of Justice
820 N. French Street
Wilmington, Delaware 19801

LISA MADIGAN
Attorney General of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

JANET T. MILLS
Attorney General of Maine
6 State House Station
Augusta, Maine 04333

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

MICHAEL A. DELANEY
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

GARY K. KING
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court St. N.E.
Salem, Oregon 97301

PETER F. KILMARTIN
Attorney General of Rhode Island
150 South Main St.
Providence, Rhode Island 02903

WILLIAM H. SORRELL
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

ROBERT W. FERGUSON
Attorney General of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, Washington 98504

IRVIN B. NATHAN
Attorney General of the District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001