12-2335(L)

12-2435(CON)

United States Court of Appeals for the Second Circuit

EDITH SCHLAIN WINDSOR, in her Official Capacity as Executor of the Estate of Thea Clara Spyer,

Plaintiff-Appellee,

v.

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Intervenor-Defendant-Appellant,

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, VERMONT, AND CONNECTICUT

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INTEREST OF THE AMICI STATES OF THE SECOND CIRCUIT

New York, Vermont, and Connecticut, the three States that comprise this Circuit, share a strong commitment to ending discrimination on the basis of sex and sexual orientation. And to advance that goal, each of these States has extended equal marriage rights to same-sex couples, allowing same-sex couples to marry on the same terms and with the same dignity and status as opposite-sex couples. Extension of equal marriage rights reflects the States' long-standing commitment to equal treatment and their considered judgment about the best interests of families and children. Section 3 of the Defense of Marriage Act (DOMA)[1] burdens the amici States by treating some of their residents, lawfully married same-sex couples, as second-class citizens and by undermining and denigrating the amici

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[1] Section 3 of DOMA, codified at 1 U.S.C. § 7, provides:

> 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.

States' efforts to eliminate discrimination and ensure equal rights and protections for same-sex couples and their families and children.

This case does not present the question whether the Constitution *requires* States to follow the path of New York, Vermont, and Connecticut as the amicus brief of Indiana and other States suggests (*see* Br. at 1, 17). Instead, this case presents the distinct question whether, when States have *chosen* to authorize same-sex marriage, there is a sufficient federal interest to justify Congress in disregarding the choice made by the States in the exercise of their traditional sovereign authority to define and regulate marriage. The States of the Second Circuit file this brief amici curiae to demonstrate that there is no such federal interest, and that same-sex marriages valid under state law are entitled to the same federal recognition accorded to other marriages. The only interest served by section 3 of DOMA is the utterly illegitimate one of stigmatizing same-sex marriages with second-class status and denying lawfully married couples the equality amici States have sought to confer. The amici States have for these reasons joined together to urge the Court to affirm the decision below invalidating section 3 of DOMA.

SUMMARY OF ARGUMENT

DOMA's sweeping refusal to recognize for federal purposes a class of marriages valid under state law warrants heightened scrutiny under the equal protection component of the Fifth Amendment. Section 3 classifies lawfully married couples by sex and sexual orientation—denying to same-sex married couples the same legal status, rights and benefits, and protections that federal law makes available to different-sex married couples. And DOMA's discrimination on the basis of sex and sexual orientation represents an express federal decision to endorse state policy choices to limit marriage to unions between a man and a woman while rejecting state decisions to extend full marital rights to same-sex couples. DOMA not only discriminates against people, but also discriminates among the States, in a way that intrudes on the States' long-standing authority to regulate marriage and family relations.

DOMA's incompatibility with basic principles of federalism calls for a searching review of the justifications offered in support of the law. Since the founding of our Nation, the whole subject of domestic relations, including determination of marital status, has been committed to

state law and state policy judgments. DOMA departs radically from that historic pattern. Because DOMA intrudes so severely on core state concerns, 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 close examination. It fails even rational basis review. DOMA purports to amend 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. None of the asserted justifications for DOMA rationally 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. At bottom, the only coherent aim served by DOMA is to codify animus towards same-sex couples and disapproval for States that sanction same-sex marriage. Those aims alone cannot justify discrimination against married same-sex couples.

BACKGROUND: MARRIAGE EQUALITY IN THE AMICI STATES OF THE SECOND CIRCUIT

All three States in this Circuit—New York, Vermont, and Connecticut—have a long-standing commitment to full equality for gay and lesbian citizens. The path to equal marriage rights for same-sex couples was different for each State, but the compelling state interest is the same: to grant gay and lesbian couples who wish to marry the same dignity and rights afforded to other married couples and to extend to all families the stability and protection that comes with legal recognition.

Ending Discrimination. Same-sex marriage is not a one-time social experiment for any of the amici States. Instead, marriage equality is a key component—and culmination—of the States' decades-long efforts to eradicate discrimination against gay and lesbian citizens. Each of the three States has long had laws prohibiting discrimination on the basis of sexual orientation in all major areas of civic life, including employment, housing, education, and the provision of government services and benefits. *See* Conn. Gen. Stat. §§ 46a-81a to 81q (enacted in Pub. Act No. 91-58 (1991)); 9 Vt. Stat. 4502(a) (enacted in Act No. 135, § 11 (1992)); Vt. Stat. tit. 21, § 495 (Act No. 135, § 15); Ch. 2, 2002 N.Y. Laws 46 (codified in Executive Law § 296).

Equality in Forming Families and Raising Children. Amici States have also extended the same protections to family life. Each of the amici States has long recognized that its gay and lesbian citizens form households and start families, and has sought to extend to those families the same protections available to other families. For more than twenty years, for example, New York has recognized same-sex partners as "family members" entitled to the full protection of state rent-regulation laws. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211-14 (1989). And all three amici States have long permitted same-sex couples to serve as foster parents and to adopt children—reflecting their considered judgment that sexual orientation is no bar to good parenting or providing for the best interests of children.

The New York Court of Appeals found that permitting adoption by same-sex partners affords "emotional security," and "allows the children to achieve a measure of permanency with both parent figures." *In re Jacob*, 86 N.Y.2d 651, 659 (1995). The Vermont Supreme Court determined that "deny[ing] the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest." *In re B.L.V.B.*, 160 Vt. 368,

375 (1993); Vt. Stat. tit. 15A, § 1-102 (enacted in 1996). And the Connecticut Supreme Court has recognized the "public policy of this state that sexual orientation bears no relation to an individual's ability to raise children." *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 181 (2008); Conn. Gen. Stat. § 45a-727(a)(3)(D) (enacted in 2000).

Marriage Equality. As a further step toward achieving equality for gay and lesbian citizens and their families, each of the amici States now provides for full marriage equality by statute, enabling same-sex couples to marry under state law.

In 1999, the Vermont Supreme Court held that denying same-sex couples the benefits of marriage violated the equal benefits clause of the Vermont Constitution. *See Baker v. State*, 170 Vt. 194 (1999). In response to that decision, Vermont enacted the first civil-union law in the nation in 2000, enabling same-sex couples to access the "benefits, protections, and responsibilities" of marriage by entering into civil unions recognized under state law. Vt. Stat. tit. 15, § 1204 (enacted by Act No. 91 (2000)). Vermont granted full marriage equality by statute in 2009—going beyond what the Vermont Supreme Court had required

in *Baker*—by granting same-sex couples the full right to marry, not simply enter into civil unions under Vermont law. *Id.* § 8.

Connecticut enacted similar civil-union legislation in 2005, becoming the second State in the nation to authorize civil-unions for same-sex couples. 2005 Conn. Pub. Acts No. 05-10. In 2008, the Connecticut Supreme Court held in *Kerrigan* that same-sex couples had the right to marry under the equal protection guarantee of the Connecticut Constitution. *Kerrigan*, 289 Conn. 135. Shortly afterwards, the Connecticut Legislature extended equal marriage rights to same-sex couples—becoming the first State in this Circuit to do so. 2009 Conn. Pub. Acts No. 09-13.

New York has long recognized marriages between same-sex couples validly performed under the laws of other States and nations.[2] *See, e.g., Dickerson v. Thompson*, 73 A.D.3d 52, 54-56 (3d Dep't 2010)

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[2] As the State of New York explained in its brief amicus curiae in the district court (J.A. 646-647), New York's recognition of same-sex marriages is rooted in the State's general principle of marriage recognition and has been uniformly endorsed by state appellate courts and statewide elected officials, including the Governor and Attorney General. Nothing in state law indicates, as appellant BLAG suggests (*see* Br. at 17-19), that New York would have declined to recognize plaintiff's marriage in 2009 at the time of her wife's death.

(summarizing New York's "clear commitment to respect, uphold and protect parties to same-sex relationships"). In 2011, the New York Legislature established the right of same-sex couples to marry by enacting the Marriage Equality Act, Ch. 95, 2011 McKinney's N.Y. Laws 749, thus following the suggestion of New York's high court to allow "the Legislature [to] listen and decide as wisely as it can" whether to adopt same-sex marriage. *Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006) (declining to hold that same-sex marriage is required under the New York Constitution). New York thus became the third State in this Circuit and the largest State in the Nation to allow same-sex couples to marry on the same terms as other couples.

For amici States, marriage equality is grounded in the aim of ending discrimination against gay and lesbian citizens by providing equal legal recognition and status for same-sex couples that marry and equal rights to their families and children. The New York Marriage Equality Act, for example, expressly declares "[i]t is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in *all respects* under the law" and identifies marriage equality as part of a larger effort to promote "[s]table family

relationships" and to create a stronger, more just society. Ch. 95, § 2, 2011 McKinney's N.Y. Laws at 749 (emphasis added).

Likewise, the Connecticut Supreme Court deemed marriage equality fundamental under the Connecticut Constitution because of the "importance of marriage to individuals and communities" and because limiting marriage on the basis of sexual orientation would have an "especially deleterious effect on the children of same sex couples." *Kerrigan*, 289 Conn. at 248-49 & n.75. The Vermont Legislature expressed its intent to "recognize legal equality in the civil marriage laws." Vt. Stat. tit. 15, § 1a note (enacted by Act No. 3, § 2 (2009)). Vermont's same-sex marriage law took the next logical step from the Vermont Supreme Court's conclusion that "[t]he laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples." *Baker*, 170 Vt. at 222.

Thus, each of the amici States of the Second Circuit has affirmed a commitment to providing same-sex couples and their families with the same legal status available to other couples and families, rather than

treating them as a class apart, with less dignity and standing to participate in society and civic life. To the extent marriage connotes state sanction, endorsement, and protection, amici States have chosen to signal that marital status is equal under their laws without respect to the sexual orientation or gender of the couples who elect to marry and assume the responsibilities of married life.

ARGUMENT

SECTION 3 OF DOMA VIOLATES EQUAL PROTECTION AND IMPERMISSIBLY INTRUDES ON THE AUTHORITY OF THE STATES TO REGULATE MARRIAGE AND FAMILY RELATIONSHIPS

Amici States agree with plaintiff Windsor and with the United States that section 3 of DOMA is subject to heightened equal protection scrutiny because section 3 discriminates against individuals based on sexual orientation. (*See* DOJ Br. at 14-33; Windsor Br. at 19-29.) The purpose and effect of DOMA is discrimination against gay and lesbian couples, a legislative classification based on sexual orientation. Gay men and lesbians are a discrete minority who have historically been subject to purposeful discrimination warranting more stringent equal protection review.

Section 3 is also subject to heightened scrutiny because it expressly employs sex-based classifications by making access to federal recognition, benefits, and protections dependent upon the sex of the partners in marriage. Such facial sex-based classification requires heightened scrutiny. *See Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999). Moreover, DOMA discriminates on the basis of sex even though it applies to both men and women who marry persons of the same sex. *See In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. Jud. Council 2009) (Reinhardt, J., for the Ninth Circuit's Standing Comm. on Fed. Pub. Defenders) ("the denial of benefits at issue here [required by DOMA] was sex-based and can be understood as" sex discrimination); *In re Balas*, 449 B.R. 567, 577-78 (Bankr. C.D. Cal. 2011) (op. of twenty bankruptcy judges) (concluding that DOMA discriminates on the basis of gender).

Furthermore, to the extent that DOMA seeks to limit federal law to opposite-sex marriages based on stereotypes about the roles of men and women within marriage, that effort must be rejected because sex-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

United States v. Virginia, 518 U.S. 515, 533 (1996). *See also Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 729 (1982) (heightened scrutiny applied to state law excluding males from nursing school because it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 138 (1994) (heightened scrutiny applied to government lawyer's use of peremptory strikes to exclude female jurors because grounded in stereotypes about women's natural sympathies).

Amici States have chosen to extend marriage equality irrespective of sexual orientation, or gender, or any gender stereotypes about the proper role of partners in marriage. Section 3 of DOMA directly impairs that interest by creating two fundamentally unequal classes of married couples based on the very characteristics that amici States and others have rejected as inappropriate and harmful to families. Because DOMA intrudes on the States' core interest in regulating marriage, more careful examination of the federal interests purportedly served by DOMA is appropriate. This brief focuses on explaining that point: why federalism concerns merit more searching examination of DOMA's

justifications and why DOMA fails such examination and cannot survive even minimal rational-basis review.

A. Because DOMA Intrudes Into Traditional State Authority, More Searching Review is Warranted.

DOMA is not, as appellant BLAG mistakenly asserts, a routine exercise of congressional power to regulate federal programs. (*See* BLAG Br. at 41-42.) Section 3 of DOMA injects the federal government into domestic relations law and works to delegitimize both the lawful marriages of thousands of same-sex couples and the considered judgments of amici States to sanction same-sex marriages. DOMA exerts federal authority to up-end amici States' sovereign judgment that a same-sex married couple deserves the same lawful status as an opposite-sex couple. DOMA *divides* lawful state marriages into legitimate and illegitimate categories—relegating same-sex couples to second-class, fundamentally unequal status, irrespective of state policy. And it also confers second-class status on the children of same-sex couples.

Those results significantly intrude on core state powers. It is, and has always been, the role of the States to determine who is married,

and who is not. To be sure, Congress may limit specific federal programs and benefits for married people to marriages that have the features relevant to the purpose or function of those federal programs or benefits. For example a federal program designed to accommodate the financial situation of married couples who form a single economic unit may exclude married couples who do not.

There is not, however, a legitimate federal interest in comprehensively relegating certain marriages to second-class status based only on the gender and sexual orientation of the spouses in contravention of important interests of States in promoting equality. The reach of section 3 is untethered from any specific federal program: it is instead a statement that the federal government rejects the fundamental choices of amici States to promote marriage equality and, thus, rejects the lawful marriages of thousands of American couples and relegates them to second-class treatment compared to other spouses.

1. Section 3 of DOMA is an unprecedented intrusion into state regulation of marriage and domestic relations.

Marriage has always been a *state-conferred* legal status. 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). Marriage is just one aspect—although a central one—of state regulation of the entire field of domestic relations, which deals with broader interests such as the protection of children and the regulation of family relationships. *See, e.g.*, *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("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."). DOMA effectively takes away, for purposes of federal law, a legal status lawfully and properly conferred by a State on its citizens.

The primacy of the States with respect to marriage and domestic relations has long been understood as inherent in our constitutional design. *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, parent and child, 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 (1980)); *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). There has never been a "federal law of domestic relations," *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), a field reserved instead to state regulation and control.

Because 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), federal laws have traditionally accorded full recognition to lawful state marriages. (*See* SPA 23-24; BLAG Br. at 6.) Section 3 of DOMA, however, imposes an entirely different regime. It purports to provide a new global federal definition of "marriage" and "spouse." The new definition still incorporates and depends on state law to determine the existence of a valid "legal union" constituting a marriage; it simply rejects any state-sanctioned legal union involving a same-sex couple. *See* 1 U.S.C. § 7.

DOMA's sweeping rejection of lawful state marriages has no historical precedent. *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. On the limited occasions when Congress has defined specific terms, or enacted specific statutory provisions, relating to family or marriage in the past, it has done so in furtherance of a particularized federal interest or program—never to interfere with important state policies on marriage across the entire sweep of federal law. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012).

Appellant BLAG and other amici argue that Congress has a long history of defining marriage as well as associated rights incident to marriage. But the cited statutes are not comparable to DOMA in scope or effect. (*See* BLAG Br. at 6-7; NOM Br. at 7-13.) In each case, Congress was advancing the targeted goal of a particular federal program or regulatory regime, rather than imposing its own policy choices about marriage on States that had made different choices.

For example, where Congress makes a specific federal right or benefit available to spouses, it has sometimes required verification that the marriage is genuine, rather than an effort to game the system to obtain federal benefits. Thus, under federal immigration laws, an alien seeking adjustment in immigration status based on marriage to a United States citizen must establish not only a lawful state marriage but also that the marriage was not entered into fraudulently to secure admission into the United States. *See, e.g.*, 8 U.S.C. §§ 1255(e), 1186a(b)(1)(A)(i).

Other federal benefits and exemptions require that a married couple be economically interdependent. Most married couples live together, commingle finances, and jointly own and share property—conduct relevant to laws like the federal tax code. In cases where the these factors are absent, federal law may decline to grant a married couple a particular marital benefit or exemption. Thus, federal tax laws do not allow married couples who live apart for most of the year to claim tax exemptions or tax rates generally available to married couples. 26 U.S.C. § 7703(b). Those examples do not reject state policy choices as to marriage.

Other statutes like ERISA and the Bankruptcy Code enact federal schemes that displace state property laws relating to marriage for specific and narrow purposes. ERISA, for example, preempts state community-property laws that conflict with differing federal pension requirements. *See Boggs*, 520 U.S. at 841. Similarly, 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* 11 U.S.C. § 523(a)(15). Federal statutes also preempt some applications of state community-property law to disposition of military retirement benefits. *See, e.g.*, 10 U.S.C. § 1408 (federal Uniformed Services Former Spouses' Protection Act).

None of these limited statutory forms of federal displacement or preemption *rejects* marriages valid under state law. They continue to rely on state marital status as dispositive and simply substitute a different federal rule with respect to marital property in light of the overriding federal interest in a particular area, such as distribution of federal military pay and benefits, or Congress's intent to create a comprehensive and exclusive federal remedial scheme, as under ERISA or the federal Bankruptcy Code. *See, e.g., Mansell v. Mansell*, 490 U.S.

581, 587 (1989) (recognizing military benefits as "one of those rare instances whether Congress has directly and specifically legislated in the area of domestic relations"); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216-17 (2004) (noting "overpowering federal policy" in making ERISA a comprehensive remedial scheme (quotation marks omitted)).

Finally, some federal laws define "spouse," "family," "child," and similar terms for different program- and statute-specific purposes. BLAG points out that a few of these provisions refer to married partners in terms of a "traditional male-female couple." (BLAG Br. at 5-7.) Those isolated gender-specific definitions, however, simply reflect the historical fact that at the time of their enactment, States had not exercised their domestic relations power to extend marriage rights to same-sex couples. The provisions do not indicate congressional intent to displace state laws with opposing congressional judgments about who *should* marry.[3]

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[3] For instance, the definition of "spouse" for purposes of veterans' benefits is a "person of the opposite sex who is a wife or husband." 38 U.S.C. § 101(31). The definition dates from 1975, when no State had granted marriage rights to same-sex couples. Moreover, the same law provides that, for purposes of benefits eligibility, the validity of the

(*continued on the next page*)

Indeed, federal statutes often contain gendered language that expresses no exclusionary policy. Thus, Congress has provided since 1871 that statutes written in masculine terms can be applied to women. Ch. 71, § 2, 16 Stat. 431, 431 (1871) (codified as amended at 1 U.S.C. § 1). Statutes referring to spouses in gendered terms—for example, the federal law making it a crime to threaten the "wife" or "widow," but not the "husband" or "widower," of a former President, *see* 18 U.S.C. § 879(b)(1)(A)—therefore do indicate any intent to discriminate against spouses on the basis of gender. Such gendered laws are historical artifacts, not evidence that Congress meant to interfere with state policy judgments about marriage.

As the above examples illustrate, when Congress has previously enacted laws touching on marriage and domestic relations, it has acted to advance a specific, functional federal end.[4] Section 3 of DOMA, by

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marriage in question is to be determined "according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." *Id.* § 103(c). Thus, until DOMA, Congress made no attempt to override state law regarding the validity of marriages.

[4] Another example relied upon by DOMA's defenders—anti-polygamy statutes applicable in U.S. territories (NOM Br. at 14-15)—

(*continued on the next page*)

contrast, serves no specific programmatic goal. It is not aimed at the relevant intent or conduct of married couples, nor at affecting federal interests or preserving the integrity of a specific federal rule or the operation of a concrete federal scheme. And that result is inherent in section 3's design and express terms: it applies to all federal statutes and regulations that mention the words "marriage" or "spouse," no matter what their subject matter or intended purpose.

Section 3 of DOMA regulates status alone. Its purpose and goal is to reject state policy judgments about same-sex marriage—*effectively erasing* a legal status that States have conferred for the protection of their citizens and advancement of equality. And section 3 erases that status in the most intrusive and untargeted fashion possible—across the entire spectrum of federal law. Never before has Congress attempted to regulate marriage, a traditional function of the States, unmoored from any independent federal aim except for countermanding

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actually proves too much. "Congress had the same powers over marriage in the territories that states had in their own domains (and bigamy was a crime in every state). Federal anti-polygamy legislation applied only to the territories, over which Congress had plenary authority." (J.A. 368 (affidavit of Nancy Cott, Ph.D.).)

state policy judgments about marriage and equality. Indeed, if DOMA is permissible, then Congress has the authority to write a federal family code and override a wide range of state policy decisions. The federal government could refuse to recognize no-fault divorces granted under state law, or disregard the parent-child relationships created by state adoption law. That result is incompatible with principles of federalism.

2. Closer examination is appropriate when Congress defies tradition to infringe on state interests in advancing equality.

Appellant BLAG mistakenly argues that intensified equal protection scrutiny is foreclosed by Supreme Court precedent (Br. at 34-35). But more searching review is warranted when confronting laws that impose novel disabilities and "'[d]iscriminations of an unusual character.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Amici States, like plaintiff Windsor (Br. at 35-36), submit that the need for searching review becomes particularly pressing where Congress seeks to carry out such novel, discriminatory actions by treading into core areas of state sovereignty. After all, even in genuine matters of economic regulation, courts "should 'pause to consider the implications

of the Government's arguments'" for exercising new and expansive "conceptions of federal power." *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.).

Courts ordinarily defer to congressional classifications when Congress enacts routine economic legislation or other legislation of known and common type. But the assumptions underlying judicial deference to Congress are absent here. 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. In this context, judicial deference is warranted not to the congressional judgment but rather to the state policy judgments that Congress has sought to displace, in areas where the States' experience and interests are most compelling and entitled to respect. Courts may appropriately examine congressional justifications with greater care when these federalism concerns are present—signaling that Congress is operating at the edge of its constitutional authority.

Relatedly, policing the bounds of federalism protects not only the States, but also individual liberty, *see, e.g., Bond v. United States*, 131

S. Ct. 2355, 2364 (2011), a concern closely aligned with the purpose of equal protection review, to protect disfavored classes from arbitrary government action, *Romer*, 517 U.S. at 633-34. "One virtue of federalism is that it permits [a] diversity of governance based on local choice," *Massachusetts*, 682 F.3d at 16, including the choice of amici States to eliminate discrimination and maximize equality for their citizens, regardless of sexual orientation. When Congress steps outside the bounds of its normal role—to forestall States' policy choices in a field of historic state control—and does so in a way to limit States' promotion of equality for their citizens, courts can and should be skeptical and more closely examine whether the federal law meaningfully advances a legitimate federal end, instead of simply disadvantaging a minority or disfavored class.

B. Section 3 of DOMA Fails Even Rational Basis Review.

Section 3 of DOMA cannot survive a skeptical look. It fails even deferential rational-basis review. Section 3 is so broad in scope that it subordinates all federal statutory and regulatory interests—whatever the underlying governmental purpose or end, and however unrelated to

substantively shaping or limiting marriage—to the single goal of establishing a second-class status for same-sex marriages. The very form, function and breadth of DOMA fails the most basic test for rational government action—coherent fit between the legislative classification and government end. 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.

Equal protection review under the rational-basis standard, the most lenient standard that applies under the law, still examines the link between "the classification adopted and the object to be attained." *Id.* at 632. In "requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that the classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

But like the state constitutional amendment struck down in *Romer* that prohibited all state and local laws forbidding discrimination based on sexual orientation, DOMA's staggering breadth "confounds" even minimal rational basis review. *Id.*

DOMA is not a single legislative classification. It purports to retroactively and prospectively amend all of federal law—denying same-sex marriages legal effect over literally thousands of different federal statutes, regulations, and administrative rulings. The breadth of DOMA is so sweeping that its scope and impact were unknown at the time of its enactment, and Congress made no attempt to even analyze DOMA's reach. (*See* Windsor Br. at 14, 40.) The government's own reported efforts to catalog the effect and operation of DOMA on federal statutes—after enactment—have been incomplete and under-inclusive. *See* Letter from Dayna K. Shah, Assoc. Gen. Counsel, General Accounting Office, to Hon. Bill First, Senate Majority Leader, at 2 (No. GAO-04-353R Jan. 23, 2004) (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 that effort did not even purport to catalog affected regulations and other federal actions.

In light of DOMA's enormous breadth, the purported interests asserted in support of section 3 fail even a basic rationality test:

First, Congress's asserted interests in "defending and nurturing" traditional marriage, "encouraging responsible procreation and child-rearing," H.R. Rep. No. 104-664, *supra*, at 12-13, or otherwise making a moral judgment about gay and lesbian couples cannot justify DOMA. Marriage is a relationship exclusively created and controlled by state law. "That has always been the rule," and DOMA "in no way changes that fact." *Id.* at 3. So long as the protection of children and families remains under the States' primary jurisdiction, decisions about how to best "defend and nurture" marriage and provide for families and children are matters committed to the States' judgment. Relegating same-sex marriages to second-class status does not *nurture* opposite-sex marriages in any plausible manner, nor does it defend the principle of equality that amici States have determined to be essential to the institution of marriage.

Moreover, because Congress does not traditionally regulate marriages or families, see *supra* at 15-24, most federal statutes touching on marriage are enacted for reasons unrelated to expressing any policy preference about marriage. Application of section 3 to broad

areas of federal law therefore leads to illogical and absurd results at odds with federal goals.

Section 3 of DOMA, for example, exempts same-sex married couples from (i) a wide range of federal statutes and regulations prohibiting conflicts of interest and nepotism, (ii) the protection of certain federal criminal laws, (iii) tax laws enacted to *close* loopholes to married taxpayers, and (iv) various creditor protections in the Bankruptcy Code.[5] In none of these cases does excluding same-sex couples advance the legislative agenda. To give but one example, section 3 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 aim of the criminal prohibition.

In fact, section 3 ironically undermines at least one piece of legislation whose avowed purpose is to combat sex discrimination by the States. The Family and Medical Leave Act (FMLA) requires employers,

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[5] *See* Br. of *Amicus Curiae* Citizens for Responsibility and Ethics in Washington (CREW Br.) at 5-23 (identifying more than thirty such examples of federal law affected by DOMA).

including state governments, to grant leave to care for a seriously ill or injured spouse. 29 U.S.C. § 2612(a)(1)(C). Section 3 denies that benefit to same-sex spouses. Since the purpose of the statute was to eliminate workplace discrimination against family caretakers,[6] excluding same-sex spouses from the law would seem to undermine rather than promote the legislative purpose.

Second, the asserted congressional interest in preserving federal resources and maintaining uniformity in the distribution of federal benefits is likewise insufficient to sustain section 3. Section 3 does not merely amend federal benefit programs; 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*, *e.g.*, CREW Br. at 5-11; *id.* at 17-23; DOJ Br. at 44.) Further, even where DOMA impacts federal expenditures, its effects are so varied it may well cost the government more than it saves. *Massachusetts*, 682 F.3d at 14 n.9. For example, the Congressional Budget Office concluded that equal application of the

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[6] *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.").

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 which 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, where a cohabiting couple need not even be married to qualify, *see* 7 U.S.C. § 2012(n)(1)(B), DOMA's refusal to recognize same-sex marriages accomplishes nothing but pure stigmatic harm and expression of animus, an illegitimate government aim. *See 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."

Many federal programs—such as Medicaid—establish jointly 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. Business*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part & 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 the *opposite* of uniformity. States are instead empowered to make "dramatically different" choices and to establish "a myriad" of different programs. *Id.* Under cooperative federal-state programs—all of which DOMA amends—state-by-state variation is the norm, not a problem to be eliminated.

Third, section 3 of DOMA does not advance the claimed interest in "protecting state sovereignty and democratic self-governance" H.R. Rep. No. 104-664, *supra*, at 16. "[I]ndeed [it] is antithetical to it." *Massachusetts*, 682 F.3d at 14. Section 3 has the purpose and effect of *rejecting* the sovereign decisions of States to provide full marriage equality to same-sex couples, and thus upending rather than supporting

the democratic decisions of amici States and others. The suggestion that section 3 nonetheless promotes state sovereignty because marriage equality in some States stems in whole or in part from judicial decisions is incorrect. (*See* Indiana Br. at 9-14.) State high court decisions that confirm independent state constitutional rights for same-sex couples lie at the heart of state sovereignty. As the Supreme Court recognized in *F.E.R.C. v. Mississippi*, "the courts have always been recognized as a coequal part of the State's sovereign decision-making apparatus." 456 U.S. 742, 762 n.27 (1982). Rejecting state court decisions is therefore as antithetical to the aim of promoting state self-governance as rejecting duly enacted state statutes.

Congress has the power to make sweeping changes in federal law. But Congress's 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 18-23, it has acted through statutes "narrow enough in scope and grounded in a sufficient factual context" to make the legitimate aim served by the statutory classification rationally discernable. *Id.* 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 unconstitutional animus towards gay and lesbian couples. The "sheer breadth" of section 3 is fatal to rational basis review. *Id.* at 632.

Fourth, BLAG's contention that DOMA is a legitimate effort to preserve federal sovereignty from "reverse preemption" by the States (Br. at 40-43) is directly contrary to the historical record and precedent regarding the States' role in defining and regulating domestic relations, see *supra* at 15-24. There is no federal law of domestic relations, *Boggs*, 520 U.S. at 848; *Haddock*, 201 U.S. at 575, and thus no federal law to pre-empt. When the States act within their sovereign and historical authority to regulate domestic relations for the benefit of families and children and in furtherance of equality for their citizens, they do not override any enumerated congressional power. BLAG's "reverse preemption" argument—by suggesting that Congress has independent domestic relations authority—would undermine the States' core sovereign function and open the door to federal legislation generally in this field. Such a result would run counter to Chief Justice

Roberts's admonition "to avoid creating a general federal authority akin to the police power." *Nat'l Fed'n of Indep. Business*, 132 S. Ct. at 2578.

Finally, while the benefits of DOMA are illusory, its harms are real. As the denial of the estate-tax exemption in plaintiff's case illustrates, section 3 inflicts both dignitary and financial harms on same-sex spouses, denying them important rights, protections, status, and recognition under federal law. It is no answer to say that DOMA leaves States free to define marriage as they choose. Marriage is important as a legal status because it sets the terms for full participation in social and civic life. *See Zablocki*, 434 U.S. at 384. Denying marital status for all federal purposes and all federal law marks same-same couples with a continuing badge of inferiority. *Romer*, 517 U.S. at 635.

Quite literally, section 3 takes married same-sex couples and unmarries them on a continuing basis whenever federal law is implicated. Just as "a State cannot . . . deem a class of persons a stranger to its laws" for the sake of animus or moral condemnation alone, *id.*, Congress violates equal protection when it attempts to make same-sex couples strangers to federal law by refusing recognition for

their valid state marriages. No legitimate governmental interest supports that result, which imposes singular, indiscriminate hardship on same-sex couples and intrudes on the States' power to extend and equalize marriage rights, a power at the heart of state sovereignty.

CONCLUSION

The Court should affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,000 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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