No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF FEDERALISM SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT WINDSOR

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Cont'd

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

Statutes

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

Other Authorities

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

Rules

INTEREST OF THE AMICI CURIAE[1]

Amici are scholars who teach and write about constitutional law and federal structure. Jonathan Adler is Johan Verheji Memorial Professor of Law at Case Western Reserve University School of Law, where he teaches constitutional and administrative law and directs the Center for Business Law and Regulation. Lynn Baker is Frederick M. Baron Chair in Law at the University of Texas School of Law, where she teaches state and local government law. Randy Barnett is Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center, where he teaches constitutional law and directs the Georgetown Center for the Constitution. Dale Carpenter is Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School, where he teaches constitutional law and sexual orientation and the law. Ilya Somin is Professor of Law at George Mason University School of Law, where he teaches constitutional law. Ernest Young is Alston & Bird Professor of Law at Duke Law School, where he teaches constitutional law and federal courts. Each

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[1] All parties have consented to the filing of this brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to this brief's preparation or submission.

has written about the federalism issues that this cases raises.

The signatories of this brief hold a variety of opinions about same-sex marriage and about how the Constitution's individual-rights provisions may bear on regulation of those marriages. But we agree that Section 3 of the Defense of Marriage Act (DOMA)[2] is an unconstitutional and unprecedented incursion into States' police powers.

SUMMARY OF ARGUMENT

Before this Court addresses whether DOMA denies equal protection of the laws, there is a prior question of federal *power*. This question is prior not only because DOMA cannot stand if it falls outside Congress's authority but also because DOMA can only survive an equal-protection challenge if it serves federal interests within Congress's legislative jurisdiction. As Chief Justice Marshall recognized in *McCulloch* v. *Maryland*, only ends "within the scope of the constitution" are "legitimate." 17 U.S. (4 Wheat.) 316, 421 (1819). That is true regardless of the level of scrutiny that this Court applies to Ms. Windsor's equal-protection claim.

DOMA falls outside Congress's powers. Marriage is not commercial activity, and DOMA is not limited

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[2] This brief does not address the validity of DOMA's other provisions, and we refer to Section 3 simply as "DOMA."

to federal-benefit programs that might rest on the Spending Clause. Any action by Congress that falls outside its specifically enumerated powers must be justified under the Necessary and Proper Clause, and DOMA cannot pass that test. DOMA's definition of marriage is not "incidental" to an enumerated power, see *Nat'l Fed'n of Indep. Bus.* v. *Sebelius* (*NFIB*), 132 S. Ct. 2566, 2591 (2012), because—as the Bipartisan Legal Advisory Group has said—its purpose is to make social policy regarding domestic relations rather than "carry into execution" some federal enumerated power. DOMA's definition is also not "plainly adapted" to an enumerated end, see *McCulloch*, 17 U.S. (4 Wheat.) at 421, because it applies to more than 1100 federal statutes at once. Congress has never even considered how defining marriage to exclude same-sex couples will affect most of these statutory regimes, and BLAG does not defend DOMA in those terms. Finally, DOMA's definition is not "proper," see *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), because it violates the States' equal sovereignty and lacks a limiting principle to cabin its usurpation of state control over domestic relations.

"[U]nder the Constitution, the regulation and control of marital and family relationships are reserved to the States." *Sherrer* v. *Sherrer*, 334 U.S. 343, 354 (1948). DOMA represents an unprecedented intrusion into this domain. That is true even though Congress has enacted statutes, such as for cross-border enforcement of child-custody and support orders, within the sphere of domestic relations. Our

claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field—such as the power to define the basic status relationships of parent, child, and spouse—are reserved to the States.

Congress's establishment of a competing federal definition of family undermines the States' sovereign authority to define, regulate, and support family relationships. Federal law is massively intertwined with state law, and state officials implement many federal programs, like Medicaid, in parallel with their own legal regimes. DOMA thus wreaks confusion and imposes substantial administrative costs that undermine States' attempts to define marriage for themselves. These contradictory legal regimes impose costs on individuals as well, who cannot rely on a single body of law to settle their domestic status or hold a single set of officials politically accountable.

DOMA's appropriation of the power to define marriage cannot be justified as simply defining a term relevant to administering federal programs. The statute is not called the "Defense of Marriage Act" for nothing: Congress did not act, say, to make ERISA function more smoothly, but rather because it wished to establish and promote a national definition of marriage to compete with States' changing definitions. BLAG's argument in defense of DOMA could not be clearer on this point. It asserts that "the federal government has the same latitude as the states to adopt its own definition of marriage for federal-law purposes." Br. 19.

BLAG is wrong. The legitimacy of same-sex marriage is a difficult and divisive issue, yet it is one that our federalism has been addressing with considerable success. Congress may regulate in this area to the extent necessary to further its enumerated powers. But it may *not* simply reject the States' policy judgments as if it had the same authority to make domestic-relations law as they do. That is the difference between a government with a general police power and a government of limited and enumerated powers. And it is sufficient to decide this case.

ARGUMENT

I. THE LIMITS OF NATIONAL LEGISLATIVE POWER MUST INFORM THIS COURT'S ANALYSIS OF DOMA UNDER EQUAL-PROTECTION PRINCIPLES

Whether same-sex couples can marry is an evolving, unresolved, and contentious debate. A slight majority of Americans approve of same-sex marriage, but many disapprove.[3] States' domestic-relations laws reflect evolving public opinion. Nine States and the District of Columbia issue marriage licenses to same-sex couples. Another five States permit them to

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[3] *Changing Attitudes on Gay Marriage*, PEW FORUM ON RELIGIOUS AND PUBLIC LIFE (Nov. 2012), http://features.pewforum.org/same-sex-marriage-attitudes/.

enter into civil unions with full spousal rights. Five more permit domestic partnerships conferring some or all rights and obligations of married couples. Two States recognize out-of-state same-sex marriages. But thirty-eight States, including some that permit civil unions or domestic partnerships, have prohibited same-sex marriage.

The Framers designed the federal system to allow States exactly this freedom to experiment and to debate contentious policy issues.[4] DOMA is an unprecedented federal intervention into this debate. For the first time, Congress has created an across-the-board federal-marital status that exists independently from, and in some cases conflicts with, States' marital-status determinations.

BLAG argues that DOMA serves five interests: DOMA (1) preserves each sovereign's ability to define marriage for itself, (2) ensures a nationally uniform definition of marriage, (3) preserves earlier Congresses' legislative judgments and protects the federal fisc, (4) maintains the status quo, and (5) serves the aims (such as promoting families and procreation) that States rejecting same-sex marriage have sought to promote. Br. 30-49. Those are

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[4] See Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, CATO POL'Y ANALYSIS no. 570, Jun. 1, 2006, at 10 *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/pa570.pdf.

interests that a *State* might assert under its police power. When this Court considers whether DOMA—under any standard of equal-protection review—serves legitimate government objectives, it can and should consider whether those ends fall within Congress's enumerated powers.

The Framers established federalism and separation of powers as a "double security" protecting "the rights of the people." THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961). By pressing the national majority's policy preferences on every State in the Nation in an area of intense national disagreement, DOMA embodies the sort of threat to liberty federalism was designed to prevent.

A. Congress Has No Legitimate Interest in Defining Marriage Because It Lacks Enumerated Power to Do So.

Under any level of scrutiny, DOMA is constitutional only if it serves legitimate federal purposes. For an "end [to] be legitimate," it must be "within the scope of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421. DOMA serves no legitimate purpose because its ends are not "within the scope of the constitution." As we explain, the federal government lacks constitutional authority to determine marital status in a blanket way.

Limiting Congress to enumerated objectives is all the more important in this case because the Court must decide *which* government to defer to—the States or Congress. The Court's tiers of scrutiny in

equal-protection analysis reflect judgments about the degree of deference owed to legislative decision-makers. Rational-basis review, in particular, presumes that judges should leave basic value and policy judgments to the appropriate political branches. *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

But Congress intentionally enacted DOMA to *reject* state governments' policy judgments. Thus this case does not involve a simple choice between a court's judgment and "the" legislature's; it forces a choice between the New York legislature and Congress. Limiting Congress to enumerated objectives balances and guides that difficult inquiry. Outside the enumerated powers, the States—not Congress—are entitled to deference.

B. Restraints on National Power Are an Integral Part of the Constitution's Guarantees of Equal Protection and Individual Liberty.

"Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). Respecting the limits of national power is as essential to protecting liberty as enforcing the Constitution's substantive equality guarantees.

For most of our history, the primary restraints on arbitrary and discriminatory action by the national

government have been federalism and separation of powers. In divisive social controversies like the debate over same-sex marriage, federalism lets each State and its citizens decide how to proceed, largely free of national pressure. Federal diversity of outcomes enables the democratic process to accommodate a higher proportion of our citizens' views on the matter than would a uniform national answer. And it prevents the majority of States from impressing their policy preferences on the minority who want to recognize gay marriage. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 110 (2001). "That gradualist approach puts the constitutional debate to one side and lowers the political temperature." Richard A. Epstein, *The Constitutionality of Proposition 8*, 34 HARV. J.L. & PUB. POL'Y 879, 881 (2011).

Moreover, letting each State decide preserves the exit option for both same-sex couples living in a jurisdiction prohibiting their marriage and strong opponents of the practice who do not wish to live in a State where it is legal. Indeed, exit may be a more effective way for citizens to express political preferences than voting in elections. Ilya Somin, *Foot Voting, Federalism, and Political Freedom* 3-16 (Geo. Mason U. Law & Econ. Research Paper Series, No. 12-68 Oct. 12, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160388. The exit option also "makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364

(quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)).

This exit right is critical to equal protection of the laws. "The right to travel and to move from one state to another has long been accepted," and, "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel* v. *Williams*, 457 U.S. 55, 60 n.6 (1982) (collecting cases). That right is considerably less effectual, however, when national legislative action presses States to adopt a uniform outcome on a social controversy. "As long as the citizen's right to exit local communities is guaranteed in a meaningful way, localism promotes diversity as an important barrier against moral tyranny on the national scale." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1872 (1995).

State-by-state policy diversity also facilitates experimentation, which can help resolve divisive questions reflecting deep-seated individual views about rights. For example, *Gonzales* v. *Oregon* applied separation-of-powers and federalism principles to prevent the Executive from preempting Oregon's experiment with physician-assisted suicide. 546 U.S. 243 (2006). To the extent that same-sex-marriage proponents and opponents disagree about its likely effect on traditional marriage, actual experience in States recognizing same-sex marriage could inform that debate. "Only when . . . competition between legal systems exists can we perceive which legal rules are most appropriate." Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the*

Corporation, 6 J. LEGAL STUD. 251, 276 (1977). Thus BLAG's argument that Congress enacted DOMA to wait and see how same-sex marriage would play out is exactly backwards. Br. 41-43. DOMA undermines and discourages those experiments by superimposing a uniform and inescapable federal definition of marriage.

II. DOMA IS NEITHER A "NECESSARY" NOR A "PROPER" MEANS OF FURTHERING ANY OF CONGRESS'S ENUMERATED POWERS

DOMA was enacted in 1996 to protect the "institution of traditional heterosexual marriage," H.R. REP. NO. 104-664, at 2 (1996), from the possibility that some States might legalize same-sex marriage. BLAG continues to insist that Congress has the power to define marital status because it is a "separate sovereign" just like the States. Br. 31.

Not so. "Bedrock principles of federalism make clear," BLAG Br. 19, that Congress never has the power to legislate on matters *because* States do. See U.S. CONST. Amend. X. Congress "can exercise only the powers granted to it." *McCulloch*, 17 U.S. (4 Wheat.) at 405.[5]

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[5] See also THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined . . . . The powers reserved to the several States will

Congress surely has authority to refuse to recognize particular marriages when executing its enumerated powers. But it cannot define marital status in DOMA's shotgun fashion. States derive the power to define marriage from their police powers, but Congress has no such power. Nor can Congress justify DOMA under the Commerce, Spending, or Necessary and Proper Clauses.

This Court's precedents and the Constitution's history, text, and structure establish three independent requirements for "necessary and proper" laws. First, an unenumerated action must be but a means to an enumerated power or end and "incidental" to the power it purports "to carry into execution." An incidental or implied power must be less significant than the enumerated powers. Any would-be power invoked in support of DOMA cannot be incidental because a general power to define marriage is such a great power that it would have to be enumerated—yet Article I, Section 8, enumerates no such power.

Second, if the implied power is incidental, it must also be "necessary," meaning "plainly adapted," to an enumerated power. A federal definition of marriage that applies to more than 1100 federal statutes, however, is "plainly adapted" to none. Finally, a law

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extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .").

must be "proper," which at the very least means it must not grant Congress unlimited power. But BLAG's rationales for DOMA contain no limiting principle. Therefore, DOMA fails each requirement.

A. DOMA Is Not Valid Commerce or Spending Clause Legislation.

This Court's Commerce Clause precedents have always held that "[t]he subject to be regulated [must be] commerce." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824); *see also United States* v. *Morrison*, 529 U.S. 598, 610 (2000) (Congress's power is limited to "commercial activity"). DOMA does not purport to regulate interstate commerce. Although weddings may involve extensive commercial activity, marital status itself is not commerce, much less interstate commerce.

Nor is DOMA justified under the Spending Clause. DOMA is not a narrow statute that applies only to federal benefit schemes. It indiscriminately governs all federal statutes and programs and affects more than 1100 federal statutes, many of which have nothing to do with the power of the purse.[6] For instance, DOMA affects, among other things, copyright protection, government ethics, and

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[6] See also H.R. REP. NO. 104-664, at 23 (1996) (failing to state any constitutional basis for Congress's authority to enact DOMA and noting that "this legislation does not provide new budgetary authority or increased tax expenditures").

testimonial privileges. See, *e.g.*, 2 U.S.C. § 31-2; 17 U.S.C. §§ 101, 203(a)(2); 28 U.S.C. § 455(b); Fed. R. Evid. 501; *see also Trammel* v. *United States*, 445 U.S. 40, 52-53 (1980).

Even if DOMA were a spending statute, it would fail under this Court's precedents. Viewed as a spending condition, DOMA requires States administering federal-benefit programs to refuse to recognize state-sanctioned marriages. Under schemes involving federal-state matching funds, DOMA may prohibit the expenditure of *state* money to couples entitled to those benefits under state law. No relevant federal-spending program clearly states a "no same-sex marriage" condition, see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (conditions must be stated "unambiguously"); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), and any such condition would operate retroactively for all federal programs that the States entered into before DOMA's enactment in 1996, see *NFIB*, 132 S. Ct. at 2606 ("[T]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions."). Moreover, a condition cutting across so many federal programs, involving vast sums of money, would surely be coercive. See *id.* at 2604.

B. DOMA Is Not Incidental to an Enumerated Power under the Necessary and Proper Clause.

Since *McCulloch,* this Court has recognized that the Necessary and Proper Clause does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Id.* at 2591 (Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411).[7]

The Necessary and Proper Clause therefore does not grant all conceivable implicit powers that could be useful to an enumerated power; it does not grant powers we would expect the Constitution to enumerate separately. Here, this Court confronts the same kind of question it decided in *McCulloch* and *NFIB*: Is the power to define marital status the sort we would expect to be enumerated? It is.

In *McCulloch*, this Court upheld Congress's power to incorporate a bank because the "power of creating a corporation" is not a "great substantive and

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[7] Recent scholarship establishes that this "incidental" power doctrine was the legal default rule when the Constitution was ratified. See Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Gary Lawson et al., *The Origins of the Necessary and Proper Clause* 52, 60-61 (2010) (explaining that at the founding an "incidental" power had to be "subordinate to" or "less worthy" than the power it was incidental to).

independent power." *McCulloch*, 17 U.S. (4 Wheat.) at 411. Chief Justice Marshall determined that a corporation is "never used for its own sake, but for the purpose of effecting something else." *Ibid.* Thus, there was "no reason to suppose[] that a constitution, omitting . . . to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified [chartering corporations]." *Id.* at 421.

But in DOMA, defining marriage is not a means to an end; it is an end in itself. As even BLAG acknowledges, marriage is one of the "bedrock institutions" in our society. Br. 41-42; *see Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men"). The power to define marital status is therefore exactly the type of power we would expect the Constitution to enumerate. It is not, like chartering a corporation, a mere "means by which other objects are accomplished." *McCulloch*, 17 U.S. (4 Wheat.) at 411.

This case does not require this Court to say that Congress may *never* limit which marriages federal law will recognize. It is enough to say that nothing about DOMA is "incidental."

First, under the Necessary and Proper Clause, Congress may incidentally regulate intrastate *economic* activity that is not itself interstate commerce if that activity, in the aggregate, has a substantial effect on interstate commerce. *Gonzales* v. *Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring)

("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). But marriage is not itself an economic activity, and the economic *effects* of marriage do not make the activity itself economic in nature. See, *e.g.*, *Morrison*, 529 U.S. at 615-16 (rejecting a broad view of "economic effects" because it would permit the federal government to regulate marriage, divorce, and childrearing).

Second, Congress may also incidentally regulate intrastate *noneconomic* activity if doing so is "essential" to a broader regulation of interstate commerce. See *Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("[T]he power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective."). But DOMA stands apart from any particular regulatory scheme, and BLAG defends it in terms that are unique to DOMA itself. Some federal statutory regimes *do* bear on marriage, but the statutes themselves generally contain a directive regarding marriage. Moreover, these schemes have generally taken state-family law as they found it, and exceptions to that principle have always been narrow and tailored to the needs of the particular federal program.

Third, DOMA is not "narrow in scope" like the federal civil commitment program in *United States* v.

Comstock, 130 S. Ct. 1949 (2010), or the immigration antifraud marriage provision, 8 U.S.C. § 1186a(b)(1)(A)(i). As explained below, the antifraud provision withholds resident-alien status from some marriages, but only when the couple entered into the marriage to obtain a federal benefit fraudulently. The federal power to confer a benefit like resident-alien status includes the power to prevent someone from fraudulently obtaining the benefit. But that is not what DOMA accomplishes.

BLAG cannot avoid this problem by insisting that DOMA merely limits federal benefits to traditional marriages or, to put it another way, that defining who may receive a benefit is incidental to the power of conferring a benefit under the Spending power. If that were DOMA's true meaning, it would read very differently. Like the immigration antifraud provision, it would relate in some way to a statute's benefit. But DOMA indiscriminately declares that, for the entire U.S. Code, marriage means opposite-sex marriages. Congress did not consider potential applications to particular statutes or programs. DOMA even undermines some statutes, such as ethics laws regulating gifts to federal officials' spouses. 2 U.S.C. § 31-2. The risks of corruption that those statutes combat are equally present when same-sex couples are involved, and federal law's refusal to recognize the union amounts to willful myopia.

Almost two centuries ago, Chief Justice Marshall counseled vigilance "should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the

government." *McCulloch*, 17 U.S. (4 Wheat.) at 423. DOMA's broad sweep proves its real meaning: it creates a federal marital status to reflect Congress's preference that States should not extend the right to marry to same-sex couples. But the power to determine who can marry "belongs to the laws of the States and not to the laws of the United States." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979).

C. DOMA Is Too Broad to Be "Plainly Adapted" to Congress's Enumerated Powers.

Since *McCulloch* this Court has held that a "necessary" law must have both a "legitimate" federal end "within the scope of the constitution" and some fit between that end and the means employed to pursue it. 17 U.S. (4 Wheat.) at 421. Congress has wide latitude to determine the fit between means and ends. See, *e.g.*, *id.* at 413-15. But that latitude has limits.

"This Court has not held that the *Lee Optical* test, asking if 'it might be thought that the particular legislative measure was a rational way to correct' an evil, is the proper test in this context. Rather, under the Necessary and Proper Clause, application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so." *Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment) (quoting *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955)). "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on

empirical demonstration." *Id.* at 1967. Congress has never even attempted such a link in support of DOMA.

In some contexts, administering a federal program might require federal officials to act based on a more-limited understanding of "marriage" than state law might provide for. One example is the immigration antifraud provision, discussed above, that limits resident-alien status to members of a "qualifying marriage," which excludes marriages that were "entered into for the purpose of procuring an alien's admission as an immigrant." 8 U.S.C. § 1186a(b)(1)(A)(i). It is at least conceivable that, in particular situations, the national government could demonstrate a need (apart from desiring to encourage a particular definition of marriage) to exclude same-sex couples. But, although the Necessary and Proper Clause might support a targeted limitation of state-conferred marital status for federal purposes, DOMA is a sawed-off shotgun. A federal definition of marriage that indiscriminately applies to more than 1100 federal statutes and programs can be "plainly adapted" to none of them.

The Court has historically deferred to Congress's assessment that legislation is "necessary" to exercise an enumerated power. If courts are to defer to Congress's judgments about fit, however, they should at least insist that Congress legislate in a way that

allows those judgments to be made.[8] Congress has made no judgment here that treating same-sex couples as unmarried will, say, contribute to the efficient operation of ERISA or some other federal program. Until it does, DOMA should not be upheld as "plainly adapted" to any constitutional exertion of national authority under Congress's enumerated powers.

D. DOMA Is Not a Proper Means for Executing Any Enumerated Power.

Laws that violate core constitutional principles like state sovereignty and enumerated powers are improper. For instance, *Printz* struck down a federal law requiring state officials to conduct background checks on prospective handgun purchasers: "When a 'La[w] . . . violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'" 521 U.S. at 923-24 (quoting THE FEDERALIST NO. 33 (Alexander Hamilton)).

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[8] Cf. *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("[E]ven [under] the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

Instead, it is "merely an act of usurpation which deserves to be treated as such." *Ibid.* This Court again held, in *Alden* v. *Maine*, that the Necessary and Proper Clause does not vest Congress with the "incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers" because such authority is not proper. 527 U.S. 706, 732 (1999).

Just last Term, a majority of Justices determined that the individual-health-insurance mandate may have been "necessary" to insurance reform but that it was not "proper." They stressed that upholding the mandate would have granted the federal government unlimited power to impose other mandates. *NFIB*, 132 S. Ct. at 2588 (Roberts, C.J.); *id.* at 2646 (joint dissent). Because the government's proffered rationales for its claim of power had no judicially administrable limit and could ultimately justify a national police power, the mandate violated the constitutional principle that "[t]he Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Id.* at 2577 (Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 405). Here, too, the rationales offered in defense of Congress's effort to define "marriage" have no obvious limit.

The case against DOMA is even stronger than in *Printz*, *Alden*, and *NFIB* because, as we explain in Part III, DOMA invades a core area traditionally reserved to the States. Some limiting principle, especially in such areas, must restrict what Congress may do to effectuate federal programs. One can

imagine an argument, for example, that a comprehensive federal family code would promote uniformity in the administration of the many federal programs touching family relationships. In any event, if DOMA is upheld—allowing Congress to enact a blanket definition of "spouse" in opposition to state law—then surely Congress may also define "divorce," "annulment," "parent," or "child" in Chapter 1 of Title 1 of the U.S. Code. And it could do so, not to further specific federal programs, but simply to promote its preferred domestic-relations policies. Such a result would tear down limits on Congress's powers set forth in Article I, Section 8.

DOMA also violates the principle of *equal* sovereignty between States by burdening those States that extend marriage to same-sex couples. For instance, Massachusetts has shown that it "stands both to assume new administrative burdens and to lose funding for Medicaid or veterans' cemeteries solely on account of its same-sex marriage laws." *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 12 (1st Cir. 2012). This burden is a "departure from the fundamental principle of equal sovereignty" between the States. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder* (*NAMUDNO*), 557 U.S. 193, 203 (2009). The federal government is not entitled to "differentiate[] between States" because authorizing same-sex marriage is not the type of "local evil" that *NAMUDNO* suggested could justify distinctions under Section 5 of the Voting Rights Act. *Ibid.*

The Founders recognized this principle of "propriety." See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: a Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (in the founding era "proper" meant that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights"). As Alexander Hamilton recognized, "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." THE FEDERALIST No. 33, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton then stated that any attempt by the federal government to "vary the law of descent in any State" would be improper. *Ibid*. But DOMA accomplishes just such an "improper" result by altering marital status conferred by the States.

Nor can two of the purported federal interests BLAG advances save DOMA. First, the argument that federal statutes need a federal definition of marriage is disingenuous. Before DOMA, federal law took state law as it found it. DOMA continues to tolerate state differences on marriage. See Br. Amici Curiae Family Law Professors 5-18. It recognizes legal unions regardless of age differences, diseases, or how closely related two spouses might be, even though individual States differ significantly on these points. DOMA picks only one issue—same-sex marriage—and declares a federal public policy without even finding that same-sex marriages somehow undermine an enumerated power. See

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979) ("reject[ing] generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect the administration of federal programs").

Second, DOMA is not a proper way to protect the public fisc. DOMA does in some cases—such as Ms. Windsor's—save the government money. Whether it saves the government money overall remains uncertain, but rational-basis review generally lets the government guess incorrectly. *Massachusetts*, 682 F.3d at 9. DOMA, however, goes much further than simply trying to save money on federal spending programs. Its across-the-board drafting affects many statutes, including copyright law, ethics statutes, and testimonial privileges, that have zero relationship—rational or otherwise—to public money. Such an indiscriminate exercise of power is improper.

DOMA goes much further than background checks for firearm purchases or the individual-health-insurance mandate. Because DOMA set a new precedent for sweeping congressional power to impose a uniform federal family law, it is improper.

III. DOMA INVADES THE STATES' RESERVED POWERS BY PURPORTING TO DETERMINE MARITAL STATUS IN A BLANKET WAY

This Court closely examines whether "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *NFIB*, 132 S. Ct at 2592

(Roberts, C.J.) (quoting *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in judgment)). In DOMA, Congress has transgressed "the longstanding tradition of reserving domestic relations matters to the States." *Thompson* v. *Thompson*, 484 U.S. 174, 186 n.4 (1988). Congress's unprecedented assertion that it has equal power to decide who can marry forces States that recognize same-sex marriages to adjust their ordinary operations under pressure from the federal definition. DOMA also violates individuals' private liberty because it places validly married same-sex couples in the odd position of being married under state law and yet strangers in the eyes of federal law.

A. Only States Can Confer and Define Marital Status under Their Police Powers.

"[R]egulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975); *see also Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (collecting cases).[9] We

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[9] The Court has been unanimous on this point. See *United States* v. *Lopez*, 514 U.S. 549, 564-65 (1995) (rejecting arguments that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"); *id.* at 624 (Breyer, J., dissenting) (acknowledging limits on federal regulation in those areas).

do not maintain that Congress may not legislate in any way touching domestic relations, and in fact many federal regulations do affect family relations. As discussed below and by other *amici*, some even adjust family-status entitlements to suit a federal objective. See Family Law Professors Br. 26-32. But that does not mean that the national government can exercise all the same *powers* over family law that the States exercise. *Lopez* teaches that *something* important remains with the States.

This Court has explained what does. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703, 706 (1992), held that the "domestic relations exception" to federal-court jurisdiction "divests the federal courts of power to issue divorce, alimony, and child custody decrees," that is, to "determin[e] . . . the status of the parties." Justice Blackmun, concurring in the judgment, correctly observed that States retain authority over the "core" of domestic-relations law, which includes "declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity." *Id.* at 716. This Court has frequently, and recently, echoed that determining family status remains a State power. See, *e.g.*, *Newdow*, 542 U.S. at 16 ("Newdow's parental status is defined by California's domestic relations law.").[10]

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[10] See also, *e.g.*, *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its

This Court relied on that premise in *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956). *De Sylva* decided whether an illegitimate child could renew a copyright under a federal statute that permitted, if an author died, the "widow, widower, or children," of the author, or his "executors" or "next of kin" to renew the copyright. *Id.* at 571-72. The Court held that state law determined who were "children" under the Act. *Id.* at 580-81.

The Court explained that state law created the relationships the statute depended on in the first place. "To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, *requires* a reference to the law of the State which *created those legal relationships*." 351 U.S. at 580 (emphasis added). Similarly, the word "children" describes a "legal status" that state law created. *Ibid.* "To determine whether a child has been legally adopted, for example, *requires a reference to state law*." *Ibid.* (emphasis added). In other words, state law created family relationships; federal law then decided what, if any, authority to renew a copyright those relationships deserved.

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borders."); *Pennoyer* v. *Neff*, 95 U.S. 714, 734-35 (1877) ("[E]very State possesses [jurisdiction] to determine the civil *status* and capacities of all its inhabitants . . . . The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

That federal dependence on state marriage law is consistent with historical practice. The federal government has never created domestic statuses independently from the States. Other than instances like the territories, where the federal government *is* the government with general police power (see Family Law Professors Br. 33-35), the federal government does not issue marriage licenses or divorce decrees. It does not legitimate children, perform adoptions, or terminate parental rights. Though federal legislation might promote, shape, or encourage those relationships, it cannot create or extinguish them wholesale.

DOMA shatters two centuries of federal practice. Read plainly and fairly, DOMA creates, for the first time, a blanket federal marital status that exists independent of States' family-status determinations. See Carpenter, *supra*, at 10 ("there has never been a national definition of marriage"). It defines "marriage" and "spouse" across the board for every federal purpose and for more than 1100 federal statutes. 1 U.S.C. § 7; DAYNA K. SHAH, GOV'T ACCOUNTABILITY OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004).

DOMA's sweeping language differs markedly from the handful of federal statutes that choose to exclude from a federal benefit some relationships that state law might respect. Compare, for example, the immigration antifraud provision. Although that statute prohibits conferring resident-alien status based on marriages that were "entered into for the purpose of procuring an alien's admission as an

immigrant," 8 U.S.C. § 1186a(b)(1)(A)(i), it does not redefine marriage as DOMA does. It simply says that *otherwise married* couples cannot qualify for this particular benefit. Equally important, it serves Congress's "plenary" power to govern immigration and its need to close gaping loopholes in immigration restrictions. *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-70 (1972). It is tailored to that objective: "qualifying marriage" is defined in the antifraud provision *only* for the purpose of that provision.

DOMA reads differently because it was never designed to serve a particular federal objective. It was deliberately drafted to express Congress's policy judgment rejecting same-sex marriage—that is why it is called the "Defense of Marriage Act." That is why its preamble reads, "An act to define and protect the institution of marriage." Pub. L. 104-199, 110 Stat. 2419 (1996). And that is why its legislative history makes clear that "Section 3 will mean simply that [State-recognized same-sex] 'marriage' will not be recognized as 'marriage' for purposes of federal law." H.R. REP. 104-664 at 31.

Far from concealing this objective, BLAG defends it. Among its five proffered justifications, BLAG argues that Congress possesses sovereign authority to define marriage for itself. Br. 30. And it insists that Congress could enact DOMA for the same reasons States can reject same-sex marriage. Br. 30, 43-49. In other words, as BLAG makes plain, DOMA's drafters and defenders have assumed that "the federal government has the same latitude as the

states to adopt its own definition of marriage for federal-law purposes." *Id.* at 19.

Congress does not enjoy that latitude because *the Constitution left that power to the States*. U.S. CONST. Amend. X. The ability to create, define, or dissolve marriages is glaringly absent from Congress's enumerated powers and from its historic practice. U.S. CONST. Art. I, § 8; *see NFIB*, 132 S. Ct. at 2586 ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." (quoting *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010))).

B. DOMA Infringes State Sovereignty and Individual Liberty by Interfering with Valid Marriages.

DOMA not only creates a restrictive federal marriage status unauthorized by the Constitution, but it also interferes with the States' exercise of their reserved power to define marriage for their own purposes. DOMA forcibly creates a two-tiered marriage system in States that recognize same-sex marriage. As a result, DOMA increases those States' administrative costs, needlessly complicates their domestic-relations systems and introduces potential errors and frustration into their chosen marriage regime. DOMA thus discourages States from experimenting in this area at all, placing the heavy hand of the federal government on one side of the scale (through legislation rather than a command of

the Constitution, cf. *Loving*, 388 U.S. 1) for the first time in our Nation's history.

DOMA also offends same-sex couples' individual interests in stability and predictability of their basic personal relationships. DOMA creates two contradictory marriage regimes applicable within the same territory. It thus undermines both the public and private significance of same-sex couples' State-sanctioned marriages because it tells them that their *otherwise valid* marriages are invalid in the eyes of the federal government. And it blurs vital lines of political accountability by forcing individuals to look to two sets of laws and officials for redress.

1. Rather Than Simply Defining Marriage for Federal Purposes, DOMA Interferes with State Law.

BLAG argues that "DOMA does not interfere with or override state law." Br. 27. That is false. Most contemporary federal regulatory and benefits programs are cooperative-federalism schemes under which States implement federal programs according to federal directives. Medicaid is a classic example. As Massachusetts explained in related litigation, however, DOMA took the "cooperative" aspect out of cooperative federalism by forcing the Commonwealth to choose between violating state domestic-relations law and forgoing billions of dollars in federal funding. *Massachusetts* v. *U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 243 (D. Mass. 2010). As an employer, Massachusetts pays higher taxes when

it extends health insurance to its employees' same-sex spouses. *Id.* at 243-44. And it cannot bury married same-sex couples together in veterans' cemeteries. *Id.* at 239-41.

Medicaid is not the only funding program forcing States to choose between state law and federal funding. For example, States that have adopted programs to promote healthy marriages among "spouses," 42 U.S.C. § 603(a)(2)(iii), presumably would similarly lose funding if they extended those programs to validly married same-sex couples. DOMA interferes with States' domestic-relations laws by undermining States' ability to enforce divorce judgments and spousal-support orders arising from divorces of same-sex couples. The Bankruptcy Code gives spousal-support obligations the highest priority, exempts them from the automatic stay, and generally makes them not dischargeable. 11 U.S.C. §§ 362, 507, 523.[11] Those accommodations do not extend to divorced same-sex couples. See *id.* § 101. A variety of federal statutes help States garnish federal tax returns, federal wages, federal benefits, and federal pensions to enforce spousal support. E.g., 10 U.S.C. § 1408; 42 U.S.C. § 659; 42 U.S.C. § 664; 50 U.S.C.

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[11] For a longer list of ways DOMA disrupts bankruptcies of same-sex couples, see Jackie Gardina, *The Defense of Marriage Act, Same-Sex Relationships and the Bankruptcy Code* (Vermont Law Sch. Faculty Working Paper No. 04-12, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850926.

§ 2094. And the Consumer Credit Protection Act lifts severe limits on wage garnishment when the creditor is recovering spousal support. 15 U.S.C. § 1673. The unavailability of these standard remedies to enforce spousal support obligations for same-sex couples throws a wrench into the administration of state family law.

States that recognize same-sex marriage likewise face added administrative burdens and confusion when collecting state taxes. State-income-tax regimes often "piggyback" on federal forms, rules, and enforcement. Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33-41 (2012). DOMA disrupts that complementary relationship. *Id.* at 48-71. For example, Vermont law provides, "A husband and wife or a surviving spouse may file a joint Vermont personal income tax return for any taxable year for which the husband and wife or surviving spouse are permitted to file a joint federal income tax return under the laws of the United States." Vt. Stat. Ann. tit. 32, § 5861(c). Because Vermont's legislature has recognized same-sex marriage, *id.* tit. 15, § 8, DOMA has forced the state to issue special rules requiring same-sex couples to recalculate their federal tax returns as if they had filed jointly. Tech. Bull. TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010).

As a final example, DOMA distorts state universities' financial-aid policies. Federal law governs eligibility for federal student loans, the bedrock of any financial-aid package. Those statutes

ordinarily permit States to consider a student's spouse's income when determining need—unless the student is in a same-sex marriage. 20 U.S.C. §§ 1087nn(b), 1087ss(b)-(c). Universities must thus either adopt the federal definition for *all* their financial aid determinations—violating state law—or somehow develop a hybrid assessment of need based on two separate definitions of family.

In short, DOMA forces States to adjust their ordinary operations to accommodate a *federal marital status* that the affected States would not otherwise recognize. The practical consequences are real. States have validly married tens of thousands of same-sex couples who pay taxes, attend state universities, and file for divorce. States that recognize same-sex marriage face added administrative burdens and, in some cases, greater expenses. As these burdens become clearer in practice, some States may well decide that departing from the federal vision of family is simply too difficult. DOMA thus discourages States from experimenting with same-sex marriage and punishes those that do.

DOMA's interference is all the more concerning because it treads in a core area of state authority: deciding who is married. DOMA deliberately rejects, and so interferes with, some States' policy judgment that "family and society" would be strengthened by permitting committed adult couples to marry legally. It is hard to imagine a more direct invasion of the heart of States' police powers.

2. DOMA Infringes Individual Liberty by Pervasively Denying the Status of Validly Married Couples.

Throughout history and today, marriage stands as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. That is why this Court has held that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence* v. *Texas*, 539 U.S. 558, 573-74 (2003). DOMA creates significant uncertainty within that private realm. It forces same-sex couples to live a divided life, married for state purposes but unmarried for federal ones. Worse, DOMA blurs lines of political accountability for this intrusion, particularly when state officials must administer federal rules that do not respect marriage rights under state law. Without DOMA, same-sex marriage would be either legal or illegal in any given State. Same-sex couples would know their rights, and both proponents and opponents of those marriages would know which level of government to petition to change the law.

For the first time, the federal government, without individualized determinations (such as "sham" marriages entered into for immigration purposes), has created dual domestic statuses—a person who thought he was a spouse suddenly enjoys the benefits and bears the burdens of that status only partially and episodically. Married same-sex couples

have, at the state level, all the rights, privileges, and obligations of married couples. They file joint tax returns, enjoy preferential inheritance and tax treatment on their shared property, and live as one another's life partners and next of kin. Yet, whenever they interact with federal law, they are no different than college roommates.

That interaction with federal marriage law is pervasive. Same-sex spouses cannot obtain Social Security or Medicare based on their partners' work histories. See, *e.g.*, 42 U.S.C. § 402. Same-sex couples cannot file joint tax returns or enjoy the preferential tax treatment that opposite-sex marriages do. E.g., 26 U.S.C. §§ 106, 152, 2053, 2056, 6013.

But DOMA goes well beyond federal spending and taxing. Same-sex spouses enjoy no testimonial privileges. They cannot take leave to care for a sick spouse under the Family Medical Leave Act. See 29 U.S.C. §§ 2611-12, § 2614. Nor can divorcing spouses obtain COBRA coverage from their spouses' employers. See 29 U.S.C. §§ 1161, 1163. Same-sex spouses lack notification and access rights when their spouses are in some health-care facilities. See, *e.g.*, 24 U.S.C. § 325(b); 42 U.S.C. §§ 1395i, 1396r.

DOMA most deeply affects government employees, especially members of the Armed Forces, and their families. Everything from access to federal pensions to maintenance stipends to relocation expenses to health insurance depends on marital status. See, *e.g.*, 5 U.S.C. §§ 5724a, 5924, 8341, 8442, 8445, 8901, 8905. Same-sex spouses are particularly excluded

from the many programs—such as education and employment assistance—the military offers to assist families of members and veterans of the Armed Forces to ease the burdens military life places on them. See, *e.g.*, 10 U.S.C. §§ 1072, 1078a, 1143, 11447-48, 1784, 2147; 20 U.S.C. § 932; 38 U.S.C. §§ 1781, 3501, 1311. DOMA even bars same-sex spouses whose partners are killed in military service from receiving compensation, notice, and bereavement services. E.g., 5 U.S.C. § 8133; 10 U.S.C. § 1115; 22 U.S.C. § 2715b; 22 U.S.C. § 1783.

Thus DOMA places same-sex couples in the untenable and humiliating position of being married and yet, for any purpose touching federal law, being denied the ordinary rights and duties that have historically flowed from that status. By placing them in a legal labyrinth of changing status, DOMA injects uncertainty into the most fundamental and intimate aspects of these couples' lives. For the first time, individuals cannot rely on their States to settle their marital status definitively, allowing them to order their affairs accordingly.

This Court has recognized a basic interest in predictability in contexts far less fundamental than this one. See, *e.g.*, *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (striking down a state-minimum-wage law under the Due Process Clause's void-for-vagueness doctrine because of the uncertainties it imposed on employers); *Kimbell Foods, Inc.*, 440 U.S. at 728-29 (discouraging creation of federal common law when it would "disrupt commercial relationships predicated on state law"). It is inconceivable that

Congress would be permitted to inject similar uncertainty into other basic family-status relationships. If DOMA is valid, however, it is hard to say why the federal government could not adopt a blanket definition of "children" or "parent" that excluded adopted children or children conceived using sperm or egg donors. BLAG's assertion that Congress can undermine the very relationships this Court has said are "essential to the orderly pursuit of happiness by free men," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), has implications far beyond same-sex marriage.

This Court has also recognized the value of identifying a single sovereign responsible for regulatory decisions so that the correct officials may be held accountable for those decisions through the democratic process. See *Printz*, 521 U.S. at 930; *New York* v. *United States*, 505 U.S. 144, 168-69 (1992). By undermining marriage rights conferred by state law, often in cooperative-federalism contexts where *state* officials will have to enforce the federal definition, DOMA blurs the "distinct and discernible lines of political responsibility" that are vital if "political accountability [is not to] become illusory." *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring); *see generally* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 77 (2012) (discussing the structural federalism principle of "one problem, one sovereign").

Thankfully, the Constitution avoids these serious problems by leaving the power to determine those relationships to the States. Not every State will

resolve these questions to the liking of same-sex couples. But if States are permitted to fix family status with certainty, then same-sex couples can either hold the state officials responsible for that decision to account through ordinary political processes or move to a more congenial jurisdiction. Any State's choice remains subject, of course, to the Fourteenth Amendment's constraints, and we do not argue that state sovereignty provides any reason to narrowly construe the Equal Protection Clause. But unless equal protection requires recognition of same-sex marriage, the Constitution best protects liberty of same-sex marriages proponents and opponents by guaranteeing each State the right to decide for itself. That is inevitably a somewhat messy solution, but it is the best option that the Constitution provides for those issues on which we have not yet reached a social consensus.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2013