No. 12-307

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR IN HER CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENT BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES ADDRESSING THE MERITS AND SUPPORTING REVERSAL

Addressing the Issue of Whether Section Three of the Defense of Marriage Act Violates the Fifth Amendment Guarantee of Equal Protection

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QUESTIONS PRESENTED

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

2. Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.

3. Whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] Pursuant to this Court's rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief.

Institutional affiliations are provided for purposes of identification only. The *amici* speak for themselves, not their universities.

Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

The *amici* law professors all have professional, scholarly and personal civic interests in the integrity of the law, including the Defense of Marriage Act (herein "DOMA"), and in establishing that DOMA, Section 3, is a valid and proper exercise of Congress' constitutional authority to define "marriage" and "spouse" for purposes of federal laws, programs and agencies that does not violate the Fifth Amendment.

INTRODUCTORY STATEMENT

In 1996 Congress passed and the President signed the Defense of Marriage Act (DOMA),[2] to protect the

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[2] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)) [hereinafter DOMA]. *See generally* Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 960-62 (2010) (discussing history of DOMA); Lynn D. Wardle, *Who Decides?: The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L. L.J. 143, 145 (2010) (discussing passage of DOMA); Lynn D. Wardle, *Involuntary Imports:* Williams, Lutwak, *the Defense of Marriage Act, Federalism, and "Thick" and "Thin" Conceptions of Marriage*, 81 FORDHAM L. REV. 771, 788-89 (2012) (discussing background of DOMA); Joshua Baker & William C. Duncan, *As Goes DOMA ... Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1, 4 (2012), (discussing federalism and justification for DOMA); William C. Duncan, *DOMA and Marriage*, 17 REGENT U. L. REV. 203 (2005); *see further* Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998) (discussing federalism generally, federalism in DOMA,

authority of Congress (in Section 3 of DOMA) and the authority of the several states (in Section 2 of DOMA) to decide for themselves whether (and, if so, when, how, to what extent, etc.) to recognize same-sex marriages created in other jurisdictions.

The Defense of Marriage Act is a well-crafted, "architectural" act carefully designed to preserve the structure and allocation of law-making authority under the Constitution of the United States relating to inter-jurisdictional recognition of same-sex marriage. Both operative sections of DOMA were intended to answer the "who decides whether to allow importation of same-sex marriage" questions.[3]

Section Three of DOMA, the "vertical" (state-federal) inter-jurisdictional recognition provision at issue in this case, confirms and properly exercises Congress' constitutional authority to decide whether same-sex marriage can be imported into federal laws, programs, and regulations.[4] Section Three's principle of

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and refuting federalism challenges to Section Two).

[3] Wardle, *Who Decides? supra* note 2, at 144.

[4] 1 U.S.C. § 7 (2006):

> 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.

"who-decides" parallels that of Section Two concerning "horizontal" (state-state) inter-jurisdictional recognition of same-sex marriage, providing that each state may decide for itself whether or not to recognize same-sex marriages from other states.[5]

Section Three of DOMA confirmed that it is for Congress to determine whether (and if so when, how, and to what extent) same-sex marriages valid in the internal domestic relations law of a state will be deemed a marriage for purposes of federal law. In Section Three Congress also exercised that authority to codify the status quo—that same-sex marriages are not treated as marriages in federal laws, agencies, bureaus, regulations, or programs.

When DOMA was enacted, no American state and no nation in the world permitted same-sex couples to marry.[6] Likewise, in 1996 same-sex marriages were not

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[5] 28 U.S.C. § 1738C (2006):

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

[6] Since DOMA was enacted, nine American states (out of 50) and eleven sovereign nations (out of 193) have legalized same-sex marriage. Wardle, *Involuntary Imports, supra* note 2, at 825 (Appendix) (listing nations and states that have legalized (or constitutionally forbidden) same-sex marriage). The Netherlands

recognized or treated as "marriages" in any federal law, regulation, program, agency or bureau. Thus, Section Three of DOMA merely codified the existing federal law understanding of marriage as the union of a man and a woman.[7] It does not prevent Congress from later changing that definition for any particular federal law or program or for all of them.[8]

However, by 1996, litigation in Hawaii raised the prospect that some state might soon legalize same-sex marriage.[9] (In fact, just months after DOMA was enacted, by the end of that same year—1996—a state court in Hawaii had ruled that the Hawaii state

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became the first nation to allow same-sex couples to marry when the national legislature legalized same-sex marriage effective in April 2001. Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk) [Act of 21 December 2000 amending Book 1 of the Civil Code in connection with the opening of marriage to persons of the same sex (Law opening marriage)], Stb. 2001, p. 9, available at https://zoek.officielebekendmakingen.nl/stb-2001-9.html (last seen January 23, 2013).] Massachusetts was the first American state to permit same-sex marriage by a 2003 ruling that became effective in 2004. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 943, 959 (Mass. 2003).

[7] Wardle, *Section Three, supra* note 2, at 956 (Section Three had a "place-holder" effect.)

[8] Indeed, several bill have been introduced in Congress to include same-sex marriages as "marriages" for purposes of some or all federal laws or to repeal DOMA. *See generally id.* at 961-62; Wardle, *Involuntary Imports, supra* note 2, at 797.

[9] *See Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993).

constitution required that state to allow same-sex couples to marry.)[10] Many advocates of same-sex marriage, including not a few law professors and legal commentators, were asserting that if any state legalized same-sex marriage, same-sex couples from other states could go to that state, get married, and require the recognition of their marriages by their home states and under federal law.[11]

Congressional concern was so great that separate hearings were held on DOMA by subcommittees in both the House of Representatives[12] and the Senate.[13] While there was much discussion about the threat of involuntary importation of same-sex marriage from a state that allowed such marriages into other states that did not allow or choose to recognize same-sex

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[10] *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *3, (Haw. Cir. Ct. Dec. 3, 1996). The Hawaii Supreme Court later vacated the trial court's decision and dismissed the case as moot, 1999 WL 1195319 (Haw. Dec. 9, 1999), after Hawaii voters in November 1998 approved an amendment to the state constitution that confirmed the legislature's power to "reserve marriage to opposite-sex couples." *See* HAW. CONST. art. I, § 23.

[11] *See* Wardle, *Section Three, supra* note 2, at 952, n.7.

[12] *The Defense of Marriage Act: Hearing on H.R. 3396 Before the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *H.R. Hearings*].

[13] *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1996) [hereinafter *Sen. Hearing*].

marriage,[14] there also was grave concern that some federal judges or administrators would interpret federal laws and regulations to compel federal programs and agencies to recognize same-sex marriages in the absence of a clear expression by Congress that same-sex unions were not to be deemed "marriages" for purposes of federal law.[15] Section Three was intended to prevent federal judges and agency officials from interpreting or applying federal law to recognize same-sex marriages in federal laws, regulations, and programs before Congress decided that such recognition was appropriate.[16]

The power of Congress to define what it means when the term "marriage" (and related terms) are used in federal laws, regulations, and other official federal materials, was undisputed in 1996, as it should be today. Section Three of DOMA is a clear expression of

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[14] *See generally* Wardle, *Who Decides?, supra* note 2, at 148-152 & 160-165; H.R. REP. No. 104-664 (1996) at 2-10, *reprinted in* 1996 U.S.C.C.A.N. 2905 [hereinafter H.R. REP. No. 104-664.]

[15] *Sen. Hearing, supra* note 13, at 23-35 (statement of Lynn D. Wardle); *id.* at 19–23 (statement of Gary L. Bauer, Pres., Family Research Council); *id.* at 42–48 (statement of Cass R. Sunstein, Prof., Univ. of Chicago); *id.* at 214 (statement of Jay Alan Sekulow). *H.R. Hearings, supra* note 12, at 62 (statement of Jay Alan Sekulow); *id.* at 158 (Statement of Lynn D. Wardle); *id.*, at 87–117 (statement of Hadley Arkes, Prof., Amherst Coll.); *id.* at 149–57 (statement of Maurice J. Holland, Prof. of Law, Univ. of Oregon Sch. of Law).

[16] *See* H.R. REP. No. 104-664, *supra* note 14, at 10-12.

Our Federalism.[17] In 1996, the Department of Justice under President Clinton twice avowed that DOMA was constitutional,[18] a conclusion that this Court should confirm today.

SUMMARY OF ARGUMENT

Federalism entered into the Second Circuit's opinion in *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012) at several points in its Equal Protection analysis of Section Three of DOMA. However, the court misstated the meaning and operative effect of DOMA, and misunderstood and misapplied the applicable federalism principles in every instance.

First, the appellate court below erred and misconstrued Section Three of DOMA when it described it as "an unprecedented intrusion 'into an area of traditional state regulation'" and as "an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity . . . ." (699 F.3d at

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[17] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

[18] Letter dated May 14, 1996 from Andrew Fois, Assistant Attorney General, U.S. Department of Justice to Hon. Henry J. Hyde, Chairman, Committee on the Judiciary of the U.S. House of Representatives, *quoted in* H.R. REP. No. 104-664, *supra* note 14, at 33-34; Letter dated May 29, 1996 from Ann M. Harkins (For Andrew Fois, Assistant Attorney General) to Hon. Charles T. Canady, Chairman, Subcommittee on the Constitution Committee On the Judiciary of the U.S. House of Representatives, *quoted in* H.R. REP. No. 104-664, *supra* note 14, at 34.

186.[19]) In fact, Section Three of DOMA does not intrude upon state domestic relations law regarding marriage at all, nor does it attempt to regulate it or alter it in any way. Section Three applies only to federal laws, regulations, programs, and agencies. This is explained in Part I of the Argument, *infra*.

Second, the Second Circuit (699 F.3d at 185-86) in that decision displayed an erroneous understanding of the constitutional principle of federalism as applied to family law. The Constitution reserves to the states primacy of authority—"virtually exclusive" authority—to regulate domestic relations in the states, notably the creation, dissolution and local incidents of domestic relationships. The Constitution confers on Congress the authority to define and regulate the legal effects of state-created domestic relationships for purposes of federal laws such as those relating to immigration, taxation, and social security, and other federal benefits. Congress' well-established and long-exercised authority to regulate and define relationships within and for purposes of the federal sphere of regulation is no less important to constitutional federalism than is the states' authority to create and regulate domestic relationships *qua* domestic relationships and for purposes of their state law incidents. This is explained in Part II of the Argument, *infra*.

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[19] The court quoted and cited "*Massachusetts* [*v. U.S. Dep't of HHS*], 682 F.3d [1 (1st Cir. 2012)] at 13" for the phrase "into an area of traditional state regulation."

Third, the Second Circuit's brief statement of the history of federalism as applied to the definition of marriage for purposes of federal law is inaccurate and incomplete. The history there presented neglects to attend to more than two centuries of federal statutes, regulations, and programs created by Congress that have defined terms like "marriage" and "spouse" for purposes of federal law. This is explained in Part III of the Argument, *infra*.

Fourth, the opinion of the court below ignores numerous federal court rulings (including many by this Court) that have upheld Congress' actions in both establishing limitations on and definitions of marriage and governing marital incidents for purposes of federal law. This is explained in Part IV of the Argument, *infra*.

In short, in its *Windsor* opinion below (699 F.3d 169), the Second Circuit plainly implies that federal law should always defer to state law. ("Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations." *Windsor,* 699 F.3d at 185.) As will be shown below, this is not the case. If conformity to state law and usage were to be required, then it nevertheless seems that at present DOMA survives, because the vast majority of the states define "marriage," some of them by constitutional provision, to mean what DOMA says it means.

ARGUMENT

I.

THE SECOND CIRCUIT ERRONEOUSLY HELD THAT SECTION THREE OF DOMA INTRUDES UPON STATE REGULATION OF MARRIAGE AND VIOLATES PRINCIPLES OF FEDERALISM; HOWEVER, DOMA DOES NOT REGULATE OR APPLY TO STATE LAWS AND PROGRAMS, BUT IT APPLIES ONLY TO FEDERAL LAWS, REGULATIONS, PROGRAMS, AND AGENCIES

The Second Circuit discussed federalism several times in its Equal Protection analysis in *Windsor*. It characterized DOMA as "an unprecedented intrusion 'into an area of traditional state regulation.'" *Windsor*, 699 F.3d at 186.[20] The Second Circuit further declared that "DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity . . . ." 699 F.3d at 186.

This discussion by the Second Circuit court betrays a lack of understanding of the meaning of Section Three of DOMA and of its operation and effect. Section Three of DOMA does *not* regulate or apply to *state* domestic relations law regarding marriage, but only

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[20] The court quoted and cited "*Massachusetts* [*v. U.S. Dep't of HHS*], 682 F.3d [1 (1st Cir. 2012)] at 13" for the phrase "into an area of traditional state regulation."

applies to *federal* laws, regulations, programs, and agencies.

The text of Section Three of DOMA is unmistakable in its application to federal laws and programs only. It reads:

> 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.[21]

The text could hardly be clearer. The first two clauses of Section Three define the scope of application of the definition of marriage (the third clause) of Section Three: it applies to (and only to) "Act[s] of Congress" and to the rulings, regulations, and interpretations "of the various bureaus and agencies of the United States." It does not apply to state law. It does not intrude in any way (let alone as an "unprecedented intrusion") into state law or apply to any state's regulation of domestic relations.

The opinion of the Court of Appeals does not cite a single case that has applied Section Three to state law, nor does it offer any other example to support its claim

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[21] 1 U.S.C. § 7 (2006) (emphasis added).

that Section Three intrudes upon state law. That is because there is no case or example to cite.

The legislative history shows that Congress intended Section Three to apply to federal laws and programs only, not to the states. As the House Report explained: "Section 3 defines the terms 'marriage' and 'spouse,' *for purposes of federal law only* . . . ."[22]

The need to enact Section Three arose out of Congress' concern that "a decision by one State to authorize same-sex 'marriage' would raise the issue of whether such couples are entitled to federal benefits that depend on marital status. [DOMA] anticipates these complicated questions by laying down clear rules to guide their resolution."[23]

The House Report noted that legalization of same-sex marriage by any state "could also have profound implications for federal law" because "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times."[24] Congress was aware that those terms seldom were defined in federal law, and that for purposes of federal law, the state meanings of "marriage" and "spouse" generally had been used. Because "none of the federal statutes or regulations that use the words 'marriage' or 'spouse'

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[22] H. REP. 104-664, *supra* note 14, at 2 (emphasis added).

[23] *Id.*

[24] *Id*. at 10.

were thought by even a single Member of Congress to refer to same-sex couples,"[25] Congress intended to protect the established, intended meaning of those terms in federal law.

Moreover, because of the traditional and general practice of treating as married for purposes of federal law persons deemed married by state law, a redefinition of marriage by a state to include same-sex couples might be imported into federal law, "mak[ing] such couples eligible for a whole range of *federal rights and benefits*."[26] Indeed, the House Report cited "literally hundreds of examples" of attempts to interpret "spouse" and "marriage" in various federal laws to include same-sex couples.[27]

Thus, by enacting Section Three of DOMA, Congress intended to prevent state-dictated expansion of the scope and expense of federal laws and benefit programs.[28] Congress also intended to prevent the alteration of the structures, purposes and effects of federal laws and programs by state legalization of same-sex marriage.[29] That is consistent with one of the

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[25] *Id.*

[26] *Id.* (emphasis added.)

[27] *Id.* at 10-11.

[28] *Id.* at 18 ("they do impose fiscal certain fiscal obligations on the federal government").

[29] *Id.* at 10-11 (stating that one state's laws "could have profound practical implications for federal law" and that "Section 3 of H.R.

major concerns of the drafters of the Constitution of the United States, who in 1787 were very concerned about possible state intrusions upon federal law.[30]

There is no hint in the text or legislative history of DOMA Section Three that it was intended to apply to or to alter any state's law as to marriage. Likewise, there is no evidence that Section Three has ever been applied to alter any such state law. Rather, the meaning and scope of DOMA is clear. It was intended only to regulate, and has been applied only to regulate, the meaning of "marriage" and "spouse" in federal laws, federal regulations, and the actions of federal agencies.[31]

3396 responds to these considerations").

[30] Wardle, *Section Three, supra* note 2 at 957 ("Today, it is easy to forget in 1787 the Founders—at least the Federalists, who supported the proposed United States Constitution—were more concerned it would 'be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities'"), *citing* THE FEDERALIST NO. 7 (Alexander Hamilton) (Clinton Rossiter ed. 1967)).

[31] *See generally* Wardle, *Involuntary Imports, supra* note 2, at 805.

II.

THE SECOND CIRCUIT ERRED IN HOLDING THAT SECTION THREE OF DOMA VIOLATES PRINCIPLES OF FEDERALISM BECAUSE FEDERALISM INCLUDES AND PROTECTS THE AUTHORITY OF CONGRESS TO DEFINE WHO IS ELIGIBLE FOR FEDERAL PROGRAMS AND FEDERAL BENEFITS, AND TO DETERMINE WHO IS SUBJECT TO FEDERAL LAWS AND DUTIES

The Second Circuit held that because the regulation of domestic relations, and specifically of marriage, "is 'a virtually exclusive province of the States,'" Congress violated a principle of federalism by enacting Section Three of DOMA. *Windsor*, 699 F.3d at 185-86.[32]

This discussion of federalism by the Second Circuit reveals a misunderstanding of the constitutional principle of federalism in family law. Federalism does not prevent (and for two centuries has not prevented) Congress from declining to adopt state law doctrines and definitions relating to marriage and other domestic relationships. Under the Constitution, federalism regulates the relationship between the two levels of government by recognizing the federal government and each of the states as sovereign in some ways. For over one hundred fifty years this Court has emphasized that the states possess primacy of sovereign, constitutional ("virtually exclusive") authority to regulate domestic

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[32] For the phrase "a virtually exclusive province of the states," the court quoted and cited "*Sosna* [*v. Iowa*, 419 U.S. 393 (1975)] at 404."

relations (the creation, dissolution, and state-law incidents of domestic relationships *qua* domestic relationships).[33] On the other side, constitutional federalism confers and preserves Congress' authority to regulate the status and legal effects of state-created domestic relationships in and for purposes of federal law (such as for immigration, taxation, federal benefits, etc.) by, *inter alia*, defining who is eligible (or ineligible) to be treated as married (or as in some other family relationship) for such purposes. Congress' authority to regulate and define relationships within and for purposes of the federal sphere is no less important to constitutional federalism in family law than the states' authority to regulate domestic relationships *qua* domestic relations in the States.

DOMA Section Three protects and reflects what Alexander Hamilton described as "the constitutional equilibrium between the general and the State governments."[34] Just as a state may decline to treat a couple as married even though the couple has been treated as married for some purposes of federal law, so also may Congress decline to recognize a couple as

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[33] *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975). *See also Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

[34] THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

married even though they are deemed lawfully married under the law of some state.[35]

Federal laws are filled with examples of congress' definition and regulation of family relationships—for the purposes of federal law. For example, persons who are lawfully married under state law, but are legally separated, are not treated as married for purposes of federal income tax law,[36] and a couple who consistently divorced at the end of the year to obtain single status for tax filing purposes, but remarried early in the following year, is considered married even though they are deemed unmarried at the relevant time for purposes of state domestic relations laws.[37]

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[35] *Lutwak v. United States*, 344 U.S. 604, 611 (1953); id. at 620–23 (Jackson, J., dissenting); *see also Adams v. Howerton*, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (validity of marriage under state law irrelevant to INS's authority to inquire into marriage for immigration purposes).

[36] 26 U.S.C. §§ 7703(a)(2), (b) (2006) (definitions of marital status); *id*. § 71(b) (definitions of alimony). *See* Wardle, *Section Three*, *supra* note 2, at 974-76.

[37] *Id., citing* Rev. Rul. 76-255, 1976-2 C.B. 40. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 714–15 (2009) (*discussing Nihiser v. Comm'r*, 95 T.C.M. (CCH) 1531 (2008); *Perkins v. Comm'r*, 95 T.C.M. (CCH) 1165 (2008); *Proctor v. Comm'r*, 129 T.C. 92 (2007); 73 Fed. Reg. 37,997 (July 2, 2008)).

While Congress often intends that state marriage law be used also in federal law, on some occasions Congress has chosen to take a different approach and apply its own standards or definitions as to domestic relationships.

> Congress's authority to enact domestic relations legislation that contradicts, supersedes, and overrides state domestic relation law is clear. In fact, in both *Hisquierdo [v. Hisquierdo*, 439 U.S. 572 (1979)] and *McCarty* [*v. McCarty*, 453 U.S. 210 (1981)] the Court concluded that federal statutes and rules governing the interests of family members in federal benefits were inconsistent with state domestic relations laws, and, as a result, superseded and replaced those state domestic relations laws for purposes of determining the federal benefits.[38]

It is a question of Congress' intention. It must be clear that Congress intended to supersede the state law on the specific point or issue in question for purposes of federal law. Section Three of DOMA is crystal clear about that. Congress clearly intended that the terms "marriage" and "spouse" when used in federal law mean only the union of a man and a woman.

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[38] Wardle, *Involuntary Imports, supra* note 2, at 783-84.

III.

THE SECOND CIRCUIT ERRED IN HOLDING THAT CONGRESS LACKS CONSTITUTIONAL AUTHORITY TO DEFINE MARRIAGE IN SECTION THREE OF DOMA BECAUSE FOR CENTURIES CONGRESS HAS ENACTED SIMILAR STATUTES DEFINING DOMESTIC RELATIONSHIPS AND THEIR INCIDENTS FOR PURPOSES OF FEDERAL LAW

The Second Circuit opinion in *Windsor* ignored entirely over two centuries of federal statues, regulations and programs that have defined terms like "marriage" and "spouse" and the meaning and operative effects and incidents of those relationships for purposes of federal law. The opinion of the appellate court in *Windsor* below ignored the long record of Congress enacting statutes that define, shape, and craft family relationship terms for purposes of federal law.

An eruption of scholarship, much of it quite recent, has documented irrefutably that from the earliest days of the United States of America Congress and other federal officials often exercised federal law-making authority to define domestic relations and their legal incidents for purposes of federal law.[39] Examining

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[39] *See generally* Lynn D. Wardle, *Involuntary Imports, supra* note 2, at 776-87 (*citing* Hendrik Hartog, MAN AND WIFE IN AMERICA: A HISTORY 258–77 (2000); Theda Skocpol, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States'*

historical sources of the pre-Civil War era, Kristin Collins has shown "how national-level actors of that period exercised their authority to regulate and adjudicate matters involving domestic relations."[40] Her research into federal law before 1861 that dealt with family relations

> reveal[s] two important things about the early history of federal regulations concerning domestic relations. First, ... during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families, whether it was the creation and administration of widows and orphans' war pensions, the regulation of married women's citizenship, or—perhaps most surprisingly—the

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Rights, 26 CARDOZO L. REV. 1761, 1764-65, nn. 14, 16 & 18 (2005) (tracing pre-Civil War federal regulation of family relationships) (*citing* Nancy F. Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 258–77 (2000)); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1379–86 (1998) (arguing that the federal government has heavily regulated domestic relations since Reconstruction); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1717–29 (1991); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998–1003 (2002); Wardle, *Who Decides?*, *supra* note 2, at 172–76.

[40] Collins, *supra* note 39, at 1765.

> resolution of an array of domestic relations issues in federal court, often pursuant to uniform federal standards . . . . [F]ederal law-makers and jurists recognized the important connection between republicanism (as they understood that concept) and domestic relations . . . . [H]istorical sources demonstrate that national jurists and lawmakers played a role in the process, slow and halting as it was, of examining and sometimes even displacing the hierarchical principles that were part and parcel of the common law of domestic relations.[41]

Federal laws were enacted that defined and regulated federal incidents of family relations in many areas over which the federal government exercised predominant lawmaking authority including for matters of federal pensions, citizenship, and federal equity principles, and these laws often displaced state domestic relations and inheritance laws.[42] "[F]ederal actors would not shy from asserting, or even creating, federal citizenship [and pension] laws and regulations [and equity principles] that directly impacted the scope and effect of domestic relations law and policy."[43]

Thus, for about two centuries Congress has been exercising constantly its constitutional authority to

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[41] *Id*. at 1767-68.

[42] *Id*. at 1777-1843.

[43] *Id.* at 1815–17. *See generally* Wardle, *Involuntary Imports*, *supra* note 2 at 786-87.

define and regulate domestic relations status, incidents, and effects for the purposes of federal laws and programs. Congressional enactments dealing with veterans' pensions (from the time of the Revolutionary War), taxes, immigration, bankruptcy, homesteading, other federal land laws, the census, copyright, and polygamy in the federal territories and in the states have defined domestic relationships in not a few cases inconsistently with the laws of some states.[44] Similarly, "a long line of statutes and cases involving federal programs have rejected application of state community property law—part of domestic relations law [of the states]."[45]

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[44] Wardle, *Section Three, supra* note 2, at 974-81 (citing federal statutes, regulations and cases interpreting them); *see also* Wardle, *Who Decides? supra* note 2, at 174-75; Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382 (2009); *see further* UTAH CONST., art. 3, §1 (prohibiting polygamy forever—a ban imposed by the federal government as a price for statehood).

[45] Wardle, *Section Three, supra* note 2, at 975, *citing Boggs v. Boggs*, 520 U.S. 833, 854 (1997) (stating that questions under the Employee Retirement Security Act (ERISA) are not controlled by state community property law); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989) (military retirement pay waived in order to collect veterans' disability benefits governed by Uniformed Services Former Spouses' Protection Act (USFSPA), not community property law); *McCarty v. McCarty*, 453 U.S. 210, 232–33, 236 (1981) (*citing Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979), *superseded by* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982) (codified as amended at 10 U.S.C. § 1408 (2006)) (military retirement pay governed by federal law, not community property law)); *Hisquierdo*, 439 U.S. at 582, 590 (railroad retirement assets governed by federal law, not community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309

That pattern of Congressional action, defining domestic relationship terms for purposes of federal law, continues today apart from Section Three of DOMA. For example, the very next section of the federal code following 1 U.S.C. § 7 (the section of DOMA at issue herein) defines the term "child," another family relationship term, for general purposes in federal law.[46] For immigration purposes, the Immigration and Naturalization Act also specifically defines the word "child" for purposes of immigration benefits and waivers of inadmissibility to include, *inter alia*, a "child born in wedlock,"[47] "a stepchild,"[48] a "child legitimated under the law of the child's . . . or . . . father's residence or domicile,"[49] and a child adopted before age sixteen (with other limitations).[50] The Copyright Act defines "a

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(1964) (United States Savings Bonds governed by federal law, not community property law, unless fraud involved); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (beneficiary of policy governed by National Service Life Insurance Act, not community property laws).

[46] 1 U.S.C. § 8(a) (2006). *See generally* Wardle, *Involuntary Imports, supra* note 2, at 807-08.

[47] 8 U.S.C. § 1101(b)(1)(A) (2006).

[48] 8 U.S.C. § 1101(b)(1)(B) (2006).

[49] 8 U.S. C. § 1101(b)(1)(C) (2006).

[50] 8 U.S.C. § 1101(b)(1)(E)-(G) (2006). *See generally* Scott Titshaw, *Sorry Ma'am, Your Baby Is An Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 59 (2010)

person's children,"[51] and the Family and Medical Leave Act defines "parent" for purposes of that federal legislation.[52]

A few of the many other examples resulting from this pattern of congressional action include these, dealing expressly with the terms "marriage," "husband," and "wife":

- An Act Supplementary to an Act Entitled "An Act to Grant Pensions," Approved July Fourteenth, Eighteen Hundred and Sixty-Two, ch. 247, sec. 14, 13 Stat. 387, 389 (July 4, 1864) (codified at R.S. §4773) (widows of colored soldiers who have been killed or died or are killed or die of wounds received in battle or disease contracted in U.S. military service, and in the line of duty, may receive pensions "without other proof of marriage than that the parties had habitually recognized each other as man and wife, and lived together as such for a definite period next preceding the soldier's enlistment, not less than two years ....");

- A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States, ch. 29, 13 Stat. 571 (Mar. 3, 1865) (codified at R.S. §2037) (the wife and children of any man in the military or naval services of the United States are forever free, and in determining who is or was the wife of an

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[51] 17 U.S.C. § 101 (1976).

[52] 29 U.S.C. § 2611(7) (2012).

enlistee, "evidence that he and the woman claimed to be his wife have cohabited together, or associated as husband and wife, and so continued to cohabit or associate at the time of the enlistment, or evidence that a form or ceremony of marriage, whether such marriage was or was not authorized or recognized by law, has been entered into or celebrated by them, and that the parties thereto thereafter lived together, or associated or cohabited as husband and wife, and so continued to live, cohabit, or associate at the time of the enlistment, shall be deemed sufficient proof of marriage for the purposes of this act");

- Immigration Act of 1924 ("An act to limit the migration of aliens into the United States..." (approved May 26, 1924), The Statutes at Large of the United States of America, from December, 1923 to March, 1925. Vol. XLII, Part 1, pp. 153-169 at § 28 ("The terms 'wife' and 'husband' do not include a wife or husband by reason of a proxy or picture marriage").

Congressional enactments like the above are legion, often dealing with domestic relationships, sometimes with provisions that are inconsistent with the laws of some of the states. Thus, the appellate court ruling in *Windsor* that DOMA Section Three exceeds Congress' legislative authority in violation of the constitutional principle of federalism is mistaken.

IV.

THIS COURT, AND MANY OTHER FEDERAL COURTS, LONG HAVE UPHELD FEDERAL LEGISLATION REGULATING THE MEANING, INCIDENTS, AND EFFECTS OF DOMESTIC RELATIONSHIPS FOR PURPOSES OF FEDERAL LAWS

The court below neglected to take account of the holdings of numerous federal courts (including many holdings of this Court) that have upheld federal statutes and regulations which apply definitions of domestic relationships divergent from those in state law or which establish, for federal law purposes, divergent legal effects to domestic relationships.

For example, *McCune v. Essig*, 199 U.S. 382 (1905), involved a dispute between a mother and daughter over land settled by their husband/father under the federal homestead law. The father had died shortly after making his homestead claim, and his widow and daughter continued to reside on the land. The widow remarried, filed proof of compliance, and received a homestead patent to the property.[53] The daughter later contested her mother's claim, invoking the state law "doctrine of relation," under which a beneficial interest would have passed to her that would have been recognized under state probate law.[54] The Supreme Court of the United States rejected application of state

[53] *McCune,* 199 U.S. at 387.

[54] *Id*. at 388.

law because "[t]he words of the [Homestead Act] are clear," and even though the Act was contrary to state law, it was controlling on the issue.[55] Citing cases going back to 1839, the Court rejected the daughter's reliance upon state family law to determine her share of the federal homestead property. The Court based its decision squarely upon federal law despite its inconsistency with state domestic relations law.[56] Many earlier decisions of the Supreme Court took the same approach, applying federal law concerning family relationships and resulting rights over state family law.[57]

Likewise, in *Lutwak v. United States*[58] this Court reconfirmed that congressional intent governs the meaning of, and requirements for, valid marriages for purposes of federal law. *Lutwak* concerned the alleged

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[55] *Id*. at 389.

[56] *Id.* at 390 ("[Her argument] is but another way of asserting the law of the State against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose").

[57] *See Bernier v. Bernier*, 147 U.S. 242, 247 (1893) (homestead land passes to all children, not just minors); *Maynard v. Hill*, 125 U.S. 190, 215 (1888) (rejecting children's claim to homestead land because recognition of father's ex parte territorial legislative divorce "will carry out the intent of Congress."); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (after title under federal law passes and is established under federal law, its conveyance and related ownership questions are governed by state law).

[58] 344 U.S. 604 (1953). *See generally* Wardle, *Involuntary Imports*, *supra* note 2, at 784-86.

"green card" marriages of three Polish refugees (two brothers and the wife or former wife of one of them) who were living in France as refugees following World War II. The brothers' sister, who lived in Illinois, allegedly arranged for three honorably discharged veterans—two women and one man—to travel to Paris, contract pretend marriages with the three relatives, and bring them into the United States under the War Brides Act. The three refugees and their veteran "spouses" celebrated their marriages properly in France, but allegedly never consummated their marriages nor lived together in the United States. They were all convicted of conspiracy to defraud the United States and of violating federal immigration laws based on their apparent "sham" marriages.

The convicted defendants argued that their marriages were valid. The three dissenting Justices in the case, Justices Jackson, Black and Frankfurter, agreed: "We start with marriages that either are valid or at least have not been proved to be invalid in their inception. . . . If the parties are validly married, even though the marriage is a sordid one, we should suppose that would end the case."[59] They added: "These marriages were formally contracted in France, and there is no contention that they were forbidden or illegal there for any reason."[60]

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[59] *Id.* at 620–21 (Jackson, J., dissenting).

[60] *Id.* at 620 (Jackson, J., dissenting); *see also id.* at 610 (majority opinion) (explaining that "[a]t the trial, it was undisputed that [the parties] had gone through formal marriage ceremonies").

However, Justice Minton, writing for the majority of six members of the Court, acknowledged the petitioners "contend that even under American law these marriages are valid."[61] Thus, they argued for recognition of the validity of the French marriages both as a matter of horizontal marriage recognition law (respect for the coequal sovereignty of France required the courts of the United States to recognize the validity of those marriages) and also as a matter of vertical choice of law (that, under the law of the relevant American states, their marriages were valid, probably because those states would recognize the validity of the French marriages).[62] Like the Second Circuit in this case, they claimed recognition of the validity of their marriages as a matter of federalism.[63]

However, the Court rejected those arguments; the validity of the marriages under French or Illinois' (or other states') law was irrelevant. "We do not believe that the validity of the marriages is material. . . . We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States."[64] For the majority, the issue was one of federal immigration and criminal

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[61] *Id.* at 611 (majority opinion); *see also id.* at 610.

[62] *See id.* at 610–11.

[63] *See id.*

[64] *Id.* at 611.

conspiracy law, not Illinois or French marriage law.[65] The definition of marriage for purposes of interpreting the federal immigration laws was entirely a matter for Congress to determine. Thus, the Court held that case turned on the intent of Congress, and the Court was obliged to follow Congress's intent regarding what kind of marriages were to be recognized for purposes of federal immigration and related criminal conspiracy laws. The Court observed:

> By directing in the War Brides Act that 'alien spouses' of citizen war veterans should be admitted into this country, Congress intended to make it possible for veterans who had married aliens to have their families join them in this country without the long delay involved in qualifying under the proper immigration quota. Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages . . . . The common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien spouses' . . . is that the two parties have undertaken to establish a life together and assume certain duties and obligations.[66]

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[65] *See id.* ("No one is being prosecuted for an offense against the marital relation."). *But see id.* at 620–21 (Jackson, J., dissenting) (explaining that the validity of the marriage "goes to the very existence of an offense" because if the marriages "were merely voidable and had not been adjudged void at the time of the entry into this country, it was not a fraud to represent them as subsisting").

[66] *Id.* (majority opinion) (emphasis added).

Lutwak continues to be not only good law, but also a definitive affirmation and example of the power that Congress and the federal government generally have to define and regulate marriage for purposes of federal law.[67] As with the federal laws in *Lutwak*, DOMA Section Three controls the meaning of "marriage" in federal law, even though it differs from the law of the nine states that have legalized same-sex marriage.

CONCLUSION

The United States Court of Appeals for the Second Circuit based its decision in *Windsor* upon an erroneous interpretation of DOMA Section Three. That section bars the recognition of same-sex marriages for purposes of federal statutes and regulations and the policies of the federal agencies. That Section does not apply, as te court below suggested, to state domestic relations law. The court below further erred in holding that Congress violated principles of federalism by enacting Section Three of DOMA when its doing so was clearly within the constitutional authority of Congress, the history of the acts of Congress, and the prior

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[67] *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 543 n.15 (2010) (noting that *Lutwak* still controls); Marcel De Armas, Comment, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL'Y & L. 743, 753–54 (2007) (advocating the *Lutwak* test for foreign marriage validity). *But see* Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 43–44 (2006) (arguing that the right to marry should override *Lutwak*).

decisions and opinions of this Court. Therefore, respectfully, *amici* request this Court to reverse the decision of the Court of Appeals and uphold as constitutional Section Three of DOMA.

Respectfully submitted this 24th day of January 2013.

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