



## **How DOMA Hurts Americans: A Summary of the GAO Reports<sup>1</sup> on Section 3 of the Federal Defense of Marriage Act**

### **Executive Overview**

The Defense of Marriage Act (DOMA) was enacted in 1996, before any state began issuing marriage licenses to same-sex couples. DOMA has two substantive parts:

- Section 2 permits states to disregard the marriages of same-sex couples, even when the marriage is legally recognized in another state.
- Section 3 of DOMA provides a definition of “marriage” and “spouse” for purposes of all federal laws and programs. It states: “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 the legal union of a man and a 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.” 1 U.S.C. § 7.

This Summary focuses on Section 3 of DOMA and how it harms married same-sex couples in any of the states where their marriages are licensed or recognized in whole or in part. The federal government does not license marriages; it has always deferred in the past to a state’s determination of a person’s marital status to determine eligibility for the protections and responsibilities in those federal laws and programs that affect married persons. But DOMA overrides a state’s determination that a person is married, thus rendering spouses in a same-sex couple “single” and disqualifying them from federal spousal protections and responsibilities across the board.

The federal programs to which same-sex married couples are denied equal access represent some of the critical legal safety nets that couples count on when they marry, as they plan their lives and futures together, as they raise children and deal with hard times, and for which they contribute their U.S. tax dollars. In particular, this document addresses how:

- DOMA Threatens the Security of our Senior Citizens.
- DOMA Adds Costs to Businesses, Employers and Employees.
- DOMA Discriminates Against Taxpayers.
- DOMA Disserves Our Service Members and Veterans.
- DOMA Tears Apart Families and Hurts Children.

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<sup>1</sup> Report of the United States General Accounting Office, GAO/OGC-97-16, Defense of Marriage Act (Jan. 31, 1997), at 1, available at <http://www.gao.gov/archive/1997/og97016.pdf>. In 2004, the Government Accountability Office updated its 1997 Report and found 1,138 federal laws implicated by DOMA. Rep. “GAO-04-353R Defense of Marriage Act - Update to Prior Report” (Jan. 24, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

Not surprisingly, some federal marital benefits are premised on the expectation that spouses mutually support one another and thus impose financial responsibilities on spouses. Benefits like Supplement Security Income, Medicaid and Medicare are “means tested” so that a spouse’s income is included as part of the recipient’s income in assessing financial eligibility for the program. Yet, due to DOMA, married same-sex couples do not face the same limitations as other married beneficiaries of these programs because the federal government ignores their marriages. Part of the reason why the Congressional Budget Office estimated that the federal government would save \$1 billion each year through 2014 if the federal government recognized marriages of same-sex couples nationwide is because of projected savings in those very programs, even as the federal government might spend more in areas such as Social Security and Federal Employee Health Benefits.

Some marital protections are non-pecuniary, but still critically important for those who need them. For instance, married persons enjoy the right under federal law to invoke the marital confidences and spousal privileges in federal court, *see* Fed. R. Evid. 501, the right to sponsor a non-citizen spouse for naturalization, *see* 8 U.S.C. § 1430, and to obtain conditional permanent residence for that spouse, *id.* § 1186b(2)(A).

Finally, married persons are also subject to a number of legal obligations, such as conflict-of-interest rules governing federal employment and participation in federally funded programs, *e.g.*, 5 U.S.C. § 3110, and restrictions on employment with or appointment to the judiciary, *see* 28 U.S.C. § 458.

## **I. DOMA Threatens the Security of Our Senior Citizens.**

DOMA exacts substantial costs to older Americans as they near and enter retirement by stripping away the federal safety net that our senior citizens have depended on for generations to grow old with dignity and security.<sup>2</sup>

### **Social Security:**

The Social Security program was created to provide for workers and retirees in their old age as well as to ensure that a worker’s family will have money to live on if the worker dies or becomes disabled. People are eligible for these invaluable protections only if they have paid into the system for a sufficient amount of time. DOMA denies the following protections to gay and lesbian retirees and widows/widowers.

- **Social Security Disability Benefits:** If a worker is eligible for disability benefits, a spouse and also a divorced spouse may qualify for up to 50% of the disabled worker’s benefit amount.<sup>3</sup>
- **Social Security Spousal Benefit:** When two people are retired and collecting Social Security, a lower earning or non-earning spouse can increase his or her benefit by up to one half of the higher earner’s payment by virtue of their marriage, as long as they meet age requirements and have been married at least 9 months.<sup>4</sup>

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<sup>2</sup> DOMA’s impact on Medicaid and Medicare is beyond the scope of this summary.

<sup>3</sup> 42 U.S.C. § 402 (b), (c).

<sup>4</sup> 42 U.S.C. § 402 (b), (c). *See also* Social Security Online, Benefits for your spouse, <http://www.socialsecurity.gov/retire2/yourspouse.htm>.

- Social Security Benefit for Surviving Spouse: After death, an individual with a lower Social Security payment may receive his or her spouse's higher benefit, instead of his or her own benefit, as long as they are at least 60 years of age, had been married at least 9 months, and are not currently married to someone else.<sup>5</sup> Even a divorced spouse benefits from this protection.<sup>6</sup>
- Social Security One Time Death Benefit: This is a one-time lump sum payment made to the surviving spouse or, if no surviving spouse exists, to a minor child of the deceased insured worker.<sup>7</sup>

#### Retirement benefits:

DOMA strikes at the heart of private spousal retirement protections. Most private retirement plans (whether provided by an employer or employee organization) are subject to a federal law known as ERISA (Employee Retirement Income Security Act) and the federal Internal Revenue Code.<sup>8</sup> ERISA provides substantive rights to spouses.<sup>9</sup>

- Qualified Joint and Survivor Annuity (QJSA): Under ERISA, the default method of distribution to an employee with a defined benefit or money purchase pension plan is the joint and survivor annuity, unless the spouse affirmatively waives his or her right to receive the survivor annuity.<sup>10</sup> Such an annuity provides a benefit to the retiree during his or her life, and then continues the benefit as an annuity paid to the surviving spouse in the amount of at least 50% and not more than 100% of what the retiree received during his or her lifetime.<sup>11</sup> These annuity and spousal waiver protections are not required to be available to married same-sex couples and non-spousal annuitants, although an employer may draft a plan to provide annuity options with non-spousal annuitants.
- Qualified Pre-retirement Survivor Annuity (QPSA): Under ERISA, when an employee vested in a defined benefit or money purchase pension plan dies before retirement, an opposite-sex surviving spouse must be offered a QPSA, unless the spouse affirmatively waives his or her right to receive the QPSA. A QPSA generally is a 50% survivor annuity for the life of the surviving spouse. As with the QJSA, the QPSA and spousal waiver protections are not required to be available to married same-sex couples and non-spousal annuitants, although an employer may draft a plan to permit same-sex couples and non-spousal annuitants to receive a pre-retirement survivor annuity.
- Required Minimum Distributions: The tax law provides favorable treatment to a spousal beneficiary of most forms of retirement plans, allowing the spouse to defer the payment of death benefits (and associated taxes) from a decedent's plan until the spouse attains

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<sup>5</sup> 42 U.S.C. § 402 (e), (f).

<sup>6</sup> *Id.*

<sup>7</sup> 42 U.S.C. § 402 (i).

<sup>8</sup> 29 U.S.C. §§ 1001 et seq.; *see also* Health Plans and Benefits, <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

<sup>9</sup> 29 U.S.C. § 1002 (2) (employee pension benefit plan). The substantive rights include the right to: (1) approve, with respect to certain types of retirement plans, the method of distribution to the participant; (2) receive benefits in the event of the participant's death as a default beneficiary; and (3) share in the participant's benefits in the event of a divorce or legal separation.

<sup>10</sup> 29 U.S.C. § 1055. *See also* 26 U.S.C. § 417 (spouse may consent to a different form of benefit, such as a lump sum payment).

<sup>11</sup> 29 U.S.C. § 1055(d); 26 U.S.C. § 417(b).

age 70½.<sup>12</sup> In contrast, because of DOMA, a surviving spouse of the same-sex whose decedent spouse was older will be required to commence distributions earlier than an opposite sex spouse, resulting in accelerated income and a loss of a valuable tax-deferral opportunity.

- Benefits Upon Divorce: As a general matter, benefits from a retirement plan that is subject to ERISA are reserved to the employee/retiree.<sup>13</sup> But if that employee or retiree divorces, the retirement assets may be viewed as marital property and some or all may be awarded on a tax-free basis to a non-employee (former spouse) through a “Qualified Domestic Relations Order” (QDRO).<sup>14</sup> Such an order is a court decree that relates to child support, alimony payment or marital rights of a former spouse. A procedure for allowing for the tax-free division of an IRA upon divorce or legal separation is also available.<sup>15</sup> In each case, after any transfer, the non-employee spouse becomes responsible for income taxes on distribution.

Because of DOMA, same-sex couples have no access to a QDRO or other procedure for dividing retirement benefits upon divorce, making it difficult to fairly divide the marital property of a couple upon divorce, such as when one ex-spouse had been the primary earner and the other had primarily cared for children or other dependents.

#### Federal Civilian Retirement Benefits:

The Federal Employees Retirement System (FERS) and the Civil Service Retirement System (CSRS) provide certain retirement benefits to qualified federal retirees and their spouses, unless they are same-sex spouses.

- FERS provides automatic coverage for employees hired after 1983 and consists of a three-pronged approach to providing retirement security: Social Security, a “Basic Benefit Plan,” and a “Thrift Savings Plan.” All three of these options provide surviving spousal benefits upon the death of a qualified retiree, but do not provide benefits to a surviving spouse of the same sex as the employee.<sup>16</sup>
- CSRS covers all employees hired before 1984 who did not transfer into the FERS. It provides an annuity for a surviving spouse of an employee who died during employment<sup>17</sup> or after retirement. However, gay and lesbian surviving spouses are not covered because of DOMA.<sup>18</sup>

#### Retirement Protections with “Spousal IRA”:

Married couples filing their income taxes jointly may fund an IRA for a non-working spouse, who thus may build retirement assets even while taking time out of the workforce to care

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<sup>12</sup> 26 U.S.C. § 401(a)(9).

<sup>13</sup> 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 401(a)(13)(a).

<sup>14</sup> 29 U.S.C. § 1056(d)(3); 26 U.S.C. § 401(a)(13)(B), 414 (p).

<sup>15</sup> 26 U.S.C. § 408(d)(6).

<sup>16</sup> For more detail about FERS and Social Security in general, *see* FERS: An Overview of Your Benefits, <http://www.opm.gov/forms/pdfimage/RI90-1.pdf>.

<sup>17</sup> Retirement Facts 1: Civil Service Retirement System, at 6, <http://www.opm.gov/forms/pdfimage/RI83-1.pdf>.

<sup>18</sup> *Id.* at 7.

for children or elderly parents.<sup>19</sup> This ability does not exist for a non-income earning, same-sex spouse.

## **II. DOMA Adds Costs to Businesses, Employers and Employees.**

In 2010, 86% of full-time U.S. workers in private industry had access to medical benefits, and 74% to an employer-provided retirement plan.<sup>20</sup> DOMA harms both employers and employees, by making it more difficult and costly for businesses to provide these benefits on an equal basis to married gay and lesbian employees.

Among the spousal benefits that employers are either prohibited from providing or are unable to provide their gay and lesbian married employees without incurring substantial administrative and financial burdens, are:

- **Tax-advantaged fringe benefits:** Employers may provide a variety of fringe benefits to employees, such as allowing an employee to use pre-tax dollars to pay health insurance premiums, or to fund a “flexible spending account” which is then used to reimburse certain medical costs with pre-tax dollars.<sup>21</sup> The only persons for whom an employee can use such an account are “dependents” as defined by law, such as a spouse, a child, and other qualifying tax dependents.<sup>22</sup>

As a result of DOMA, an employee cannot use any of these tax-advantaged benefits for his or her same-sex spouse, unless the spouse qualifies as a tax dependent. A spouse in a same-sex couple will not qualify as a dependent unless a number of requirements are met, including having little or no earnings.

- **Taxation of spousal benefits:** DOMA imposes discriminatory tax treatment that burdens both employers and employees. When a married employee receives employer-provided health benefits, the value of the health insurance for the spouse, child or other qualifying tax dependent is not subject to federal income tax even though such benefits are a form of compensation to the employee.<sup>23</sup> But as a result of DOMA, that exclusion does not apply to same-sex spouses; the employer and the employee must treat the fair market value of the spouse’s coverage as taxable income to the employee.<sup>24</sup> On average, this “imputed”

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<sup>19</sup> 26 U.S.C. § 219.

<sup>20</sup> METLIFE, 8<sup>th</sup> Annual Study of Employee Benefit Trends (2010), *available at* [www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf](http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf). Typically, these benefits are offered through an “employer sponsored group health plan,” or “group health plan.” See 29 U.S.C. § 1167(1).

<sup>21</sup> See generally 26 U.S.C. § 125(a) (cafeteria plans; pre-tax treatment limited to opposite sex spouses or dependents, as defined under 26 U.S.C. § 152). Amounts received by an employee, directly or indirectly, from a health or accident plan or through a “flexible savings account” are excluded from gross income under 26 U.S.C. § 105.

<sup>22</sup> Married employees with spouses of the same sex cannot use these benefits for a spouse by using pre-tax wages unless the spouse is also a tax dependent. For these purposes, a tax dependent is someone who lives in the same household as the taxpayer and the taxpayer furnishes more than one-half of the cost of maintaining such household during the taxable year. 26 U.S.C. §§ 105, 106, 152(d).

<sup>23</sup> 26 U.S.C. § 106.

<sup>24</sup> See Private Letter Ruling (“PLR”) 200524016, 2005 PLR LEXIS 278 at \*23-24 (Mar. 17, 2005); PLR 200339001, 2003 PLR LEXIS 879 at \*\*9-11 (June 13, 2003); PLR 9850011, 1998 PLR LEXIS 1650 at\*10-13 (Sept. 10, 1998); PLR 9717018, 1997 PLR LEXIS 85 at \*11-12 (Jan. 22, 1997).

income requires that employees with partners pay \$1,069 more annually than married employees with similar coverage.<sup>25</sup>

For businesses and employers, determining and recording the amount of “imputed” income due to spousal health coverage adds administrative costs and burdens to payroll systems. There are also increased payroll taxes since employers pay a portion of federal social security (FICA) and unemployment (FUTA) taxes based on employee’s wages.<sup>26</sup>

A growing number of businesses, including Google, Credit Suisse, JetBlue, and Cisco, have begun reimbursing their gay and lesbian employees for the additional tax burden they must pay due to DOMA’s unfair treatment of their spousal health benefits as taxable income.<sup>27</sup> These companies incur even greater costs by reimbursing their employees for the federal government’s discrimination and also paying additional payroll taxes on those reimbursements.

- Family Medical Leave: The Family Medical Leave Act (FMLA) provides 12 work weeks of unpaid leave in any 12-month period to a spouse with a “serious health condition.”<sup>28</sup> Because of DOMA, FMLA does not require employers to provide the same protections for gay and lesbian employees. This defeats the FMLA’s goal of helping workers balance family and work commitments, although some employers take on the burden of crafting “workarounds” to provide access to leave.

Generally speaking, access to health coverage through a spouse’s plan is a major benefit of marriage. Unfortunately, many employers refuse to provide spousal health insurance to their gay and lesbian employees, citing DOMA as their reason.

- Health Benefits and “ERISA Plans”: Most large employers as well as unions and employee organizations provide health coverage through “self-insured” arrangements, and, under present law, are exempt from state laws regulating employee benefit plans. These self-insured entities are governed by the terms of the plan document as well as by ERISA.<sup>29</sup>

Regulation of benefit plans by ERISA rather than by state law has important consequences for married same-sex couples. In contrast to state insurance contracts that recognize same-sex spouses, self-insured plans have the discretion to provide coverage to employees with spouses of the same sex, or not to, even as they cover other married employees.<sup>30</sup> Some self-insured entities have chosen not to provide the same coverage for

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<sup>25</sup> See Center for American Progress & UCLA Williams Institute, *Unequal Taxes on Equal Benefits*, at 7 (Dec. 2007).

<sup>26</sup> *Id.* at 5-7.

<sup>27</sup> See generally <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/>.

<sup>28</sup> 29 U.S.C. § 2612(a)(1)(A)-(D). FMLA covers many, but not all employers. See, e.g. 29 U.S.C. § 2611(4)(A)(i) (FMLA applies to employer “who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”); 29 U.S.C. § 2611(2)(B)(ii) (worker is not an “eligible employee” if the employee is at a worksite with less than 50 employees and the employer has less than 50 employees within 75 miles of that worksite).

<sup>29</sup> 29 U.S.C. §§ 1001 et seq.; see also *Health Plans and Benefits*, <http://www.dol.gov/dol/topic/health-plans/erisa.htm>.

<sup>30</sup> See, e.g., New Jersey Civil Union Review Comm., First Interim Report of the New Jersey Civil Union Review Commission, February 19, 2008, <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

same-sex spouses and point to their interest in conforming to the federal definitions of “marriage” and “spouse” in DOMA as the basis for their decision.<sup>31</sup>

In addition, there are a number of health insurance-related spousal benefits that employers are otherwise required to provide to their employees on an equal basis, unless that married employee is gay or lesbian. These include:

- Continuing Health Coverage: COBRA requires private employers with 20 or more employees to offer continued coverage for a defined period of time to employees and their covered dependents under certain circumstances, such as job termination, death and divorce.<sup>32</sup> DOMA excludes married gay and lesbian couples from automatic protection, leaving it up to the individual employer to decide on continuing coverage.
- Open Enrollment Periods: Under “HIPAA” (Health Insurance Portability and Accountability Act), marriage is a “qualifying event” that allows an employee to immediately add a new spouse to his health plan if the health plan allows for spousal coverage.<sup>33</sup> Upon marriage to a spouse of the same sex, however, the employee must defer enrolling for coverage until the annual open enrollment period.
- Hardship Distributions From Retirement Accounts: In emergencies, an employee may use a pre-retirement “hardship distribution” from a retirement plan (such as a 401(k) plan) to pay a spouse’s medical expenses. Married same-sex couples facing the same emergencies do not have this automatic protection, although some employers assume the burden of crafting their plans to permit pre-tax hardship distributions for a “primary beneficiary” designated by the participant.<sup>34</sup>

Finally, due to DOMA, federal employees are denied certain spousal employment benefits, including:

- Federal Employee Health Benefits: The Federal Employees Health Benefits Program (FEHB) is the key program providing health benefits (including dental, vision, and participation in Health Care Flexible Savings Accounts, among others) to federal employees, retirees and their survivors. A “member of family” includes “the spouse of an employee or annuitant.”<sup>35</sup> Under existing law and regulations, the spouse of an employee who selects “Self and Family” coverage is automatically enrolled for purposes of the FEHB program and receives health care coverage.<sup>36</sup> All of these protections are denied to the employee for the benefit of his or her spouse of the same sex.

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<sup>31</sup> Cf. Anthony Faiola, Civil Union Laws Don’t Ensure Benefits, Wash. Post, June 30, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902201.html> (references situation where Federal Express refused to provide benefits to employees with same-sex partners in New Jersey on the basis of federal law while similarly providing benefits in California as a result of specific legislation signed into law to mandate coverage by employers doing business with the state).

<sup>32</sup> Continuation of Health Coverage-COBRA, available at <http://www.dol.gov/dol/topic/health-plans/cobra.htm>. Since COBRA is a right available through federal law, DOMA allows employers to deny COBRA continuation coverage to same-sex spouses.

<sup>33</sup> Health Insurance Portability and Accountability Act, 29 U.S.C. §§ 1181-1183. See also Portability of Health Coverage, available at <http://www.dol.gov/dol/topic/health-plans/portability.htm>.

<sup>34</sup> IRS Notice 2007-7 (Jan. 27, 2007); see also Pension Protection Act of 2006, (P.L. 109-280).

<sup>35</sup> 5 U.S.C. § 8901(5).

<sup>36</sup> FEHB For Dependents, available at <http://www.opm.gov/insure/health/eligibility/dependents.asp>. See also 5 U.S.C. §§ 8701-8914.

- Health Benefits – Continuation after Death and Divorce: Family health insurance through the FEHB program continues for the family as long as a spouse or dependent child receives a survivor benefit.<sup>37</sup> Some divorced spouses may retain FEHB coverage indefinitely as long as they pay for the coverage,<sup>38</sup> while others can retain coverage for 36 months as long as they pay the premiums and an administrative fee.<sup>39</sup>
- Family Leave: Most federal employees may use up to a total of 12 administrative workweeks of sick leave each year to care for a family member with a serious health condition. Spouses are included as family members.<sup>40</sup>
- Compensation for Work-Related Injury or Death: If a federal employee becomes disabled from a work-related injury, the employee is paid 33% of his or her salary if the employee has no dependents, and 75% if the employee does have dependents, such as a spouse.<sup>41</sup> If death results from the injury, a surviving spouse receives either 50% of the deceased employee's salary, or 45% plus another 15% for each additional child.<sup>42</sup>

### III. DOMA Discriminates Against Taxpayers.

The 2004 GAO report identifies a total of 198 statutes involving marital status and taxation.<sup>43</sup> DOMA essentially forces the IRS to ignore reality and pretend that gay and lesbian married couples are single individuals or a head of household for purposes of taxation. The following are just a few examples of how DOMA discriminates against gay and lesbian taxpayers.

#### Income Taxation:

- Filing Status: Marital status is the central consideration in determining filing status, as only married couples have the option to file joint or separate returns.<sup>44</sup> Only married couples filing jointly may pool deductions on such a return, such as the deduction for uncompensated medical expenses to meet the required threshold for a federal tax deduction.<sup>45</sup> Yet, DOMA forces gay and lesbian taxpayers to disrespect their very own marriages when they complete and sign their federal forms by requiring married same-sex couples to file their federal tax returns as unmarried persons. No one likes being compelled to tell an untruth, even if it is a lawful one.

<sup>37</sup> OPM-Federal Retirees – FAQ: Death Benefits, *available at* <http://www.opm.gov/retire/faq/post/faq4.asp#survivingspouse>.

<sup>38</sup> FEHB Continuation Coverage for Former Spouses, *available at* [http://www.opm.gov/insure/health/eligibility/former\\_spouses.asp](http://www.opm.gov/insure/health/eligibility/former_spouses.asp).

<sup>39</sup> FEHB Frequently Asked Questions About Divorce, *available at* <http://www.opm.gov/insure/archive/health/qa/qa.asp?divorce#15> (no gay or lesbian married federal employee or his or her divorced or surviving spouse has these benefits).

<sup>40</sup> 5 U.S.C. §§ 6382-6383. *See also* Sick Leave to Care for a Family Member, *available at* <http://www.opm.gov/oca/leave/HTML/12week.asp>.

<sup>41</sup> U.S. Department of Labor, Employment Standards Administration, Division of Federal Employees' Compensation, CA-11: When Injured at Work: Information Guide for Federal Employees, *available at* <http://www.dol.gov/owcp/dfec/regs/compliance/ca-11.htm>.

<sup>42</sup> 5 U.S.C. § 8133.

<sup>43</sup> Report of the United States General Accounting Office (1997), *supra* note 3, at 5-6, 11.

<sup>44</sup> 26 U.S.C. § 6013.

<sup>45</sup> 26 U.S.C. § 213 (uncompensated medical expenses of the taxpayer, his or her spouse, or his or her dependents are deductible from income to the extent that such expenses exceed 7.5 percent of the taxpayer's adjusted gross income). The taxpayers must file as "married filing jointly" in order to pool such deductions. 26 U.S.C. § 6013.

- Tax Preparation: DOMA also makes tax preparation complicated and expensive. Like others, married same-sex couples typically commingle their finances and share expenses. However, for tax reporting, DOMA requires them to unwind what is joint and re-allocate expenses on an individual basis.

In states that respect the marriages of same-sex couples, those couples must file their state tax returns under the correct married status. However, some items on a “married” state return require the taxpayer to have a married federal return in place first. This means that married same-sex couples must still prepare a *pro forma* “married” federal return (that is never actually filed because the IRS cannot accept due to DOMA) in order to complete their state income taxes returns correctly. Preparation of a federal “dummy” return can be as significant additional expense.

Of course, some married same-sex couples will pay more in federal income taxes when the federal government respects their marriages because of the so-called “marriage penalty.” Typically, spouses who earn comparable amounts will pay more tax than if they had filed two returns as unmarried persons. *But see* Section V, *below*. The 2004 CBO Report analyzing the budgetary impact of federal recognition of marriages between persons of the same sex estimates that federal individual income tax and estate tax revenues would actually increase between \$400 million a year to \$700 million per year if DOMA did not mandate the nonrecognition of marriages of same-sex couples.<sup>46</sup>

- Divorce Taxation: Beyond division of retirement accounts (*see above*, Section I), tax laws help a married couple unwind their economic partnership and divide their marital assets equitably during a divorce, without extra tax burdens.
  - Property transferred between spouses due to a divorce is not taxable.<sup>47</sup> But if a same-sex couple divorces, transfers of the home and other assets are taxable.
  - If alimony (also known as “spousal support”) or separate maintenance payments are ordered to be paid to a former spouse, the amounts paid are deductible to the person making the payments on his or her tax returns, thereby lowering the amount of tax due.<sup>48</sup> None of these exemptions from taxation extend to same-sex divorced couples as a result of DOMA.

#### Gift and Estate Taxation:

- Transfers between Spouses: Spouses have an unlimited ability to make gifts and transfer property to one another without incurring taxes. But this is not true for same-sex married spouses because of DOMA.<sup>49</sup> As a practical matter, a homeowner may be reluctant to make his or her same-sex spouse a joint owner of the home because of the gift tax consequences.
- Bequests to Surviving Spouses and Estate Tax: The estate tax marital deduction allows a full deduction from an individual's gross estate tax equal to the fair market value of any

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<sup>46</sup> The Potential Budgetary Impact of Recognizing Same-Sex Marriages (June 1, 2004), *available at* <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>. The CBO reaches this result by assuming access to equal marriage in all 50 states and the recognition of those marriages by the federal government.

<sup>47</sup> 26 U.S.C. § 1041 (no gain or loss realized on transfers between spouses related to divorce).

<sup>48</sup> 26 U.S.C. § 215 (a).

<sup>49</sup> 26 U.S.C. § 1041.

property passing to the decedent's spouse.<sup>50</sup> This marital deduction lets married couples postpone the federal estate tax that otherwise would have to be paid on a married person's estate by deferring any tax on property that passes to the surviving spouse until the surviving spouse's death. DOMA strips away this crucial deduction from surviving gay and lesbian spouses.

#### **IV. DOMA Disserves Our Service Members and Veterans.**

A critical injustice created by DOMA is the discrimination imposed on married gay and lesbian service members and veterans. The following are invaluable protections that DOMA denies to our service members and veterans.

##### Service Members:

- **Health Care:** Gay and lesbian spouses of qualified active duty military, active duty service families, and retirees are denied health coverage through TRICARE, the Department of Defense's managed health care program, due to DOMA.<sup>51</sup>
- **Retirement:** Members on active duty for 20 years or more are eligible for retirement under a number of different systems that depend on the date the retiree first entered the military. Surviving spouses generally receive 55% of the retired pay under the Uniformed Services Survivor Benefit Plan or one of its corollaries, which is denied to same-sex surviving spouses due to DOMA.<sup>52</sup>
- **Death Gratuity:** A one-time non-taxable cash payment of \$100,000 is made in the event that a service member on active duty or in a variety of other circumstances dies. It is paid to survivors in a prescribed order, starting with the surviving spouse, unless that spouse is gay or lesbian.<sup>53</sup>

##### Veterans:

The 2004 GAO found 104 statutes related to marriage and veterans, none of which apply to married gay and lesbian veterans. All of these benefits are denied to the spouse or surviving spouse of a gay and lesbian veteran due to DOMA. A sampling is below.

- **Death Benefits:** There are several spousal benefits related to a veteran's death. If the veteran's death is service connected, the surviving spouse may choose either monthly dependency and indemnity compensation payments or a death pension.<sup>54</sup> Such a spouse is also entitled to a one time payment, and if there is no spouse, it is provided to the next of kin.<sup>55</sup>

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<sup>50</sup> I.R.C. § 2056 (a) (bequests, etc., to surviving spouse).

<sup>51</sup> TRICARE Eligibility, available at

<http://www.tricare.mil/mybenefit/home/overview/Eligibility/WhoIsEligible/ActiveDutyAndFamilies>.

<sup>52</sup> Spouse Coverage, [http://www.defenselink.mil/militarypay/survivor/sbp/04\\_cost\\_spouse.html](http://www.defenselink.mil/militarypay/survivor/sbp/04_cost_spouse.html).

<sup>53</sup> 10 U.S.C. 1475-1476. See also, *Death Gratuity*,

<http://www.military.com/benefits/survivor-benefits/death-gratuity>.

<sup>54</sup> 38 U.S.C. §§ 1311 (entitlement to monthly dependency and indemnity compensation), 1317 (survivor's choice regarding benefits).

<sup>55</sup> 10 U.S.C. § 1477(b) (automatic distribution of benefit to spouse in the absence of any designated recipient). Note that a service member may designate someone to receive this benefit under §§ 1475 or 1476 even if not legally related to the eligible individual.

In some instances, death pensions may be available to low-income survivors of service members.<sup>56</sup> “Dependency and Indemnity Compensation” or “Death Pension” is available when the veteran was 100% disabled for a period of 10 or more years immediately prior to death and the surviving spouse is income eligible.

- Disability Benefits: Veterans with at least a 30% disability are entitled to increased disability compensation if they have a spouse.<sup>57</sup> In 2010, that amount was \$150/month.
- Other Allowances: There is an allowance for spousal benefits when a service member has disappeared.<sup>58</sup>
- Other Benefits: There are a variety of benefits that flow to spouses by virtue of being married to a veteran. These include:
  - Being interred at military cemeteries with the deceased veteran, if the veteran is eligible;<sup>59</sup>
  - Educational assistance for spouses, including payments for college education and training;<sup>60</sup>
  - Job counseling, training and placement services for the spouses of veterans;<sup>61</sup>
  - Employment preferences with the federal government for widows and widowers as well as certain disabled veterans;<sup>62</sup> and
  - Medical care from the government for spouses of certain veterans.<sup>63</sup>

## V. DOMA Tears Apart Families and Hurts Children

All of the harms described above not only harm same-sex married couples but any children they may have. Denying federal marital protections to the parents affects the economic stability of the entire family. Just a few examples include:

- Social Security Parent Benefits: Sometimes tragedy strikes and a parent dies in his or her working years. The spouse of a qualified deceased worker may be entitled to a benefit as a spouse (“parent’s benefits”)<sup>64</sup> in addition to Social Security payments for the children through age 18 (“children’s benefits”). Children may be 19 if still enrolled full time in primary or secondary school or 22 if diagnosed with a disability.<sup>65</sup> Gay and lesbian parents who are married to a deceased worker are not eligible for this crucial protection.
- Federal Income Taxes: Many married same-sex couples have children, and in those families, some have only one working parent or a parent or parents working a reduced schedule in order to care for those children. These families are the ones most likely to “benefit” from being able to file their taxes jointly as “married” rather than as an

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<sup>56</sup> 38 U.S.C. § 1543 (net-worth limitation on non-service connected death pension).

<sup>57</sup> 38 U.S.C. § 1115.

<sup>58</sup> 38 U.S.C. § 1158.

<sup>59</sup> 38 U.S.C. § 2402.

<sup>60</sup> 38 U.S.C. § 3501.

<sup>61</sup> 38 U.S.C. § 4101 (establishing eligibility of spouses).

<sup>62</sup> 5 U.S.C. § 2108.

<sup>63</sup> 38 U.S.C. § 1781.

<sup>64</sup> 42 U.S.C. § 402 (g).

<sup>65</sup> 42 U.S.C. § 402 (d).

“individual” or “head of household.” However, these couples pay more in federal income taxes than identically-situated taxpayers whose marriages the federal government respects, thereby taking money away that could be used for the family’s needs.

Most harmful to children is when DOMA literally tears a family apart because one parent is not a lawful permanent resident of the United States. Although family unity has been a staple of our immigration law since at least 1952,<sup>66</sup> DOMA withholds important protections to gay and lesbian families, some of whom are parents to children living in the United States.

- Immediate Relative Spousal Visas: A citizen of the U.S. may file a petition<sup>67</sup> for an “immediate relative” visa for a non-citizen spouse, unless that spouse is gay or lesbian due to DOMA.<sup>68</sup> Immediate relatives are not subject to any direct numerical limitations on entry visas.<sup>69</sup>
- Naturalization for Spouses of U.S. Citizens: A U.S. citizen’s spouse, who has obtained the status of lawful permanent resident, may become a United States citizen if the spouse has: (1) continuously resided in the United States for at least 3 years since being admitted for permanent residence; (2) lived “in marital union” with the citizen spouse during that 3-year period; (3) been physically present in the United States for periods totaling at least 18 months of that 3-year period; (4) continuously resided in the United States from the time of application for citizenship to admission; (5) for all relevant times been a person of good moral character; and (6) complied with all other requirements for naturalization.<sup>70</sup> This invaluable protection to keep a family together in the same country is denied to same-sex married couples due to DOMA.

### Conclusion

While the breadth of DOMA’s harms is breathtaking as laid out in the 1997 and 2004 GAO reports, when one considers the groups of individuals who are hurt the most – including senior citizens, service members and veterans, taxpayers, employers and employees, and families and children – the stark picture of DOMA’s discrimination comes into focus. DOMA is counterproductive in that it burdens the ability of married gay and lesbian Americans to grow old with dignity and security, fulfill their constitutional obligation as citizens and taxpayers, and protect their families and children.

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<sup>66</sup> See, e.g., *Fornalik v. Perryman*, 223 F.3d 523, 525 (7<sup>th</sup> Cir. 2000) (“United States immigration law ... sets family unity as one of the principal goals of the statutory and regulatory apparatus”).

<sup>67</sup> Form I-130 “Petition for Alien Relative” (Rev. 06/05/02) Y (Fee Change 01/21/05), available at <http://www.uscis.gov/files/form/i-130.pdf>.

<sup>68</sup> 8 U.S.C. § 1154(a)(1)(A)(i), (b) and (c) (the right to file a petition and investigation of facts); 8 U.S.C. § 1151(b)(2)(A)(i) (“Immediate relative” means “the children, spouses and parents of a citizen of the United States ...”). See also 8 CFR §§ 103.2, 204.1, 204.2 (general information about immediate relative and family-sponsored petitions).

<sup>69</sup> See 8 U.S.C. § 1151(b).

<sup>70</sup> 8 CFR § 319.1. For other circumstances in which spouses of U.S. citizens can be admitted to citizenship, see generally 8 U.S.C. §§ 1430(a), (b), (d), (e) (married persons and employees of certain non-profit organizations); 8 CFR §§ 319.2, 319.3.