

No. 12-307

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

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

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**On Writ of Certiorari to the  
United States Courts of Appeals  
For the Second Circuit**

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**BRIEF OF THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, CHANGE TO WIN, AND THE  
NATIONAL EDUCATION ASSOCIATION AS  
AMICI CURIAE SUPPORTING RESPONDENT  
EDITH SCHLAIN WINDSOR AND  
SUGGESTING AFFIRMANCE**

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**INTEREST OF AMICI CURIAE**

This brief *amicus curiae* is submitted, with the consent of the parties,<sup>1</sup> on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Change to Win (CTW), and the National Education Association (NEA). The AFL-CIO is a federation of 56 labor unions representing more than 12 million working men and women in the public and private sectors in every industry and level of government in the United States. CTW is a federation of four labor unions representing 5.5 million working men and women, including farm workers, food service workers, janitors, security guards, healthcare workers, truck drivers, and others employed in both the public and private sectors. The NEA is a nationwide employee organization with over 3 million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities including the approximately 8,000 federal educators who staff schools at U.S. military bases at home and throughout the world.

*Amici* and our affiliated labor unions, which together represent every corner of the American labor movement, are dedicated to the equal and fair

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<sup>1</sup> Letters from Petitioner United States and Respondent Bipartisan Legal Advisory Group consenting to the filing of this brief are on file with the Clerk. Written consent by Respondent Edith Schlain Windsor has been submitted with this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

treatment of all workers. Protecting the economic rights of working men and women, including gay and lesbian Americans, is an important part of our collective mission. Accordingly, we bargain and advocate for domestic partner benefits in union contracts, for prohibitions forbidding employers from firing lesbian and gay workers because of sexual orientation, and for programs to help end discrimination in the workplace.

The Defense of Marriage Act (DOMA),<sup>2</sup> by intention and design, ensures that workers with same-sex spouses earn less money, pay higher taxes on their wages and benefits, and have available to them fewer valuable benefits than their counterparts with different-sex spouses. *Amici*, therefore, stand united in our belief that DOMA impermissibly relegates an entire class of working families to a lower stratum of economic security by irrationally depriving married gay and lesbian workers of employment benefits extended to their colleagues. As such, DOMA deprives these union members and other workers of the equal protection of the law.

### **SUMMARY OF ARGUMENT**

Several of the *amicus* briefs filed in support of Respondent Edith Schlain Windsor vividly illustrate DOMA's psychological, familial, and social harms. This brief is focused on a separate set of harms that flow from DOMA—namely, the myriad of concrete economic injuries DOMA inflicts on married gay and lesbian workers and their families. Those tangible economic injuries, as illustrated by the stories recounted in the

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<sup>2</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

pleadings and affidavits of the plaintiffs in this and other cases, can be quantified in the dollars married gay and lesbian workers spend because of higher costs and taxes; denials of access to publicly and privately provided benefits; and refusals of entry into, and deportations out of, the U.S.

DOMA circumscribes the employment-related rights and benefits available to same-sex spouses by recognizing only marriages of different-sex spouses.<sup>3</sup>

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<sup>3</sup> Nine states, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington, as well as the District of Columbia, currently grant marriage licenses to same-sex couples. Nat'l Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (Feb. 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>. Rhode Island, Illinois, New Jersey, Nevada, and likely New Mexico recognize out-of-state marriages between two people of the same sex. See Jeanne Rauch-Zender & Jessica Lechuga, *Federal and State Restrictions on Marriage Create a Cumbersome Tax Filing Environment for Same-Sex Couples*, Bloomberg BNA (Feb. 8, 2013), <http://www.bna.com/federal-state-restrictions-n17179872259/>. Two Native American tribes, the Coquille Tribe of Oregon and the Suquamish Tribe of Washington, also extend full marital rights to same-sex couples. See Coquille Indian Tribal Code §740.010(3)(b) (2008), available at [http://www.coquille-tribe.org/documents/740Marriage and DomesticPartnership.pdf](http://www.coquille-tribe.org/documents/740Marriage%20and%20DomesticPartnership.pdf); William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. Times, A12 (Aug. 12, 2011), available at <http://www.nytimes.com/2011/08/12/us/12tribe.html>. In recent months, two states moved closer to granting marriage rights to same-sex couples, with the Rhode Island House of Representatives' approval of a marriage equality bill in January 2013, and the Illinois Senate's approval of such a bill in February

Section 3 of DOMA defines the terms “marriage” and “spouse” for purposes of federal law and limits the application of these terms solely to unions between a man and a woman.<sup>4</sup> Because marital status plays a key role in determining eligibility for a myriad of workplace benefits, rights, and privileges, as well as the level of taxation of many benefits, DOMA deprives married gay and lesbian workers and their families of significant economic protections associated with employment that are enjoyed by their coworkers married to different-sex spouses. Indeed, federal employees who are married to persons of the same sex under the laws of their home states are denied altogether many crucial spousal benefits. DOMA also allows and at times requires private sector employers to reduce or withhold workplace benefits from spouses and families of married gay and lesbian workers.

DOMA’s effects reverberate throughout the American workforce as it deprives married gay and lesbian workers of the employment benefits, as well as the state and federal program benefits, upon which working families rely for retirement and financial assistance in the event of illness, injury, disability, or death. Such benefits and programs are particularly crucial for families in which only one adult

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2013. See State of R.I. Gen. Assembly, *In Historic Vote, House Approves Same-Sex Marriage* (Jan. 24, 2013), <http://webserver.rilin.state.ri.us/News/pr1.asp?prid=8805>; Steven Yaccino, *Illinois Senate Votes to Back Gay Marriage*, N.Y. Times, A15 (Feb. 14, 2013), available at <http://www.nytimes.com/2013/02/15/us/illinois-senate-approves-same-sex-marriage-bill.html>.

<sup>4</sup> 1 U.S.C. § 7.

works outside of the home or is eligible for employer-provided benefits. These families generally depend exclusively on workplace benefits—including healthcare, retirement, and Social Security—provided through the employment of one spouse.

### **ARGUMENT**

DOMA deprives married gay and lesbian working people and their children of significant benefits associated with employment. Because most Americans obtain health insurance through their own employer or through their spouse's employer, DOMA prevents or substantially restricts access to spousal healthcare benefits. DOMA also denies married gay and lesbian couples important protections and benefits provided to other married couples when one spouse suffers a workplace injury or illness. DOMA further impinges on the ability of married same-sex couples to plan and provide for retirement. Finally, DOMA unfairly eliminates opportunities for married gay and lesbian couples to work and remain lawfully in the United States.

#### **I. DOMA Significantly Impairs Married Gay and Lesbian Workers Access to Employer-Provided Healthcare Benefits for Their Spouses**

Employer-provided healthcare benefits provide the most common source of medical insurance for working Americans and their families.<sup>5</sup> But for fami-

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<sup>5</sup> Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2011*, U.S. Census Bureau, 2 (Sept. 2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf> (55.1% of Americans, or 170.1 million people, were covered by employer-based health insurance in 2011).

lies of married same-sex couples, DOMA creates a litany of impediments that complicate, penalize, or flatly prohibit full family coverage.

### **A. DOMA Denies Married Gay and Lesbian Workers Access to Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses**

Due in part to the effects of DOMA, one or both partners in gay and lesbian long-term committed relationships are more likely to be uninsured than spouses in married different-sex couples.<sup>6</sup> Without access to employer-provided spousal health coverage, some non-covered gay and lesbian spouses are forced to rely on coverage available through public assistance or to go without health insurance entirely. And, as explained below, even for workers whose employers extend coverage to gay and lesbian spouses or who can afford to purchase insurance for the non-covered spouse on the open market, DOMA raises healthcare expenditures for married same-sex couples significantly, adding thousands of dollars annually in costs due to DOMA's preclusion of otherwise available tax benefits.<sup>7</sup>

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<sup>6</sup> Ninez A. Ponce, *et al.*, *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, Health Affairs, 1539-40 (Aug. 2010), available at <http://www.britecenter.org/wp-content/uploads/2013/02/The-effects-of-unequal-access-to-health-insurance-for-same-sex-couples-in-California.pdf>.

<sup>7</sup> See Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits 2011 Annual Survey*, 20 (2011), available at <http://ehbs.kff.org/pdf/2011/8225.pdf>.

The burdens that DOMA imposes on married same-sex couples seeking healthcare coverage can have consequences for the well-being of their entire families. The lack of spousal coverage often forces individuals to remain in the workforce when they might otherwise choose to stay home or work part-time in order to care for children or for elderly or infirm family members. Even when non-covered spouses qualify for coverage through their own employers, families often face higher insurance costs or lower levels of coverage because coverage under a family enrollment is generally less expensive than coverage under two separate individual enrollments.<sup>8</sup> In addition, one spouse's employer-provided coverage may charge higher premiums or out-of-pocket costs than those charged by the other spouse's employer-provided coverage, denying married same-sex workers the ability to choose which spouse's benefit plan is the most advantageous for their economic and health needs. These additional expenses impose significant burdens on working families and consume resources that might otherwise be invested elsewhere, such as college funds or retirement savings.

One analysis quantified DOMA's discriminatory effect on a hypothetical same-sex couple partnered for 46 years, who were the parents of two children, and whose combined annual income was

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<sup>8</sup> See, e.g., *Pedersen v. OPM*, 881 F. Supp. 2d 294, 302-05 (D. Conn. 2012) (finding DOMA unconstitutional in denying equal access to employer-provided healthcare coverage), *appeal docketed*, No. 12-3273 (2d Cir. Aug. 21, 2012), *petition for cert. filed*, No. 12-231 (U.S. Aug. 21, 2012).

\$140,000.<sup>9</sup> In the worst case scenario, the couple, who lived in New York State, would incur an additional \$211,993 in health insurance costs over the course of their lifetimes.<sup>10</sup> In the best case scenario, healthcare coverage would cost the same couple at least \$28,595 more in insurance premiums over their lifetimes than it would cost similarly situated married different-sex couple.<sup>11</sup> Nearly all of the extra costs would be eliminated if the federal government recognized the marriages of same-sex couples.<sup>12</sup>

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<sup>9</sup> Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. Times, A1 (Oct. 3, 2009), available at <http://www.nytimes.com/2009/10/03/your-money/03money.html>.

<sup>10</sup> In the worst case scenario, one partner earned \$110,000 and the other partner earned \$30,000. *Id.* The lower earning partner's employer did not provide health insurance coverage and her partner's employer did not provide domestic partner coverage. *Id.* Consequently, the higher earning partner provided coverage for herself and the couple's two children and the lower earning partner purchased individual healthcare coverage on the private market. *Id.*

<sup>11</sup> In the best case scenario, both partners earned identical incomes and were eligible for employer-provided health insurance coverage. *Id.* One partner's employer provided domestic partner coverage which the couple used for five years while the other partner stayed home to care for their two children. *Id.* After five years, the second partner returned to work and resumed her employer-provided coverage. *Id.*

<sup>12</sup> *Id.*



## **B. DOMA Results in Unequal Tax Treatment of Employer-Provided Healthcare Benefits for Married Gay and Lesbian Workers**

As part of their employees' overall compensation packages, many private sector employers extend healthcare and other benefits to their employees, their employees' spouses and domestic partners, and their dependent children. These employers often recognize the importance of providing such benefits in order to attract and retain valued employees. They may also be motivated by a basic sense of fairness and a desire to promote employee morale through a commitment to non-discrimination. And still others may provide such benefits based on the give-and-take of collective bargaining with a union committed to equality for the employees it represents. In states that allow gay and lesbian couples to join in marriage, state and local governments generally extend employee benefits to the spouses of all public employees as well. The application of DOMA to the federal tax code, however, limits the ability of these private and public employers to extend equal benefits to all married employees because it imposes disparate payroll and income tax requirements on both employees with same-sex spouses and on their employers.

The Internal Revenue Code allows employees to exclude from gross income the value of employer-provided health insurance coverage for spouses and children.<sup>13</sup> This exclusion represents a significant tax

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<sup>13</sup> 26 U.S.C. §§ 105, 106(a), 152; 26 C.F.R. § 1.106-1 (excluding from gross income "contributions which his employer makes to an accident or health plan for compensation . . . to the employee for personal injuries or sickness incurred by him, [or] his spouse").

advantage because the fair-market value of employer-provided healthcare insurance would otherwise be taxable as income. DOMA, however, forecloses married same-sex couples from enjoying this tax benefit and forces both employers and employees to treat the fair-market value of coverage as taxable income.<sup>14</sup> This is true even when an employer provides coverage under a “family plan,” in which the addition of a spousal beneficiary would not add to the premium cost. In that circumstance, an employee who elects such coverage for her same-sex spouse or for the children of her same-sex spouse is taxed on the imputed fair-market value of that coverage, unless the individuals covered qualify as tax dependents through independent means.<sup>15</sup>

The tax burdens DOMA imposes on married same-sex couples do not end there. Married couples may generally pay for health insurance premiums incurred on behalf of themselves and certain family members with pre-tax dollars, thereby both lowering the actual cost of coverage and reducing their taxable income.<sup>16</sup> Married couples may also make contributions to a “cafeteria” plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal med-

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<sup>14</sup> See, e.g., I.R.S. Priv. Ltr. Rul. 200339001 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018 (Jan. 22, 1997).

<sup>15</sup> I.R.S. Priv. Ltr. Rul. 9850011 (Sept. 10, 1998); see also 26 U.S.C. § 152(a) (defining “dependent”).

<sup>16</sup> 26 U.S.C. §§ 105(b), 106(a) (limiting pre-tax treatment of medical expenses to employees’ different-sex spouses and certain dependents).

ical expenses from a health savings account or flexible savings account.<sup>17</sup> But DOMA precludes the use of these tax-saving mechanisms for married same-sex couples, which significantly increases the cost of benefits for these employees and—in some cases—even forces them into a higher tax bracket.

Several studies have confirmed and quantified DOMA's economic impact on the families of married same-sex couples. One study calculated that the average employee who receives same-sex spousal or domestic partner benefits pays \$1,069 more in taxes per year than a heterosexual married employee with the same coverage.<sup>18</sup> In the analysis cited above of the hypothetical New York-based same-sex couple, one scenario demonstrated that it was less expensive for the couple to use their separate, employer-provided coverage because of the onerous tax treatment of domestic partner benefits.<sup>19</sup>

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<sup>17</sup> See 26 U.S.C. § 125(f) (limiting “qualified benefits” under a cafeteria plan to benefits that are “not includible in the gross income of the employee”); 26 C.F.R. § 1.106-1.

<sup>18</sup> M.V. Lee Badgett, *Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits*, Williams Institute, 7-8 (Dec. 2007), available at [http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/domestic\\_partners.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/domestic_partners.pdf).

<sup>19</sup> Bernard, *supra* note 9.

### **C. DOMA Denies Married Gay and Lesbian Workers Access to Federal Guarantees of Uninterrupted Healthcare Coverage for Their Spouses**

In the past 25 years, Congress enacted two landmark statutes—the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)<sup>20</sup> and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>21</sup>—that were intended to give workers and their families greater healthcare security and continuity. Due to DOMA, however, married same-sex couples are largely excluded from these statutory protections.

COBRA requires public and private employers with twenty or more employees to offer continued healthcare coverage, at group rates, for a defined period of time to employees and their dependents under certain circumstances, such as termination, reduction in employment hours, or death of the employee.<sup>22</sup> The aim of this requirement is to maintain the portability of healthcare coverage and to ensure that employees who change jobs or become unemployed may maintain coverage.<sup>23</sup> Because of DOMA, however, covered employers are not required to continue coverage for same-sex

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<sup>20</sup> Pub. L. No. 99-272, 100 Stat. 82.

<sup>21</sup> Pub. L. No. 104-191, 110 Stat. 1936.

<sup>22</sup> 29 U.S.C. §§ 1161-69.

<sup>23</sup> See U.S. Dep't of Labor, *An Employee's Guide to Health Benefits under COBRA* (Nov. 2012), <http://www.dol.gov/ebsa/publications/cobraemployee.html>.

spouses.<sup>24</sup> Although an employer may voluntarily extend continued coverage to the same-sex spouse of an employee, the coverage would not be subject to the protections of COBRA. Therefore, an employer would remain free to terminate coverage at any time, thereby exposing the couple to precisely the health-care insecurity COBRA was enacted to prevent.

Congress likewise designed HIPAA to promote portability of healthcare coverage and ease transfers of coverage in the event of a change in family circumstances. In particular, HIPAA allows an employee to add a spouse to his or her healthcare plan immediately upon marriage or in the event of certain special circumstances, such as a loss of the spouse's existing coverage resulting from termination of employment.<sup>25</sup> Once again, DOMA prevents married gay and lesbian couples from taking advantage of this protection that is guaranteed to other married couples, thereby placing gay and lesbian couples at an increased risk of loss of continuity in coverage.

#### **D. DOMA Denies Married Gay and Lesbian Federal Employees Healthcare Coverage for Their Spouses and the Dependent Children of Their Spouses**

Because DOMA defines “spouse” and “marriage”

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<sup>24</sup> See U.S. Dep't of Labor, *Frequently Asked Questions: Participants and Beneficiaries*, [http://www.dol.gov/ebsa/faqs/faq\\_911\\_1.html](http://www.dol.gov/ebsa/faqs/faq_911_1.html) (last visited Feb. 26, 2013); see also 29 U.S.C. § 1167(3) (“qualified beneficiary” defined as covered employee’s “spouse”).

<sup>25</sup> See 26 U.S.C. § 9801(f); 26 C.F.R. § 54.9801-6.

for purposes of all federal law, its economic hardships fall with particular severity on federal employees in same-sex marriages. DOMA deprives married gay and lesbian federal employees of many of the valuable health benefits that are otherwise available to active and retired federal employees, their spouses, and their children.

The Federal Employee Health Benefits Act (FEHBA) provides significantly subsidized health-care coverage to federal employees, retirees, and their families.<sup>26</sup> Karen Golinski, the plaintiff in a Ninth Circuit case challenging DOMA, has received health insurance coverage through a plan offered under FEHBA during her two-decade tenure as a staff attorney with the U.S. Court of Appeals for the Ninth Circuit.<sup>27</sup> She paid bi-weekly premiums in the amount of \$108.91 for her and her young son's health insurance during the 2010 calendar year.<sup>28</sup> DOMA, however, denies Golinski the spousal and dependent care coverage provided to her heterosexual married colleagues.<sup>29</sup> Consequently, Golinski's spouse, Amy

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<sup>26</sup> 5 U.S.C. §§ 8901-14.

<sup>27</sup> Decl. of Pl. Karen Golinski in Supp. of Mot. for Prelim. Inj. at 1, *Golinski v. OPM*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 10-257).

<sup>28</sup> *Id.* at 1.

<sup>29</sup> See U.S. Office of Pers. Mgmt., *Family Members in Federal Employees Health Benefits Program Handbook*, <http://www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/family-members/> (last visited Feb. 26, 2013). Legally-recognized children of covered workers are covered automatically, 5 U.S.C. § 8901(5), but because of DOMA

Cunninghis, who is ineligible for health insurance through her own employer, has had to purchase separate, private individual health insurance.<sup>30</sup> That separate insurance is both more expensive and inferior to what she would have received under FEHBA.<sup>31</sup>

DOMA similarly precludes same-sex spouses of federal employees and their dependent children<sup>32</sup> from enrolling in the Federal Employees Dental and Vision Insurance Program (FEDVIP).<sup>33</sup> Thus, Nancy Gill, a long-term employee of the U.S. Postal Service and the named plaintiff in *Gill v. Office of Personnel Management*, was unable to add her spouse, Marcelle Letourneau, to her vision plan.<sup>34</sup> Because

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the children of a worker's same-sex spouse are not necessarily covered, whereas the children of a different-sex spouse automatically receive coverage. In July 2012, the U.S. Office of Personnel Management issued a proposed rule that would allow children of a same-sex domestic partner of a FEHBA enrollee to be covered under FEHBA. Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums, 77 Fed. Reg. 42914 (July 20, 2012) (to be codified at 5 C.F.R. pts. 890, 892, 894). This rule is not yet final.

<sup>30</sup> Golinski Decl., *supra* note 27, at 2-3, Exs. B & F.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> Children of same-sex spouses of federal employees do receive coverage when the federal employee also has a legal relationship with the child.

<sup>33</sup> 5 U.S.C. §§ 8951-62, 8981-92; *but see supra* note 29 (discussing proposed regulation).

<sup>34</sup> Joint Aff. of Pls. Nancy Gill & Marcelle Letourneau at 5, *Gill v. OPM*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 09-10309).

Gill's family was denied FEDVIP's savings, Letourneau incurred hundreds of dollars of expenses every year for her eye examinations and eye glasses.<sup>35</sup>

Similarly, Martin Koski, another plaintiff in the *Gill* lawsuit, cannot add his spouse, James Fitzgerald, to his FEHBA coverage.<sup>36</sup> As a result, the couple has incurred higher healthcare costs because Fitzgerald's employer-provided coverage is not only more expensive, but also less comprehensive than Koski's coverage.<sup>37</sup> In 2009, they paid \$912 more for their separate plans than they would have paid under a family plan through Koski's employer.<sup>38</sup> During the same year, they also spent an additional \$2,000 that they would not have incurred under Koski's plan due to higher co-payments, uncovered medical expenses, and higher prescription costs.<sup>39</sup>

Thus, DOMA forces the same-sex spouses of federal employees to rely on coverage from the other spouse's employer (if available), to purchase costly or substandard private healthcare insurance, or to go without healthcare insurance altogether. Not only does the denial of benefits to the same-sex spouses of federal employees inflict real economic harm, it also directly contravenes a "fundamental undergird-

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<sup>35</sup> *Id.*

<sup>36</sup> Joint Aff. of Martin Koski & James Fitzgerald at 2-3, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

<sup>37</sup> *Id.* at 4-5.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> *Id.* at 4-5.



ing” of federal personnel law: nondiscrimination.<sup>40</sup> It is a basic principle of federal personnel law that “[f]ederal personnel management should be . . . free from prohibited personnel practices.”<sup>41</sup> In particular, federal government agencies are prohibited from discriminating against employees—including in “decision[s] concerning pay, benefits, or awards”—“on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others.”<sup>42</sup> The denial of spousal employment benefits to federal employees because they are married to a spouse of the same sex is, therefore, fundamentally at odds with the antidiscrimination principles that ensure a competent and productive federal workforce.<sup>43</sup>

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<sup>40</sup> Mem. from Raymond A. Pagliarini, Dir., Pers. Staff, *Merit System Principles and Prohibited Personnel Practices*, U.S. Dep’t of Justice (Sept. 28, 2007), available at <http://www.justice.gov/jmd/hr/docs/msppp-practices.pdf>.

<sup>41</sup> 5 U.S.C. § 1101; see also Pagliarini, *supra* note 40.

<sup>42</sup> *Id.* § 2302(a)(2)(A)(ix), (b)(10).

<sup>43</sup> Several administrative judges for the Merit Systems Protection Board, the quasi-judicial body that adjudicates federal personnel matters, have held that discrimination on the basis of sexual orientation is prohibited under merit system principles and the prohibited personnel practices statute, 5 U.S.C. § 2302 (b)(10). See, e.g., *Borsa v. U.S. Dep’t of the Treasury*, MSPC Case No. AT-0752-13-0291-I-2, 2012 WL 6202332, \*3, 112 LRP 58573, 2 (MSPB Nov. 6, 2012); *Cowart v. U.S. Postal Serv.*, 2012 WL 620235, \*14, 112 LRP 59216, 12 (MSPB Nov. 5, 2012).

## **II. DOMA Significantly Restricts Married Gay and Lesbian Workers' Access to Critical Programs That Protect Married Workers in the Event of Illness, Workplace Injury or Death**

Several federal programs provide monetary and other assistance to workers if a worker or her spouse becomes ill, is injured, or dies. The best-known of these programs is Social Security, which provides benefits to surviving spouses of workers who paid into the Social Security system. Many workers are also guaranteed the right to unpaid leaves of absence to care for a sick spouse. Federal and some state public sector workers are beneficiaries of a number of programs that provide care for a spouse in the event a worker becomes injured or dies on the job. Because of DOMA, these benefits are generally denied to married gay and lesbian couples.

### **A. DOMA Precludes Gay and Lesbian Spouses From Receiving Social Security Survivor Benefits**

The Social Security system provides a variety of disability and survivor benefits to spouses and surviving spouses of covered workers.<sup>44</sup> Social Security

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<sup>44</sup> According to the 2000 Census data, 28% of gay and lesbian couples have at least one partner with a disability, and 7% of same-sex couples have one partner who is 65 or older. Adam P. Romero, *et al.*, *Census Snapshot: United States*, Williams Institute, 3 (Dec. 2007), available at <http://escholarship.org/uc/item/6nx232r4>.

provides benefits to some surviving spouses who have not yet retired and whose deceased spouses have paid into the system.<sup>45</sup> This provision is particularly beneficial to a surviving spouse who earned less income than her deceased spouse, due to the fact that Social Security benefits are computed based on an individual's lifetime earnings.<sup>46</sup> Surviving spouses may also be eligible for a "Lump-Sum Death Benefit"<sup>47</sup> and/or the "Widower's Insurance Benefit," which grants the surviving spouse the insurance benefits of the deceased spouse, if they are higher than what the surviving spouse is already receiving.<sup>48</sup> DOMA prevents same-sex spouses from receiving Social Security death benefits.

For 79-year-old Herbert Burtis, a plaintiff in the *Gill* lawsuit, his deceased spouse's Social Security benefits would have helped him pay for his Medicare Part B coverage, as well as his asthma and high blood pressure medications.<sup>49</sup> Burtis had done what any loving spouse would do when his husband and life partner of over 60 years became ill; he provided steadfast care to John Ferris during his long battle with Parkinson's disease.<sup>50</sup> When Ferris finally succumbed to the disease, the government did not rec-

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<sup>45</sup> 42 U.S.C. § 402.

<sup>46</sup> *Id.* § 415.

<sup>47</sup> *Id.* § 402(i).

<sup>48</sup> *Id.* § 402(e), (f).

<sup>49</sup> Aff. of Herbert Burtis at 5, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

<sup>50</sup> *Id.* at 3-4.

ognize their marriage because the legally married couple did not meet DOMA's definitions of "marriage" and "spouse."<sup>51</sup> Burtis would otherwise be entitled to a "One-Time Lump-Sum Death Benefit" of \$255, along with a Social Security survivor benefit of approximately \$700 per month.<sup>52</sup> By treating Burtis and other same-sex surviving spouses differently, DOMA denies them the security and protection provided to different-sex surviving spouses during this most vulnerable time.

### **B. DOMA Denies Married Gay and Lesbian Workers Access to Family and Medical Leave**

The Family and Medical Leave Act (FMLA) entitles employees of qualified employers up to twelve weeks of unpaid leave to care for a spouse who has a serious health condition.<sup>53</sup> The FMLA is intended "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."<sup>54</sup> As a result of DOMA, however, employers are not required to provide FMLA leave to their married lesbian and gay workers who need time off from work to care for a seriously ill spouse.

The experience of Lynda DeForge and Raquel Ardin, plaintiffs in *Pedersen v. OPM*, concretely

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<sup>51</sup> *Id.* at 4-5.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> 5 U.S.C. § 6382(a); 29 U.S.C. § 2612(a).

<sup>54</sup> 29 U.S.C. § 2601(b)(1).

illustrates the resulting hardship. DOMA means that DeForge, a U.S. Postal Service employee and Navy veteran, has had to exhaust her vacation time to care for her spouse.<sup>55</sup> Ardin experiences debilitating pain caused by scar tissue from two neck fusion surgeries and degenerative arthritis in her neck, a condition which has rendered her unemployable.<sup>56</sup> DeForge drives Ardin, also a military veteran, to a VA facility two and a half hours from their home for Ardin's quarterly injection treatments.<sup>57</sup> DeForge requested FMLA leave for these appointments, but her application was denied because of DOMA.<sup>58</sup> Due to these circumstances, DeForge has had to postpone her own knee surgery so that she can accrue more sick and vacation time.<sup>59</sup> As her experience demonstrates, DOMA both undermines the FMLA's goal of protecting workers from loss of employment and burdens working families when a spouse falls ill.

### **C. DOMA Precludes Gay and Lesbian Spouses of Public Safety Officers and Federal Employees From Receiving Survivors' Benefits**

DOMA precludes spouses of gay and lesbian employees who work in particularly dangerous fields

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<sup>55</sup> Joint Aff. of Raquel Ardin & Lynda DeForge at 4-6, *Pedersen*, 881 F. Supp. 2d 294 (No. 10-1750).

<sup>56</sup> *Id.* at 3-4.

<sup>57</sup> *Id.* at 3, 5.

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Id.* at 7.

from qualifying for specialized workers' compensation benefits provided by the federal Public Safety Officers' Benefits Program. If a married public safety officer with a different-sex spouse dies or becomes permanently disabled as a result of an injury sustained on duty, her spouse receives a lump-sum death benefit, currently \$328,612.73, and may also be eligible for educational financial assistance.<sup>60</sup> However, if Mary Ritchie, a Massachusetts State Police Lieutenant and a plaintiff in the *Gill* lawsuit, is killed in the line of duty, her same-sex spouse Kathleen Bush, who is the full-time caretaker of the couple's two young children, would receive neither the lump-sum death benefit nor the education benefit.<sup>61</sup> Although Ritchie's children are eligible to receive the benefits, her spouse would be constrained in how she could use the funds, whereas a different-sex spouse would be free to use the benefits as she thought best for her family.<sup>62</sup> Put simply, DOMA deprives public safety enforcement officers with same-sex spouses of the rights enjoyed by their counterparts married to different-sex spouses despite the fact that they perform the same duties and undertake the same risks.

Other programs specifically protect federal employees and their families in the event of the death or injury

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<sup>60</sup> 42 U.S.C. §§ 3796(a), 3796d-1; Office of Justice Programs, *Public Safety Officers' Benefits Programs* (2013), <https://www.psob.gov/index.html>.

<sup>61</sup> Joint Aff. of Mary Ritchie & Kathleen Bush at 2, 4, *Gill*, 699 F. Supp. 2d 374 (09-10309); *see also* 42 U.S.C. § 3796d-1.

<sup>62</sup> *Id.* at 4.

of the federal employee. The Federal Employee Retirement System (FERS), for example, provides death and survivor benefits to the current or former spouse of a federal employee if the employee dies before retirement and has worked for the federal government for a minimum of 18 months.<sup>63</sup> Because of the application of DOMA to FERS, however, same-sex spouses of deceased federal employees are barred from receiving these benefits.

Another program designed to protect federal employees is the Federal Employees' Compensation Act, which provides workers' compensation benefits to federal employees injured in the performance of duty. If a federal employee dies as a result of such injury, her surviving spouse is entitled to receive up to 75% of the deceased employee's monthly pay.<sup>64</sup> DOMA denies these protections to surviving gay and lesbian spouses. Married gay and lesbian federal employees who desire such protection must purchase life insurance from a private vendor, a financial hardship not faced by similarly situated heterosexual married federal employees.

### **III. DOMA Imposes Significant Burdens on Married Gay and Lesbian Workers as They Plan for Retirement**

Married gay and lesbian workers across the employ-

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<sup>63</sup> See U.S. Office of Pers. Mgmt., *FERS Information Survivors*, <http://www.opm.gov/retire/pre/death/index.asp#FERS> (last visited Feb. 26, 2013).

<sup>64</sup> 5 U.S.C. § 8133(a); 20 C.F.R. § 10.410.

ment spectrum—whether in private, federal, state, or local employment—are denied access by DOMA to retirement, pension, Social Security, and other benefits provided to those married to a person of a different sex.

**A. DOMA Denies Married Gay and Lesbian Workers Access to Social Security Retirement and Medicare Benefits Designed to Protect Lower Earning Spouses**

Social Security and Medicare are the foundation of our nation’s commitment to ensuring that older workers and their spouses can retire with a modicum of dignity and stability. Yet, DOMA prevents married same-sex couples from fully sharing in that commitment and thereby places them at greater risk of economic insecurity in retirement.

Upon retirement, a married worker covered by Social Security may opt to receive the larger of either her own retirement benefit or one-half of her covered spouse’s benefit, by adding a spousal benefit to the married worker’s lower benefit.<sup>65</sup> Because of the application of DOMA to the Social Security laws, however, married gay and lesbian workers are denied the right to such spousal benefits. Social Security also permits married persons at full retirement age to elect to receive only the spousal benefit, while at the same time continuing to accrue delayed retirement credits in their own accounts,<sup>66</sup> a benefit that DOMA denies to same-sex spouses.

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<sup>65</sup> 42 U.S.C. § 402.

<sup>66</sup> Soc. Sec. Admin., *Soc. Sec. Retirement Benefits*, 9-10 (July 2012), available at <http://www.ssa.gov/pubs/10035.pdf>.



Moreover, when one spouse receiving Social Security retirement benefits dies, the surviving spouse is entitled to receive the deceased spouse's benefits if they would be greater than those of the surviving spouse.<sup>67</sup> This provision allows a lower earning spouse to maintain her standard of living in the event the higher earning spouse predeceases her. Once again, DOMA precludes same-sex widows and widowers from taking advantage of those crucial benefits. For such couples, when the higher earning spouse dies first, the surviving spouse loses the higher earner's Social Security payment and continues to receive only her own (lower) payment, if she is eligible to receive any payment whatsoever. Thus, Randell Lewis-Kendell, a plaintiff in the *Gill* lawsuit, will not be able to access Social Security survivor benefits when he is otherwise eligible to receive Social Security.<sup>68</sup> Due to his deceased spouse's higher lifetime earnings, Lewis-Kendell would likely have been entitled to approximately twice what he will receive based on his own earnings record but for DOMA.<sup>69</sup> As his business has faltered in the weakened economy, he faces a precarious financial situation due in part to his inability to access benefits to which other surviving spouses are entitled.<sup>70</sup>

The impact of DOMA on the Social Security benefits of married same-sex couples can result in the loss

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<sup>67</sup> See 20 C.F.R. § 404.335.

<sup>68</sup> Aff. of Randell Lewis-Kendell at 5, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

<sup>69</sup> *Id.* at 5-6.

<sup>70</sup> *Id.* at 4-6.

of thousands of dollars of retirement benefits annually. According to a 2009 study, the average difference in annual Social Security income between same-sex spouses and different-sex spouses is approximately \$5,700.<sup>71</sup> In the worst case, the lower earning surviving same-sex spouse could lose up to \$28,152 per year in Social Security payments.<sup>72</sup> This loss of income makes it more likely that a surviving same-sex spouse will live her elder years at or below the poverty line.

DOMA imposes comparable restrictions on same-sex spouses seeking Medicare coverage. Individuals generally become eligible for Medicare coverage by meeting the same work-history criteria necessary to receive Social Security retirement benefits.<sup>73</sup> The spouses of those individuals are also automatically eligible for Medicare benefits, even if they lack the work history to become eligible in their own right.<sup>74</sup>

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<sup>71</sup> Naomi G. Goldberg, *The Impact of Inequality for Same-Sex Partners in Employer-Sponsored Retirement Plans*, Williams Institute, 9 (Oct. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Retirement-Plans-Report-Oct-2009.pdf>.

<sup>72</sup> This assumes that the deceased spouse earned the maximum Social Security payout and the surviving spouse would not qualify for Social Security on her own. Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders & Movement Advancement Project, *Improving the Lives of LGBT Older Adults*, 13 (Mar. 2010), available at <http://www.lgbtagingcenter.org/resources/pdfs/ImprovingtheLivesofLGBTOlderAdultsFull.pdf>.

<sup>73</sup> 42 U.S.C. §§ 426(a)-(b), 1395c; 42 C.F.R. § 406.5(a).

<sup>74</sup> 42 U.S.C. § 426(a).

Because of DOMA, however, married same-sex couples must qualify for Medicare independently of one another.

Taken together, DOMA's restrictions on Social Security and Medicare greatly increase the economic insecurity of married same-sex couples in retirement. Moreover, these restrictions have the perverse effect during those couples' working lives of discouraging one spouse from caring for the couples' children on a full-time basis or foregoing employment to care for sick or disabled family members.

### **B. DOMA Denies Married Gay and Lesbian Workers Equal Rights and Benefits under Defined Pension Plans**

Many private employers provide traditional pension plans—*i.e.*, “defined benefit plans”—to their employees as a benefit of employment. Under these plans, employees, upon retirement, are guaranteed fixed monthly payments for life and often for the lives of their spouses. These plans confer several tax deduction and income-deferral benefits on both employers and employees, provided the plans conform to certain requirements of federal tax law. Among those prerequisites are numerous nondiscrimination rules, many of which are designed to protect spouses of covered employees. DOMA removes those protections for married gay and lesbian workers.

The Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code require defined benefit plans and certain other pension plans to provide automatic survivor benefit payments to a

surviving spouse of a plan participant who dies prior to retirement, unless the participant elects another payment form and the participant's spouse consents to that election.<sup>75</sup> DOMA precludes gay and lesbian surviving spouses from receiving these annuities. Additionally, while ERISA prohibits assignment or alienation of benefits provided under a qualified retirement plan, state court alimony or child support orders in divorce cases may require that pension plan amounts be assigned to alternate payees.<sup>76</sup> Because DOMA prohibits recognition of marriages between persons of the same sex, however, a pension plan may not be required to comply with such an order from a state court in which a same-sex spouse is named the alternate payee.<sup>77</sup>

Many employers believe that DOMA prevents them from defining or interpreting the term "spouse" for purposes of their pension plans to encompass marriages between people of the same sex and that if they recognize such marriages their pension plan's qualified tax status could be jeopardized. Gerald Passaro II, a plaintiff in the *Pedersen* lawsuit, was deemed ineligible to serve as the beneficiary of his deceased spouse's, Thomas M. Buckholz's, pension plan, despite the fact that his employer had previously acknowledged Passaro's

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<sup>75</sup> 29 U.S.C. § 1055(a). Analogous provisions may be found in the Internal Revenue Code. *See* 26 U.S.C. § 401(a)(11).

<sup>76</sup> 29 U.S.C. § 1056(d)(3)(B); *see also* 26 U.S.C. § 414 (p)(1)(A).

<sup>77</sup> *See* Albert Feuer, *Who Is Entitled To Survivor Benefits From ERISA Plans?*, 40 J. Marshall L. Rev. 919 (2007).

beneficiary status.<sup>78</sup> Buckholz, a chemist, qualified as a fully vested participant in his employer's pension plan program after having devoted 20 years to the company.<sup>79</sup> He was entitled to receive a monthly single life annuity of \$1,169.01 when he reached 65 years of age, and he may have been entitled to receive some portion of it when he turned 55.<sup>80</sup> Buckholz's life was cut short due to lymphoma. Passaro contacted Buckholz's employer after his death and he was informed that, because of DOMA, he would not be recognized as the beneficiary of his spouse's pension plan.<sup>81</sup> Despite having been lawfully married under the laws of their home state of Connecticut, DOMA served as the basis for the pension plan ignoring Buckholz and Passaro's marriage.<sup>82</sup>

Similarly, Sarah Ellyn Farley's employer asserted that DOMA prevented it from recognizing her surviving spouse, Jennifer Tobits, as the beneficiary of Farley's profit sharing plan, despite the absence of any reference to the statute in the plan.<sup>83</sup> Following

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<sup>78</sup> Aff. of Gerald V. Passaro II at 3-4, *Pedersen*, 881 F. Supp. 2d 294 (No. 10-1750).

<sup>79</sup> *Id.* at 3-4.

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Id.* at 4-6.

<sup>82</sup> *Id.* at 3-4.

<sup>83</sup> Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings Pursuant to Rule 12(c) at 13-14, *Cozen O'Connor, P.C. v. Tobits* (E.D. Penn. filed Sept. 8, 2011) (No. 11-00045); Jennifer Tobit's Opp'n to Pl. Cozen O'Connor, P.C.'s Mot. for J. on the Pleadings at 2, *Cozen O'Connor, P.C.* (No. 11-00045).

her death, Farley's employer commenced an interpleader action in the Eastern District of Pennsylvania to resolve the distribution of her profit sharing plan. Her employer argued that it could not interpret its ERISA-governed plan in a way that conflicts with DOMA without jeopardizing its status as a qualified plan.<sup>84</sup> Thus, in a myriad of ways, DOMA undermines the fairness objectives of ERISA by denying employees married to a same-sex spouse many of the benefits and rights that are extended to married different-sex couples.

### **C. DOMA Precludes Married Gay and Lesbian Workers from Contributing to Their Spouses' Retirement Accounts and Denies to Them Plan Rollover and Distribution Options**

Federal law provides tax benefits to working individuals who make contributions to qualified retirement programs, such as individual retirement accounts (IRA) and 401(k) plans.<sup>85</sup> For example, working people who file joint tax returns may deduct contributions made to a retirement account on behalf of a spouse who is out of work.<sup>86</sup> Married gay and lesbian couples cannot take advantage of these tax benefits, and are thereby denied equal footing in saving for a secure

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<sup>84</sup> Tobit's Opp'n, *supra* note 83, at 4.

<sup>85</sup> 26 U.S.C. § 219.

<sup>86</sup> *See id.* §§ 25B(d)(2)(D), 408, 408A.

retirement. Due to the inability to file joint tax returns, for example, Mary Ritchie—the Massachusetts State Police Lieutenant and plaintiff in the *Gill* lawsuit—is ineligible to receive tax incentives available to different-sex couples for contributing to a spousal IRA on behalf of her spouse, who is the full-time caretaker of the couple's two young children.<sup>87</sup>

The divide furthers when one member of the couple dies. Surviving spouses of different-sex couples are permitted to roll over a deceased spouse's IRA or 401(k) plan into their own account and to defer withdrawing funds from the account until they reach 70½ years of age.<sup>88</sup> By contrast, a surviving spouse in a same-sex couple designated as the beneficiary of her spouse's retirement account is required to commence withdrawing distributions by the end of the year following the year of death.<sup>89</sup> In addition, because of DOMA, the participant with a same-sex spouse is permitted to change her beneficiary, obtain a loan from the retirement account, or change the form of benefit (*e.g.*, to a lump sum from an annuity) without her spouse's written approval or knowledge.<sup>90</sup> Indeed, because of DOMA, IRAs and 401(k) plans are only required to offer the option of joint annuity benefit distribution to married couples. The

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<sup>87</sup> Ritchie-Bush Aff., *supra* note 61, at 7.

<sup>88</sup> M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 Drake L. Rev. 1081, 1096-97 (2010).

<sup>89</sup> See 26 C.F.R. § 1.401(a)(9)-3, A-3(a).

<sup>90</sup> See 26 U.S.C. § 417(a)(2); 26 C.F.R. § 1.401(a)-20, A-24(a).

types of rollovers available to same-sex spouses upon the death of their participant spouses are also limited.<sup>91</sup> Here again, DOMA denies married gay and lesbian couples retirement planning tools and benefits, thus undermining their financial security in retirement.

#### **D. DOMA Denies Married Gay and Lesbian Federal Employees the Ability to Participate Equally in Retirement Plans**

Federal employees may opt for a retirement annuity that provides a defined benefit payable to a surviving spouse in the event the federal employee predeceases her spouse.<sup>92</sup> Retired federal employees who choose this option receive a smaller retirement benefit payment while alive to ensure that a surviving spouse will continue to receive benefits in the event the retiree dies first. DOMA, however, precludes federal employees from designating a same-sex spouse as a survivor beneficiary under this important retirement program.

Prior to the passage of DOMA, openly gay Congressman Gerry E. Studds aptly summarized this inequality: “I have paid every single penny as much as every Member of this House has for that pension, but my partner, should he survive me, is not entitled to

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<sup>91</sup> See 26 U.S.C. § 402(c)(11).

<sup>92</sup> U.S. Office of Pers. Mgmt., *supra* note 63.



one penny. I do not think that is fair, Mr. Speaker.”<sup>93</sup> Notwithstanding Studds’ contributions and financial planning, the Office of Personnel Management denied his surviving spouse’s application for a monthly survivor annuity.<sup>94</sup> Because of DOMA, Studds’ spouse, Dean Hara, and other surviving same-sex spouses of federal employees, do not receive the financial protections available to different-sex spouses of federal employees.

#### **IV. DOMA Diminishes Financial and Familial Stability for Married Bi-National and Foreign-National Gay and Lesbian Couples Seeking to Work in the United States**

Foreign nationals seeking to work and live in the United States do so either through family sponsorship or employment-based preferences.<sup>95</sup> While lawful immigrants are normally permitted to immigrate with a spouse,<sup>96</sup> DOMA denies this entitlement to married gay and lesbian couples, even when their

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<sup>93</sup> Aff. of Dean Hara at 4, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309).

<sup>94</sup> *Id.* at 5.

<sup>95</sup> An individual not married to a U.S. citizen may also seek to immigrate to this country through diversity visas and refugee visas, both of which include the right to bring a different-sex, but not a same-sex, spouse. *See* U.S. Dep’t of State, *Visa Types for Immigrants*, [http://travel.state.gov/visa/immigrants/types/types\\_1326.html](http://travel.state.gov/visa/immigrants/types/types_1326.html) (last visited Feb. 26, 2013).

<sup>96</sup> 8 U.S.C. § 1153(d).

marriages are fully recognized under the laws of their home country.<sup>97</sup>

According to a 2010 study based on Census Bureau data, an estimated 28,574 bi-national same-sex couples and approximately 11,422 dual non-citizen same-sex couples currently reside in the U.S.<sup>98</sup> Although U.S. immigration policy generally places spousal relationships above all others—protecting U.S. citizens’ right to marry non-citizens while providing safeguards to facilitate the bi-national, married couple’s ability to remain in the U.S. to work, seek employment, and pursue higher education—DOMA categorically denies these protections to married same-sex couples.

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<sup>97</sup> Eleven countries permit gay and lesbian couples to marry: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, and Sweden. Same-sex marriage is also legal in parts of Mexico. Marriage Equality USA, *Current Status Around-the-World* (Sept. 7, 2012), <http://www.marriageequality.org/Around%20the%20World>. At least twenty-five countries recognize gay and lesbian couples for immigration purposes. See Human Rights Campaign, *Uniting American Families Act*, <http://www.hrc.org/resources/entry/uniting-american-families-act> (last modified Feb. 14, 2013).

<sup>98</sup> Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, Williams Institute, 1 (Nov. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf> (“bi-national” refers to couples where only one member is a U.S. citizen).

### **A. DOMA Forecloses the Option of Immigration Through Family Sponsorship for Married Bi-National Gay and Lesbian Couples**

U.S. immigration policy puts the highest priority on reuniting non-citizen spouses with their spouses who are either U.S. citizens or lawful permanent residents. U.S. citizens who marry non-citizens are generally automatically granted the rights and benefits of “Family Sponsorship,” enabling the U.S. citizen to sponsor her spouse for conditional permanent residence.<sup>99</sup> To effect the timely reunification of married couples, non-citizen spouses of U.S. citizens are not subject to the numerical limitations on immigration generally applicable to other types of immigrant visa holders. This allows a non-citizen to join her U.S. citizen spouse expeditiously, bypassing the quota system, waiting lists, and priority dates applicable to other types of family-sponsored immigration.<sup>100</sup> If a lawful permanent resident becomes a U.S. citizen while her spouse is waiting for a visa, her spouse

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<sup>99</sup> 8 U.S.C. §§ 1430, 1151(b), 1154(a)-(b).

<sup>100</sup> The quota system can often stall family reunification for years and even decades. For example, the wait time for an F-1 family visa for unmarried sons and daughters of U.S. citizens from Mexico is nearly 20 years. U.S. Dep’t of State, *Visa Bulletin: Immigrant Numbers for September 2012*, No. 48, Vol. IX, 2 (Aug. 9, 2012), available at [http://www.travel.state.gov/pdf/visabulletin/visabulletin\\_september2012.pdf](http://www.travel.state.gov/pdf/visabulletin/visabulletin_september2012.pdf); 8 U.S.C. § 1151(b)(2).

immediately receives a visa as well.<sup>101</sup> In addition, a non-citizen spouse of an American citizen becomes eligible for U.S. citizenship after only three years, in contrast to the five-year wait required of other lawful permanent residents.<sup>102</sup> Regardless of whether a same-sex couple is lawfully married in this country or another, these opportunities are unavailable to them.

Because of DOMA, married, same-sex bi-national couples, such as the plaintiffs in *Blesch v. Holder*, are denied spousal sponsorship rights.<sup>103</sup> In 1998, Heather Morgan, a U.S. citizen, and Maria del Mar Verdugo, a Spanish citizen, met in Madrid, Spain, while Morgan was there teaching English.<sup>104</sup> Morgan returned to New Jersey, and Verdugo eventually secured a temporary H1-B skilled worker visa through a Spanish-language newspaper in New York.<sup>105</sup> After the couple married, Morgan filed an I-130 Petition for Alien Relative on behalf of her spouse, which will most cer-

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<sup>101</sup> U.S. Citizenship & Naturalization Servs., *How Do I Help My Relative Become a U.S. Permanent Resident*, M-561, 2 (Aug. 2008), available at <http://www.uscis.gov/USCIS/Resources/B1en.pdf>.

<sup>102</sup> See U.S. Citizenship & Naturalization Serv., *Citizenship through Naturalization* (2011), <http://www.uscis.gov/portal/site/uscis>.

<sup>103</sup> Compl. at 11-12, *Blesch v. Holder*, 2012 U.S. Dist. LEXIS 75999 (E.D.N.Y. May 31, 2012) (No. 12-1578).

<sup>104</sup> *Id.* at 12.

<sup>105</sup> *Id.* at 12-13.

tainly be denied due to DOMA.<sup>106</sup> As a result, the couple's life is riddled with uncertainty.<sup>107</sup> Verdugo's ability to remain in the U.S. is contingent on her continued employment, and the couple has postponed starting a family because they are not sure whether they will be able to raise their children together in this country.<sup>108</sup> Because DOMA precludes U.S. citizens married to non-citizen same-sex spouses from sponsoring their spouses' immigration to this country, Morgan and Verdugo, like thousands of others, are deprived of the security and stability afforded to other similarly situated married different-sex couples.<sup>109</sup>

### **B. DOMA Makes it Difficult for Married Gay and Lesbian Couples to Immigrate to the United States**

Workers may also immigrate to the United States through sponsorship by an employer.<sup>110</sup> Employment-

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<sup>106</sup> *Id.* at 12-13.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Rebecca Walters, *The Uniting American Families Act: A Critical Analysis of Legislation Affecting Bi-National Same-Sex Couples*, 17 Am. U. J. Gender Soc. Pol'y & L. 521, 525 (2009) (Immigration and Nationality Act does not explicitly exclude married bi-national same-sex couples, but is constrained by DOMA's definition of spouse); *but see Matter of Paul Wilson Dorman*, 25 I. & N. Dec. 485, 2011 BIA LEXIS 8 (Op. Att'y Gen. Apr. 26, 2011).

<sup>110</sup> 8 U.S.C. § 1101(a)(15)(H).

based visas normally provide immigrants the right to bring their spouses, who in turn are provided the right to live and work in the United States.<sup>111</sup> DOMA denies an immigrating worker the right to be accompanied by a spouse if the spouse is of the same sex—even if the worker’s marriage is otherwise lawfully recognized in her country of origin and the state in the United States where the immigrant intends to work.

The denial of this right profoundly affects the ability of married gay and lesbian legal immigrants to maintain family relationships and financial stability. Without lawful permanent resident status, same-sex spouses of employment-based visa holders must be able to obtain their own visitor visas or other types of visas to remain with a spouse in the United States. However, many married gay and lesbian spouses of employment-based visa holders cannot qualify for a visitor visa or may not be permitted to renew the visitor visa. Under these circumstances, the same-sex spouse may need to return to her home country for extended periods of time, resulting in costly travel expenses and extended periods of separation from her spouse and children, who are permitted to remain lawfully in the United States.<sup>112</sup> Such extended visits can also hinder the occupational advancement of either or both members of the couple, reducing earnings over the course of a lifetime.<sup>113</sup>

Even when the spouse can obtain a visitor visa,

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<sup>111</sup> *Id.* § 1153(d).

<sup>112</sup> Badgett, *supra* note 88, at 1097-98.

<sup>113</sup> *Id.*

such visas generally require the applicant to prove that she does not intend to remain permanently in the United States, and that she maintains strong ties to her home country. This can be difficult—if not impossible—to do given her marriage to a lawful resident of the United States. Not only must gay and lesbian couples deliberate about whether they can tolerate DOMA's harsh constraints on their immigration prospects when considering U.S. employment opportunities, employers may also be reluctant to hire immigrant workers who may be compelled to return home regularly.<sup>114</sup>

DOMA's impact on U.S. immigration policy cruelly forces many married, bi-national, same-sex couples into painful and untenable dilemmas. As a consequence of DOMA, families are either broken apart or qualified workers who are married to persons of the same sex choose not to immigrate to the United States for employment. DOMA leaves gay and lesbian couples who are legally married under state law or the laws of a foreign nation with a choice between three equally poor options: the citizen must leave the United States, the non-citizen must reside in the United States illegally, or the couple must separate.<sup>115</sup> Each unfortunate alternative directly contravenes longstanding U.S. immigration policy favoring family reunification.

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<sup>114</sup> Immigration Policy Ctr., *The Migrant Integration Policy Index* (2011), available at <http://www.immigrationpolicy.org/just-facts/migrant-integration-policy-index-mipex-iii>.

<sup>115</sup> Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 Nev. L.J. 629, 630 (2011).

**CONCLUSION**

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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