NOS. 10-2204(L); 10-2207; 10-2214

In The
United States Court of Appeals
For The First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff – Appellee,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants – Appellants.

DEAN HARA,
Plaintiff–Appellee/Cross–Appellant,

NANCY GILL, *et al.*,
Plaintiffs – Appellees,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants–Appellants/Cross–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF *AMICUS CURIAE* OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF AFFIRMANCE OF JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Citizens for Responsibility and Ethics in Washington ("CREW") submits this corporate disclosure statement.

CREW does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest. CREW is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

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INTEREST OF *AMICUS CURIAE*

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the conduct of members of Congress and the executive branch and, where appropriate, files complaints with Congress, the Federal Election Commission, the U.S. Department of Justice, and the federal courts.

CREW also publishes reports on a range of issues, including on the ethical and legal lapses of members of Congress. For example, in *Family Affair*, CREW detailed how certain members of Congress in leadership roles used their positions to financially benefit family members. Part of the information for this report was gleaned from personal financial disclosure reports members are required to file, which include financial information about their spouses.

CREW is participating as an *amicus* in this case to highlight the impact Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, has on key ethics statutes, including those requiring public officials and candidates to disclose sources of income for themselves and their spouses, and anti-nepotism statutes

designed to guard against the undue influence resulting from the employment of spouses of high-level officials and judges. If the constitutionality of Section 3 is upheld, public officials, employees, and candidates for public office in same-sex marriages will be subject to differing disclosure requirements than those to which officials, employees, and candidates in opposite-sex marriages are subject, with a resulting decrease in transparency and accountability. Similarly, the public will lose the protection against corruption and undue influence afforded by the anti-nepotism laws if they are not also applied to married same-sex couples.

Related to its interest in maintaining ethical laws is CREW's interest in assuring that taxpayer funds are spent wisely and fairly. That interest also is undermined because DOMA's discriminatory treatment of married same-sex couples also will cost the federal government nearly $1 billion per year, according to a 2004 report of the Congressional Budget Office ("CBO").

This brief is filed with the consent of counsel for all parties in the case.

SUMMARY OF ARGUMENT

DOMA mandates the words "marriage" and "spouse," as used in any federal statute, regulation, ruling or interpretation, "refer[] only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Plaintiff-appellees here challenge this provision as unconstitutionally depriving them of equal protection by denying them federal benefits afforded individuals in opposite-sex marriages.

DOMA's unduly restrictive definitions of marriage and spouse also have the perverse effect of undermining important objectives in a host of other federal laws that otherwise bear no relationship to DOMA and its supposed goals. Statutes intended to promote ethics in government by guarding against conflicts of interest through financial disclosure requirements, bans on hiring or appointing spouses for government positions, and recusal requirements for federal judges, are all rendered inapplicable to married same-sex couples by DOMA. These consequences, which Congress never explored, let alone considered in its debates, highlight the fundamental problems with this irrational and over-broad legislation, which interferes with and undermines other important federal policies completely unrelated to same-sex marriage.

Moreover, Congress was so intent on passing DOMA that, although it thought the legislation would save the government money, it never sought to find out whether that was correct. When the CBO eventually was asked to provide an estimate, it discovered DOMA will cost the taxpayers nearly $1 billion per year. Even if discrimination of this kind could be justified by fiscal considerations, it surely cannot be sustained when it turns out to be so expensive.

I. DOMA'S DEFINITIONS OF "MARRIAGE" AND "SPOUSE" SERIOUSLY UNDERMINE A SIGNIFICANT NUMBER OF FEDERAL ETHICS LAWS.

In 1978, in the aftermath of Watergate, Congress passed the Ethics in Government Act ("EIGA"), Pub. Law No. 95-521, 92 Stat. 1824, to "preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government." S. Rep. No. 170, 95th Cong., 2d Sess. 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216. Its goal is "to prevent corruption and other official misconduct before it occurs . . .." *Dean v. Veterans Admin.*, 151 F.R.D. 83, 87 (N.D. Ohio 1993), *quoting* S. Rep. No. 170 at 31. EIGA accomplishes this by imposing annual reporting requirements on members of Congress, candidates for federal office, certain high-level federal employees, the president, the vice president, federal judges and Supreme Court justices, and certain congressional and judicial employees.

Many of EIGA's provisions apply to both the reporting individual and "relative[s]" of that individual, defined to include, *inter alia*, a husband or wife. 5 U.S.C. Appx § 109(16). For example, among the items EIGA requires to be reported are income in excess of $1,000, honoraria, and specified gifts to the reporting individual's "spouse." 5 U.S.C. Appx §§ 102(e)(1)(A)-(D). Under DOMA, these provisions must be construed as excluding from their coverage any "spouse" in a single-sex marriage. As a result, those in same-sex marriages need

not report any of the financial information pertaining to their spouses that EIGA otherwise requires of opposite-sex married couples. But without this information, identifying potential financial conflicts of interest is difficult, if not impossible. Thus, for example, post-DOMA, a same-sex spouse of an agency head could receive significant income from an entity regulated directly by the agency with no duty to report such income, even though this situation presents a clear potential for a serious conflict of interest.

DOMA undermines other provisions of EIGA as well. EIGA dictates how honoraria paid to charitable organizations in lieu of directly to a member of Congress, officer, or employee are to be treated. 5 U.S.C. Appx § 501(c). Such payments cannot exceed $2,000, and also cannot be made to a charitable organization in which, *inter alia*, the member, officer, or employee or his or her spouse "derives any financial benefit." *Id.* Again, the purpose of this provision is to protect against financial conflicts of interest, which is undermined by DOMA's exclusion of same-sex spouses from this ban.

DOMA's reach extends beyond the reporting requirements in EIGA to other statutes intended to protect against financial conflicts of interest. For example, officers and employees of labor organizations must report certain financial assets they or their spouses hold, a requirement that would not, by virtue of DOMA, extend to same-sex spouses. *See* 29 U.S.C. § 432(a)(1). Further, by statute, health

maintenance organizations ("HMOs") must disclose certain financial information to the Secretary of Health and Human Services, including specified transactions between the HMO and a "party in interest," defined to include the spouse of the party in interest. 42 U.S.C. § 300e-17(b)(4). Under DOMA, this requirement would not extend to same-sex spouses.

Congress never considered DOMA's impact on these other legislative schemes. EIGA, for example, was enacted to promote the goal of a more ethical and transparent government, yet, though unintended, DOMA's restrictive definitions of marriage and spouse thwart EIGA's goals without any rational justification. Same-sex married couples are not inherently more ethical than their opposite-sex counterparts, yet DOMA treats them as if they are by exempting them from important ethics requirements. Of course, like married opposite-sex couples, many married same-sex couples will make disclosures about their spouses regardless of DOMA, and a spouse employed by an agency may refuse to participate in a matter in which his or her same-sex spouse has an otherwise disqualifying financial interest. Others, however, may simply follow the black letter of the law. While the truly ethical person would never do what is prohibited, DOMA tells those most in need of regulation that federal ethics laws do not apply to them. On this basis alone, DOMA fails constitutional scrutiny.

DOMA also thwarts the goals of "anti-nepotism" and judicial recusal laws. Under the federal anti-nepotism law, public officials are prohibited from appointing, employing, promoting or advancing "any individual who is a relative of the public official." 5 U.S.C. § 3110(b); *see also* 5 U.S.C. § 2302(b)(7) (forbidding advocating the appointment or employment of a relative, including a spouse). By outlawing favoritism based on kinship, anti-nepotism laws promote fairness in the workplace in hiring and promotions. The term "relative" is defined under these laws to include husbands and wives, and also a variety of "in-laws" and "step" relations. 5 U.S.C. § 3110(a)(3). Because DOMA excludes from the anti-nepotism law married same-sex couples, such couples are legally free to hire and supervise their own spouses and family members of their spouses. This situation presents the very danger of serious conflicts anti-nepotism laws were enacted to prevent.[1]

DOMA creates loopholes in other similar statutes as well. In the federal judicial system, judges are empowered to appoint magistrate judges.

[1] DOMA also affects agency regulations and policies implementing federal law. For example, the Centers for Disease Control and Prevention ("CDC") has adopted a policy that prohibits "CDC managers, supervisors, and others in positions to influence personnel actions" from advocating for or employing, promoting, or advancing a relative to any position within the CDC. Manual Guide - Human Resources Management Manual CDC Chapter 310-1, § IV C (Jan. 20, 1998). Relative is defined to include, *inter alia*, "father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law," *id.* at § IV A., relationships that appear to be outside the policy as applied to married same-sex couples because of DOMA.

28 U.S.C. § 631. That power is limited to appointing individuals who are "not related by blood or marriage to a judge of the appointing court or courts . . ." *Id*. at § 631(a)(4). Under DOMA, however, judges are free to appoint their same-sex spouses to be magistrate judges, even though such appointments raise the same potential conflicts as the prohibited appointment of opposite-sex spouses.

DOMA has an equally irrational effect on judicial recusal laws. All federal justices, judges, and magistrates are required to disqualify themselves in a variety of circumstances, including where their

> spouse[s] . . . ha[ve] a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4). Further, judges are required to "make a reasonable effort to inform [themselves] about the personal financial interests of [their] spouse[s] . . ." *Id.* at § 455(c). Yet DOMA operates to excuse judges in same-sex marriages from these recusal requirements, meaning a judge could preside over a proceeding in which his or her same-sex spouse has a substantial financial interest, despite the obvious conflict this would present.

Beyond EIGA and anti-nepotism laws, DOMA undermines the transparency and accountability afforded by a wide range of statutes and regulations, from gift

bans imposed on senators and their spouses[2] to limitations on the personal funds a presidential candidate can spend.[3] DOMA impacts the ban on accepting certain travel and travel-related expenses from non-federal sources that applies to federal employees and their spouses,[4] and excludes same-sex spouses from the reach of the foreign gift ban.[5]

DOMA also impacts statutes intended to guard against potential conflicts in commission membership and participation. For example, opposite-sex spouses are barred from membership in the Citizens' Commission on Public Service and Compensation when their opposite-sex spouses sit on the commission,[6] while same-sex spouses face no such prohibition. Similarly, members of the Foundation for the National Institutes of Health are barred from participating in any foundation matter in which their opposite-sex spouses have a financial interest,[7] yet the same-sex spouses of foundation members face no such bar.

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[2] *See* 2 U.S.C. § 31-2(a) (barring senators and their spouses and dependents from accepting gifts in excess of $250 from certain sources).

[3] *See* 26 U.S.C. § 9035 (barring presidential candidates who receive matching funds from spending more than $50,000 from their personal funds or the personal funds of their families, defined to include spouses).

[4] *See* 31 U.S.C. § 1353.

[5] *See* 5 U.S.C. § 7342.

[6] *See* 2 U.S.C. § 352(2).

[7] *See* 42 U.S.C. § 290b(j)(2).

DOMA produces some of the most extreme results when applied to criminal statutes. "Bribery, graft, and conflicts of interest" are defined to include "[a]cts affecting a personal financial interest" of an employee of the federal or District of Columbia government, including those of his or her spouse. 18 U.S.C. § 208(a). DOMA removes from this definition financial interests of same-sex spouses, leaving them free to engage in what would otherwise be criminal conduct.

Criminal laws also make it illegal to retaliate against a federal official by threatening or injuring an immediate family member of the official. 18 U.S.C. § 115(a). "Immediate family member" is defined to include the official's spouse. *Id.* at § 115(c)(2). By excluding same-sex spouses from the definition of "spouse," however, DOMA effectively decriminalizes retaliation when committed against the same-sex spouse of a federal official.[8]

* * *

Congress enacted a network of statutes to promote the increasingly important role of ethics in public life. Through the poorly considered act of redefining the meaning of "marriage" and "spouse," DOMA has prevented same-

[8] While this section of this brief addresses DOMA's impact on statutes designed to bring transparency and accountability to the government and public officials, DOMA also impacts other statutes that protect equally important values. For example, the Secretary of Defense is required to request that each state report on suspected instances of child abuse and neglect of children of members of the armed forces or their spouses. 10 U.S.C. § 1787(a). Because of DOMA's restrictive definition of spouse, abused children of a same-sex spouse are not protected by this reporting requirement.

sex married couples from being held to the same ethical standards as opposite-sex married couples. Contrary to the plea in the concluding paragraphs of the brief of the Bipartisan Legal Advisory Group of the United States House of Representatives ("House Brief"), the public should not have to wait for an ethics scandal involving a same-sex spouse for Congress to respond to correct DOMA's unintended but patently irrational effects: the courts can do this now by applying the Equal Protection Clause.

II. NOT ONLY DOES DOMA'S DISCRIMINATORY TREATMENT OF MARRIED SAME-SEX COUPLES NOT CONSERVE MONEY, BUT IT ACTUALLY COSTS THE FEDERAL GOVERNMENT ALMOST A BILLION DOLLARS ANNUALLY.

As the brief of plaintiffs-appellees demonstrates, section 3 of DOMA serves no legitimate purpose. The House Brief suggests in several places that section 3 can be justified as a decision by Congress not to provide a financial subsidy to relationships of which it disapproves – same-sex marriages: "Congress also had rational interests in protecting the public fisc. . ." (House Brief p. 7); "Congress also expressed concern that expanding marital benefits to same-sex couples would unduly strain the public fisc in a manner not foreseen by the Congresses that originally enacted those benefits (*Id.*, p. 13). The difficulty with this contention is that a report issued by the Congressional Budget Office in 2004, when Republicans controlled both Houses of Congress, concluded the discrimination against married same-sex couples actually *costs* the federal taxpayers nearly $1 billion annually.

See Douglas Holtz-Eakin, Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004): http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

In response, the House pointed out (House Brief p. 44, note 12) that the report was written eight years after DOMA was passed, suggesting it is not indicative of what Congress knew or had in mind in 1996 when DOMA became law. The main difficulty with that argument is that Congress never sought to discern DOMA's impacts on the more than one thousand statutes DOMA affects. As Senator Robert Byrd observed when DOMA was being debated by Congress (quoted in House Brief, p. 14), "I know I don't have any reliable estimates [of its impact]. . . . That is the point -- nobody knows for sure." But Congress passed it anyway. The House does not claim that the laws affected by DOMA changed in any way in those intervening years such that if Congress had sought a CBO analysis in 1996, it would have received a different answer than it obtained in 2004. In light of the total lack of curiosity on the part of Congress as to whether DOMA would save money or increase federal expenditures, it is surely no defense that the law turned out to be very expensive, but that the result was not known at the time.

Without pointing to any contrary evidence, in the record or otherwise, the House suggests (House Brief, p. 44, note 12) the CBO estimate is flawed because it

"assumes that same-sex couples who would suffer a net reduction in federal benefits nonetheless would marry and self-identify to the federal government at the same rate as ones receiving a net benefit from marriage." There are several problems with this criticism of the CBO Report. First, the marital status of a couple is not a matter of how they "self-identify." Starting with the federal income tax form, and extending to every situation where a person's marital status is relevant to any federal program, the person completing the form must state whether he or she is married or not – under penalty of perjury. Since the person's marital status is a matter of official record in the state where the marriage took place, no sensible person would try to "mis-identify, *i.e.*, lie about their marital status. Moreover, there is no more reason for a same-sex couples to lie about their marital status than similarly situated opposite-sex couples.

If Congress were truly concerned about self-identification, section 3 of DOMA is a very strange way to deal with the problem, as illustrated by the federal tax laws that affect almost every couple in the United States. The Internal Revenue Code does not define "marriage," but it is the longstanding practice of the IRS to defer to state law determinations of marital status, including common-law marriage. *See* Rev. Rul. 58-66, 1958-1 C.B. 60; Rev. Rul. 83-183, 1983-2 C.B. 220. Thus, if a taxpayer's state of residence recognizes common-law marriages, individuals meeting the state's requirements are treated as husband and wife for

federal income tax purposes. Rev. Rul. 58-66. In the case of a couple who entered into a common-law marriage in a state recognizing such relationship, and then moved to a state that does not, the IRS will continue to treat the couple as husband and wife for tax purposes. *Id.* *See also* Pub. No. 17 (2010) (available at http://www.irs.gov/publications/p17/ch02.htm#enUS_2010_publink1000170736). By definition, common law marriages are not recorded, and so if Congress were truly worried about self-identification (or more precisely self-selection in whether to be married or not, depending on which status was more advantageous), it would have changed the law so that couples who claim to have common law marriages could no longer pick and choose without fear of being trapped by official state records. Indeed, the supposed congressional goals of uniformity and ease of administration also cited to sustain DOMA are also undermined by the IRS practice of treating common law marriages as valid under the Tax Code, but Congress has tolerated those problems for at least 50 years since Rev. Rul. 58-66 was published in 1958.

Second, while it may be true that some same-sex couples will choose not to marry because of some of the negative economic consequences in the tax and other areas of law, the same is also true of opposite-sex couples. Under the laws of Massachusetts, the other five states, and the District of Columbia, where same-sex couples can be legally married, they face the same choice as opposite-sex couples.

Both must weigh the pros and cons of marriage, including those related to benefits and detriments from the federal government, and make a choice. These plaintiffs have made their choice, and they would like the benefits they seek in this lawsuit. They also recognize that, with their married status, may come some denials or reductions of financial benefits, and they are prepared to take the bad with the good, which include all of the reasons why both same and opposite-sex couples choose to marry.

Third, the relevance of the CBO report is not that it proves the actual cost to the federal treasury will be $1 billion a year, or for that matter any particular amount. After all, plaintiffs need not show this law will have a certain negative fiscal impact in order to prevail. Quite the contrary. If the supporters of DOMA enacted it as a money-saving device, it is the House, in defending the law, that must show it saves money, and does so in a non-discriminatory way. It has not. Thus, even if the CBO estimate of costs is on the high side, its overall conclusion that DOMA will cost a substantial amount of money cannot be disregarded just because the House does not like the CBO's conclusion, while offering no facts to counter it. At most, the House's criticisms of the CBO are quibbles at the edges, but it does not explain why Congress proceeded without even inquiring as to the cost of this law, and it surely eliminates any claim that section 3 of DOMA was

enacted to "preserve scarce government resources," House Brief at 13, *quoting* H. R. Rep. No. 104-664, 18 (1996).

There is another respect in which the across-the-board treatment of what the House recognizes (House Brief, p. 45) as "the host of pre-existing federal statutes" to which section 3 is applicable, is irrational. As the House next observed, "Each such statute involved its own unique legislative debate, balancing the importance of the benefit against fiscal restraint and other countervailing considerations." *Id.* Yet Congress did not even attempt to revisit that "balancing" when it enacted DOMA: it simply decided that married same-sex couples would not be treated the same as married opposite-sex couples under federal law. To Congress, the fiscal consequences of DOMA were so irrelevant that it did not even inquire as to what they were. If that is not the sign of an irrational law, it is hard to know what would be, especially when it turns out that DOMA will cost money and not save it.

CONCLUSION

Not only does section 3 of DOMA not support any legitimate goal of the federal government in its discriminatory treatment of plaintiffs and other married same-sex couples, but it also seriously undermines the interest of the federal government in the enforcement of its laws on ethics, conflicts of interests, and nepotism and may cost the federal taxpayers as much as $ 1 billion per year. For these reasons and those set forth in the brief of appellees, the judgment below should be affirmed.

Respectfully Submitted,

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DATED: November 3, 2011

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Dated: November 3, 2011

/s/ Alan B. Morrison
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of November, 2011, I caused this Brief *Amicus Curiae* of Citizens For Responsibility and Ethics In Washington ("CREW") to be filed electronically with the Clerk of the Court using the CM/ECF System. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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