

Case Nos. 10-2204, 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 OF *AMICI CURIAE* 70 BUSINESS, PROFESSIONAL AND MUNICIPAL EMPLOYERS,
AND PROFESSIONAL, TRADE, AND CIVIC ORGANIZATIONS REPRESENTING
EMPLOYERS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE
JUDGMENT BELOW

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Dated: November 3, 2011

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Professional, and Municipal Employers, and
Professional, Trade, and Civic Organizations
Representing Employers in Support of Appellees and
in Support of Affirmance of the Judgment Below*

This brief is filed on behalf of the following businesses:

ABT Associates

Aetna, Inc.

Akamai Technologies, Inc.

Alere Inc.

Bank of New York Mellon Corporation

Biogen Idec, Inc.

Blue Cross Blue Shield of Mass., Inc.

Boston Community Capital, Inc.

Boston Medical Center Corp.

Bright Horizons Children's Centers LLC

Calvert Investments, Inc.

CBS Corporation

The Chubb Corporation

Communispace Corp.

Constellation Energy Group, Inc.

Diageo North America, Inc.

Eastern Bank Corp.

Exelon Corp.

FitCorp Healthcare Centers, Inc.

Gammelgården, LLC

Google Inc.

Integrated Archive Systems, Inc.

Kimpton Hotel & Restaurant Group, LLC

Levi Strauss & Co.

Loring, Wolcott & Coolidge Trust, LLC

Massachusetts Mutual Life Insurance Co.

Massachusetts Envelope Company, Inc.

Massachusetts Financial Services Company

Microsoft Corp.

National Grid USA, Inc.

Nationwide Mutual Insurance Co.

New Balance Athletic Shoe, Inc.

New England Cryogenic Center, Inc.

NIKE, Inc.

The Ogilvy Group, Inc.

Onyx Pharmaceuticals, Inc.

Partners HealthCare System, Inc.

Reproductive Science Center of New England

Skyworks Solutions, Inc.

Starbucks Corp.
State Street Bank and Trust Co.
Stonyfield Farm, Inc.
**Sun Life Financial (U.S.) Services
Co., Inc.**

Time Warner Cable, Inc.
Trillium Asset Management Corp.
W/S Development Associates LLC
Xerox Corp.
Zipcar, Inc.

Law and professional firms:

Burns & Levinson LLP
Edwards Wildman Palmer LLP
Foley Hoag LLP
Goodwin Procter LLP
Goulston & Storrs, P.C.
McCarter & English LLP

Nixon Peabody LLP
Parthenon Group LLC
Ropes & Gray LLP
Salera Consulting
Seyfarth Shaw LLP
Sullivan & Worcester LLP

Professional, trade and civic organizations:

**Greater Boston Chamber of
Commerce**
The Boston Foundation
**Massachusetts Association of Health
Plans**
**Massachusetts Biotechnology
Council, Inc.**

**The National Fire Protection
Association**
Out & Equal Workplace Advocates
Retailers Association of Massachusetts

And by the following cities:

The City of Boston, MA
The City of Cambridge, MA

The City of New York, NY

CORPORATE DISCLOSURE STATEMENTS OF CORPORATE AMICI

ABT Associates, Inc. is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Aetna Inc. is a corporation organized under the laws of Pennsylvania with a principal place of business in Connecticut. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

Akamai Technologies, Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Alere Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Bank of New York Mellon Corporation is a corporation organized under the laws of Delaware with a principal place of business in New York. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Biogen Idec Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Blue Cross and Blue Shield of Massachusetts, Inc. is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

Boston Community Capital, Inc. is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

The Boston Foundation is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Boston Medical Center Corporation is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Bright Horizons Children's Centers LLC is a limited liability company organized under the laws of Delaware with a principal place of business in Massachusetts. It is a wholly-owned subsidiary of Bright Horizons Family Solutions LLC.

CBS Corporation is a corporation organized under the laws of Delaware with a principal place of business in New York. To CBS Corporation's knowledge without inquiry, GAMCO Investors, Inc., on March 15, 2011, filed a Schedule 13D/A with the Securities and Exchange Commission reporting that it and certain

affiliates (any of which may be publicly-traded) own, in the aggregate, 10.1% of the Class A voting common stock of CBS Corporation; and CBS Corporation is not aware of any other publicly-traded corporation that owns 10 percent or more of its stock.

Calvert Investments, Inc. is a corporation organized under the laws of Delaware and headquartered in Maryland. Calvert is an indirect wholly owned subsidiary of UNIFI Mutual Holding Company. UNIFI has no parent company and no public corporation owns 10 percent or more of its stock.

The Chubb Corporation is a corporation organized under the laws of New Jersey with a principal place of business in New Jersey. It has no parent company, and it is aware of no publicly-held corporation that owns 10 percent or more of its stock.

Communispace Corporation is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts and is a wholly owned subsidiary of Omnicom Group, Inc.

Constellation Energy Group, Inc. is a corporation organized under the laws of Maryland with a principal place of business in Maryland. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Diageo North America, Inc. is a corporation organized under the laws of Connecticut with a principal place of business in Connecticut. It is an indirect wholly-owned subsidiary of Diageo plc, which is incorporated as a public limited company in England and Wales.

Eastern Bank Corporation is a mutual holding company organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company, issues no stock and is not publicly-held.

Exelon Corporation is a corporation organized under the laws of Pennsylvania with a principal place of business in Illinois. It has no parent company and no publicly-held company owns 10 percent or more of its stock.

Fitcorp Healthcare Centers, Inc. is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Gammelgården, LLC is a limited liability company organized under the laws of Vermont, operating a creamery at its sole place of business in Pownal, Vermont. No publicly-held corporation owns 10 percent or more of its membership interests.

Google Inc. is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Greater Boston Chamber of Commerce is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

Integrated Archive Systems, Inc. is a corporation organized under the laws of California with a principal place of business in California. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

Kimpton Hotel & Restaurant Group, LLC is a limited liability company organized under the laws of Delaware with a principal place of business in California. It is wholly-owned by Kimpton Group Holding, LLC, a privately-held limited liability company organized under the laws of Delaware.

Levi Strauss & Co. is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Loring, Wolcott & Coolidge Trust, LLC is a non-depository trust company and limited liability company organized under the laws of New Hampshire with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

The Massachusetts Association of Health Plans is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Massachusetts Biotechnology Council, Inc. is a section 501(c)(6) trade association organized under the laws of Massachusetts with a principal place of

business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Massachusetts Envelope Company, Inc., *d/b/a Grossman Marketing Group* is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Massachusetts Mutual Life Insurance Company is a life insurance company organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns more than 10 percent or more of its stock.

Massachusetts Financial Services Company is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. Over 10% of its stock is owned by its parent corporation, Sun Life of Canada (U.S.) Financial Services Holdings, Inc. Sun Life of Canada (U.S.) Financial Services Holdings, Inc. is a wholly-owned indirect subsidiary of Sun Life Financial, Inc. Sun Life Financial, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Microsoft Corporation is a corporation organized under the laws of Washington with a principal place of business in Washington. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

The National Fire Protection Association, Inc. is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and it issues no stock.

National Grid USA, Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It is a wholly owned subsidiary of National Grid plc, a publicly-traded English company.

Nationwide Mutual Insurance Company is a corporation organized under the laws of Ohio with a principal place of business in Ohio. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

New Balance Athletic Shoe Inc. is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

New England Cryogenic Center, Inc. is a corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

NIKE, Inc. is a corporation organized under the laws of Oregon and headquartered in Oregon. It has no parent company and no publicly-held corporation owns more than 10 percent or more of its stock.

The Ogilvy Group, Inc. is a corporation organized under the laws of New York with a principal place of business in New York. It is an indirect, wholly-owned subsidiary of WPP plc, a public limited company incorporated under the Companies (Jersey) Law 1991 (as amended).

Onyx Pharmaceuticals, Inc. is a corporation organized under the laws of Delaware with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Out & Equal Workplace Advocates is a section 501(c)(3) corporation organized under the laws of California with a principal place of business in California. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

The Parthenon Group, LLC is a limited liability company organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its membership interests.

Partners HealthCare System, Inc. is a non-profit corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

Reproductive Science Center of New England p.c. is a professional corporation organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and issues no stock.

The Retailers Association of Massachusetts is a non-profit trade association organized under the laws of Massachusetts with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

Skyworks Solutions, Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Starbucks Corporation is a corporation organized under the laws of Washington State with a principal place of business in Washington. It has no parent company and no publicly-held corporation owns more than 10 percent of its stock.

State Street Bank and Trust Company is a trust company chartered and existing under the laws of Massachusetts with a principal place of business in Massachusetts. It is a wholly-owned subsidiary of State Street Corporation, a publicly-traded corporation.

Stonyfield Farm, Inc. is a corporation organized under the laws of Delaware with a principal place of business in New Hampshire. It is wholly-owned by Danone SA, a publicly-traded corporation organized and existing under the laws of France.

Sun Life Financial (U.S.) Services Company, Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It is a wholly-owned subsidiary of Sun Life of Canada (U.S.) Holdings, Inc.

Time Warner Cable Inc. is a corporation organized under the laws of Delaware with a principal place of business in New York. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Trillium Asset Management Corporation is a corporation organized under the laws of Delaware and headquartered in Massachusetts. It has no parent company and not publicly held corporation owns more than 10 percent of its stock.

W/S Development Associates LLC is a limited liability company organized under the laws of Massachusetts with a principal place of business in Massachusetts. No publicly-traded corporation owns more then ten percent of its membership interests.

Xerox Corporation is a corporation organized under the laws of New York with a principal place of business in Connecticut. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

Zipcar, Inc. is a corporation organized under the laws of Delaware with a principal place of business in Massachusetts. It has no parent company and no publicly-held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	xiv
INTEREST OF AMICI CURIAE.....	1
ARGUMENT	2
A. The Burden of Compliance with DOMA.....	3
1. Workplace Benefits and a Workplace Ethos of Transparent Fairness are Critical to Enterprise Success.....	3
2. DOMA Burdens Amici’s Employees and Strains the Employer/Employee Relationship	4
3. DOMA Forces Employers to Incur Administrative Burdens and Expense	11
B. DOMA Forces Employers to Affirm Discrimination They Regard as Injurious to the Corporate Mission	15
CONCLUSION	19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Board of the County Commissioners of Bryan County v. Brown</i> , 520 U.S. 397, 400 (1997).....	16
<i>Ex Parte Burrus</i> , 136 U.S. 586 (1890).....	2, 3
<i>Goodridge v. Dep’t of Pub. Health</i> , 440 Mass. 309, 798 N.E.2d 941 (2003).....	4, 16
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	18
<i>In re Golinski</i> , 587 F.3d 901 (9th Cir. 2009)	18
<i>Strauss v. Horton</i> , 46 Cal.4th 364, 183 P.3d 384 (2009).....	3

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. X	2
1 U.S.C. § 7	1
5 U.S.C. §§ 6381-87.....	8
8 U.S.C. §§ 1153(b)(1)(A), (B), (C)	10
8 U.S.C. § 1153(d)	10, 11
26 U.S.C. § 72(t)	8
26 U.S.C. § 105	5
26 U.S.C. § 106(a)	5
26 U.S.C. § 125(a)	6

26 U.S.C. § 152.....	6, 11
26 U.S.C. § 213(a) (2011).....	7
26 U.S.C. § 401(a)(9).....	10
26 U.S.C. §§ 401(a)(11), 417.....	9
26 U.S.C. § 401(k)(2)(B)(i)(IV)	8
26 U.S.C. § 415(b)	9
26 U.S.C. §§ 417(b), (c).....	9
26 U.S.C. § 5000(b)(1).....	5
26 U.S.C. § 6013	7
26 U.S.C. § 6110(k)(3).....	12
26 U.S.C. § 9801(f).....	8
29 U.S.C. § 1055	9
29 U.S.C. §§ 1055(d), (e).....	9
29 U.S.C. §§ 1161-69	7
29 U.S.C. § 1163(1)-(6)	7
29 U.S.C. § 1167(1)	5
29 U.S.C. §§ 1181-83	7
29 U.S.C. § 2601 <i>et seq.</i>	8
Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).....	1
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99- 272, 100 Stat. 82 (1986).....	7
Family and Medical Leave Act of 1993 (“FMLA”), Pub. L. 103-3, 107 Stat. 6 (1993).....	8

Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (1996).....	7
Mass. G.L. c 176J § 9	7
Mass. G.L. c. 151B(4).....	16
N.M. Stat. Ann. § 40-1-4 (Michie 1978)	3

REGULATIONS

Treas. Reg. § 1.106-1	5, 6
Treas. Reg. § 1.125-4	8
Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B)(1).....	8
Treas. Reg. § 54.9801-6.....	8

ADMINISTRATIVE RULINGS

95 Md. Op. Atty. Gen. 3, 2010 WL 886002 (Feb. 23, 2010)	3
I.R.S. Notice 2007-7, 2007-1 C.B. 395, 2007 WL 60771 (Jan. 27, 2007)	9
I.R.S. Priv. Ltr. Rul. 200108101, 2000 PLR LEXIS 2092 (Nov. 17, 2000)	13
I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 (June 13, 2003)	6
I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 (Mar. 17, 2005).....	6
I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 (Jan. 22, 1997).....	6
I.R.S. Priv. Ltr. Rul. 9850011, 1998 PLR LEXIS 1650 (Sept. 10, 1998)	6
Mass. Dept. of Revenue, Technical Information Release, 04-17 at § (D)(1)(a) (July 7, 2004)	11
N.M. Op. Atty. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011).....	3

OTHER AUTHORITIES

David Agren, <i>Mexican States Ordered to Honor Gay Marriages</i> , N.Y. TIMES, Aug. 10, 2010, available at http://www.nytimes.com/2010/08/11/world/americas/11mexico.html	11
---	----

M.V. LEE BADGETT, CENTER FOR AMERICAN PROGRESS & UCLA WILLIAMS INSTITUTE, UNEQUAL TAXES ON EQUAL BENEFITS (Dec. 2007), available at http://www3.law.ucla.edu/williamsinstitute/publications/UnequalTaxesOnEqualBenefits.pdf	6
Tara Siegel Bernard, <i>Yale Payroll Error Gives Gay Employees a New Years Surprise</i> , N.Y. TIMES, Jan. 11, 2011, available at http://bucks.blogs.nytimes.com/2011/01/11/yale-payroll-error-costs-gay-employees-thousands/	13
Tara Seigel Bernard, <i>For Gay Employers, an Equalizer</i> , N.Y. TIMES, May 20, 2011, at http://www.nytimes.com/2011/05/21/your-money/health-insurance/21money.html	15
Tara Seigel Bernard, <i>A Progress Report on Gay Employee Health Benefits</i> , N.Y. TIMES, Aug. 15, 2011, http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/	15
Birna Bjornsdottir & Nicholas Vinocur, <i>Iceland Passes Gay Marriage Law in Unanimous Vote</i> , REUTERS, Jun. 11, 2010, available at http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611	10
Burgerlijk Wetboek [BW] [Civil Code], Art. 30:1 (Neth.)	10
Civil Marriage Act, S.C. 2005, c. 33 (Can.)	10
Civil Union Act 17 of 2006 (S. Afr.)	10
CODE CIVIL [C.CIV.] art. 143 (Belg.)	10
Eastern Bank: Embracing Diversity, available at https://www.easternbank.com/site/about_us/Pages/diversity.aspx	18
Fortune 500 Project, available at http://www.equalityforum.com/fortune500/	18
James K. Harter, Frank L. Schmidt & Theodore L. Hayes, <i>Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis</i> , 87 J. APPLIED PSYCHOL. 268 (2002)	4

Constance Johnson, Law Library of Congress, <i>Norway: Same-Sex Marriage Approved</i> , GLOBAL LEGAL MONITOR (Jul. 2, 2008), available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_120540512_text	10
Law 13/2005 Código Civil [C.C.] [Civil Code] 2005, 157 (Spain)	10
Law No. 26.618, July 22, 2010, [CXVIII] B.O. 31.949 (Arg.)	10
Letter from Patrick C. Lynch, Attorney General for the State of Rhode Island, to Jack Warner, Commissioner of the Rhode Island Board of Governors for Higher Education (Feb. 20, 2007), available at http://www.oag.state.md.us/Opinions/2010/Warner.pdf	3
METLIFE, 9TH ANNUAL STUDY OF EMPLOYEE BENEFIT TRENDS (2011), available at http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf	4
<i>Mexico City Legalizes Same-Sex Marriage</i> , ASSOCIATED PRESS, Dec. 22, 2009, available at http://www.guardian.co.uk/world/2009/dec/22/mexico-city-same-sex-marriage	11
Press Release, U.S. Bureau of Labor Statistics, Employee Benefits in the United States 2010 (July 27, 2010).....	4
RONALD D. ROTUNDA & JOHN E. NOWACK, 2 TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE & PROCEDURE § 16.3 at 1027-28 (4th ed. 2007)	16
Eduardo Soares, Law Library of Congress, <i>Portugal: Gay Marriage La Approved By Constitutional Tribunal</i> , GLOBAL LEGAL MONITOR (Apr. 12, 2010), available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401917_text	10
<i>Sweden Allows Same-Sex Marriage</i> , BBC NEWS, Apr. 2, 2009, available at http://news.bbc.co.uk/2/hi/7978495.stm	11

INTEREST OF *AMICI CURIAE*

Amici are financial institutions, medical centers, health-care providers, insurance companies, energy and high technology businesses, manufacturers, media companies, pharmaceutical companies, professional firms, retailers, marketers, non-profit organizations, and the cities of Boston, Cambridge and New York, as well as trade associations and the Greater Boston Chamber of Commerce.¹ In short, *amici* are employers -- or represent them -- and we share a desire to attract, retain and secure a talented workforce. Our enterprises are located in states, including the Commonwealth of Massachusetts, that recognize the marriages of our employees and colleagues to same-sex spouses. At the same time, we are subject to the federal Defense of Marriage Act (“DOMA”)², which precludes federal recognition of these marriages. This dual regime uniquely burdens *amici*. It puts us, as employers and enterprises, to unnecessary cost and administrative complexity, and regardless of our business or professional judgment forces us to discriminate against a class of our lawfully-married employees, upon whose welfare and morale our own success in part depends. *Amici* write to advise the Court concerning the impact on the employer of these conflicting legal regimes.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund, prepare, or submit this brief.

² DOMA directs that all federal legislation and regulation be construed such that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7.

ARGUMENT

The House of Representatives argues that Congress, through DOMA, sought to impose a uniform rule of eligibility for federal marital benefits.³ The perspective of the American employer who must implement DOMA is very different. Because marriages are celebrated and recognized under state law, a federal law withholding marital benefits from some lawful marriages, but not others, creates a *non*-uniform rule. Employers are obliged to treat one employee spouse differently from another, when each is married, and each marriage is equally lawful. In this brief, *amici* show how the burden of DOMA's dual regime is keenly felt by enterprises that conduct operations or do business in jurisdictions that authorize or recognize same-sex marriage.⁴

The Tenth Amendment protects certain state powers from federal intrusion.⁵ The Commonwealth's argument that the power to regulate marriage is among these state powers⁶ is consistent with the historical practice of employers to look to state law to determine which employees were married for purposes of administering workplace benefits. *See generally, Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890) (“[t]he whole subject of the domestic relations of husband and wife, parent and

³ *See* Brief for Intervenor-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives at 46-49.

⁴ The fact that marriage laws vary from state to state does not create the practical problems we discuss below. Absent DOMA, employers could treat all employees married under the law of any state in a consistent way. Our burden arises because federal law intrudes to conflict with state law, forcing the employer to create two groups of married employees, and to treat one group differently from another.

⁵ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

⁶ *See* Brief of Plaintiff-Appellee Commonwealth of Massachusetts *et al.* at 15.

child, belongs to the laws of the States and not to the laws of the United States.”).⁷ Ten states and the District of Columbia now either authorize the marriages of same-sex couples, or recognize (to varying degrees) such marriages when performed in other states, while DOMA, operating in each state, precludes federal recognition of these marriages.⁸ The burden of a dual regime arises where enterprises that conduct operations or do business in any of these jurisdictions.

A. The Burden of Compliance with DOMA.

1. Workplace Benefits and a Workplace Ethos of Transparent Fairness are Critical to Enterprise Success.

The capital of modern enterprises is in many ways a human capital. Success depends on the talent, morale and motivation of people. To attract the best employees and colleagues, *amici* must offer robust workplace benefits and a workplace ethos of transparent fairness. In 2010, 86% of full-time U.S. workers in private industry had access to medical benefits through their employer, and 74% to

⁷ See Brief of Plaintiff-Appellee Commonwealth of Massachusetts *et al.* at 17-20.

⁸ Marriage between same-sex couples is lawful in Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia. See Brief of Plaintiff-Appellees Nancy Gill *et al.* at 8 n. 5. California recognizes marriages between same-sex couples as valid under state law if those marriages were performed between June 16, 2008 and November 4, 2008. See *Strauss v. Horton*, 46 Cal.4th 364, 183 P.3d 384 (2009).

Rhode Island, Maryland, and New Mexico recognize marriages between same-sex couples lawfully performed in other states. Letter from Patrick C. Lynch, Attorney General for the State of Rhode Island, to Jack Warner, Commissioner of the Rhode Island Board of Governors for Higher Education (Feb. 20, 2007), available at <http://www.oag.state.md.us/Opinions/2010/Warner.pdf>; Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid In The State Of Celebration May Be Recognized In Maryland, 95 Md. Op. Atty. Gen. 3, 2010 WL 886002 (Feb. 23, 2010); N.M. Stat. Ann. § 40-1-4; Are same-sex marriages performed in other jurisdictions valid in New Mexico?, N.M. Op. Atty. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011).

an employer-provided retirement plan.² Benefits packages—especially health and retirement benefits—are a direct contributor to employee loyalty.¹⁰ Satisfied and engaged workers are more productive and perform better across a variety of metrics than less-satisfied colleagues.¹¹ Workplace benefits enhance the employer/employee relationship, which in turn is a key to enterprise success. To compete effectively in modern economies and demographic groups, *amici* strive to offer workplace benefits to their employees on an equitable basis.

2. DOMA Burdens *Amici's* Employees and Strains the Employer/Employee Relationship.

Federal law provides to the working family many benefits and protections relating to healthcare, protected leave, and retirement. These protections provide security and support to an employee grappling with sickness, disability, childcare, family crisis, or retirement, allowing the employee to devote more focus and attention to his work. In Massachusetts, for example, married employees expect to enjoy the full array of “protections, benefits, and obligations conferred by civil marriage.”¹² They make important personal and financial decisions in reliance on

² Press Release, U.S. Bureau of Labor Statistics, Employee Benefits in the United States 2010 (July 27, 2010).

¹⁰ METLIFE, 9TH ANNUAL STUDY OF EMPLOYEE BENEFIT TRENDS at 20 (2011), available at <http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf> (last visited Nov. 1, 2011). Seventy-four percent of polled employees describe health benefits as an important driver of employee loyalty, with 64 percent who agreed regarding retirement benefits, and 59 percent who agreed regarding dental, disability, vision, and life insurance benefits. *Id.* at 22.

¹¹ James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268 (2002).

¹² *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 312, 798 N.E.2d 941, 948 (2003).

that promise and expect such protections to be available to them when faced with challenging life circumstances.

DOMA defeats this expectation, to the direct detriment of some married employees of *amici*, and by extension, of *amici* ourselves. As set forth below, DOMA forces *amici* to investigate the gender of the spouses of our lawfully-married employees and then to single out those employees with a same-sex spouse. DOMA enforces discriminatory tax treatment of spousal health care benefits. In many other benefit-related matters, *amici* must incur the cost and administrative burden of “workarounds” (employer-created benefit structures attempting to compensate for the discriminatory effects of DOMA), or leave the married workforce in separate castes.¹³

Health Insurance and Related Benefits. While DOMA does not prevent an employer from offering health-care benefits¹⁴ to the same-sex spouse of an employee, it does impose discriminatory tax treatment. Under the Internal Revenue Code, the fair market value of health care benefits for a qualified employee’s spouse is not subject to federal income tax,¹⁵ but DOMA forces both employer and employee to treat that value as taxable income when the covered spouse is a same-sex spouse.¹⁶ Even where an employer provides coverage under a

¹³ See Brief of Plaintiff-Appellee Commonwealth of Massachusetts *et al.* at 44-45.

¹⁴ Such benefits typically are offered through a “group health plan.” See 29 U.S.C. § 1167(1); 26 U.S.C. § 5000(b)(1).

¹⁵ See, e.g., 26 U.S.C. §§ 105 & 106(a); Treas. Reg. § 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 ...”).

¹⁶ See, e.g., I.R.S. Priv. Ltr. Rul. 200524016, 2005 PLR LEXIS 278 at *23-24 (Mar. 17, 2005); I.R.S. Priv. Ltr. Rul. 200339001, 2003 PLR LEXIS 879 at *9-11 (June 13, 2003); I.R.S. Priv. Ltr. Rul. 9850011, 1998 PLR LEXIS 1650 at*10-

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“family plan,” in which the addition of a discrete beneficiary may not add a discrete premium cost, an employee who elects such coverage for her same-sex spouse is taxed on the imputed fair market value of the spouse’s coverage.

DOMA creates other tax distinctions with respect to workplace healthcare benefits. An employer may allow a married employee to reduce his taxable income by paying, on a pre-tax basis, the cost of coverage for a different-sex spouse, but not for a same-sex spouse.¹⁷ A married employee may reduce his tax burden through pre-tax contributions to a “cafeteria” plan on behalf of a spouse, or be reimbursed on a pre-tax basis for spousal medical expenses from a health savings account or flexible savings account—but only for a different-sex spouse.¹⁸

Because of DOMA, the typical paycheck and Form W-2 for a married employee with a same-sex spouse looks quite different from that of her colleague married to a different-sex spouse. The Form W-2 for the first will show higher taxable wages, due to the addition of the imputed value of the spouse’s healthcare coverage, and reduced take-home pay, reflecting the increased withholding on that imputed income. One study shows that, on average, the Form W-2 of the employee married to a same-sex spouse will show \$1,069 more in federal taxes paid than that of her colleague married to a different-sex spouse.¹⁹ The former,

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12 (Sept. 10, 1998); I.R.S. Priv. Ltr. Rul. 9717018, 1997 PLR LEXIS 85 at *11-12 (Jan. 22, 1997).

¹⁷ Treas. Reg. § 1.106-1; 26 U.S.C. § 106(a); 26 U.S.C. § 152.

¹⁸ 26 U.S.C. § 125(a) (pre-tax treatment limited to opposite-sex spouses or dependents, as defined under 26 U.S.C. § 152).

¹⁹ M.V. LEE BADGETT, CENTER FOR AMERICAN PROGRESS & UCLA WILLIAMS INSTITUTE, UNEQUAL TAXES ON EQUAL BENEFITS, at 7 (Dec. 2007), available at <http://wiwp.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf> (last visited Nov. 1, 2011).

unlike the latter, cannot reduce her tax obligation by pooling her same-sex spouse's uncompensated medical expenses to meet the threshold required for a federal tax deduction.²⁰

Continuing Health Coverage and Open Enrollment Periods. Under COBRA,²¹ most private employers must continue to offer existing group healthcare coverage to employees and their covered dependents upon certain qualifying events, such as job termination and divorce.²² DOMA excludes same-sex spouses from this default protection. Unless an employer voluntarily extends coverage (which may be difficult as a practical matter in markets where such coverage is limited or unavailable), the same-sex spouse of a terminated employee will be without the equivalent of federal COBRA protection.²³

Under HIPAA,²⁴ marriage is a “qualifying event” that allows an employee immediately to add a new spouse to his health plan if his plan allows for spousal

²⁰ See 26 U.S.C. § 213(a) (2011) (uncompensated medical expenses of the taxpayer, his or her spouse, or his or her dependents deductible to the extent exceeding 7.5 percent of adjusted gross income). DOMA bars the same-sex married couple from filing federal income tax returns under “married, filed jointly” status—a prerequisite for pooling deductions like uncompensated medical expenses. See generally, 26 U.S.C. § 6013 (2011) (joint tax returns).

²¹ Consolidated Omnibus Budget Reconciliation Act (COBRA), Pub. L. No. 99-272, 100 Stat. 82 (codified in scattered titles, including at 29 U.S.C. §§ 1161-69); see also Treas. Reg. § 54.4980B-1. COBRA applies to businesses with 20 or more employees.

²² See, e.g., 29 U.S.C. § 1163(1)-(6) (defining qualifying events for COBRA coverage).

²³ Because COBRA does not extend to small businesses, DOMA does not impair the operation of a Massachusetts statute that provides comparable benefits to businesses with fewer than 20 employees. See generally Mass. G.L. c. 176J § 9.

²⁴ Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 (codified in various titles and sections, including at 29 U.S.C. § 1181-83).

coverage. HIPAA also allows an employee to change his coverage status to cover a spouse under his own plan in special circumstances, including where the spouse loses coverage due to job termination.²⁵ Because of DOMA, lawfully married same-sex couples lack this federal protection. Equitable treatment can exist only where an employer voluntarily secures a special plan accommodation.

Protections in Times of Family Crisis and Illness. If an employee's different-sex spouse becomes seriously sick or injured, federal law permits her up to 12 work weeks of unpaid, protected leave to care for her spouse.²⁶ In emergencies, she may use a pre-retirement "hardship distribution" from her 401(k) plan to pay his medical expenses.²⁷ While the distribution is taxable, the employee will be exempted from certain penalties that would otherwise apply.²⁸ An employee with a same-sex spouse has no such assurances. Federal law secures her no leave, and she will be subject to early withdrawal penalties (as well as tax) should she take pre-tax distributions to pay for spousal care. At their cost and administrative burden, some employers extend "FMLA-like" rights to employees with same-sex spouses, allowing them take protected leave to care for a same-sex

²⁵ See generally, 26 U.S.C. § 9801(f); Treas. Reg. § 54.9801-6 (regulating coverage in special enrollment periods). Employees under cafeteria plans may also change their health coverage following triggering qualifying events. See Treas. Reg. § 1.125-4.

²⁶ Family and Medical Leave Act of 1993 ("FMLA"), Pub. L. 103-3, 107 Stat. 6 (codified in scattered sections of 5 U.S.C. and 29 U.S.C., including at 5 U.S.C. §§ 6381-87 and 29 U.S.C. §2601 *et seq.*).

²⁷ 26 U.S.C. § 401(k)(2)(B)(i)(IV); Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B)(1).

²⁸ Under 26 U.S.C. § 72(t), an enrollee may avoid imposition of additional tax on early retirement fund distributions if certain criteria are met, including distributions for spousal medical expenses and qualified domestic relations orders. The same-sex spouses of *amici's* employees are excluded from these federal benefits under DOMA.

spouse. In addition, employers may devise 401(k) plans to permit pre-retirement hardship distributions for a “primary beneficiary” designated by the participant.²⁹ These workarounds are entirely at the employer’s direct cost. Absent employer-funded programs, the employee will lack the flexibility – enjoyed by her colleague with a different-sex spouse – to care for a same-sex spouse in times of crisis or illness.

Retirement Protections. DOMA also strikes at retirement protections. Most employee pension plans are controlled by ERISA, which provides substantive rights to different-sex spouses. For example, most defined-benefit pension plans and certain defined-contribution retirement plans are required to distribute benefits in a form, such as a “Qualified Joint and Survivor Annuity” (“QJSA”), that ensures that an opposite-sex spouse may receive a portion of his spouse’s benefit unless he expressly waives that form, and most retirement plans must provide opposite-sex spouses with special rights to the participant spouse’s benefit if the participant dies while still employed.³⁰ The same-sex spouses of *amici*’s employees lack these ERISA safeguards. Employers can provide equivalent protections across the workforce only by building workarounds into retirement plans. Even then, the same-sex spouse will not be afforded the full range of federal tax benefits associated with QJSAs and QPSAs that a different-sex spouse enjoys.³¹

²⁹ I.R.S. Notice 2007-7, 2007-1 C.B. 395, 2007 WL 60771 (Jan. 27, 2007).

³⁰ “Qualified pre-retirement survivor annuities” (“QPSAs”) illustrate. *See* 29 U.S.C. § 1055; 26 U.S.C. §§ 401(a)(11), 417.

³¹ *See, e.g.*, 29 U.S.C. §§ 1055(d), (e) (defining qualified joint and survivor annuities and qualified pre-retirement survivor annuities as covering the “surviving spouse” of the plan participant); 26 U.S.C. §§ 417(b), (c) (same). Benefits under a QJSA are excluded for purposes of calculating annual limits on retirement benefits an individual may receive on a tax-deferred basis. 26 U.S.C. § 415(b). A surviving same-sex spouse receives benefits as a straight life annuity, which counts towards these limits without exclusion. A surviving employee is also unable,

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Visa Rights. Under operative immigration law, employers may recruit certain highly qualified scientists, business executives and scholars.³² This is of great benefit to those *amici* that actively recruit foreign nationals, or transfer international employees domestically. DOMA burdens an enterprise's ability to do so by precluding it from offering a foreign national's same-sex spouse the shared visa status that a different-sex spouse would receive. A recruited or transferred foreign national married to a same-sex spouse must either leave the spouse behind, or secure an independent visa status for the spouse (at personal expense and effort), and thereafter live with the risk of the expiration or rescission of that visa. For obvious reasons, this is a considerable impediment to attracting foreign nationals. Many may decline to come to a country that will not recognize a marriage lawful at home³³; others may require assurances from the prospective employer that their

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because of DOMA, to defer the payment of death benefits (and associated taxes) from his spouse's plan. *See* 26 U.S.C. § 401(a)(9). An opposite-sex surviving spouse may defer to age 70.5. *Id.* Thus, an employee widowed by the death of her same-sex spouse will face tax burdens sooner than an employee with an opposite-sex spouse.

³² 8 U.S.C. §§ 1153(b)(1)(A), (B), (C).

³³ *See* 8 U.S.C. § 1153(d) (providing that a "spouse" shall share the same visa status of an immigrant granted a visa). Currently, *amici* understand that individuals may lawfully marry a same-sex spouse in Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. *See* Law No. 26.618, July 22, 2010 [CXVIII] B.O. 31.949 (Arg.); CODE CIVIL [C.CIV.] art. 143 (Belg.); Civil Marriage Act, S.C. 2005, c. 33 (Can.); Birna Bjornsdottir & Nicholas Vinocur, *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS, Jun. 11, 2010, available at <http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>; Burgerlijk Wetboek [BW] [Civil Code], Art. 30:1 (Neth.); Constance Johnson, Law Library of Congress, *Norway: Same-Sex Marriage Approved*, GLOBAL LEGAL MONITOR (Jul. 2, 2008), available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_120540512_text (Norway); Eduardo Soares, Law Library of Congress, *Portugal: Gay Marriage La Approved By Constitutional Tribunal*, GLOBAL LEGAL MONITOR (Apr. 12, 2010), available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401917_text (Portugal); Civil Union Act 17 of 2006 (S. Afr.); Law 13/2005 Código Civil [C.C.] [Civil

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relationship and marital estate can be adequately protected despite DOMA—assurances that the employer cannot provide. The preclusion of recognition of the foreign same-sex spouse under immigration law also subjects the foreign national, and accordingly the employer, to special taxation problems.³⁴

3. DOMA Forces Employers to Incur Administrative Burdens and Expense.

DOMA forces *amici* to administer dual systems of benefits and payroll, and imposes on them the cost of the workarounds necessary to protect married colleagues.

The burden of compliance. DOMA requires *amici* simultaneously to treat employees with same-sex spouses as (1) single for the purposes of federal tax withholding, payroll taxes, and workplace benefits that turn, as most do, on marital status, and (2) married for all other purposes under state law.³⁵ This requires *amici*

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Code] 2005, 157 (Spain); *Sweden Allows Same-Sex Marriage*, BBC NEWS, Apr. 2, 2009, available at <http://news.bbc.co.uk/2/hi/7978495.stm> (Sweden). Mexico City allows same-sex marriages which are recognized in all Mexican states. See David Agren, *Mexican States Ordered to Honor Gay Marriages*, THE NEW YORK TIMES, Aug. 10, 2010, available at <http://www.nytimes.com/2010/08/11/world/americas/11mexico.html> (each website last visited Oct. 31, 2011).

³⁴ Whereas the same-sex spouse of a foreign national might be considered the tax dependent of the foreign national in the home country, DOMA precludes this treatment for the purposes of federal income taxes (even if the foreign national is the couple's sole income source). See 26 U.S.C. § 152(a)(3)(A) (foreign national cannot qualify as dependent of taxpayer). Absent DOMA, the same-sex spouse of the foreign national would be eligible for a US resident visa, see 8 U.S.C. § 1153(d), would receive a social security number, and could be claimed as a tax dependent by the foreign national.

³⁵ See Mass. Dept. of Revenue, Technical Information Release, 04-17 at § (D)(1)(a) (July 7, 2004) (“For Massachusetts tax purposes, if an employee benefit is tax-exempt when extended to the opposite sex spouse of an employee, or to the children of the spouse, the benefit is tax-exempt when extended to a same-sex spouse or his or her children.”).

in effect to maintain two sets of books—one for married employees with same-sex spouses, another for married employees with different-sex spouses. The double entries ripple through human resources, payroll, and benefits administration.

The treatment of healthcare benefits illustrates. When an employee resident in Massachusetts adds a same-sex spouse to his healthcare plan, the employer must impute the value of that coverage as taxable income under federal law. Because the employer pays a portion of federal Social Security (FICA) and unemployment insurance taxes based on employees' wages, this imputed income increases the employer's overall tax burden as well.³⁶ How should the imputation be calculated? The I.R.S. declines to provide official guidance, and instead puts the burden (and risk of error) on the employer.³⁷

The Massachusetts employer must then immediately reverse course, and for purposes of calculating an employee's state income taxes, treat benefits for a same-sex spouse exactly as it does for a different-sex spouse.³⁸ Because the marriages of same-sex couples are not recognized federally, but are recognized by the state, DOMA thus requires the employer—whether or not it currently has employees married to a same-sex spouse—to have systems capable of separately tracking

³⁶ Badgett, *supra* n. 19 at 5-7.

³⁷ *See*, I.R.S. Priv. Ltr. Rul. 200108101, 2000 PLR LEXIS 2092 at *24 (Nov. 17, 2000) (ruling that the fair market value of health benefits provided to domestic partners are taxable and declining “to issue a ruling that approves [a given] method of determining the value of the domestic partner health coverage”). While the I.R.S. has since issued various private letter rulings in response to written requests from individual taxpayers regarding specific valuation methods, other taxpayers cannot rely on those private letter rulings as precedent, as they constitute neither official I.R.S. guidance on a topic nor have the force or effect of law. *See* 26 U.S.C. § 6110(k)(3).

³⁸ *See* n. 36, *supra*.

married employees by reference to the gender of the spouse.³⁹ Confusion abounds, and even sophisticated employers struggle. Employees of Yale University learned in January, 2011 that the university had failed to withhold taxes for the imputed value of spousal health coverage in 2010, and that these amounts would be deducted from their paychecks in 2011.⁴⁰ Such incidents unnecessarily strain the employer-employee relationship and attract unwanted attention from the I.R.S.

These dual regimes have spawned an industry of costly compliance specialists. Some *amici* have had to pay vendors to reprogram benefits and payroll systems, to add coding to reconcile different tax and benefit treatments, to reconfigure at every benefit and coverage level, and to revisit all of these modifications with every change in tax or ERISA laws for potential DOMA impact. Attorneys and ERISA advisors must be consulted. Human resources, benefits, and payroll personnel must be trained and retrained as tax or ERISA laws change. Plan documents, enrollment forms, and administrative procedures must be scoured for the word “spouse,” and amendments and disclosures drafted to try to explain the numerous implications and consequences of a given benefits decision on the personal tax situation of an employee with a same-sex spouse. Enrollment systems must be reprogrammed to account for different spousal circumstances, and linked to provider records to ensure the providers extend appropriate coverage. Benefits and Human resources departments, facing questions from employees with

³⁹ Because changes to payroll/benefits administration require preparation, long lead time, and substantial expenditures, employers in states that recognize same-sex marriage must prepare systems that can address same-sex married employees well in advance of their hiring.

⁴⁰ Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Years Surprise*, N.Y. TIMES, Jan. 11, 2011, available at <http://bucks.blogs.nytimes.com/2011/01/11/yale-payroll-error-costs-gay-employees-thousands> (last visited Oct. 27, 2011).

same-sex spouses regarding workplace benefit selections and coverage, must be adequately trained and prepared to explain the disparate treatment to employees who may later realize (perhaps too late) that their benefits choices and decisions carried unanticipated and significant financial implications. The complexity and uncertainty saps critical time, focus, and energy from the human resources and benefits administration function.

The burden on the small employer is especially onerous. Regular retention of outside consultants is generally not an option, and many may not be capable of devoting limited resources to understanding and administering the conflicting regimes. Administration of benefits for an employee married to a same-sex spouse is more likely to occur in an ad hoc, piecemeal fashion, and may require that employee to divulge personal information that she would not otherwise be required to make, enhancing a sense of marginalization. Such burdens, standing alone, might chill a smaller employer from employing an otherwise qualified employee because she happens to be married to a same-sex spouse.

The dual regime especially burdens certain providers of workplace benefits, who must counsel their customers struggling with administration of inconsistent regimes. They must keep a roster of attorneys and ERISA consultants on retainer to grapple with the multi-faceted impact of DOMA on benefits packages. Call center employees and the sales force must be appropriately trained and prepared to respond to questions from both employers and employees about DOMA's impact on health insurance, tax, medical leave benefits, and retirement benefits. The complexities that arise from the variety of individual cases increases the risk that incorrect information may be given.

Workarounds. Many employers seek to rectify the invidious treatment of a class of their married employees by creating and funding parallel systems of benefits for employees lawfully married to same-sex spouses. These may include

stipends representing the amount of imputed health-care benefits,⁴¹ leave policies modeled to duplicate FMLA-related rights, and retirement plans that safeguard the same-sex spouse. These policies impose a direct cost on the employer. They carry administrative burden, requiring *amici* to retain experts to craft the policies and structure systems that can record and treat gross-up amounts, educate human resources, benefits, and payroll administrators, and manage the dual systems. Workarounds may attract attention from regulators or cause tension with shareholders or investors, all of which consumes time, resources and goodwill. However enlightened and necessary, such voluntary policies perpetuate a caste system among married employees, resting on unhelpful distinctions inimical to teamwork and by extension, to the success of the enterprise.

B. DOMA Forces Employers to Affirm Discrimination They Regard as Injurious to the Corporate Mission.

DOMA imposes on *amici* not simply the considerable burden of compliance and cost. DOMA conscripts *amici* to become the face of its discrimination. As employers, we must administer employment-related health plans, retirement plans, family leave, and COBRA. We must impute the value of spousal healthcare benefits to our employees' detriment. We must intrude on their privacy by

⁴¹ See generally Tara Seigel Bernard, *For Gay Employers, an Equalizer*, N.Y. TIMES, May 20, 2011, at <http://www.nytimes.com/2011/05/21/your-money/health-insurance/21money.html> (reporting that “a growing number of companies have taken it upon themselves to make life a little more equal for their gay employees” by “pay[ing] for an extra tax that their gay employees owe on their partners’ health insurance—something that their married heterosexual co-workers don’t have to worry about because the federal government recognizes them as an economic unit.”). For a list of companies currently “grossing up” the pay of employees who must pay federal taxes on the imputed value of health benefits for their same-sex spouses, see Tara Seigel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES, Aug. 15, 2011, <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/> (each website last visited Oct. 27, 2011).

investigating the gender of their spouses, and then treat one employee less favorably, or at minimum differently, when each is as lawfully-married as the other. We must do all of this in states that prohibit workplace discrimination on the basis of sexual orientation and demand equal treatment of all married individuals.⁴² This conscription has harmful consequences.

Litigation Risk. The American enterprise is accustomed to statutory regimes that are either silent as to, or prohibitive of, workplace discrimination. But a regimen that *forces* it to discriminate imposes subtle, but real risk. For example, DOMA forces upon *amici* conduct (e.g., withholding on wages attributable to the imputed value of the cost of group health plan benefits) that, but for the Supremacy Clause, would be unlawful in the Commonwealth. More broadly, DOMA forces the employer to determine, at its own risk, where DOMA supersedes state law and where state law continues to protect the employee. Future litigation risk may take other forms, even harder to predict. For example, although constitutional litigation claims typically require state action, and sixty-seven *amici* are not state actors, three *amici* are cities (Boston, New York and Cambridge). Municipal actors often *are* required, in costly litigation, to respond to allegations that they are “state actors.”⁴³ The practical fact is that DOMA makes the employer the unwilling

⁴² See Mass. G.L. c. § 151B (4) (unlawful “[f]or an employer... because of ... the sexual orientation ... of any individual ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment...”); *Goodridge*, 440 Mass. at 312, 798 N.E.2d at 948 (individuals married to a same-sex spouse must be accorded the full array of “protections, benefits, and obligations conferred by civil marriage” made available to persons in different-sex marriages).

⁴³ See *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 400 (1997) (municipal actors may be liable under section 1983 where plaintiff identifies an official policy or “custom” of the municipality that caused injury). The other *amici* assuredly are *not* state actors, but some commentators have sought to discern “state action” where sufficient government command or encouragement is shown. RONALD D. ROTUNDA & JOHN E. NOWACK, 2 TREATISE

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agent of federally-required disparate treatment of lawfully-married employees. Whatever the lack of merit of a formal legal challenge, disparate treatment in the workplace imposed by DOMA fosters workplace distress. and practical experience teaches that workplace distress increases the risk of the employer's having to respond, at its own expense, to claims of the aggrieved.

Morale. In the modern workplace, the employer becomes the face of DOMA's discriminatory treatment, and is placed in the role of intrusive inquisitor, imputer of taxable income, withholder of benefits. The employer is thus forced by DOMA to participate in the injury of its own workforce morale. Yale University's error in administering DOMA, and its implementation of unexpected tax withholding against employees married to same-sex spouses in 2011,⁴⁴ cast the university as the antagonist to its own employees. And the enforced compliance with DOMA's discriminatory regime has another dimension. The employee confused about the conflicting legal rules typically puts his first question to the human resources department. Every benefits administrator must become a constitutional scholar, or give no advice at all. Even the best-informed can provide only a general answer. The wrong answer may lead to harsh tax and financial consequences, and further erosion of workplace morale.

Our Mission. The injury runs far deeper than mere litigation risk; deeper even than the morale of the work force. For many employers, DOMA does violence to the morale of the institution itself. Like other persons, legal and

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ON CONSTITUTIONAL LAW, SUBSTANCE & PROCEDURE § 16.3 at 1027-28 (4th ed. 2007) (citing cases where "legislation may encourage an activity so as to give rise to state action in the activities of private persons").

⁴⁴ See *supra* n. 41.

natural, *amici* are motivated by core principles. As of 2008, 94 percent of Fortune 500 companies provide nondiscrimination protection for their gay and lesbian employees.⁴⁵ To take one example of many, *amicus* Eastern Bank “embrace[s] diversity in our workplace because it makes us a better employer and a better provider of service to our customers.” The business judgment of other *amici* has been to the same effect.⁴⁶ These principles spring from hard experience. Our enterprises are engaged in national and international competition—for talent, customers, and business. That competition demands teamwork, and teamwork thrives when the enterprise minimizes distracting differences, and focuses on a common mission. DOMA’s core mandate—that we single out some of our married colleagues, and treat them as a lesser class—upsets this imperative.

Our principles are not platitudes. Our mission statements are not simply plaques in the lobby. Statements of principle are our agenda for success: born of corporate experience, tested in laboratory, factory, and office, attuned to competition. Our principles reflect, in the truest sense, our business judgment.⁴⁷ By force of law, DOMA would rescind that judgment,⁴⁸ and direct that we renounce these principles, or betray them.

⁴⁵ See Fortune 500 Project, available at <http://www.equalityforum.com/fortune500/> (last visited Oct. 28, 2011).

⁴⁶ See Eastern Bank: Embracing Diversity, available at https://www.easternbank.com/site/about_us/Pages/diversity.aspx (last visited Oct. 28, 2011). In an appendix (the subject of an accompanying motion for leave to file), *amici* gather a collection of similar statements of corporate principle.

⁴⁷ “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

⁴⁸ DOMA forced even the Ninth Circuit Court of Appeals to the burden of workarounds to avoid undermining commitments made to Circuit staff. See *In re Golinski*, 587 F.3d 901 (9th Cir. 2009).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Support of Appellees and in Support of
Affirmance of the Judgment Below*

Dated: November 3, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 5,680 words, which is less than half the length allowed for a party's principal brief under Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally-spaced typeface, using Word 2003 in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(1)(B), I certify that the Brief of *Amici Curiae* 70 Business, Professional and Municipal Employers, and Professional, Trade, and Civic Organizations Representing Employers in Support of Appellees and in Support of Affirmance of the Judgment Below, filed electronically with the Clerk's Office of the United State Court of Appeals for the First Circuit, was served by electronic and/or hand delivery to Boston counsel, and electronic delivery and/or first-class mail to all other counsel of record on November 3, 2011:

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